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v. 50

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume I

including

CM 243977 - CM 272994

(Supplementing Volumes XXVII - XLVIII)

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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(1)

SPJGK
243977

17 DEC 1943

UNITED STATES

v.

Second Lieutenant EDWARD F.
BREYMANN (O-1797076), Corps
of Military Police.

SOUTHERN CALIFORNIA SECTOR
WESTERN DEFENSE COMMAND

Trial by G. C.M., convened at
Pasadena, California, 3 November
1943. Dismissal and total for-
feitures.

OPINION of the BOARD OF REVIEW
TAPPY, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: In that 2nd Lieut. Edward F. Breyman Co. "C" 775th Military Police Battalion did, at Tucson Arizona, on or about the 19th day of September 1943, conduct himself in an indecent, lewd and obscene manner by going to a hotel room with Sgt. Frank J. Babcock, disrobing and while both were naked and lying on a bed did put his arms around and try to kiss the said Sgt. Frank J. Babcock and did fondle his person.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and of Specification 2 and not guilty of Specification 1. No evidence of previous convictions was introduced. He was sentenced to dismissal and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that at about 7:15 p.m. on 19 September 1943, at the Mandalay Inn, Tucson, Arizona, Sergeant Frank J. Babcock, 62nd Bomb Squadron, 39th Bomb Group, met accused, whom he had not previously known (R.16,19). Sergeant Babcock was sitting alone in a booth at the time, and the accused walked over and asked whether he could join Babcock, who replied

(2)

in the affirmative. Thereupon accused seated himself at the booth and the two proceeded to drink and engage in conversation for approximately half an hour (R.16). It developed that Babcock had a room at the Arizona Hotel in Tucson. Accused had no room and asked Babcock whether he could stay in the latter's room. Babcock said that he could. When they left the Inn, accused bought a pint of whiskey and they went to Babcock's room in the hotel, arriving at about 8 p.m. It was very warm and each took off his shirt (R.16,17). At this time the window shade was up (R.18).

Accused locked the door and he and Babcock sat on the edge of the bed talking and drinking. At some stage of the proceedings, not entirely clear from the testimony of Babcock, the latter pulled down the shade. Accused suggested that when they became intoxicated they should undress, go to bed, and sleep it off. After awhile Babcock began to feel the effects of the liquor and apparently at this time accused put his arm or arms around Babcock and suggested that the latter undress and go to bed. Accused undressed and again suggested that Babcock do likewise. Babcock did so and they lay together on the bed, facing each other. They were naked. Accused put his arm and hands around Babcock and his leg over Babcock's leg (R.17,18,19,22).

Thereafter, accused kissed Babcock on the lips and felt his penis. At this time Babcock's penis was "hard". A few seconds later some members of the military police, together with other persons, entered the room. Babcock testified that the accused's contact with his penis "could not have been accidental" (R.20).

First Lieutenant John J. Fox, Corps of Military Police, 777th Military Police Battalion, testified that he was called to the Arizona Hotel on the night in question by an officer of the Tucson Police Department. Lieutenant Fox, together with the Tucson policeman, an enlisted man, and an official of the hotel, went to a room across a courtyard from that occupied by the accused and Babcock (R.26). The window of this room was not more than 12 or 13 feet away from Babcock's room (R.29). In the latter's room the lights were on, the window was open, and the window shade was up. Accused and Babcock were stripped to the waist and were sitting on the edge of the bed, talking. From time to time accused would lie back on the bed. Every once in awhile he and Babcock would get up and pour a drink. While the accused was lying on the bed he had his hand over Babcock's back, patting him on the shoulder (R.26). Several times he pulled Babcock down onto the bed (R.30). After about 15 or 20 minutes the shade was pulled down, whereupon Lieutenant Fox and the others went around to the door of the room occupied by accused and Babcock. While they were outside the door, Lieutenant Fox heard the accused say, "You better take off your pants and take off your shoes". Babcock "acquiesced" (R.27). The hotel official opened the door with a pass key (R.31) and the party entered the room (R.27). The lights were on, and accused and Babcock, who were naked, "were just getting off the bed". Each had a "formidable

erection" of the penis. Accused said, "Fox, can't something be done about this?". Babcock said, "Damn it, I should have known what he was up to when he was feeding me the liquor" (R.27,28).

On cross-examination Lieutenant Fox conceded that accused was regarded as a good officer (R.28).

The accused testified briefly concerning his military service and his educational background (R.40). With reference to the evening of 19 September 1943, he admitted asking Babcock for permission to sit at his booth at the Mandalay Inn (R.42,47,48). He corroborated Babcock's evidence concerning their conversation and drinking at that place. After Babcock mentioned that he had a hotel room, accused said he would be willing to buy a pint of liquor if they could use the room together, to which Babcock agreed (R.42). They left the Inn about 7:45 p.m. (R.48). They bought some liquor and went to Babcock's room in the hotel, where they sat on the edge of the bed, stripped to the waist. Accused removed his shirt because of the heat (R.42,48). They drank and talked and the accused put his arm around Babcock and "just let my arm on his shoulder". Accused would "lay back" and smoke his cigar and after awhile "would come forward again and take some more of the liquor" (R.43).

At length accused said he was going to bed. Babcock decided to go also and pulled down the window shade, after which they undressed (R.42, 43). At this point, while they were sitting on the bed with the lights still on, the officers came in (R.43,49,50). After accused dressed, he said to Lieutenant Fox, "What are you going to do about this?" (R.50).

At no time after accused had removed his clothing did he "lie down by the sergeant" (R.49). He did not kiss or attempt to kiss Babcock (R.43,44). He did not touch Babcock's penis or put his hand on any other part of Babcock except across the back of his shoulders (R.44). Accused testified that he did not know whether either he or Babcock had an erection (R.50). He did not deny having one but testified merely that he was not conscious of any such condition. He was not drunk (R.51).

For the defense, Sergeant Philip B. Salatino, Corps of Military Police, Camp Roberts, California, testified that he had roomed with accused for about six months while accused was a sergeant, and that during this period he had never seen "any unnatural reactions of a sexual nature" (R.35).

Second Lieutenant Louis Bulasky, 775th Military Police Battalion, testified that he had lived in the same barracks with accused for some time and had also occupied hotel rooms with him. Accused never evidenced any irregular conduct from a sexual standpoint and always behaved himself as an officer and gentleman. His reputation in the battalion was excellent (R.36,37).

It was stipulated that First Lieutenant Joseph R. Weir, Company D, 775th Military Police Battalion, would testify that he had been quartered with accused for a time and had occupied hotel rooms with him on several occasions. Accused had always acted as a perfect gentleman, and witness regarded him as a person of high character and morals (R.38).

It was stipulated that Sergeant Charles A. Gallandat, Company D, 775th Military Police Battalion, would testify that he had shared the same quarters with accused for a time; that accused had always conducted himself as an officer and gentleman; and that he was a very conscientious officer (R.38,39).

Captain Arthur R. Casey, Jr., Medical Corps, Pasadena Area Station Hospital, testified that shortly prior to the day of trial he had examined accused and that in his opinion accused had normal sexual desires (R.33,34).

It was stipulated that Captain Robert J. Stein, Medical Corps, Chief of the Neuropsychiatric Service, Davis-Monthan Hospital, Tucson, Arizona, would testify that accused had requested witness to make a psychiatric examination by reason of accusations of sexual perversion. Accused described to witness the various "episodes" which had occurred during the few weeks immediately preceding the examination. Witness made a review of the accused's past history in an attempt to discover any homosexual trend. The neuropsychiatric examination did not reveal any unusual behavior and there was no evidence before the witness to support a claim of "either overt or latent homosexuality" (R.39).

4. The evidence for the prosecution clearly proves that at the place and time alleged in Specification 2, accused did the acts alleged therein. Without doubt those acts were indecent, lewd, and obscene, and constituted conduct unbecoming an officer and a gentleman. In view of the clear and manifestly unprejudiced nature of the testimony for the prosecution, accused's denials are unworthy of belief. The medical testimony is inconclusive and does not suffice to throw a reasonable doubt upon the story of the evening's events. In the opinion of the Board of Review, the findings of guilty of the Charge and Specification 2 thereof are sustained by the evidence.

5. As noted, Lieutenant Fox testified for the prosecution. On cross-examination the defense counsel questioned Lieutenant Fox concerning the reputation of the accused as an officer. Witness replied that although he had never heard accused's reputation "expressed", accused was regarded as a good officer and that, so far as witness knew, he was a "fine man" (R.28). Inasmuch as this testimony placed accused's character in evidence, it would have been proper for the prosecution to introduce evidence in rebuttal thereafter (M.C.M., 1928, p. 112). The defense counsel then asked when witness first learned that accused was under surveillance by the police department. Witness answered, "After the Garis incident", manifestly referring to

Specification 1 of the Charge. The next question was, "How long after the Garis incident?", to which witness replied, "There was another incident at, I believe, the same hotel with a Corporal Bareo. I went down there and when I got there, Lt. Breymann was just coming out of this Corporal Bareo's room."

The defense counsel moved that the answer be stricken "in that it went beyond the question itself and brought in a matter that might be considered by the court as influential in the decision in the case" (R.28). The law member denied the motion (R.29). Even if it be conceded that the law member's ruling was erroneous, in view of the convincing nature of the prosecution's evidence the substantial rights of accused were not prejudiced.

Defense counsel objected to that portion of Lieutenant Fox's testimony relating to matters observed and occurring after the entrance into Babcock's hotel room. Counsel contended that the entry was illegal and that, by reason thereof, evidence of what occurred thereafter was incompetent (R.30, 31). The law member overruled the objection (R.31). The ruling was correct, since the entry was lawful (32 C.J. 566; 6 C.J.S.607; 26 A.L.R. 286; Clark, Criminal Procedure, 2nd ed., secs. 10-12,18).

6. War Department records show that the accused is 29 years old. He graduated from high school, attended Concordia College, Fort Wayne, Indiana, for four years, and the University of Illinois for two years, but did not graduate from either institution. He served as an enlisted man from June 1941 until 12 February 1943, when, upon graduation from the Provost Marshal General's Officer Candidate School, Fort Custer, Michigan, he was appointed second lieutenant, Army of the United States. In recommending accused for Officer Candidate School, his commanding officer stated that he had demonstrated outstanding qualities of leadership and that his character was excellent.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is mandatory under Article of War 95.

Thomas M. Jappy, Judge Advocate.
Ann W. Wrenthall, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

(6)

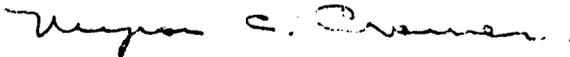
1st Ind.

War Department, J.A.G.O., 6 JAN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward F. Breymann (O-1797076), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



Myron C. Cramer,
Major General,

The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

Incl.2-Draft of ltr. for
sig. Sec. of War.

Incl.3-Form of Ex. action.

(Resigned)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(7)

SPJGQ
CM 244302

- 4 - DEC 1943

UNITED STATES	)	87TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Warrant Officer Junior	)	Camp McCain, Mississippi, 15
Grade CHARLES G. VAN DORN	)	October 1943. Dishonorable
(W2110363), 787th Ordnance	)	discharge and confinement for
Company.	)	ten (10) years. Disciplinary
	)	Barracks.

HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Warrant Officer Charles G. Van Dorn, 787th Ordnance Company, did, at Sardis, Mississippi, on or about 5 December 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Willard J. Ware, Private, 787th Ordnance Company, per os.

Specification 2: In that Warrant Officer Charles G. Van Dorn, 787th Ordnance Company, did, at Houston, Mississippi, on or about 25 July 1943, attempt to commit the crime of sodomy, by feloniously attempting to have carnal connection against the order of nature with Richard F. Sowkin, Private, 787th Ordnance Company, per annum.

Specification 3: In that Warrant Officer Charles G. Van Dorn, 787th Ordnance Company, did, at Houston, Mississippi, on or about 8 August 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Willard J. Ware, Private, 787th Ordnance Company, per os.

He pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, but the order directing the execution of the sentence was withheld pursuant to Article of War 50 $\frac{1}{2}$.

3. Since the record of trial supports the findings of guilty of the Specifications as charged, the evidence is not discussed. However, an attempt to commit sodomy, as charged by Specification 2, is properly brought under Article of War 96 rather than Article of War 93, since the attempt is not included in the express terms of the latter Article (M.C.M. 1928, par. 78b). The sentence is not thereby affected, being supported by the convictions under Specifications 1 and 3 of the original Charge.

4. Confinement in a penitentiary is authorized for the offenses here alleged, recognized as offenses of a civil nature and so punishable by penitentiary confinement by section 28, title 6, of the Code of the District of Columbia, and directed by the provisions of paragraph 5d, sec. 2, AR 600-375.

5. For the reasons stated above, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 3 of the Charge, and the Charge, and legally sufficient to support only so much of the findings of guilty of Specification 2 of the Charge as involves a finding of guilty of attempt to commit sodomy in violation of Article of War 96, and legally sufficient to support the sentence.

William A. Pounds, Judge Advocate.

Earle Stephen, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

1st Ind.
10 DEC 1943

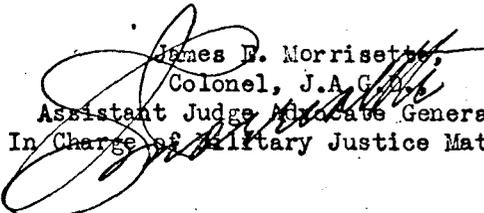
War Department, J.A.G.O., - To the Commanding General,
97th Infantry Division, Camp McCain, Mississippi

1. In the case of Warrant Officer Junior Grade Charles G. Van Dorn (W2110363), 787th Ordnance Company, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of Specification 2 of the Charge be approved as involves a finding of guilty of attempt to commit sodomy in violation of Article of War 96. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50 $\frac{1}{2}$, and Executive Order No. 9363, dated July 23, 1943, you will have authority to order the execution of the sentence.

2. I likewise concur in the holding of the Board of Review that confinement in a penitentiary is authorized for the offense of sodomy of which the accused has been convicted and paragraph 5d, sec. II, AR 600-375, contemplates that a Federal penitentiary will be designated as the place of confinement in a case of this kind. It is therefore recommended that your action be modified accordingly prior to the issuance of the general court-martial order publishing the proceedings in the case.

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 244802).


James E. Morrisette,
Colonel, J.A.G.O.,
Assistant Judge Advocate General,
In Charge of Military Justice Matters.



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(11)

13 JUN 1944

SPJGH
CM 247981

UNITED STATES)

ARMY AIR FORCES

EASTERN TECHNICAL TRAINING COMMAND

v.)

First Lieutenant CHARLES)
L. COBB (O-430786), Air)
Corps.)

Trial by G.C.M., convened
at Seymour Johnson Field,
North Carolina, 6 January
1944. Dismissal.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant Charles L. Cobb, 321st Fighter Squadron, 326th Fighter Group, did, at Marion, Mass. and at Wareham, Massachusetts, on or about 10 September 1943, wrongfully fly a RF-47C Government-owned airplane, serial number 41-6086, at an altitude of about fifty (50) feet, in violation of paragraph 16 a, Army Air Forces, Regulation 60-16, 9 September 1942, and did thereby wrongfully damage said airplane in the amount of about \$521.65.

Specification 2: In that First Lieutenant Charles L. Cobb, 321st Fighter Squadron, 326th Fighter Group, did, at Marion, Massachusetts, and at Wareham, Massachusetts, on or about 9 September 1943, wrongfully fly an AT-6A, Government-owned airplane, serial number 41-16576, at an altitude of about fifty (50) feet and performed acrobatics at an altitude of about two hundred (200) feet, in violation of paragraph 16 a, Army Air Force Regulation 60-16, dated 9 September 1942.

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

Specification 1: In that First Lieutenant Charles L. Cobb, 321st Fighter Squadron, 326th Fighter Group, did, at Westover Field, Massachusetts on or about 10 September 1943, with intent to deceive Second Lieutenant George W. Steller, Engineering Officer,

321st Fighter Squadron, 326th Fighter Group, officially report in part on War Department AAF Form No. 1A, that the left wing of RP-47C airplane, serial number 41-6086, which was being flown by him on or about 10 September 1943, hit a tree because of engine failure, which report was known by the said First Lieutenant Charles L. Cobb to be untrue in that engine failure was not the cause, on or about said date, of the airplane's left wing hitting a tree.

Specification 2: In that First Lieutenant Charles L. Cobb, 321st Fighter Squadron, 326th Fighter Group, did, at Westover Field, Massachusetts, on or about 10 September 1943, with intent to deceive Captain Laurence F. Sorrels, Air Corps, Assistant Operations Officer, 321st Fighter Squadron, 326th Fighter Group, officially state to the said Captain Laurence F. Sorrels, that RP-47C airplane, serial number 41-6086, had been damaged by striking a tree while making an emergency landing on or about 10 September 1943, which statement was known by the said First Lieutenant Charles L. Cobb to be untrue in that said airplane was not damaged by striking a tree while making an emergency landing on or about said date nor was an emergency landing made on or about said date.

Specification 3: In that First Lieutenant Charles L. Cobb, 321st Fighter Squadron, 326th Fighter Group, did, at Westover Field, Massachusetts, on or about 10 September 1943, with intent to deceive Major Donald T. Bennink, Air Corps, his Squadron Commander, officially state to the said Major Donald T. Bennink that RP-47C airplane, serial number 41-6086, had been damaged by striking a tree while making an emergency landing on a dirt road necessitated by engine failure on or about 10 September 1943, which was known by the said First Lieutenant Charles L. Cobb to be untrue in that said airplane was not damaged while making an emergency landing nor did said airplane make an emergency landing nor was there any engine failure on or about said date.

Specification 4: In that First Lieutenant Charles L. Cobb, 321st Fighter Squadron, 326th Fighter Group, did, at Westover Field, Massachusetts, on or about 10 September 1943, with intent to deceive Lieutenant Colonel William S. Steele, Air Corps, his Group Commander, officially state to the said Lieutenant Colonel William S. Steele, that RP-47C, airplane, serial number 41-6086, had been damaged by striking a tree while making an emergency landing necessitated by engine failure on or about 10 September 1943, which statement was known by the said First Lieutenant Charles L. Cobb to be untrue in that there had been no engine failure and no emergency landing on or about said date.

He pleaded not guilty to and was found guilty of the Charges and all Specifications. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge I, as involves an offense committed at Wareham, Massachusetts; approved only so much of the finding of guilty of Specification 2, Charge I, as involves the offense of flying at an altitude of about 50 feet at Wareham, Massachusetts, in violation of regulations; approved the sentence; and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows:

a. Specification 2, Charge I: Major George A. Parker, acting operations officer of the 326th Fighter Group, identified a flight report (Ex. 5), 321st Fighter Squadron, 326th Fighter Group (the organization of accused), Westover Field, Massachusetts, 9 September 1943. The report shows that accused and First Lieutenant W. S. Borders made a flight from Westover to Otis, beginning at 2:30 p.m. and ending at 3:40 p.m., in a model AT-6A plane, serial number 41-16576. Major Parker testified that the spotter number of the plane was 229, and that accused was listed as pilot and Lieutenant Borders as passenger. The report shows accused as pilot for an hour and Lieutenant Borders as pilot for ten minutes (R. 11-12).

At about 2:30 or 3:00 p.m. on 9 September, Mrs. Viola Murphy, Wareham, Massachusetts, saw an airplane fly over. It had the number 229 on the wing, was "flying quite low and just cleared the steeple on the town hall" (R. 8; Ex. 1).

Lieutenant Colonel William S. Steele, commanding the 326th Fighter Group, testified that during an investigation on or after 25 September accused appeared before a board of officers, was advised of his rights, and made a statement, substantially as follows: He took off from Westover Field, flew directly to Wareham, then toward Marion and to Otis Field. He made one or two "slow rolls" en route, did not remember how many passes he made, estimated his altitude at about 30 feet, "quite low", and stated that Lieutenant Borders was in the rear seat. Colonel Steele stated that accused was "quite honest about the whole thing" (R. 14-15, 18-20).

At some time between 4 or 5 September, when accused joined the organization, and 9 September, he read a number of flying regulations, as shown by a signed and initialled certificate (Ex. 7) dated 9 September. Army Air Forces Regulation No. 60-16 is not listed on the certificate. Accused subsequently admitted that he knew the regulations (R. 16-17, 30-31).

b. Specification 1, Charge I: An engineering flight report (Ex. 6) dated 10 September 1943, identified by Major Parker and covering a model RP-47C airplane, serial number 416086, bears a notation showing that accused piloted the plane on that day and that the plane hit a tree with the left wing. As Major Parker recalled it, the plane bore the spotter number 226. The Air Corps insignia follows the spotter number (R. 12-14, 22).

At about 1:50 to 2:00 p.m. on 10 September, Mr. Clifton F. Keyes, Wareham, Massachusetts, saw a P-47 with "226*" on the side, flying over "Very low, tree top height". As it "swung low by the Town Hall, it clipped the top off of a tree" (R. 9-11; Ex. 3).

On 11 September, accused appeared before an investigating board, was warned of his rights, and stated that he had flown to the vicinity of Wareham, passed over "an old duck hunting spot" and decided to make a simulated pass at a rock in the river just south of Wareham. He made a dive, leveled off, aimed at the rock, and, as he pulled up, struck a tree with the left wing. The rock was "real close" to Wareham. Major Donald T. Bennink, commanding the 321st Fighter Squadron, testified that on 11 September before the board met, accused came to him, withdrew a former statement, and "volunteered" a new statement (Ex. 10), which was substantially the same as the statement made to the board that afternoon (R. 15-16, 18-19, 25, 27, 29-31).

It was stipulated (Ex. 4) that the damage done to the plane on 10 September amounted to \$521.65, and that accused had offered to pay that amount to the Government (R. 11).

c. Charge II: Second Lieutenant George W. Steller, assistant engineering officer, 321st Fighter Squadron, testified that the engineering flight report (Ex. 6) of 10 September was received by him (Spec. 1). This report contains a statement that accused "Hit tree with left wing on engine failure. Failure due to air lock in gas line. Engine functioning O.K. now. Forced landing not complete. Engine caught just before wheels hit ground". Lieutenant Steller testified that accused flew the plane on the last flight that day, he did not see accused "make" the remarks in the report, but it was his "belief" that accused made them (R. 21-23).

At about 3:30 or 4:00 p.m. on 10 September, Colonel Steele examined a P-47 which was reported damaged in flight and interviewed accused, who was standing by the plane. The damage consisted of a sharp gash near the end of the left wing. When asked how the damage occurred, accused stated to Colonel Steele (Spec. 4) that he had been flying at about 2,000 feet about 50 miles southeast of Westover Field, his motor began to "miss", he shifted from the auxiliary to the main tank, lost altitude, the engine would not "catch", and he attempted a forced landing in a field. On the way in the left wing struck the top of a tree, the motor "caught", he "gunned" it, and, in taking off, the left wing again hit a tree. He then returned to Westover Field. Accused had been in the organization since 4 or 5 September, and although Colonel Steele could not state definitely that accused knew he was the commanding officer he was sure accused had a "very good idea" who he was (R. 15, 17-18).

Captain Laurence F. Sorrels, assistant operations officer, 321st Fighter Squadron, testified that he was present about 3:45 p.m. on 10 September when accused made a statement to Colonel Steele about the cause of the accident. Accused reported to Colonel Steele and Captain Sorrels (Spec. 2) that the plane was damaged by striking a tree while making an emergency landing. Later that day Captain Sorrels made a flight with accused by order of Colonel Steele in order that accused could point out the field where he made "his attempted forced landing". They found the field "in the vicinity of" Wareham and Marion, Massachusetts. Accused claimed that he attempted to make an emergency landing in "that field" (R. 23-26, 28).

Major Bennink testified that on 10 September he looked at the damage to the plane and accused tried to explain how it happened. Accused stated to him (Spec. 3) that his engine failed on a training flight when he "switched" from one gas tank to another; that he tried unsuccessfully to get the engine started, and hit a tree while making a forced landing; that he landed in a road; and that after several attempts he started the engine, took off, and returned to Westover Field. Major Bennink identified a handwritten statement (Ex. 9), signed "Charles L. Cobb", and stated "I believe it to be the signature" of accused. This statement was substantially the same as the statement about which Colonel Steele testified (R. 28-30).

At 8:30 or 9:00 a.m. on 11 September accused came to Captain Sorrels and stated that he wanted to make a complete statement about what happened on the flight. Captain Sorrels referred him to Major Bennink. Accused then came to Major Bennink and "volunteered" the information that the statement he had made to Colonel Steele and the one he had made to Major Bennink were false. Accused stated that the incorrect statement had been given "due to excitement". On the afternoon of 11 September accused appeared before an investigating board, was warned of his rights, and stated that he had flown in the vicinity of Wareham and Marion, that in passing over an "old duck hunting spot" he decided to make a simulated pass at a rock in the river just south of Wareham, that he made a dive, leveled off and aimed at a rock, and that, as he pulled up, the left wing struck a tree (R. 15, 18-19, 25-27, 29, 31-32).

4. Accused testified that he entered the service 28 April 1941, received his flying training, and was commissioned a second lieutenant. He was one of two men in his class who graduated with a "B" flying grade. None had a better grade. At Elgin Field he attained the high fixed gunnery score of his class. In December 1941 he was sent to Panama, where he remained on duty until June 1942, when he went to Australia. About the middle of July he arrived at a field in New Guinea. After about 30 missions, accused was shot down over a Japanese airfield. He made his escape through the jungle and after five days found friendly natives. He returned to the field after 26 days more of travel. During this experience his weight dropped from about 140 pounds to about 85 pounds, and he contracted malaria. After recuperating

for a month, he returned to his squadron. Their planes were destroyed and they returned to Australia to be re-equipped. On returning to New Guinea he engaged in further combat until June 1943, when he was returned to the United States, via Australia, where he made several ferrying trips. He arrived at his home in "Mariam", four or five miles south of Wareham, Massachusetts, on 5 August 1943 (R. 32-37).

The squadron of accused was decorated with the Air Medal, and accused was awarded the Distinguished Flying Cross. He served in five major campaigns. A copy of the citation (Def. Ex. A) dated 19 July 1943, awarding accused the Distinguished Flying Cross, was placed in evidence (R.37-38).

5. a. Specification 2, Charge I: The evidence shows that at about 2:30 or 3:00 p.m. on 9 September 1943, accused, while making a routine flight from Westover Field to Otis Field, in a model AT-6A plane, serial number 41-16576, flew over the town of Wareham, Massachusetts, "quite low" and "just cleared" the steeple on the town hall. Accused estimated his altitude at about 30 feet. The conduct of accused was a violation of paragraph 16a (Ex. 8), Army Air Forces Regulation No. 60-16, 9 September 1942, forbidding the operation of aircraft at altitudes less than 1,000 feet, when flying over any building, house or other obstructions to flight. The approved finding of guilty is sustained.

b. Specification 1, Charge I: On 10 September accused made a flight from Westover Field in a model RP-47C plane, serial number 416086. He flew very low over Wareham again, and "clipped" the top off a tree near the town hall. Accused admitted that he made a dive at a rock in a river "just south" of Wareham, and struck a tree with the left wing as he pulled up. The amount of damage to the plane was \$521.65. The approved finding of guilty is sustained.

c. Specification 1, Charge II: Although the wing of the plane was actually damaged by striking a tree when accused brought the plane to a low level in making a dive, as he stated, at a rock in the river, the engineering flight report, received by Second Lieutenant George W. Steller, assistant engineering officer of the squadron of accused, contains a statement that the wing hit a tree on account of engine failure. This statement on the report was not signed. Although Lieutenant Steller believed that accused made the statement, he did not see him make it. The Board of Review is of the opinion that the evidence does not show beyond reasonable doubt that accused placed this remark on the report.

d. Specification 4, Charge II: At about 3:30 or 4:00 p.m. on 10 September, accused was interviewed about the damage to the plane by Lieutenant Colonel William S. Steele, commanding the group to which accused belonged. He stated to Colonel Steele that while he was flying at about 2,000 feet the motor began to "miss", he lost altitude, he attempted to make

a forced landing in a field, and the left wing struck a tree. This statement made to his commanding officer was false, in that the plane had in fact struck a tree when accused brought it to a low level in making a dive. The next day at about 8:30 or 9:00 a.m., accused voluntarily reported to his superior officers that his statement made to Colonel Steele was false. His withdrawal of the false statement the next day does not constitute a defense. The making of a false official statement is a violation of the 95th Article of War. The Board is of the opinion that the finding of guilty is sustained.

e. Specification 2, Charge II: Captain Laurence F. Sorrels, assistant operations officer of the squadron, was present when Colonel Steele interviewed accused, and heard the statement which accused made. Although Captain Sorrels stated that accused made the report to Colonel Steele and himself, it was obviously a single false report, and, regardless of the number of officers who heard it, there was but one offense. It appears that the report was in fact made to Colonel Steele, and the Board is of the view that the finding of guilty of Specification 4 completely covered the offense. Therefore, the finding of guilty of Specification 2 is not sustained.

Later in the afternoon of 10 September Captain Sorrels made a flight with accused by order of Colonel Steele in order that accused could point out the field where he made "his attempted forced landing". Accused pointed out a field near Wareham, and claimed that he attempted to make an emergency landing in "that field". It seems obvious to the Board that this was not the statement alleged in the Specification as a false official statement.

f. Specification 3, Charge II: On 10 September, accused tried to explain to Major Donald T. Bennink, squadron commander of accused, how the plane had been damaged. He stated that his engine failed while he was on a training flight, that he made a forced landing in a road, and that the plane hit a tree while he was making the forced landing. This statement was false in that the plane was damaged when accused made a dive and struck a tree in pulling up. The next morning accused withdrew the false statement. The Board of Review is of the opinion that the evidence sustains the finding of guilty of this Specification, in violation of the 95th Article of War.

6. Before the court was sworn and as a basis for challenges for cause, defense counsel attempted to inquire of the members of the court as to the extent that they felt obligated to adjudge dismissal as the sentence upon a finding of guilty of violating flying regulations, because of a letter (see certificate of correction) from the Commanding General, Army Air Forces, which had been read to the members of the court. The letter states that dismissal from the service is considered appropriate punishment for intentional violation of flying regulations. The court did not permit defense

counsel to make the inquiry (R. 3-5).

In the opinion of the Board of Review it is unnecessary to determine whether this ruling of the court was erroneous, inasmuch as the accused was found guilty of violation of the 95th Article of War, so that the court was obliged to adjudge dismissal from the service. The letter referred to dealt only with the matter of punishment and had no reference to guilt or innocence.

7. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 1 May 1941; appointed second lieutenant, Air Corps Reserve, Army of the United States, and active duty, 12 December 1941; temporarily promoted to first lieutenant, Army of the United States (Air Corps), 6 April 1943.

8. The court was legally constituted. 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 findings of guilty of Specifications 1 and 2, Charge II; legally sufficient to support the approved findings of guilty of all other Specifications and of the Charges; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Drew, Judge Advocate

William J. Brown, Judge Advocate

J. J. Lottinbos, Judge Advocate

1st Ind.

War Department, J.A.G.O.,

8 AUG 1944

- To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Charles L. Cobb (O-430786), Air Corps.

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 of Specifications 1 and 2, Charge II; legally sufficient to support the approved findings of guilty of all other Specifications and of the Charges; and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused on two occasions wrongfully operated an Army airplane at an altitude of about 50 feet contrary to regulations (Specs. 1 and 2, Chg. I), on the second occasion (Spec. 1) struck a tree and damaged the plane to the extent of about \$521.65, and made two false official statements to his commanding officers that the plane was damaged in making an emergency landing (Specs. 3 and 4, Chg. II).

Attached to the record of trial is a recommendation of clemency by all members of the court and by all the personnel of the prosecution and defense counsel. Consideration has also been given to a letter dated 21 October 1943 from Mrs. Sara T. Packard to the President in behalf of the accused.

In a memorandum to me dated 6 April 1944 the Chief of the Air Staff, for the Commanding General, Army Air Forces, states that he has considered the evidence in the case and recommends that the sentence be confirmed and ordered executed. The record of trial shows that accused engaged in extended combat duty while stationed in New Guinea, was shot down over a Japanese airfield but made his escape through the jungle, and was awarded the Distinguished Flying Cross. I recommend that the sentence to dismissal be confirmed but, in view of the excellent war combat record of accused, that it be commuted to a reprimand and a forfeiture of \$100 of his pay per month for six months, and that as thus commuted the sentence be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

5 Incls.

Incl.1-Rec. of trial.

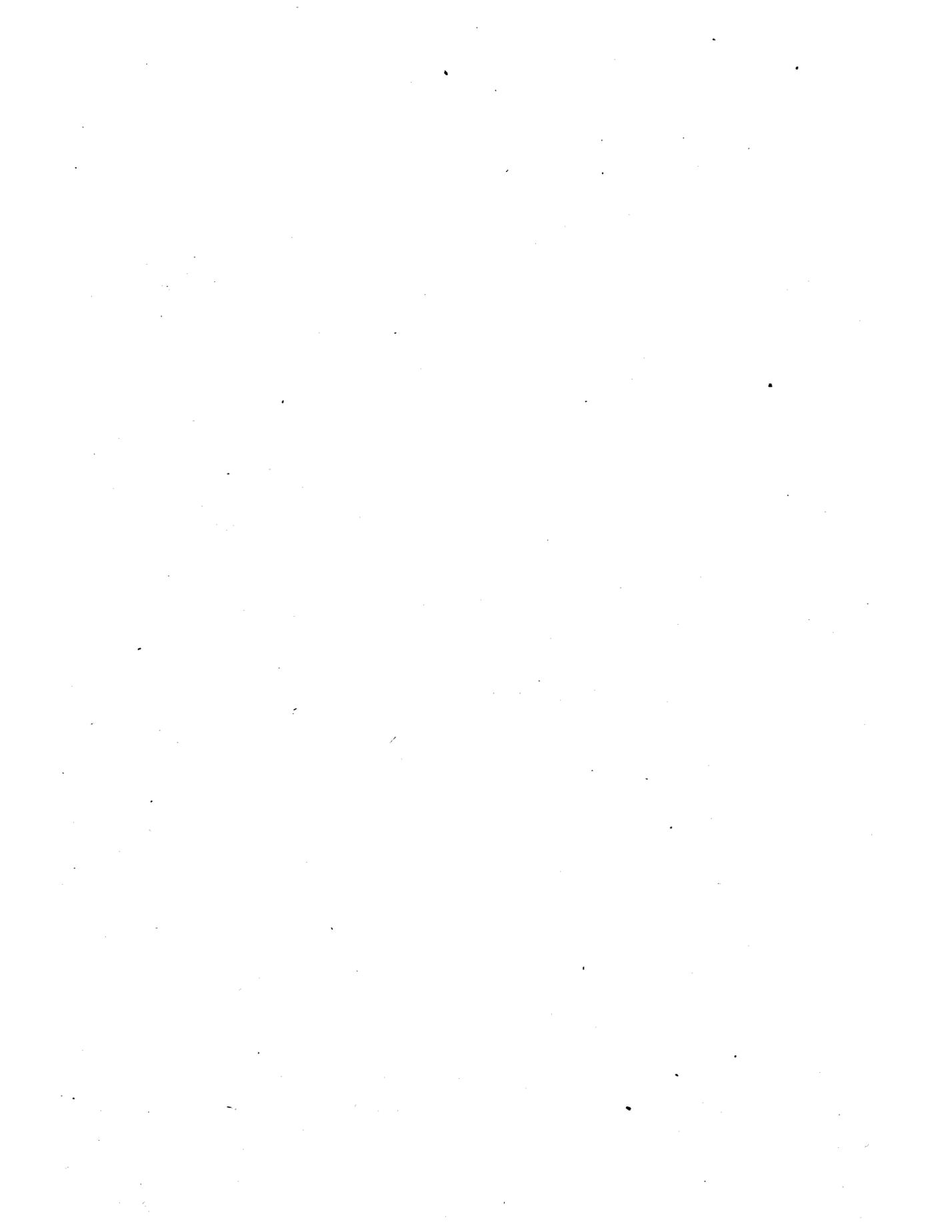
Incl.2-Drift. ltr. for sig. S/W.

Incl.3-Form of Action.

Incl.4-Ltr. fr. Mrs. Packard,
21 Oct. 43.Incl.5-Memo. fr. Ch. of Air Staff,
6 Apr. 44.

Myron C. Cramer
Myron C. Cramer,
Major General,
The Judge Advocate General.

(Findings of guilty of Specifications 1 and 2, Charge II, disapproved. Sentence confirmed but commuted to reprimand and forfeiture of \$100 per month for six months. G.C.M.O. 468, 1 Sep 1944)



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

(21)

SPJGN
CM 248793

25 APR 1944

UNITED STATES)

v.)

Prisoners of War WALTER BEYER,)
Hauptfeldwebel, SWG-49588,)
German Army Serial Number)
Flg. H. KDTR. Rotenburg,)
Hanover, No. 4; BERTHOLD SEIDEL,)
Feldwebel, SWG-49593, German)
Army Serial Number Wehrmel-)
deamt, Ratzeburg, No. 8; HANS)
DEMME, Unteroffizier, SWG-)
49957, German Army Serial Num-)
ber 2, N.E.A. 9.443; HANS SCHOMER,)
Unteroffizier, SWG-49620, German)
Army Serial Number 2, I.R. 107,)
No. 195; and WILLI SCHOLZ,)
Obergefreiter, SWG-49691, German)
Army Serial Number Inf. PZ. Jag.)
ERS. KOMP. 213, No. 972.)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

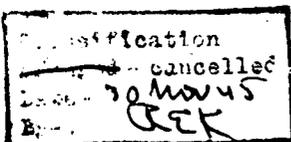
Trial by G.C.M., convened at
Camp Gruber, Oklahoma, 17,
18, 19, 20, 21, 22, 24 and
25 January 1944. Each: To
be hanged by the neck until
dead.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the prisoners of war named above 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 89th Article of War.

Specification: In that Walter Beyer, Berthold Seidel, Hans Demme, Hans Schomer, and Willi Scholz, being prisoners of war and in camp at Prisoner of War Camp, Tonkawa, Oklahoma, did at Prisoner of War Camp, Tonkawa, Oklahoma on or about 4 November 1943, commit a riot, in that they, together with certain other prisoners of war to the number of twenty or more, and whose names are unknown, did unlawfully and riotously and in



a violent and tumultuous manner, assemble to disturb the peace of said camp, and having so assembled, did unlawfully and riotously assault Johannes Kunze, to the terror and disturbance of the said Johannes Kunze.

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

Specification: In that Walter Beyer, Berthold Seidel, Hans Demme, Hans Schomer, and Willi Scholz, all being prisoners of war in the Prisoner of War Camp, Tonkawa, Oklahoma, acting jointly and in pursuance of a common intent, did, at the Prisoner of War Camp, Tonkawa, Oklahoma, on or about 4 November 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Johannes Kunze, a human being, by striking him with their fists and with instruments not known.

The accused pleaded not guilty to and were found guilty of each Charge and Specification. They were all sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each of them and forwarded the record of trial for action under Article of War 48.

3. All of the accused are non-commissioned officers of the German Army who were taken captive in North Africa. General court-martial jurisdiction to try them for the offenses charged is derived from the Geneva Convention of July 27, 1929, Relative To the Treatment of Prisoners of War. The Department of German Interests of the Legation of Switzerland was given more than three weeks notice of the place and date of trial, and Werner Weingaertner, its representative, was present at the hearings. The accused had recourse to the services of a competent interpreter and were defended not only by military counsel acceptable to them but by individual counsel of their own choice. Every right and privilege guaranteed by international law to prisoners of war against whom judicial proceedings have been instituted were strictly observed (R. 3, 6-10, 72; Pros. Exs. 1-7).

4. The evidence for the prosecution shows that the accused, Walter Beyer, a master sergeant in the German Army, was the company leader of Company 4, Compound 1, of the Prisoner of War Camp at Tonkawa, Oklahoma. Among his fellow war prisoners was Johannes Kunze, the deceased. Both men had served together and had known each other in North Africa. According to Beyer, Kunze had not been very popular there because he had wanted to convey information to English officers, and openly expressed his belief in Communism. After Kunze's arrival in this country he would, when given orders, "remind [Beyer] that they were not in Germany". According to Beyer, Kunze did not intend to return to his native land after the war (R. 162-163, 167-168, 173).

On 5 October 1943, Kunze wrote a letter to his wife in Leipzig. In it he requested that certain books be sent to him and remarked that the "companionship of the co-prisoners" was good. All outgoing correspondence was "handled largely by the German non-commissioned officers in the offices of the various companies". Kunze's letter was deposited for mailing at some undetermined time between the date it bore and 4 November 1943. In accordance with the established practice prevailing in prisoner of war camps, it was unsealed. It was still in that condition when it came into the hands of Beyer. The exact day on which he took possession of it is not disclosed (R. 81, 164; Pros. Exs. 25, 27).

Shortly before 4 November 1943, an unsigned note was delivered to Beyer by a German prisoner working at the camp hospital. It read as follows:

"Reichs - Motor - Sport-School, drivers school for all sections of the army, at Frankfurt on the Oder. Hamburg: the main station was camouflaged as a block of houses with dummies and paint, through the middle a wide light strip was marked off as a street. The inner lake was covered over. The outer lake was divided and an island was marked. Reichsportsanatorium (military hospital) in Lessen. This place may be in Pomerania but also in Meklenburg. There may possibly be an army-munitions plant in the vicinity of Lessen? From what I hear the chief sergeant-major, Herbert Richter, wrote an insolent letter, besides, during the train journey from Norfolk here he made insulting remarks and described decent women as prostitutes. With a presumptuous gesture he declared: 'many fields, rich soil, many automobiles, all this will be our colony some day'.

"The transportation chief of the train, an American captain, had the kindness to give the prisoners a late newspaper. Richter threw the newspaper out of the window with the words 'it is poison to our soldiers'.

"One of the new prisoners who arrived today relates that: In the camp from which they came a pastor took letters from one of the prisoners out for relatives in America, thereby evading the censors. Here they have trucks with high chassis underneath which a prisoner can hide if he wants to get to the outside.

"Please let me write at the hospital if there is something to report. Please inform the sergeants on duty.

(24)

"Of the prisoners who left today Otto Hansmann is anti-Nazi, I have informed this man that an American officer may speak to him.

"Dachsenberger is a rabid Nazi, I do not know what position he held in his Party" (R. 172; Pros. Exs. 24, 26).

Much the same information concerning the camouflage of Hamburg had appeared in Life Magazine on 4 August 1943. A copy of this issue may or may not have been available to the prisoners of war (R. 207-212, 443-446; Pros. Ex. 30).

Upon reading the above note, Beyer concluded that it had been written by Kunze and that "Kunze wanted to give this information to an American officer, which would prove detrimental to the German cause". During the morning or afternoon of 4 November 1943 he showed it to the accused, Technical Sergeant Berthold Seidel. There is controverted evidence that he also showed it to several other German noncommissioned officers. They compared the handwriting of Kunze's letter to his wife with that of the unsigned note and determined that in each instance it "coincided". Seidel was "very outraged" at what he called "this treason". He stated that,

"We understood that he [Beyer] should do something about it, but I still had some duties to perform and we did not decide on anything definitely. We knew that something should be done about it. I do not want to put the blame on Beyer, but it was understood that the company must know it and punishment meted out, but if Beyer had not done it then another man would have had to do it."

Beyer acted promptly to inform the other prisoners of war of "the traitorous letter". At approximately 10:00 o'clock that very night he ordered the entire company to assemble in the company mess hall (R. 132, 148, 165, 173, 185, 197; Pros. Ex. 21).

Approximately two hundred men attended this meeting, of whom forty-two or forty-three were noncommissioned officers of the German Army. Some knew the purpose of the meeting; others thought that it was another "counting". Kunze, who was one of the last to enter, seated himself at one of the tables with several fellow prisoners of war. No American guards were present (R. 170, 181, 185, 190, 194, 447-448).

Everyone was quiet as Beyer arose to address them. "Comrades!" he said, "I am sorry and it hurts me in my soul to be forced to tell you some sad news and the case is so grave that I am not in a position to pass judgment myself. Bad as it may seem, we have a traitor in our midst". A murmur spread through the crowd, and silence was restored only with difficulty. When he had their attention again, Beyer commenced reading Kunze's note. "The last words almost drowned in the noise". Cries of "treason", "beat him to death" and "just beat him to give him a souvenir", were heard. Beyer again obtained silence. He called for volunteers to

compare the handwriting of the note with that of a letter he had. About twenty noncommissioned officers crowded around him to examine the documents. "Although no name had been mentioned so far, the name Kunze now reverberated through the room". There was a great tumult. Kunze was called to the front and confronted with his writings. His eyes were swelling out, his face was pale, "completely yellow", and he was perspiring freely. According to two witnesses he "said he didn't do it"; "it wasn't I, it wasn't me". A third testified that Kunze "did not make a sound" (R. 167, 174-175, 177, 186, 190-191, 199; Pros. Exs. 18-23).

His fellow prisoners, regardless, forthwith proceeded to rain blow after blow upon him with their fists until the blood streamed from his mouth and nose. He strove desperately to escape. As he made for the exit, he passed near and received several blows on the face from Seidel. There were shouts of "Don't let him get out". Demme blocked his path, "thundered him one in the face", and then grabbed him around the hips. Kunze struggled wildly to extricate himself, but the other clung to him tenaciously. At length Demme "threw him off so that he hit his head on a table full of dishes, fell down on the floor, and some cups and platters tumbled after him" (R. 144, 150, 166, 175, 186, 190-192; Pros. Exs. 18, 23).

While lying prostrate, either on this occasion or shortly thereafter, he was picked up by Seidel and struck again. The beating continued. Beyer alone among the accused did not strike or attempt to strike Kunze. Scholz pummelled Kunze three times and then departed. Climbing to the top of a bench, Schomer threw two heavy "G.I." drinking cups at Kunze but apparently missed. Still boiling with rage, Seidel, whose hands were covered with blood, went to the latrine, put his "head under the faucet and quieted down" (R. 144, 156, 160, 175-177, 183, 188; Pros. Ex. 22-23).

The beating had gone on uninterrupted. Aside from an admonition by Beyer that "the Americans might make difficulties for you in this matter", neither he nor any of the noncommissioned officers present made any attempt to stop it. Victor Zorzi, a prisoner of war who assisted the American Catholic priest at Tonkawa, attempted to intercede. He was told by Beyer that "this was no place for him" and that "he should leave". Zorzi complied with the suggestion (R. 178-179, 186, 200-201).

After completing his ablutions at the latrine, Seidel set out again for the mess hall. As he approached it, Kunze came "shooting" out of the door pursued by other prisoners who overtook and surrounded him. When the American authorities arrived on the scene, between 10:30 and 11:30 o'clock, his body was lying on its left side near the northeast corner of the mess hall. His head was "in a pool of blood * * * His trousers were drawn down over his hips * * * The left or posterior aspect of the skull was impinged against a cement fragment of the foundation of the mess of Company 4 in Compound 1. The abdomen * * * was bare. The head, the scalp, and face were covered with blood. The knees

of both lower extremities were flexed". He had sustained "multiple lacerations, abrasions, and contusions of the body". His death was due to a "fractured skull, laceration of the brain and cerebral hemorrhage". "Under two of the lacerations on the right side of the scalp you could visualize the brain". "His head was busted open" (R. 11, 13-14, 17, 19, 25, 27, 36, 48, 58, 147, 151; Pros. Exs. 9-10 20-21).

The accused and the other prisoners of war all returned to their barracks and went to bed. Their sleep was shortly disturbed by the American authorities. Blood was found on the clothes or persons of thirteen of the prisoners of war by Major Edward R. Polsley the Camp Commander. Captain W. S. Kilgore of the Medical Corps stated that he saw "between forty and sixty" with such stains. Among the thirteen discovered by Major Polsley were the five accused (R. 31, 64, 68; Pros. Exs. 18-23).

The pool of blood near the body of Kunze was twenty inches in length and fifteen to eighteen inches in width. Through the mess hall there was a trail of blood marking the deceased's course. There was blood on the door and the screen-door, on the walls, on potato sacks, on the floor leading into the kitchen, on the coal shovel, under the kitchen table and sink, on broken dishes, on top of an ice chest, in the pores of the cement flooring, under the mess hall sink, on ten bowls, and back of the stove. Someone had unsuccessfully attempted to remove some of these fatal markings by washing and scraping (R. 28, 30, 42, 46, 49, 60-63).

In the opinion of Captain Kilgore, the deceased's wounds were "not produced by a fist". Surmises as to the identity of the lethal weapon include a piece of crockery and a milk bottle on both of which there were blood and hair. The bottle was found beside the body. A third possibility was that Kunze was thrown against the building (R. 16, 20, 31, 39-41, 43, 49, 56-57, 62).

5. Each of the accused, after having been apprized of his rights relative to testifying or remaining silent, took the stand in his own defense. The evidence adduced from them and from the other witnesses called on their behalf shows that when the first prisoners of war arrived at Tonkawa, Oklahoma, on 30 August 1943, it "was put up to [them] by the American Officers * * * to pick four men out of those thousands that were there for the purpose of having a First Sergeant for each of the four companies". Beyer, a master sergeant with over nine years experience in the German Army, was one of the four appointed. Although he thus became the "number one man", he had no powers except such as were necessary to execute the orders communicated to him by the American authorities (R. 215, 217-218, 329-330).

In the middle of September Beyer was instructed to direct Kunze to go to the hospital for an interview with an American Officer. Beyer transmitted the order but advised Kunze to be cautious in his statements and requested that he report the subject of conversation. These additions were made because Beyer, "as a soldier of more service, felt that

I was superior to him in this matter, or that I had more judgment than he in this matter, because he probably would not be able to consider those questions very carefully and he might say something which he could not take upon his responsibility * * *. Unintentionally one can say many things concerning which a soldier generally is not permitted to say anything". When Kunze returned from his appointment, he informed Beyer that he had been asked "what his occupation had been in civilian life" and that, "Of course, I didn't tell him that I was working in a war industry. I told him that I had been an agricultural laborer". This account of what had occurred did not satisfy Beyer. From that moment he was convinced that Kunze "was not entirely on the level" (R. 330-332, 362-363).

Beyer did not apparently then know that the interview at the hospital had been preceded by another of a similar nature immediately after the arrival of the first group of prisoners of war at Tonkawa. Kunze had been placed in a building by himself and there joined by a man in civilian clothes whose identity remains a mystery but who, just prior to the rendezvous, had been "in the presence of Lt. Moreland", the Camp Intelligence Officer (R. 222a-227, 308-316, 449).

On 2 November 1943 a German sergeant at the hospital, named Heise, brought Beyer the unsigned note disclosing details of the Hamburg camouflage system. It contained the names of two former members of the company, who had been transferred elsewhere. Beyer surmised that the author was also a member of the company and with that thought in mind proceeded to examine the contents of the company mail box, hoping to discover "who had written this accusing or rather this treasonable note". He finally found the same handwriting in the letter written by Kunze to his wife. Later in the day, for some undisclosed reason, the note was returned to Heise. Between four and five o'clock on the afternoon of 4 November, however, he redelivered it to Beyer, who again compared the two documents and "came to the conclusion that in order to protect myself I had to read this to the company * * * in order to prevent that when I go back to Germany I am put before a court-martial as an accessory to treason" (R. 332-337).

He decided to call a meeting that night "at a quarter to ten or ten minutes to ten". The American authorities were not informed by him of his intention because he "considered that an entirely German affair since the men had been requested, or asked, by American soldiers before that time to betray the Fatherland". He was "cut to the quick that such a man should betray those things for which we stood at the front for four years already". The "idea or thought" that Kunze might be beaten "occurred" to him, but he took no precautions beforehand to insure the maintenance of order at the meeting. He "was internally much too moved and much too insulted by the very thought that there should be such a man who could betray his Fatherland in such a manner" (R. 337, 346-348).

The only other person to whom he displayed the letter and note that afternoon was Seidel. No preliminary meeting of noncommissioned officers was called or held. Seidel testified that his pre-trial statements to the contrary were incorrect. As he was leaving the orderly room, after examining the documents, several other sergeants were going in, and he assumed that they, too, would be acquainted with the facts. In this belief he had been mistaken, for the existence and contents of the note were not at the time divulged to anyone else (R. 337, 415, 417, 429-430, 433-436).

Taps was supposed to be observed at ten o'clock but the camp was "not very accurate about the exact minute". Shortly after nine o'clock Beyer ordered an announcement to be made in all the barracks summoning the men to the mess hall forthwith. When the entire company had assembled between nine-thirty and ten o'clock, he called the meeting to order. Most of those present were under the impression that another count was to be held. The accused, Schomer, a member of Seidel's platoon, evidently had some more accurate foreknowledge of what was happening or about to happen. His testimony was that to "some extent I knew it and to some extent I didn't know it". He claimed to have received his information from other members of the Company on his way to the mess hall. At the pre-trial investigation he had stated that he and the other prisoners of war in his barracks had been told by Seidel "prior to the meeting * * * that one of their men had tried to give information to the Americans concerning the camouflage of Hamburg, and * * * the location of near hospitals and ammunition factories or depots" (R. 229-230, 238, 252, 255, 267, 298, 304, 321, 368, 379, 389, 418, 418-419, 438, 447-448).

Beyer first read the note (Ex. 24). He then raised the letter (Ex. 25) on high and said, "It hurts me to have to communicate a sad thing to the company". "There is a traitor in our midst". He stepped off to the right and, after folding the letter so that the name of the sender was hidden, invited the members of the company to compare the handwriting. The crowd roared "who is this bum, who is this traitor" (R. 257, 338, 368, 379, 383, 419).

Kunze was pale and sweating. Along with many others, he "came up front". The two documents were held before him. He did not say a word but his face was alternately white and red and there were beads of perspiration on his forehead. His appearance and his silence were interpreted as confessions of guilt. There were shouts of "Give him a beating so he won't do it again". The ring of men around him rapidly increased in size. Someone struck him; soon there were "many hands beating" (R. 231, 254, 259, 268-269, 273, 280, 339, 345, 380, 384, 419-420).

"Just about the first platoon to arrive in the mess hall" was the one led by Seidel. While the note was being read, he had "by accident noticed a man sitting on the west side of the mess hall who got my eye * * * by the white color of his face and by sweating". "It must have been shortly

thereafter, and everybody was pointing to him and saying 'That's the bum, that's him there', and it was quite apparent that he couldn't make any denials with the expression of his face". The name "Kunze" was uttered, and Seidel "knew" that this "was the man because he knew beforehand that Kunze was the man". Although he had "followed Kunze immediately" he could not get within striking range until after "the beating, or the fight, had already started". He hit Kunze twice with his fists, and after an interval hit him three times more. He believed it "understandable that I who have been a soldier for so long and stood on several fronts and have lost practically everything through bombing attacks, that I lost my composure". After his last blow, his rage was so fierce that he thought that he would lose control of himself. He left the mess hall and walked to the latrine where he cooled off by placing his head under the faucet (R. 339, 418-422).

Ever since they had both served at Bone in North Africa, Demme had borne an antipathy toward Kunze "on account of his unsoldierly behavior" in failing to carry out orders "to go after chow and to clean latrines". As Kunze was fleeing toward the door, his sole avenue of escape, Demme was "the first who had collected his thoughts", "in order not to let him out". Demme struck Kunze in the face, grappled with him, hurled him back, and caused him to "hit his head upon a table full of dishes". Every material assertion in Demme's pre-trial statement was reaffirmed. Demme testified that he had intervened because,

"that which Kunze had done was too much for me. It didn't agree with my ideas". "Since I have been a soldier for four years I have been in Belgium, France, Russia, Africa and Holland, and on top of that, if one becomes a Prisoner of War * * * well, then you too could understand that I could not act otherwise; and if one as a front line soldier stands out there opposite the enemy, comes under fire of bombardment, that has a bad effect on one's morale, and how much worse must it be for women and children". "Above all I was thinking about the inhabitants of those surrounding places".

Having contributed to the beating, he left the mess hall. He did not return that night (R. 369-376).

After the note had been read, Scholz, who was sitting "two or three tables to the right and to the front of Kunze", "looked around" and saw "a man who made a very confused expression on me sic". He "thought right away that it was Kunze when he saw that man who was white in the

face and started to perspire. A man that has not done anything has no reason for being white in the face or perspiring". During the "excitement" he was thinking of home and of the women and children. He "knew from the campaigns that not every bomb hits the target and that sometimes they hit other spots, and I myself have been a soldier in Germany for a certain period of time and I saw with my own eyes what bombs can hit". These were the reasons that he "hit Kunze once and struck him three blows". Others had preceded him. He did not intend to kill Kunze and, the matter [being] finished so far as [he] was concerned", he walked out of the mess hall (R. 379-384).

When the meeting was announced, Schomer was sick and in bed. He arose, dressed warmly, and walked to the mess hall. On the way he learned from other members of the Company something of the events then occurring. His own property in Germany had been damaged by bombs, and he "thought only of those four years of war through which [he] had gone * * * and those things that were destroyed and [his] home * * *." He testified further that he did not know whether his wife was still alive or not because her home was in the air raid danger zone. When he entered the mess hall, the "beating was already in progress" and "many fists" were "moving about in the air". He was agitated and in his "excitement" he "reached for two cups", "climbed on a bench", and "threw them" at Kunze. Both missed their mark. He was "weak and very excited" and did not participate further in the melee. He went into the kitchen where a "comrade had laundered some underclothing for" him. Kunze came running by him and on into the storeroom, then fled back into the kitchen, continued into the mess hall proper, and finally succeeded in reaching the door and passing through it to the outside. Two or three minutes later, Schomer departed for his barrack and bed. He was awakened from a sound sleep late that night and ordered to return to the mess hall for examination. He donned the same clothes he had worn earlier. Blood was found on the left side of his pants near the pocket (R. 389-411).

At his pre-trial interrogation he had testified that Seidel had, before the meeting, informed him and others that Kunze "had given the Americans information". At the trial itself Schomer upon cross-examination stated that "I don't know that anymore". Upon being pressed further, he said that one of his officers in Africa, a former lawyer with a knowledge of American law, had "explained to us that if we should be captured and had anything to do with a legal case then we should only state before a court what we knew". Since he accordingly believed that he need tell the truth only when testifying in a court, he had deliberately misled his pre-trial interrogators. It was only at the trial itself that he admitted throwing the cups. The testimony of Heidutzek and Person had already established that fact. If his aim had been better, his "blow would not have been strong since [he] hadn't eaten a bite at all for almost three days" (R. 397-401).

There were forty-seven German noncommissioned officers in Company 4 of Compound 1. Those who were present took no effective action to restore order. One testified that, "It was shouted by the noncommissioned officers that they should stop and cease but when such a crowd starts to push around or mill around a noncommissioned officer who is a prisoner of war can't do anything about that". If "one had involved oneself there, or if one had gotten in between there, one might have received something, might have gotten blows" (R. 254, 277).

Beyer had been very sick when crossing the Atlantic on the way to this country. He "was almost carried" off the ship and, after his arrival at Tonkawa, was put in the hospital for a while. When the beating commenced, his thoughts "were in Germany". He "imagined how at that time, perhaps at that very moment, American or English bombers dropped bombs over Hamburg and by doing so perhaps soon" would destroy his family. He demanded that Kunze's assailants desist, for he foresaw trouble with the American authorities. According to one witness, he shouted "Be quiet, leave Kunze alone, otherwise we will get the Americans on our necks". No one paid any attention to him; there was "too much noise * * *, too much tumult". Yet, when Zorzi attempted to climb on a table and to aid him in quelling the disorder, Beyer told him to leave the hall. The "idea" that a murder might be committed never entered Beyer's head (R. 231, 239, 243, 260, 261, 269, 275, 277, 281, 299, 302, 304, 341, 343, 350-352, 357, 392-393, 402).

He did not himself hit Kunze with his "hands nor with an object nor * * * kick him or touch him". While the beating was in its initial stages, he walked over to the orderly room. After spending some time there, he returned to the mess hall. Kunze was still running the gauntlet. Mounting a bench, Beyer yelled "stop it, stop it", but to no avail. The violence did not abate until Kunze momentarily evaded his assailants and dashed outside. Beyer stayed behind in the mess hall for a while. When all but thirty fellow prisoners of war had departed, he again set out for the orderly room. On the way over he saw Kunze's body lying up against the northeast corner of the kitchen building. He was "terribly surprised because due to the fact that he had been running out of the mess hall, I had assumed that he had gone to his barracks long ago or had otherwise sought security for himself". His "first thought was an ambulance". He proceeded on to the orderly room and searched for the interpreter,

"and he wasn't there * * *. I went to my bedroom and didn't find him there either * * *. I closed the door to the bedroom again and went back to the orderly room by the same route and then I went outside and at that moment a medical officer came toward me. He was coming back from night duty in hospital and I asked him whether he could speak English, and he said, 'Yes', so I said an ambulance should be called and that was done immediately" (R. 240, 253, 275-276, 341-343).

6. The Specification, Charge I, alleges that each of the accused did at Prisoner of War Camp, Tonkawa, Oklahoma, on 4 November 1943, commit a riot, in that they, together with certain other prisoners of war to the number of twenty or more, whose names are unknown, did "unlawfully and riotously and in a violent and tumultuous manner assemble to disturb the peace of said camp and having so assembled, did unlawfully and riotously assault Johannes Kunze to the terror and disturbance of the said Johannes Kunze". Article of War 89 under which the Specification is alleged, provides in part, as follows:

"All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste * * * depredation or riot, shall be punished as a court-martial may direct. * * * (M.C.M., 1928, AW 89, p. 223).

The word "riot", as used in the above article, is a common law term and we must look, therefore, for its interpretation and meaning both to our military law and to the common law. Our Manual for Courts-Martial explains that,

"A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful" (M.C.M., par. 147c, M.C.M., 1928).

Similarly, the word "riot" is defined at common law as,

"* * * a compound offense, including some of the essential elements of criminal conspiracy, involving the execution of express or implied agreement among three or more persons to commit an assault or a battery or a breach of the peace.

* * * * *

"An unlawful assembly is an essential prerequisite; but, as we have seen, an assembly meeting lawfully can be converted into one that is unlawful, by the concerted determination, however sudden, to effect tumultuously an unlawful purpose. Hence to constitute a riot it is not necessary that the original intention should have been riotous" (Wharton's Criminal Law, 12th Ed., pp. 2192 and 2193).

In view of the above authoritative explanation of the meaning of the term riot, it is unnecessary to determine whether or not any of the accused knew, prior to their assembling together, that the purpose

of their meeting was to assault or otherwise mistreat Johannes Kunze. On the other hand, there is sufficient proof of the commission of a riot, if the evidence shows that each of the accused, after assembling together and learning of the unlawful purpose of the meeting, entered in concert upon its execution or otherwise gave support to the group action by word or act. Concerning the criminal responsibility of all present at a riotous group flogging in Oklahoma in 1926, the Court of Criminal Appeals of that State in the case of R. B. Perkins et al v. State of Oklahoma, 50 Pac. 544, 49 A.L.R., 1129, stated that,

"* * * it is not necessary that an unlawful act be perpetrated in accordance with their prearranged plan; but, if executed unlawfully, pursuant to a criminal conspiracy, the offense is deemed to have been committed by each and all of the co-conspirators, unless there is proof tending to show that some one or more of them actively withdrew from the conspiracy. Under the circumstances shown, the several members of this mob stood by and acquiesced in this flogging, and it cannot be said that the offense was committed by the two persons who did the actual beating, independent of the others".

The unlawful character and purpose of the meeting in question seems too clear to require comment. The accused, as prisoners of war were and are "* * * subject to the laws, regulations and orders in force in the Armies of the detaining Power" and had no right, therefore, to sit in judgment of their fellow prisoner of war or to impose punishment upon him (Article 45, Chapter 3, Convention of July 29, 1929, Relative to the Treatment of Prisoners of War). Any other rule would lead to chaos and unrestrained violence. Our courts have repeatedly condemned the viciousness of unlawful group action and riotous conduct. Thus in 1836 the court in the case of United States v. Fenwick et al (Federal Cases #15,086), declared that;

"* * * No voluntary association of individuals, unknown to the constitution, have a right to make or execute the laws, or to judge, condemn, or punish those whom they may deem to be offenders, and to punish whom they may suppose the law to be inadequate to, however pure or holy may be their motive; and if, in their fanaticism or their frenzy, they should take the life of their victim, they would be guilty of murder. Such, also, would be the judgment of the law if any unauthorized individual, or combination of individuals, should snatch from the officers of justice even a condemned murderer, and proceed themselves to execute the sentence. But the example of such usurpation of judicial or executive functions,

if unpunished, would be far more pernicious to society than the mere act of murder which would have been committed. The reign of terror would have commenced and no one could foresee the extent of its ravages. It is easier to create an excitement than to allay it; for every degree of excitement tends to pervert the judgment, to obscure the light of reason, and to sear the conscience. When a mob is once raised, no one can tell where it will end, and all who assisted in raising it are guilty of all the consequences. The more respectable the persons engaged in it, and the more desirable the end to be obtained, the more dangerous is the example; for if good men may use unlawful means to accomplish a good end, how can wicked men be restrained from using like means for an unlawful end? All good ends must be pursued by lawful means. The supremacy of the law is the only security for life, liberty, and property*.

The above principles are as true today as when written and are basic to all true justice applicable not only to the civilian, and to the soldier, but also to the prisoner of war, who, under the terms of the Geneva Convention, is the ward of our military justice - a ward whose life we are obligated to guard, and whose crimes we are obligated to punish.

In view of the above doctrine and since the facts show beyond a reasonable doubt that each of the accused actively participated in the riot as alleged we must conclude that the proof is legally sufficient to support, as to each of the accused, the findings of guilty of the Specification, Charge I and Charge I.

7. In the Specification, Charge II, each of the accused is charged with the murder of Johannes Kunze. The Specification alleges that the accused,

*** acting jointly and in pursuance of a common intent, did, at the Prisoner of War Camp, Tonkawa, Oklahoma, on or about 4 November 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Johannes Kunze, a human being, by striking him with their fists and with instruments not known*.

Murder is defined as *** the unlawful killing of a human being with malice aforethought*. The word "unlawful" as used in this definition means *** without legal justification or excuse*. A justifiable homicide is "a homicide done in the proper performance of a legal duty ***". An excusable homicide is one *** which is the

result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *. The definition of murder requires that the death of the victim * * * take place within a year and a day of the act or omission that caused it * * * (par. 148a, M.C.M., 1928). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which it may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

"Malice aforethought - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause

the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * * (M.C.M., 1928, par. 148a).

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 Criminal Law, vol. 1, sec. 420). In the case of Bostic v. United States (94F (2) 636, C.C.A.D.C. 1937), it was said that:

"This court has stated the applicable rule in Aldridge v. United States, 60 App. D.C. 45, 47 F. 2d 407, 408, as follows: 'Deliberation and premeditation may be instantaneous. Their existence is to be determined from the facts and circumstances in each case. It is a question, under a proper charge by the court, for the jury to determine.'

"The authorities agree that no particular length of time is necessary for deliberation. * * * It is not the lapse of time itself which constitutes deliberation, but the reflection and consideration, which takes place in the mind of the accused, concerning a design or purpose to kill. * * * Lapse of time is important because of the opportunity which it affords for deliberation. * * * The human mind sometimes works so quickly as to make exact measurement of its action impossible, even with the facilities of a psychological laboratory. The jury must determine from the circumstances preceding and surrounding the killing whether reflection and consideration amounting to deliberation actually occurred. * * * If so, even though it may have been of exceedingly brief duration, that is sufficient. It is the fact of deliberation which is important, rather than the length of time during which it continued." (Citations of Authorities omitted; Certiorari denied, 58 S. Ct. 523, 303 U.S. 635, 82 L. Ed. 1095).

The Specification also alleges that the five accused killed Johannes Kunze by "acting jointly and in pursuance of a common intent". Since the crime in question is alleged as having been accomplished by group action and since the evidence shows that other prisoners of war whose names are unknown participated in it, it is only necessary, if the

findings of guilty under this Specification are to be sustained that the proof show that the fatal blow resulted from the concerted action of the group. It is not necessary to show that the individual accused or any one of them struck the death blow. The doctrine which imposes responsibility upon a principal for the act of his agent in the perpetration of a crime is a very ancient one. This doctrine is well illustrated in the case of State v. Jenkins, (94 American Decisions 132; 14 Richardson's Law 215), wherein the Court stated,

"All who are present concurring in a murder are principals therein, and the death, and the act which caused it, is in law the act of each and of all. There is no distinction in the regard of the law in the degrees of their guilt, or the measure of their punishment, or the nature of their offense, founded upon the nearness or remoteness of their personal agency respectively. An indictment charging it as the act of a particular individual of the party will be well sustained by evidence that any other of them gave the fatal stroke, or that it was given by some one of them, though it does not appear by which; Mackalley's Case, 9 Coke, 67 b; Sissinghurst House Case, Hale, 461; 1 Russell on Crimes 537)".

Furthermore, Justice Story in the case of United States v. Ross (Federal Cases #16, 196), asserted that,

"If a number of persons conspire together to do any unlawful act, and death happen from any thing done in the prosecution of the design, it is murder in all, who take part in the same transaction. * * * More especially will the death be murder, if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life; and, a fortiori, if death be one of the events within the obvious expectation of the conspirators. Fost. Crown Law, 261, 351-353."

When the evidence is examined in the light of the above concepts, it becomes apparent that each of the accused is guilty of murder of Johannes Kunze as charged. The evidence shows that shortly before the meeting in question, an unsigned note containing a brief description of the camouflage of Hamburg was delivered to Beyer. Although the same information about Hamburg had appeared in Life magazine in August of 1943, it was not shown whether that issue of the publication had been available to Beyer or to the other accused. After reading the unsigned note, Beyer concluded that it had been written by Kunze and that he wanted to give information to an American officer which would be detrimental to the German cause. Beyer showed the note to Seidel and possibly to several other German noncommissioned officers. They compared the handwriting of the unsigned note with the handwriting of a letter

written by Kunze to his wife and determined that Kunze was a traitor to Germany. Thereafter, at approximately 10 o'clock on the night of 4 November 1943, Beyer ordered the entire company of which he was the first sergeant, to assemble in the company mess hall. When the group, comprising approximately 200 men including 43 noncommissioned officers had assembled, Beyer arose and addressed them as follows:

"Comrades, I am sorry and it hurts me in my soul to be forced to tell you some sad news and the case is so grave that I am not in a position to pass judgment myself. Bad as it may seem, we have a traitor in our midst."

After order had been restored, Beyer read Kunze's unsigned note. Before the reading was completed, Beyer's voice was drowned in cries of "treason" and "beat him to death". Beyer again obtained silence and called for volunteers to compare the handwriting of the unsigned note with the signed letter which he had. After 20 noncommissioned officers had crowded around Beyer to examine the documents, the name Kunze reverberated through the room. He was called to the front and confronted with his writings and was forthwith attacked by his fellow prisoners in a violent and brutal manner. He strove desperately to escape. As he made for the exit Seidel struck him several blows on the face. There were shouts of "don't let him get out". Demme blocked his path "thundering him one in the face" and then grabbed him around the hips and threw him so that he hit his head on a table laden with dishes which fell to the floor. He was picked up by Seidel and struck again. Scholz struck Kunze three times and then left the mess hall. Schomer climbed on the top of a bench and threw two heavy drinking cups at Kunze. Although Beyer, after his inflaming denunciatory speech, did not himself strike a blow, he was the instigator of the charge of treason - the ringleader who aroused the hatred and frenzy of the mob, inciting it to unrestrained violence.

Finally Kunze reached and passed through the exit of the mess hall but he did not escape. His assailants pursued him into the open area and surrounded him there. Shortly thereafter, his body was discovered near the entrance to the mess hall lying "in a pool of blood". "His death was due to a fractured skull, laceration of the brain and cerebral hemorrhage". There was a trail of blood marking the deceased's course in the mess hall and to the place outside where he died, and blood was found on the person or clothing of each of the accused.

The above facts show that the accused, either by their own hands or by the hands of their comrades in crime, willfully, unlawfully, feloniously, deliberately, and with premeditation killed Johannes Kunze. Each of the accused is shown to have definitely participated in the concerted action which resulted in his death and each is both morally and legally guilty of murder. The evidence shows beyond a reasonable doubt every element of the crime charged and sustains the findings of guilty of the Specification, Charge II and Charge II.

8. The defense counsel submitted to the Board of Review both a written brief and an oral argument in which various propositions are asserted. The most important of these propositions may be summarized, as follows: (I) That the evidence is insufficient to sustain a conviction of riot, (II) That the evidence is insufficient to sustain a conviction of murder, (III) That since the evidence shows that Johannes Kunze was a traitor to Germany, the accused had a right to kill him in order to prevent him from committing another act of treason, (IV) That the conviction is based upon an illegal investigation, and (V) That the approval of the sentence in this case may cause retaliation by Germany and the suffering of our own soldiers.

I. Defense counsel have advanced the ingenious contention that the term riot as used in Article of War 89 was intended to cover offenses committed by a single individual on a personal mission involving damage to property and was never meant to apply to tumultuous disturbances of the public peace by group action resulting in murder or other forms of physical violence. They further maintain that the common-law definition of riot set forth on page 162 of the Manual for Courts-Martial, describes a "separate", "distinct", and "entirely unrelated" offense bearing no resemblance to the special offense prohibited by Article of War 89. This view is based upon a misconception.

Article of War 89 which was enacted in its present form in 1920 represents a consolidation of Articles of War 54 and 55 of the statutory military code previously in force. As Colonel Winthrop points out on page 658 of his treatise on Military Law and Precedents, the old Article of War 54 was "incomplete and unsatisfactory" because "(1) it leaves in doubt what class of injuries are had in view - whether injuries to the person only, or injuries to property as well as person; and (2) fails to indicate in what manner and by what instrumentality the reparation for such injuries is to be effectuated.

"As to the injuries contemplated, the language of the Article would rather imply that it was bodily assault only that was intended. But as the species of disorderly conduct specified are such as naturally to result in damage to property, such damage, at least when incidental to violence against the person or the outgrowth of a breach of the peace, might well be regarded as within the spirit of the Article".

The phrasing of the present Article of War 89 removed all doubts as to its applicability to property. But the emphasis placed upon that factor should not obscure one of the principal original purposes of old Article of War 54 which was to punish soldiers who participated

in riots resulting in injuries to the person. When one understands that present Article of War 89 represents a combination of old Articles 54 and 55, its meaning becomes patent. One of its constituent elements clearly covered riots, and there is no reason to believe that Congress in 1920 intended to limit rather than to expand the common-law concept of the offense of "riot".

II. Under the second general proposition that the evidence is not sufficient to sustain the finding of guilty of murder, the defense counsel points out that Kunze was killed on the outside of the mess hall in which the concerted attack upon him began, and that no one of the accused is shown to have struck the death blow. Whether the death blow was struck on the outside of the mess hall or within is immaterial. The essential fact is that the death of Kunze came as the culmination of a violent group attack upon him, in which all of the accused participated. Concerning this there can be no reasonable doubt. It is equally immaterial to the guilt of the accused to determine whose hand struck the fatal blow. As previously stated in paragraph 7, the guilt of the accused arises from their concerted action with one another and with the other prisoners of war who are not named. Since the accused are shown to have shared in the mob attack, each participant in that attack became their agents for whose acts they were fully answerable. The evidence shows beyond a reasonable doubt that as Kunze ran from the mess hall he was surrounded on the outside by a group of the prisoners and that shortly thereafter he was found dead near the mess hall door. From these facts, the only reasonable and logical inference which can be drawn is that Kunze was beaten to death by the assembled prisoners of war. In 1919 in the court-martial case of Cook et al, CM 123414, the Board of Review in reviewing the record of the trial of nineteen general prisoners tried for a murder committed in the United States Disciplinary Barracks, in which some but not all of the accused participated in the final fatal attack, said:

"In the present case, to constitute any of the accused aiders and abettors, it is not necessary that they should have assisted in the particular acts of criminal violence resulting in the death of the deceased, but it is sufficient if they were acting in general concert with the actual perpetrators of such acts in their commission."

Similarly in 1854 in Brennan v. the People (15 Ill. 511), the court said:

"These instructions required the jury to acquit the prisoners, unless they actually participated in the killing of Story, or unless the killing happened in pursuance of a common design on the part of the prisoners and those doing the act to take his life. Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story; and that he was killed in the attempt to execute the common purpose" (2 Hawk. P.C. ch. 29; 1 Hale, P.C. ch. 34; 1 Russell on Crimes, 24; 1 Chitty, Criminal Law, 264).

Furthermore, in Green v. State (51 Ark. 189, 10 S.W. 266) the defendants and others banded together for the purpose of whipping one Horton. Entering his room while he was sleeping, they seized him and carried him a short distance away where they whipped and beat him cruelly. The next day Horton's dead body was found wrapped in a quilt, and near it were a number of switches or small sticks. His skull was fractured, three ribs and his collar bone were broken, and there was a severe cut across his face. The defendants were each convicted of murder in the first degree. In affirming the judgment, the court after citing from a number of leading cases said:

"We think there was evidence to show that the killing in this case was done in the furtherance or prosecution of the common design of appellants and their associates to whip the deceased. It is highly probable that in the execution of their design they were met by resistance on the part of the deceased, and in overcoming that resistance the fatal blow was struck. The circumstances accompanying the killing, and the nature of the injuries inflicted, indicate a purpose to kill. The cruel and brutal treatment the deceased received shows an intention to do something more than to whip. They are presumed to have intended the natural consequences of their acts."

The above authorities support the court's conclusion that each of the accused is guilty of murder as charged.

The defense counsel also maintains that there was no design on the part of the accused to kill Kunze and that, therefore, the offense was not murder. He further contends that under the interpretation of the facts most favorable to the prosecution, the offense could be only manslaughter because Kunze's death resulted from a "mere fist fight". This argument ignores the true facts and the law applicable thereto. What is referred to by the defense counsel as a "mere fist fight" was actually a deliberate, brutal assault by two hundred men upon Kunze which resulted in his death. The element of malice aforethought is clearly established by the facts showing that the accused attacked Kunze with an intent to cause his "death or grievous bodily harm". It may be further observed that in order to establish the existence of malice aforethought it is not necessary that the facts show an active intent to kill if the evidence reveals an attitude of indifference as to "whether death or grievous bodily harm" resulted or not. As stated by Chief Justice Shaw in Commonwealth v. Webster, supra, malice is shown by "such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden". This language when applied to the facts of the present case can have no other meaning than that the cruel mass killing of Kunze carried out in disregard and in defiance of law was with malice aforethought.

In this connection the defense has suggested that the accused, upon learning of Kunze's alleged treason, attacked him in the heat of sudden passion aroused by adequate provocation, and that, consequently under the doctrine of "provocation", the resulting homicide was manslaughter only. This argument loses sight of the real character of the crime. The type of provocation which the law recognized as sufficient to reduce a homicide from murder to manslaughter is stated in paragraph 149, Manual for Courts-Martial, 1928, as follows:

"In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man. The act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm.

As has been pointed out by the Supreme Court of the United States it is not enough that there be passion on the part of the accused but his passion must have arisen from an adequate cause such as to render him "incapable of deliberating" (Allen v. United States, 164 U.S. 528).

Thus in Frank Collins v. United States (150 U.S. 998), the Supreme Court declared that:

"* * * mere passion does not reduce the crime from murder to manslaughter, for it may be a passion voluntarily created for the purpose of homicide; but it must spring from some wrongful act of the party slain at the time of the homicide, or so near theretofore as to give no time for passion to cool."

The courts appear to have avoided defining the scope of the application of adequate cause as a basis for provocation. They all agree that in the absence of a statutory provision to the contrary, "provocation" cannot be produced "by mere words, because mere words alone do not excuse even a simple assault" (Allen v. United States, supra). Justice Lumpkin in Stevens v. State (137 Ga. 520, 73 S.E. 737, 38 L.R.A. 99) has presented a summarization of the type of cases in which the doctrine of provocation might be invoked, as follows:

"An attempt to commit a serious personal injury on a member of one's family in his presence, the catching of a man in adultery with one's wife, or a violent trespass on one's property in his presence, and a killing then taking place, might authorize a submission to the jury of the theory of voluntary manslaughter. But mere words will not. In some cases, where it may appear at first glance that words were treated as authorizing a submission of that theory, a careful consideration will show some added fact or conduct on the part of the person slain."

An exhaustive search of the American and English decisions has failed to reveal any common law decision which recognizes the applicability of the theory of provocation beyond those cases involving sexual wrongs and acts of violence.

The record shows that the accused, at the inception of the beating, were not "incapable of deliberating". After being informed by Beyer of Kunze's alleged treason, they called him to the front, confronted him with his alleged writings and demanded his beating. The killing which followed was the result of malice and a desire for vengeance.

In analyzing the theory of "provocation" the courts, as is shown by the quotations from the Supreme Court decisions cited above, have repeatedly placed emphasis upon the necessity of the deceased's doing of a violent act, closely related to the responding violent act upon the part of the accused (Collins v. United States, 150 U.S. 998; Allen v. United States, 164 U.S. 528). As previously stated, the record does not contain any evidence of this essential element of "provocation". Regardless of its existence or non-existence however, an analysis of the decisions fails to reveal a single case in which "provocation" has been recognized as any defense to a mass assault against one man resulting in his death. The brutality of a mob assault, the cooperative action of many against one, are in their very nature so repugnant to fairness and justice, so dangerous to the social order, and so revealing of determined wrong-doing as to preclude the application of the doctrine of "adequate provocation". In the present case, when the accused became prisoners of war, they relinquished their rights, subject to the provisions of the Geneva Convention, both as individuals and as a group, to use violence as a means of aiding their country's cause, and submitted themselves to the military law of the nation to which they had surrendered. Their mass violence cannot be extenuated or mitigated under any theory or doctrine of defense, recognized by the Anglo-American systems of jurisprudence. The principles presented above provide an unassailable legal foundation for the court's finding of guilty.

III. Thirdly, the defense counsel argues that Kunze was a "traitor" to Germany and that the accused had a right to kill him in order to prevent "another act of treason". Such a contention is wholly without foundation. As prisoners of war the accused are, under the Geneva Convention, subject to our Articles of War. Whether Kunze was a "traitor" to Germany is not at issue. The point is that neither our own soldiers nor prisoners of war have any authority as self-constituted judges to sit in judgment and to impose punishment upon one of their number for any cause. To contend otherwise is absurd.

Our military law, even prior to the adoption of the Geneva Convention, recognized this principle. In 1901, in a case similar to the present one, Pedro Corpus, a military prisoner of the United States in the Phillipine Islands, in pursuance to direction of his guerilla chief, attacked and killed a fellow prisoner. The accused was tried for the offense and was sentenced to be hung. In General Orders #399, Headquarters Division of the Phillipines, it was stated:

"Whether the statement of the accused that

he killed his sleeping victim because some person assuming authority over him (he was not present) ordered him to do it, be true or not does not lessen his criminal responsibility."

Accordingly, it must be concluded that regardless of whether or not Kunze was a traitor to the German Government, the accused had no legal right as prisoners of war or as individuals either to inflict punishment on him or to take his life. Neither they nor any other self-constituted group may defy authority by taking the law into their own hands.

IV. The defense introduced or elicited certain testimony at the trial tending to impugn the voluntary character of the pre-trial statements of the accused. Thus upon cross-examination Captain Maffitt admitted that he had subjected them to lengthy and numerous interrogations. He went on to testify that:

"I don't know that any threats of punishment were made under such circumstances, but I will say this, I myself told some of them that I wanted them to get right down to brass tacks and rock bottom and tell me the facts in the case. I didn't want anything withheld and we expected to stay with them and grill them until we got at the bottom of the thing. That was our duty and that was what we were trying to do."

To Seidel he addressed the following admonition:

"You might as well tell the truth because you are going to be tried and accused of this crime, along with several others. You helped kill this man so you had better tell the truth. You are going to be court-martialed and the guilty man is going to suffer for this crime. If you are trying to protect somebody else you had better stop it and give us all the information you can. We are not going to fool around here with you. We mean business. If you are protecting anybody else you had better start protecting yourself. You have been accused by your comrades. They have told us that you did

this." "Listen, Seidel, we are going to send you back to your cell, and when you are ready to talk you can let us know and you can come back. We are going to give you a chance to think this over in the guardhouse. You must tell the truth."

Demme at the beginning of the trial took the stand for the single purpose of disproving the voluntary character of his statement. He asserted that the interpreters had not informed him that he did not have to give testimony; that he was told that he had to answer the questions; that he would not have done so had he not been so instructed; that no other witnesses appeared in his presence before Captain Maffitt; and that nothing was said to him concerning his right to counsel and to cross-examine other witnesses. On the other hand, he admitted that the interpreter had directed him to tell the truth; that he had subsequently made a statement in his own handwriting; that its contents were true; that he wrote it in his cell; that no one else was present; that he spent approximately two hours in its preparation; that, after it had been delivered, he had been specifically instructed that he need not make a statement but that, if he did make it, it could be held against him; that he then said that he had already made one; that it was true; and that he desired that it be accepted (R. 88, 115-124, 146-148, 371-372).

The pre-trial interpreters both denied that they had failed to instruct the accused as to their rights. They had given the required warnings not once but several times. Captain Maffitt's testimony was to the same effect. Four of the accused had agreed to write out in their own words their versions of the events which had occurred on 4 November 1943 and had voluntarily delivered their statements to him. They "did it freely and without any pressure having been put upon them" (R. 75-78, 96, 99, 107, 133-134, 156-157).

Upon being placed in arrest after Kunze's body was found, each of the accused was placed in a separate cell about seven by eight or nine feet. They were given "their full and regular meals" and "were taken out at certain times of the day for fresh air and exercise". When Beyer complained that his room did not have sufficient ventilation and that it was too small, he was transferred to the hospital. In Captain Maffitt's opinion this was not solitary confinement but "segregation" (R. 82, 93-95).

The Board of Review recognizes that a confession which has not been freely and voluntarily given or which has been induced by

fear of punishment or hope of reward is clearly inadmissible (M.C.M., 1928, par. 114b). Its use cannot be too strongly condemned, for to force an accused to testify against himself is to encourage violent, unlawful practices and to endanger the processes of justice by subjecting the court to the consideration of untrustworthy testimony. In the present case, however, it is very clear that neither evil was present. Although Captain Maffitt employed an ill-advised manner in his pre-trial investigation, he did not physically abuse the accused, unreasonably confine or restrain them, threaten them with punishment, or hold out to them any hope of reward. Furthermore, the complete transcript of the pre-trial oral examination of the accused was not placed into evidence, and such parts of it as were read into the record were not vital to the prosecution's case. On the other hand, the written statements of Demme, Seidel and Scholz, are clearly shown to have been voluntarily given. They were written in privacy and voluntarily delivered to the American authorities. The truth of their contents was not only affirmed at the time of delivery but subsequently during the trial. The record affirmatively shows that as to these confessions the accused were carefully and scrupulously warned of their rights and that no coercion was employed against them nor inducement offered to them.

Referring again to the pre-trial statements, it must be observed that none of them could possibly have endangered the process of justice in this case or injuriously affected the substantial rights of the accused. The evidence adduced by the prosecution, even if all of the pre-trial oral admissions of the accused be excluded, is abundantly adequate to sustain the findings of guilty. Moreover, the individual testimony of the accused at the trial is sufficient as to each accused to support the court's findings. (CM 206090 (1936) Dig. Ops. JAG 1912-40, sec. 395 (10), p. 206; CM 237711 (1943); II Bull JAG, Oct. 1943, p. 377).

V. The final argument of the defense counsel is that the approval of the sentence would invite retaliation against those of our soldiers who are held as prisoners by the Axis powers. This contention presents no legal argument and therefore raises no legal question for discussion by this Board.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of murder, in violation of Article of War 92. Article

66, Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, provides that:

"If the death penalty is pronounced against a prisoner of war, a communication setting forth in detail the nature and circumstances of the offense shall be sent as soon as possible to the representative of the protecting Power, for transmission to the Power in whose armies the prisoner served.

"The sentence shall not be executed before the expiration of a period of at least three months after this communication."

Abner E. Lipscomb, Judge Advocate.

William H. Brambell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 248793

1st Ind.

War Department, J.A.G.O., 25 APR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Prisoners of War Walter Beyer, Hauptfeldwebel, 8WG-49588, German Army Serial Number Flg. H. Kdtr. Notenburg, Hanover, No. 4; Berthold Seidel, Feldwebel, 8WG-49593, German Army Serial Number Wehrmeldeamt, Ratzburg, No. 8; Hans Demme, Unteroffizier, 8WG-49957, German Army Serial Number 2, N.E.A. 9.443; Hans Schomer, Unteroffizier, 8WG-49620, German Army Serial Number 2, I.R. 107, No. 195; and Willi Scholz, Obergefreiter, 8WG-49691, German Army Serial Number Inf. Pz. Jag. ERS. KOLP. 213 No. 972.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. As shown in the foregoing opinion, each of the accused has been found guilty of committing a riot, in violation of Article of War 89; and of murdering Johannes Kunze, in violation of Article of War 92. Each accused was sentenced to be hanged by the neck until dead. It is, of course, the crime of murder which authorizes the imposition of the death penalty.

The record shows that the accused were all noncommissioned officers of the German army who were taken captive in North Africa. The accused, Beyer, was the company leader, Company 4, Compound 1, of the Prisoner of War Camp, Tonkawa, Oklahoma, of which Johannes Kunze, the deceased, was also a member. An alleged traitorous note, supposedly written by Kunze, came into Beyer's hands. Thereafter, at approximately 10 o'clock on the night of 4 November 1943, Beyer ordered his entire company to assemble in the company mess hall. When the group, composed of approximately 200 prisoners of war, including 43 noncommissioned officers, had assembled, Beyer arose and addressed them in part as follows:

"Comrades, I am sorry and it hurts me in my soul to be forced to tell you some sad news and the case is so grave that I am not in a position to pass judgment myself. Bad as it may seem, we have a traitor in our midst".

After order had been restored, Beyer read an unsigned note containing a

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brief description of the camouflage of Hamburg. Before the reading was completed, Beyer's voice was drowned in cries of "treason" and "beat him to death". Beyer again obtained silence and called for volunteers to compare the handwriting of the unsigned note with a letter which he had in his possession signed by Kunze. After 20 noncommissioned officers had crowded around Beyer to examine the documents, the name Kunze reverberated throughout the room. He was called to the front, confronted with his writings, and forthwith attacked by his fellow prisoners in a violent and brutal manner. He strove desperately to escape. As he made for the exit Seidel struck him several blows on the face. There were shouts of "don't let him get out". Demme blocked his path "thundering him one in the face" and then grabbed him around the hips and threw him so that he hit his head on a table laden with dishes which fell to the floor. He was picked up by Seidel and struck again. Scholz struck Kunze three times and then left the mess hall. Schomer climbed on the top of a bench and threw two heavy drinking cups at Kunze. Although Beyer, after his inflaming denunciatory speech, did not himself strike a blow, he was the instigator of the charge of treason - the ringleader who aroused the hatred and frenzy of the mob, inciting it to unrestrained violence.

Finally Kunze reached and passed through the exit of the mess hall but he did not escape. His assailants pursued him into the open area and surrounded him there. Shortly thereafter, his body was discovered near the entrance to the mess hall lying "in a pool of blood". "His death was due to a fractured skull, laceration of the brain and cerebral hemorrhage". There was a trail of blood marking the deceased's course in the mess hall and to the place outside where he died, and blood was found on the person or clothing of each of the accused.

The above evidence shows that the accused, either by their own hands or by the hands of their comrades in crime, willfully, unlawfully, feloniously, deliberately, and with premeditation killed Johannes Kunze. Each of the accused is shown to have definitely participated in the concerted action which resulted in his death and each is both morally and legally guilty of murder. The evidence shows beyond a reasonable doubt every element of the crimes charged. I recommend that the sentence of each accused be confirmed and ordered executed.

3. General court-martial jurisdiction to try the accused is derived from the Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War. The Department of German Interests of the Legation of Switzerland was given more than three weeks' notice of the place and date of trial, and Mr. Werner Weingaertner, its representative, was present at the trial. The accused had the services of a competent interpreter.

and were defended not only by military counsel acceptable to them but by individual counsel of their own choice. One of the military counsel came to Washington and presented an oral argument to the Board of Review. Every right and privilege guaranteed by International Law to prisoners of war against whom judicial proceedings have been instituted were strictly observed. Article 66 of the Geneva Convention provides that if the death penalty is pronounced against a prisoner of war, a communication must be sent to the protecting power for transmission to the Power in whose Army the prisoners served, setting forth in detail the nature and circumstances of the offenses of which the prisoners have been convicted. This article also provides that the death sentence shall not be executed before the expiration of a period of at least three months after this communication.

4. The Provost Marshal General, in a communication to The Judge Advocate General, has made the following statement:

"I recommend that the sentence of German prisoners of war Walter Beyer and others at Camp Gruber, Oklahoma, 17 to 25 January 1944 be confirmed by the President and duly executed. In making this recommendation I have considered the effect, if any, which execution of this sentence might have upon American prisoners of war in German hands."

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.

(Sentence of each accused confirmed. G.C.M.O. 262, 2 Jul 1945)



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(53)

SPJGK
CM 252242

24 MAY 1944

UNITED STATES)

FOURTH AIR FORCE

v.)

) Trial by G.C.M., convened at
) Hamilton Field, California, 30
) November, 14 December 1943 and
) 5, 25 January, 14 and 15 February
) 1944. To be hanged by the neck
) until dead.

Private EDWARD J. REICHL
(36346011), 653rd Signal
Air Warning Company.)

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward J. Reichl, 653rd Signal AW Company, did, at Gualala, California, on or about 17 November 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one T/5 Adam Buchholz, a human being, by shooting him with a rifle.

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 hanged by the neck until dead. The reviewing authority approved the sentence, and stated in his action that "pursuant to Article of War 50 $\frac{1}{2}$ the order directing execution of the sentence is withheld". The record of trial has been considered as though forwarded for action under Article of War 48.

3. Summary of the evidence.

Accused shot Technician Fifth Grade Adam Buchholz with a rifle in the day room of their organization at about 1815 on 17 November 1943. All the relevant details leading up to and encompassing the crime clearly appear in the prosecution's evidence.

Accused was one of the cooks for a detachment of 45 men and a few

officers stationed four miles north of Stewart's Point, on the California coast near Gualala, in the general vicinity of Santa Rosa. His particular camp is variously designated by witnesses as "Point Arena", "Del Mar", and "Gualala", though it appears to have been one of several satellite detachments of a larger camp at the last mentioned place. It will hereafter be referred to as Point Arena (R. 33,37,39,59,67,72).

The day room of the organization was a room about 44 by 20 feet, and was part of one large building housing also a considerably larger mess hall, kitchen, and store room, separated from each other by walls. Access was had to each compartment from outside, and by internal doors from one room to another (R. 38-41,73,76,77; Pros. Ex. 2).

Deceased appears to have been a truck driver for the detachment, whose duty it was to make runs into the nearby towns of Jenner, Guerneville and Santa Rosa. On the afternoon of 17 November 1944, accused was in the town of Jenner, which was approximately 32 miles from his camp. He was seen at about 1530 by Miss Juanita Antone, a cook in a cafe in the Jenner General Store, where he was having a beer. It was customary for Army trucks to stop at the store and give the men rides to camp, but from where accused was sitting the road was not visible. Miss Antone saw an Army truck pass the store and go on towards camp and spoke to accused, saying, "You must have lost your ride". Accused replied that "The truck was supposed to stop" and pick him up. He then went outside to a telephone booth on the porch, where he made a call, later returning to the store for a while. He may have drunk some more beers, but Miss Antone was not certain (R. 24,26-32,52).

First Lieutenant Stanley M. Glass, Signal Corps, the commanding officer of the 653rd Signal Aircraft Warning Detachment at Point Arena, testified that he received a telephone call from accused about 1545 that afternoon. Accused said, "This is Reichl. I'm at the store at Jenner. The truck didn't pick me up". Accused did not ask who had been in the truck, and witness did not tell him. Witness said, "Well, I guess you'll have to hitch hike", to which accused replied, "Well, I just wanted to let you know" (R. 44,51).

Miss Antone testified that accused finally got a ride from a civilian at about 1730 (R. 27-29). Some time before 1800 Second Lieutenant George B. Hastie, commanding officer of the detachments of military police at Point Arena and Jenner was driving with "Sergeant Brown" and "Sergeant Spinnelli" from Jenner to Point Arena. They saw accused standing on a dirt highway, about 100 yards from the main road, leading to the camp. He thumbed a ride, and they picked him up. The three enlisted men talked together, and accused mentioned the fact that he had told one of the other drivers whom he had seen at Santa Rosa to be sure to tell deceased to stop and pick him up, but that deceased had driven right by the Jenner store without stopping. Accused did not appear to be angry, but witness "would say he was irritated" because he had not been picked up. They dropped

accused off at "Post Number 1", at the main entrance of the camp, about 300 or 400 yards from accused's day room (R. 33-37).

Lieutenant Glass and First Lieutenant Goodman C. Wheeler, Signal Corps, were eating supper in the mess hall that evening. About 1800 or 1815 accused came abruptly into the room from outside, stopped at their table and said to Lieutenant Wheeler, "Why didn't Buchholz pick me up at Jenner?" Wheeler replied to the effect that he thought that deceased did not know that accused was there, to which accused replied, "The Hell he didn't"! Accused then turned and walked away, going through the kitchen to the store room. Lieutenant Glass described accused as "tense and agitated" at this time (R. 44,45,53,54,59,60,66,67). Lieutenant Wheeler testified that accused "seemed to be angry" (R. 68).

Technician Fourth Grade Herman C. Kloke (then a Technician Fifth Grade) was working alone in the kitchen that evening as cook. He went into the store room about 1800 to obtain fuel for his stoves, and saw accused standing there with a rifle (R. 73,77). The mess personnel kept their weapons in the store room when they were on duty (R. 39). Accused put a full clip of 5 rounds of ammunition into the rifle, and Kloke asked him what he was doing. Accused replied, "Just don't bother. I'll get even with the boy". He mentioned deceased by name. Witness did not know and did not ask what the trouble was, but told accused that he "wouldn't do that", and that there were other methods of settlement of their difficulties. Accused replied, "You just mind your own business", and said of deceased that "he was going to get him and he was going to shoot him through the heart". Accused turned around and left the store room, going out of the building through the back door (R. 73,74,77,78,82). Witness described accused as appearing "rather angry" at this time - "That is, his complexion was" (R. 74,77). He denied the existence of any jealousy or ill feelings over promotions between accused and himself (R. 75,76,81,82).

About 12 enlisted men were in the day room after supper. Some were playing cards, others shooting pool, and three or four were seated at a table close to a door leading to the mess hall, putting together a jig-saw puzzle. Among them were Technician Fifth Grade Howard E. Lange, Privates First Class Enio L. Alberghini and Joseph Medico, all of the 653rd Signal Aircraft Warning Company, Private First Class Edward Joseph Carlin, Medical Corps, attached to the Signal Company, and Private Ollie C. Carpenter, Company C, 748th Military Police Battalion. Deceased was standing at the table watching over the shoulders of Lange and Carlin as they worked on the puzzle. Private Medico testified that at about 1815 accused went through the day room, passing from the south door to the mess hall. It appears likely that this was just prior to his conversation with Lieutenants Wheeler and Glass, but it is not certain from the evidence. Accused had no rifle at this time (R. 83,84,87,88,92,99,103,104,108,109,114,116,118).

Alberghini testified that he saw accused enter the day room from the outside through the west door, trailing his rifle at his hip (R. 84,88). None of the others saw him enter, but all heard him speak to deceased, saying, "Who do you think you are? Why didn't you pick me up at Jenner?" (R. 92,97,100,105,109,114,119). Without any further word or act, accused raised the rifle and fired at deceased, from a distance estimated by witnesses as two to ten feet (R. 85,86,89,92,93,95,96,100-105,109,110,114,115, 117,119,120). Deceased straightened up slightly, twisted, and fell on his back on the floor without a sound. Accused turned around, and walked out of the north door of the room, his rifle trailing at his side (R. 85-87,93,94, 96).

Hearing the noise, Lieutenants Wheeler and Glass rushed in, to find deceased lying on the floor and the men standing about, dazed and silent. They did not even reply to Lieutenant Glass' question as to who had done it (R. 45,48,60). Carlin procured medical supplies but found no pulse or heart beat. The shot entered underneath deceased's right arm, and came out a little lower on the left (R. 102,117,118). It was stipulated that deceased died of the gunshot wound (R. 125).

Lieutenant Glass immediately went to accused's barracks. Standing outside the screen door, he heard the click of a rifle trigger, "just as if he were unloading it". As Lieutenant Glass opened the screen door accused said, "All right, I did it, but he had it coming to him". Accused then walked calmly and voluntarily with the lieutenant to the mess hall. On the way there, Lieutenant Glass stated, "But you murdered him!", to which accused replied, "He's always tried to mess me up. He has always been trying to make my life miserable for me". Witness took accused to the mess hall and posted a guard over him until about 2300, when he was taken to Hamilton Field (R. 46, 55-57).

Meanwhile, Lieutenant Wheeler went to accused's barracks, where he found accused's rifle lying lengthwise on accused's bed. The bolt was open. There were 3 shells in the chamber and one on the bed, and the number on the rifle corresponded with that on accused's Form 33, which was a record of equipment issued to him (R. 42,43,60-63,69; Pros. Exs. 4,10).

No witness testified that accused was drunk. Miss Anton stated that he was sober at the time she spoke to him in the Jenner General Store (R. 28). He was sober during the time he rode in Lieutenant Hastie's car (R. 35,37). Nothing indicated to Lieutenant Glass that accused was drunk. He talked in jerky sentences, "as if he were under some strain", but he spoke clearly and walked straight (R. 46).

Evidence for the defense.

The defense offered three distinct types of evidence, - testimony of

witnesses to events leading up to the shooting, evidence offered by accused and his wife concerning his background and mental status, and the testimony of expert witnesses concerning his sanity and legal responsibility for his act. Separate consideration will be given to each factor, in the order set forth above.

a. Evidence concerning the offense itself.

Technician Fifth Grade Howard E. Lange, recalled as a witness for the defense, testified that he talked to accused on the day prior to the crime. Accused asked witness to pick him up at Jenner if witness should be driving on the next day. Witness did not recall that deceased was present at the time of their conversation (R. 130).

Lieutenant Wheeler testified that he had been driven by deceased from the Point Arena camp to Guerneville, then to Jenner, and that they passed the last place on their way back to Point Arena between 1430 and 1500. They did not see accused when they passed the store, and witness had not said anything to deceased about stopping (R. 137,138,143). Lieutenant Wheeler did not see accused until supper time. Deceased was not there at the time, and witness did not suggest to accused that the latter ask deceased why he had not stopped (R. 140).

Corporal Merritt testified that he was making a ration run on that day and that he drove accused from Santa Rosa to Sebastopol, and then to a point on his route within a mile of Jenner, where he left accused out of the truck. When witness reached Jenner he gave deceased accused's message, to pick up accused at Jenner. About an hour later deceased left Jenner for Point Arena. Witness denied having had anything to drink with accused at either Sebastopol or Guerneville, and stated that accused was sober when he left the truck near Jenner (R. 126-129,263,264,266).

Technician Fourth Grade James T. Brown, the mess sergeant at Point Arena on 17 November, was in the car with Lieutenant Hastie and Sergeant Spinnelli which picked accused up about a mile outside camp at "about 6:30". Witness testified that accused wondered why deceased had not picked him up at Jenner, stating that deceased "had been doing stuff like that before". Accused "seemed pretty mad" (R. 131-133). Witness also testified that he knew accused fairly well, and that accused "drank quite a bit". Witness thought that there was petty jealousy between accused and Sergeant Kloke, the other cook (R. 134).

b. Accused's background and story.

Accused's rights as a witness were explained to him and he elected to be sworn and take the stand. At the time of trial he was 37 years of age. He was inducted into the Army on 6 June 1942. He did not finish the

sixth grade of school, but left at the age of 14, and has worked since that time. He was first employed as a grocery clerk, then for three years as a bookbinder, and subsequently as a bartender. He has worked in and has operated his own "speakeasies". As a bartender and speakeasy operator he has participated in "50 or 60" fist fights, during some of which he has been thrown downstairs, been hit over the head with bottles, and suffered other physical violence. In some four or five of these brawls he has been rendered unconscious for periods of 10 or 15 minutes, the last such occasion occurring about three years previously (R. 147-150,181,182).

He has contracted five cases of gonorrhoea, the first two some 15 years ago, and the last just before he entered the Army. He smokes an average of 50 cigarettes a day, and has been drinking intoxicating liquor daily for the past 18 years; this drinking has continued since he has been in the Army. Accused has a habit of going on drunken sprees for 3 to 5 days. He stated that he has auditory hallucinations, in which he hears the voice of one of his brothers. It appears from his testimony that these hallucinations generally occur during or soon after he has been indulging in excessive use of liquor (R. 150-152; 171,178,182,183). Upon several occasions he has committed acts of violence, of which he later had no recollection. He described two assaults upon his wife which will be detailed at greater length in her testimony. Both were committed while he was under the influence of liquor (R. 171,172).

Accused first met deceased at Drew Field, Florida, where accused had spent 11 months as a cook and mess orderly. There was at that time little contact between accused and deceased, and they got along satisfactorily. They shared the same "compartment" on the train from Drew Field to California. During the trip deceased was "kind of bossy", and angered accused by taking for himself a whole bowl of 100 cigarettes provided at a service canteen en route (R. 153,154). While the two had not had much to do with each other since their arrival, deceased "was always sort of arrogant" towards the men of the camp. On one occasion accused and deceased had been sent to obtain gravel, but deceased refused to help shovel, claiming that he was a truck driver and did not have to do so. Accused had to shovel the whole load himself. Upon another occasion deceased had been assigned as one of accused's kitchen police, but failed to appear. Accused found him dressed up and preparing to go to town on pass. Deceased refused to work as a K.P. (R. 154,155). There appear also to have been ill feelings between accused and deceased over the subject of their respective "I.Q.'s" (presumably Army General Classification Test scores), accused believing his to be much higher than deceased's. This dissatisfaction was one of the reasons which had led accused to ask to be reduced from his rank of Technician Fifth Grade (R. 156,157).

The men at Point Arena were allowed 144 hours' leave on pass per month, which accused was in the habit of taking in two 3-day passes to visit his

wife in Santa Rosa. He obtained a pass on 16 November and was due back at camp at 1800 on 17 November. Prior to leaving on the morning of the 16th accused spoke to Corporal Lange in the barracks and reminded Lange to pick him up on Jenner if Lange drove the Santa Rosa ration truck (R. 158). A few minutes later accused saw deceased, and reminded him similarly. Still later he saw deceased and Lange together, and again asked whichever one drove the truck to be sure to pick him up at Jenner (R. 159). He then hitch-hiked to Santa Rosa by means of a series of short rides, drinking 3 bottles of beer en route. Arriving about 1500, he met his wife at her hotel. That evening after dinner and attending a theater, he drank six or seven highballs and six or seven bottles of beer in the hotel bar. When it closed at midnight they took two quarts of beer to their room; accused drank one quart before going to bed. They arose at 0930 on the 17th and accused drank most of the remaining quart. He left Santa Rosa on the ration truck with Corporal Merritt some time after 1130. They stopped at Sebastopol, where accused drank four bottles of beer in a tavern while waiting for the driver to finish some business (R. 160-162,173,174,178). He had a bottle of beer with Merritt at Guerneville about one half an hour later, and finally left the truck at the bridge over the Russian River about a mile from Jenner, again instructing Merritt to tell deceased to stop at the store in Jenner and pick him up. He then walked up to the store, arriving about 1315 (R. 162,163,175,176). He drank four or five bottles of beer at Jenner, and missed the truck when it went by without stopping, as described by Miss Antone. He telephoned Lieutenant Glass, and drank two more beers (R. 163-165,176). Lieutenant Glass did not tell him who was driving the truck (R. 165). He finally obtained a ride from a civilian, who took him as far as Ocean Cove. Here he had three bottles of beer at a store. He then got a ride from another civilian who took him as far as the road which led off to the camp. Somewhere along this road he was picked up by Lieutenant Hastie and the two sergeants (R. 166,176,177). Accused testified that he thought that he was drunk by this time (R. 179).

Accused claimed that he remembered little after getting in the car. He had a vague recollection of leaving the automobile at the main gate and walking to the mess hall, which he entered, and where he spoke to Lieutenant Wheeler. He recalled asking why the ration truck had not stopped at Jenner, but did not remember clearly Lieutenant Wheeler's reply, except that "they" must not have known about it. He did not know until that moment that deceased had been the driver. The next thing he remembered was that he was standing in his barracks with a gun in his hand, but understanding little of what Lieutenant Glass was saying. Upon being told that he was under arrest, he said, "All right, I'll go with you" (R. 167-169,180,181). He did not remember the conversation with the sergeants in Lieutenant Hastie's car, nor that in the store room with Sergeant Kloke. He had no recollection of talking to anyone between the time he spoke to Lieutenant Wheeler in the mess hall and the time when he found himself in his barracks. He did not remember being in the day room, or having seen deceased at any time after

returning to camp. He stated that since being in the Army he had previously become drunk on an amount of liquor similar to that consumed by him between 0930 and 1800 the day of the shooting (R. 169,170,171,173,181,183).

Testimony of Elizabeth Reichl, accused's wife, a waitress at the Travelers Hotel in Santa Rosa, was mostly corroborative of that given by accused. She stated that she had followed him about the country from camp to camp (R. 185,186). Prior to entering the Army accused had for years been a bartender, had drunk whiskey and beer continually as long as she had known him, and had been in a number of fights and brawls in which he had been hit with fists, beer bottles, and like weapons, and had been rendered unconscious (R.186,188,189). Accused was given to acts of violence while drinking, which he would not afterwards remember (R. 186). On Hallowe'en of 1937 he struck witness across the nose and cheek with a chair when she told him that he had been cheated by fellow players in a card game, while he was drinking. In their hotel's bar at Santa Rosa he once pulled her off a stool and slapped her when she refused his request for money. He remembered neither incident later. Witness alluded to but did not describe other similar acts (R. 187, 189). They occurred after he had been drinking heavily. The only times he used violence was when he had been drinking (R. 188,190). Witness' story of accused's drinking between his arrival in Santa Rosa at 1500 on 16 November and his departure about 1130 on 17 November was corroborative of accused's testimony (R. 188).

c. Expert testimony concerning accused's sanity.

As a result of the testimony of Mrs. Reichl, the law member ruled that mental derangement upon accused's part at the time of the commission of the offense had become an issue (R. 187). The defense then introduced two expert witnesses. First Lieutenant Leonard C. Frank, Medical Corps, the Base Psychiatrist at Hamilton Field, testified that he had examined accused on 18 November, the day accused was brought there from Point Arena (R. 191,192,201, 223). When accused was brought in he was "quite apprehensive and tense". Witness questioned him at length, and learned from accused a past history of frequent and excessive consumption of alcohol, and use of physical violence similar to that described by accused and his wife. Accused told witness of his auditory hallucinations during his drinking episodes or shortly afterwards. It was witness' impression that they were only in relation to drinking (R. 201,202,212,214). While accused at that time declined to answer witness' question whether he had been drinking at the time of the killing, on the ground that it might tend to incriminate him, there was nothing which led witness to believe that accused was responding to any hallucination or delusion at the time he committed the act (R. 202,212). Witness diagnosed accused's condition as that of "Psychopathic personality with pathological reaction to the use of alcohol", stating that "he does things under the influence of liquor that the average person wouldn't do, and his reaction is in such a degree that it is greater than the average" (R. 202,213). Witness stated

that in his opinion accused was sane in the "normal senses" and in a "legal sense" at the time he shot deceased (R. 211,223,225).

Defense counsel propounded to Lieutenant Frank, and subsequently to the other expert witness for the defense, a long hypothetical question in which were set forth in great detail all facts and statements previously brought out in the evidence by both prosecution and defense. Outlining accused's life history, his previous relations with deceased, his drinking on the two days he was on pass, and all the events leading up to the killing, witness was asked whether in his opinion accused knew the difference between right and wrong and was able to adhere to the right (R. 202-210). Witness stated that he was unable to answer the question because of the inclusion therein of a hypothesis that the auditory hallucinations existed separate and apart from the drinking episodes. He said that using the rest of the question, he did know right from wrong at the time he committed the act, could adhere to the right, and was sane (R. 211,225). While witness would be inclined to question accused's sanity if accused suffered the hallucinations completely apart from and without relation to his use of alcohol, he would still want to know their nature, when they occurred, and other details concerning them (R. 214,218-221,222,226).

Doctor A. A. Thurlow, a physician in private practice in Santa Rosa and a surgeon in the United States Public Health Service, with extensive experience in the treatment of mental diseases, examined accused on 22 December 1943. From his questions to accused he obtained background material similar to that adduced by Lieutenant Frank and brought out in the evidence (R. 228,229). Witness stated that accused became vague in describing the details of his activities after leaving Sebastopol and in camp, but witness believed accused was not voluntarily withholding this information (R. 229,230,240). Accused told witness that he did not know whether he was sorry (R. 230).

Witness' diagnosis at that time was that accused was a "constitutional psychopath with one of the emotional outbursts associated with alcoholism", but witness did not know "how much weight to give to the alcoholism, as compared with the psychosis feature" (R. 230). Basing his opinion upon the alcoholism, the "defect in judgment", accused's lack of regret, the auditory hallucinations, the clouded memory, and his failure to run away, witness stated that he believed that accused was "not fully sane at that time" (R. 230,238, 239). Witness believed, however, that no true psychosis was present (R. 235).

In reply to counsel's hypothetical question witness again stated that he believed accused was not "able to exercise judgment between right and wrong" (R. 230-235,236,237). Witness stated that accused underwent transient periods of psychosis, during which times he had auditory hallucinations, and that he was a "constitutional psychopath with psychotic episodes" (R. 235-237).

If it were shown that accused was feigning the hallucinations, witness would class him as a "straight constitutional psychopath with an alcoholic factor" (R. 239).

Evidence in rebuttal.

The prosecution's expert witness was Major Clarence H. Godard, Medical Corps, chief of the Neuropsychiatric Section at Letterman General Hospital. He had been chairman of a board of officers who examined into accused's sanity on 2 December 1943. Accused was subjected to "the usual question and answer type of interview" in order to learn his personal and family background (R. 243). Accused "did not press his alcoholism", and "like most alcoholics, he evaded the direct questioning" (R. 244,252). This was particularly true with respect to his drinking on 16 and 17 November. He was also evasive about his past difficulties (R. 244). Witness' impression was that accused was voluntarily withholding details, rather than suffering from a blank mental period or an "amnesiac episode". Witness noted an adequate description of details (excluding the drinking), up to the time accused entered the camp area, after which accused claimed to remember nothing. In response to direct questions accused denied having auditory hallucinations (R. 244-246,252).

The board found that accused was sane and responsible, and that although temporarily under the influence of alcohol on 17 November, he knew the difference between right and wrong. None of the evidence pointed to accused's being a constitutional psychopath (R. 246,247,249,250-252; Pros. Ex. 11).

In response to the hypothetical question and from his own examination, witness stated that he believed that accused knew the difference between right and wrong and that he was at the time of his act under the influence of alcohol to an extent that his judgment and ability to conform to the right were lessened to a moderate degree, but that there was no evidence of psychosis (R. 253,257-259). Witness believed accused did not suffer from auditory hallucinations between episodes of drinking, but knowledge that he did would not have materially affected witness' diagnosis (R. 262,263).

4. The evidence is undisputed that because of a real or fancied slight offered him by deceased, accused walked into their organization's day room and shot and instantly killed deceased with a rifle. It is not clear from the evidence how long accused had known or believed that deceased was responsible for the failure of the company ration truck to stop for him at Jenner. In the opinion of the Board of Review it is immaterial. From his conversation with Sergeant Kloke before the shooting, and from his unsolicited statements to Lieutenant Glass in the barracks afterwards, it is clear that accused entertained a personal ill-will towards deceased and an intent to cause death or grievous bodily harm to him. Murder is the unlawful killing of a human being with malice aforethought. The malice, clearly shown to exist by the evidence, need not exist for any particular length of time before the

commission of the act, and it is sufficient to show that it existed at the time the act was committed. The evidence is uncontradicted here that it did (M.C.M., 1928, par. 148a, p. 163).

No serious attempt was made by defense counsel to show that provocation existed sufficient to reduce the measure of guilt and the nature of the crime to voluntary manslaughter. Accused may have had a motive for his act in deceased's failure to pick him up at Jenner, and in a long -continued course of arrogance, boastfulness and selfishness upon deceased's part. Clearly, none of these supplies a provocation which the law deems sufficient to excite uncontrollable passion in the mind of a reasonable man. Upon all the facts which go to make up the offense, accused is guilty of murder.

5. The Board of Review is also of the opinion that the court correctly rejected the contention of insanity as a defense. Of the two expert witnesses for accused, one testified that in his opinion accused was sane at the time of the murder. His answer to a hypothetical question based upon almost every fact in evidence was likewise that accused was sane. Witness was unable to express an opinion concerning accused's sanity when the additional hypothesis concerning accused's auditory hallucinations unconnected with alcoholic indulgence was injected into the fact statement. He was under the impression, from his examination of accused, that the alleged hallucinations existed only in connection with accused's drinking. The other expert witness for defense was of the opinion that accused was insane at the time of his act, both from his own observation of accused and in answer to the hypothetical question. He stated, however, that no true psychosis was present, but only psychotic trends of a transient character, accompanied by a saturation with alcohol, a clouding of judgment and a tendency toward the use of violence. If it were shown that accused was feigning the hallucinations, witness would diagnose his condition as one of psychopathic character with an alcoholic factor.

The prosecution's witness diagnosed accused's condition as sane, both after his examination and in answer to the hypothetical question. Accused had denied suffering from hallucinations. He had appeared to be purposefully vague concerning the events surrounding the killing itself, although lucid enough in supplying other information, and witness believed accused to be withholding facts which he thought would be to his detriment.

It is impossible to avoid this last conclusion after a thorough analysis of the testimony given by accused himself upon the witness stand. While he did claim to suffer from hallucinations, it is clear from his testimony that they occurred, if at all, only in connection with, or within a comparatively short period of time after heavy drinking. Furthermore, his description in elaborate detail of his activities up to the time of his arrival in camp

and his almost complete mental blank thereafter corresponds in surprising degree to Major Godard's and Lieutenant Frank's diagnoses. In neither the record of events nor in the medical testimony is there any fact which compels or even strongly points toward a finding that accused was not aware of what he was doing, or that he was driven to it by inevitable compulsion. Finally, there is cogent evidence of several witnesses that he was sober both before and after the crime. The Board of Review is of the opinion that the court correctly determined this issue of sanity.

6. It appears (R. 11) that only 4 members of the court were present when it met on 5 January 1944, and that counsel for accused were not present. The only action taken, however, was to grant a continuance at the request of defense counsel, such motion being made on accused's behalf by the trial judge advocate. Less than five members may adjourn from day to day, and the court's action was in all respects proper (M.C.M., 1928, par. 38c, p.28).

7. Attached to the record of trial is a petition for clemency, signed by the appointed defense counsel and by accused's civilian counsel, Edward T. Koford, Esq., of the Santa Rosa, California Bar.

8. It appears from the Charge Sheet that accused is now 38-3/12 years of age. He was inducted 6 June 1942 at Chicago, Illinois.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The death penalty is authorized upon conviction of murder in violation of Article of War 92.

Irving G. Egan , Judge Advocate.
Victor R. Andrews , Judge Advocate.
Samuel Cornfield , Judge Advocate.

1st Ind.

War Department, J.A. G.O., 3 JUN 1945 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Edward J. Reichl (36346011), 653rd Signal Air Warning Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. The evidence shows that accused has been a heavy drinker over a long period of time but that he was sane and legally responsible for his act. Accused is 39-7/12 years of age. His record of almost two years of service in the Army has been good. He is married and has two brothers who are noncommissioned officers in the Army. In view of the brutal and calculated nature of the homicide, I recommend that the sentence of death be confirmed and carried into execution.

3. Consideration has been given to letters dated 25 March 1944 and 26 March 1944 from Mrs. Rose Michalski and Maria and Georg Reichl, respectively, accused's sister and parents, addressed to the President and requesting clemency; to a petition addressed to The Judge Advocate General by Edward T. Koford, Esq., of the Santa Rosa, California, bar, and Captain Raymond F. Straus, Air Corps, accused's civilian and military counsel, likewise requesting clemency; and to a letter dated 5 April 1944 to The Judge Advocate General from the Honorable C. Wayland Brooks, United States Senate, requesting information concerning the status of the case.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,

7 Incls. The Judge Advocate General.

Incl.1-Record of trial.

Incl.2-Draft of ltr.

for sig. Sec. of War.

Incl.3-Form of Ex. action.

Incl.4-Ltr. fr. Mrs. Rose Michalski.

Incl.5-Ltr. fr. Maria and Georg Reichl.

Incl.6-Petition of accused's counsel.

Incl.7-Ltr. fr. Hon.C. Wayland Brooks.

(Sentence confirmed. G.C.M.O. 337, 20 Jul 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

(67)

SPJGV
CM 253195

18 MAY 1944

UNITED STATES)

v.)

Private ROBERT DAVIDSON)
(32521838), 823rd)
Amphibian Truck Company.)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Gordon Johnston, Florida,
20 March 1944. To be shot to
death with musketry.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert Davidson, 823rd Amphibian Truck Company, did, at Camp Gordon Johnston, Florida, on or about 1 March 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Melvin McClellon, a human being, by shooting him with a Carbine.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for the use of crooked dice with intent to cheat, in violation of the 96th Article of War was introduced. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Summary of evidence:

On the night of 1 March 1944 the 823rd Amphibian Truck Company, of which accused was a member, had bivouaced on Dog Island, near Camp Gordon Johnston, Florida. In the area where their tents had been pitched,

several soldiers, including Corporal Gregory Fair, Privates Melvin McClellon, John Portgee, William Chavis, Robert Dunlap, and accused, were engaged in a dice game, commonly known as "craps". A blanket had been spread upon the ground on which to roll the dice. A fire was burning nearby and in addition flashlights were being used to better see the spots on the dice. Corporal Fair's turn came to roll the dice and Private McClellon bet three dollars that Fair would make his point. Private Portgee offered to cover the bet but accused told Portgee to take his money back and that he (accused) had the three dollar bet covered, although he did not put his three dollars down on the blanket. Private McClellon won the bet and an argument ensued between him and accused. Each stood up and McClellon clinched his fist, but did not otherwise threaten accused. There is evidence that McClellon said to accused, "This is the last time you will fuck with my money"(R. 24) * * * "Don't mess with my money" * * * "If you mess with my money I will knock your teeth out" (R. 44, 47). McClellon made no motion to strike accused and did not advance toward him. Accused said, "We'll see about that" or words to that effect and walked away (R. 24). McClellon returned to the dice game. Accused went to his tent where he obtained his carbine rifle (R. 50) and returned to the scene of the game. He was gone from five to ten minutes. As he walked up to where the dice game was in progress, accused said, "Where's McClellon" * * * "What's that you say you are going to do to me" (R. 25, 33, 34, 45), or words to that effect. McClellon stood up and then started backing away from accused. Accused had the carbine in his hands and Private Dunlap told accused to put the gun down (R. 25). When McClellon had retreated a distance of about nine feet accused shot him in the stomach. McClellon cried out, "Lord, he shot me, somebody help me" (R. 34). Accused returned to his tent, left his carbine there and then reported to the first sergeant (R. 54-57). Accused was cool and collected throughout the entire episode.

The shooting took place about 10:30 o'clock at night, but due to unavoidable difficulty in water transportation from Dog Island, where the incident took place, the deceased, McClellon, did not reach the hospital at Camp Gordon Johnston until about 4:30 o'clock on the morning of 2 March 1944. He was immediately treated for shock with blood plasma and transfusions. He was operated upon about 7 o'clock that morning, and died about 1:30 o'clock that afternoon as a result of gunshot wounds inflicted by accused. Major Richard V. Fletcher, M.C., who operated on deceased, stated that, in his opinion, the wound was made by a bullet which caused severe damage to the large and small intestine accompanied by extensive hemorrhage. The victim was in severe pain. The operation was not performed until 0700 hours although the victim reached

the hospital at 0430 hours, because he had to be strengthened for the operation by blood transfusions. The wound was "the natural, probable cause of the death" (R. 16). This witness testified that if the victim had "been in the hospital for adequate treatment within a short period of time, within an hour to two hours, his chances of survival would have been slightly greater", but "with the injuries that this man had the chances of survival are very slim" (R. 60).

4. After having his rights fully explained, accused elected to make a sworn statement, substantially as follows:

On the night of 1 March 1944, accused and four or five soldiers were playing "a little game" on a blanket which had been spread on the ground. When it came Gregory Fair's turn to roll the dice, McClellon said "three dollars he lose" and put three dollars down. Portgee picked up his money and said that accused had the bet with McClellon. Accused had said, "It's no bet" and had not put his money down, but after Fair had made his point, McClellon wanted to know where his (accused's) money was. An argument followed. McClellon got up, put his hand in his pocket and accused thought McClellon was going to pull a knife from his pocket. Accused knew that McClellon kept a knife in his "right hand pocket". McClellon said, "I am not going to tell you about fucking with my money again. I will kill one of you sons of bitches yet". Accused said, "Do you mean me, McClellon?" and McClellon said, "Yes", and started walking toward accused. Accused backed away, went to his tent and got his carbine. He does not know why he got the carbine. He imagines he was angry and did not know that he was going at the time. He guesses he wanted to frighten McClellon. Accused stayed away from the scene of the game about five minutes and supposes he was angry during that time. When accused returned, McClellon started the argument again and "it seemed" that McClellon put his hand in his pocket again and walked a few steps toward accused. Accused said, "What was that you said you would do to me?" and walked up to McClellon, raising the gun as he did so. McClellon backed away and accused lost his head and shot McClellon. Before he fired the shot accused does not recall anyone interfering with him or Dunlap saying, "Put that gun down". After firing the shot, accused went to his tent and then reported to the lieutenant, saying he had shot McClellon. Accused had been threatened by McClellon when an argument arose in a dice game sometime before this night. Accused did not get his carbine with the idea of killing McClellon nor did he intend to kill him when he fired the shot. Accused got the round of ammunition he used from a man in Tallahassee. He is not the type of person who shows any excitement. On cross-examination accused stated that McClellon

did not "exactly" raise his hand at him "but you can mostly tell when anyone gets ready to strike you". McClellon did not "grab" accused. When accused left the game he intended to go to his tent and get his carbine. While he does not remember clearly inserting the shell, he must have put it in the carbine. When he returned to the scene of the game, McClellon said, "What are you doing coming up behind me?" and that is all accused remembers. After the shooting he told Lieutenant Goldstein, "I was carrying the carbine by my right side so nobody could see it except those standing at my side" (R. 61-70).

5. The facts established by the clear and consistent evidence of the prosecution make out a strong case of murder, and these facts are not, in any material particular, in conflict with those related by accused. The accused failed to establish any justification for his willful and apparently premeditated act and the court was clearly justified in finding that every element of first degree murder was present.

6. Accused is 27 years of age and was inducted 6 October 1942 for the duration and six months. He has one previous conviction for wrongful use of crooked dice with intent to cheat, in violation of the 96th Article of War, adjudged on 13 August 1943.

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

Thomas N. Jappy, Judge Advocate.

Arthur M. Tidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV-CM 253195

1st Ind

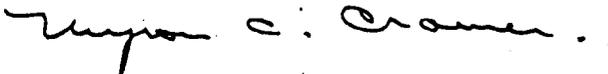
Hq ASF, JAGO, Washington 25, D. C. 12 JUN 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Robert Davidson (32521838), 823d Amphibian Truck Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Accused murdered a fellow soldier by deliberately and without warning shooting him in the stomach with a .30 caliber carbine rifle. I find no extenuating or mitigating circumstances to warrant clemency and accordingly recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should it meet with approval.

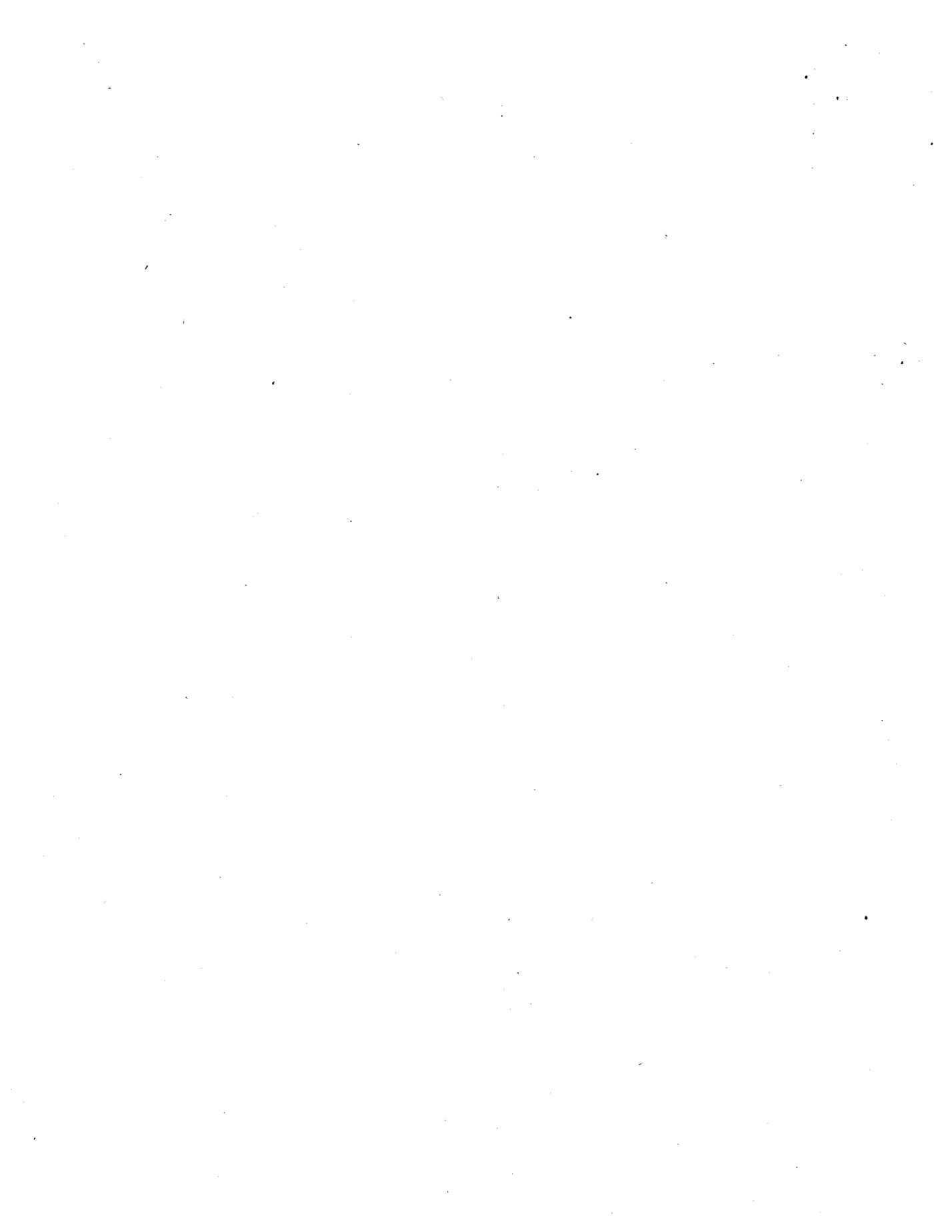


3 Incls

1. Record of trial
2. Dft ltr for sig S/W
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 338, 20 Jul 1945)



WAR DEPARTMENT
Army Service Forces
In the Office of the Judge Advocate General
Washington, D. C.

(73)

SPJGH
CM 255335

27 JUN 1944

UNITED STATES	)	CAMP HAAN, CALIFORNIA
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Haan, California, 18
General Prisoners JOHN W.	)	April 1944. To be hanged by
BESHERSE (7003315) and	)	the neck until dead.
KEITH E. LIST (15060259).)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

2. The accused were tried at a common trial upon the following Charges and Specifications:

(As to accused Besherse):

CHARGE I: (Withdrawn by the appointing authority).

Specification: (Withdrawn by the appointing authority).

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

Specification 1: (Withdrawn by the appointing authority).

Specification 2: In that General Prisoner John W. Besherse, a General Prisoner at Camp Haan Stockade, Camp Haan, California, having been duly placed in confinement in the Camp Haan Stockade, Camp Haan, California, on or about 29 February 1944, did, at Camp Haan, California, on or about 19 March 1944, escape said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner John W. Besherse, a General Prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near McFarland, in the State of California, on or about 20 March 1944, forcibly, unlawfully and feloniously, against her will, have carnal knowledge of Mrs. Margaret Bailey, a female human being.

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

Specifications 1 and 2: (Withdrawn by the appointing authority).

Specification 3: In that General Prisoner John W. Besherse, a General Prisoner at Camp Haan Stockade, Camp Haan, California, did, at Camp Haan, California, on or about 19 March 1944, without authority, take and carry away a U. S. Army Rifle M-1, No. 1735260, value of \$35.00, property of the United States.

Specification 4: In that General Prisoner John W. Besherse, a General Prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, willfully, unlawfully, feloniously, forcibly and against her will, seize, kidnap and carry away from at or near the City of Bakersfield, County of Kern, State of California, to at or near the Town of McFarland, County of Kern, State of California, one Mrs. Margaret Bailey, a female human being, with the intent to hold and detain, and who did hold and detain, said Mrs. Margaret Bailey, with the intent and purpose of committing robbery.

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

Specifications 1, 2 and 3: (Withdrawn by the appointing authority).

Specification 4: In that General Prisoner John W. Besherse, a General Prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near Arlington, California, on or about 19 March 1944, feloniously and unlawfully, take, steal and carry away, one Oldsmobile Sedan automobile of a value of more than \$50.00, property of Anthony Viero. (As amended, R. 12).

Specification 5: In that General Prisoner John W. Besherse, a General Prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near Bakersfield, California, on or about 20 March 1944, by force and violence, and by putting her in fear, feloniously take, steal and carry away from the person of Mrs. Margaret Bailey, lawful money of the United States, in the sum of \$343.00, in the lawful possession of Mrs. Margaret Bailey.

Specification 6: In that General Prisoner John W. Besherse, a General Prisoner of Camp Haan Stockade, Camp Haan, California, did, at or near Bakersfield, California, on or about 20 March 1944, by force and violence, and by putting her in fear, feloniously take, steal and carry away from the presence and possession of Mrs. Margaret Bailey, one 1941 DeSoto Sedan automobile, of a value of more than \$50.00, property of Kay Bailey.

(As to accused List):

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

Specification: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, having been duly placed in confinement in the Camp Haan Stockade, Camp Haan, California, on or about 29 February 1944, did, at Camp Haan, on or about 19 March 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near McFarland, California, on or about 20 March 1944, forcibly, unlawfully, and feloniously, against her will, have carnal knowledge of Mrs. Margaret Bailey, a female human being.

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

Specification 1: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, willfully, unlawfully, forcibly and against her will, seize, kidnap and carry away, from at or near the City of Bakersfield, County of Kern, State of California, to at or near the Town of McFarland, County of Kern, State of California, one Mrs. Margaret Bailey, a female human being, with the intent to hold and detain and to withhold and detain Mrs. Margaret Bailey with the intent, and for the purpose, of committing robbery.

Specification 2: (Withdrawn by the appointing authority).

Specification 3: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at Camp Haan, California, on or about 19 March 1944, without authority, wrongfully take and carry away a United States Army rifle, M1 #1735260, value of \$35.00, property of the United States.

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

Specification 1: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near Arlington, California, on or about 19 March 1944, feloniously and unlawfully take, steal and carry away one Oldsmobile sedan automobile, of a value of more than \$50.00, the property of Anthony Viero. (As amended, R.12).

Specification 2: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, by force and violence, and by putting her in fear, feloniously and unlawfully take, steal and carry away from the presence and possession of Mrs. Margaret Bailey, one 1941 DeSoto sedan automobile, of the value of more than \$50.00, property of Kay Bailey.

Specification 3: In that General Prisoner Keith E. List, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, by force and violence, and by putting her in fear, feloniously and unlawfully take, steal and carry away from the person of Mrs. Margaret Bailey, lawful money of the United States in the amount of \$343.00, in the lawful possession of Mrs. Margaret Bailey.

Each accused pleaded not guilty to and was found guilty of all Charges and Specifications. Each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

(The Board of Review has held the record of trial legally sufficient as to General Prisoner William J. Sheridan (33786577), who was tried with the accused Beshorse and List and sentenced, as approved by the reviewing authority, to life imprisonment. A separate review has been written as to General Prisoner Sheridan).

3. The evidence for the prosecution in pertinent part follows:

Extract copies (Exs. 2 and 3) of the morning report of the Stockade, Camp Haan, California, show the accused Beshorse and List confined on 29 February 1944, and escaped from confinement on 19 March 1944. Beshorse, List and General Prisoner William J. Sheridan disarmed their guard at Camp Haan on 19 March 1944, forced him to accompany them to the outskirts of the camp, where they released him, and left, taking with them his United States Army Rifle, M-1, No. 1735260, the clip and eight rounds of ammunition (Ex. 5). The rifle, clip and ammunition were in the possession of List and Sheridan when they were apprehended. The stipulated value of the rifle was \$35 (Ex. 1; R. 12-13, 15-16).

The 1936 Oldsmobile automobile (a sedan) of Mr. Anthony Viero was parked in front of his home at 3696 Myers Street, Arlington, California, at about 0115 on the morning of 20 March 1944. Between that time and 0800 that morning it was discovered that the car was gone. Mr. Viero gave no one permission to use the car. A 1936 Oldsmobile sedan "listed to" Mr. Viero was

found by the state highway patrol "just north of Bakersfield, California", on 23 March. In the car were found a billfold and some papers, the property of one William J. Armstrong, which, together with a suit belonging to Armstrong, had been in Mr. Armstrong's car when it was parked at Bakersfield on 20 March 1944. The suit, which Armstrong "lost", was in the possession of accused Besherse when he was placed in confinement. The next time Mr. Viero saw his car after it was stolen was in a garage at Bakersfield on 23 March after he was notified it was there. The stipulated value of the Viero car was over \$50 (Ex. 1; R. 12-14).

Between 1800 and 1900 on 20 March 1944, Mrs. Margaret Bailey, wife of William Kay Bailey, a Shafter, California, grocer, drove Mrs. J. A. Crafton, a neighbor who was with child, to the hospital at Bakersfield, California, for her confinement. Mr. Crafton was also in the car. The 18 mile trip was made in a 1941 De Soto sedan, owned by Mr. Bailey, which was of a stipulated value of more than \$50. (Ex. 1). There were a pillow and a hot water bottle in the car for Mrs. Crafton's use. Mrs. Crafton vomited twice on the way to Bakersfield. After arriving at the hospital Mrs. Bailey waited outside in the car while Mr. Crafton took his wife inside and made the necessary arrangements. Mrs. Bailey fell asleep and was awakened by the opening of the car doors. A man "grabbed" her around the neck while another pushed her from under the steering wheel and said, "Listen, dame, we are in trouble and you've got to get us out of it". The two men, Besherse and List, got in the front seat with her and List took the wheel. Two other men, one of them Sheridan, got in the back seat. Either Besherse or List said, "Don't give us any trouble and you will get out of this alive". She heard "a gun clicking" in the back and begged them to release her. One of the men said, "Isn't this luck. The dame is drunk", and another said, "Yes, did you smell the scent in the car?". Mrs. Bailey replied, "That's what you dirty skunks think". She testified that about 1000 that day she consumed "a drink of brandy or rum or something" which her mother had "fixed" for her because she was suffering from a menstrual cramp. She further testified that this was the only drink she had before going to Bakersfield, that there was no liquor or odor of liquor in the car and no drinking during the trip, that she was not feeling the effects of the one drink she had in the morning, and that she was "plenty sober". Mr. Crafton testified that he saw no liquor in the car during the ride from Shafter to Bakersfield (R.20-26, 27, 29-33, 45, 56-57, 96-97).

List drove the car away from the hospital. Mrs. Bailey saw no car following them and nobody got out of another car and into the De Soto. She did not know where they drove. She was not watching the road, because she was so "torn up" although she did remember being on "99" and passing Minter Field. List reached over and took the bills out of her purse, saying "Keep quiet and you will get out of this alive". There was \$360 in \$20 bills in her purse. Her husband had gone to the bank that morning and had given her \$727 in bills. She had started to put the money in the cash register at the store but her husband had said it was not necessary to put it all in. Mrs. Bailey did not look to see if List took all the bills she had but there were none left the

next morning. When List took the money she did not say anything. They drove on further and then List stopped the car, saying he "had business in the back seat with the dame". He took Mrs. Bailey by the arm, opened the back door, put her in the back seat and got in alongside of her. The other men got in the front seat. He said "O.K., dame". She begged him not to "bother" her and offered him the car "and everything" if "they" would leave her alone. List then "raped" her. She meant he had sexual intercourse with her, his penis actually penetrated her private parts. She was "afraid not to let them do what they wanted", she was afraid they would kill her. List was in the back seat "just a few minutes" and then he said, "O.K., Whitey". List left the back seat and Besherse got in with her. He "started pulling me down" and said not to give him any trouble and she would get out alive. Besherse then "raped" her. She meant he had sexual intercourse with her, his penis actually penetrated her private parts. She was "afraid not to" consent to sexual intercourse. After he finished he wiped himself with a pillow case (Ex. 10) from the pillow on the seat. Besherse stayed in the back seat with her, and took between 23 and 27 silver dollars which she had in a black cosmetic bag and some money and her husband's picture which she had in a purse. She reached her hand out for the car door and he grabbed it, finding her wrist watch (Ex. 7), which he removed. At one time Besherse said, "We will take the dame's coat" and at another time, "Why don't we kill the dame and get it over with?". Finally Besherse said "Here's the dame's getting-off place" and the car stopped. She was afraid they were going to kill her so, after leaving the car, she stooped down behind it. Besherse started for the car but came back and asked "what the God-damn hell" she was doing. She told him "Nothing" and he made her get up. He then jumped in the car and they drove away. Besherse threw out the pillow case at the place where they left her. Mrs. Bailey ran up the road, saw some lights in a house, stopped and "yelled" for them to let her in. "Mr. Furr" and his wife opened the door. She told them that four men "had gotten" her at the hospital and taken her car and money, but when they asked if "they hurt" her she told them, "No". She was too embarrassed to tell them the truth and wanted to speak to her husband first (R. 27-30, 34-41, 45, 50, 97).

On cross-examination, Mrs. Bailey testified that she thought they were on a country road at the time she changed seats. She saw no houses. She made no outcry and did not try to attract anyone because she was afraid. When List got in the back seat he "took hold of my feet and pulled me over with my back down to the seat". He raised her dress and slip over her hips. She was "flowing" at the time and "they" moved the sanitary napkin out of the way. She was also wearing underwear, which "they" moved out of the way. She did not assist in any way, sat in the seat as straight as she could, and tried to keep her legs from being spread apart, but "he" took hold of her feet, pulled her down, and got between her legs. She "didn't offer to hit him or anything" because she was afraid that "they" would kill her or beat her and leave her somewhere. "They" kept telling her to keep quiet and

do as they said and she would get out alive. She did not see a doctor until the next day. She did not "at first" tell the police that the men had attacked her (R. 46-47, 49).

Mr. Walt Furr, ranch worker, whose home was on a country road "hardly half a mile" from Highway 99, and near McFarland, California, 25 miles north-west of Bakersfield, testified that about 10:25 on the night of 20 March, Mrs. Bailey knocked at the door, saying "Let me in, let me in. They will blow my brains out". She was crying and "more or less" hysterical, her coat was wrinkled and her hair was "messed up". When she calmed down she said four men drove off with her, and took her car, money, watch, and gasoline stamps. Neither Mr. Furr, nor his wife in his presence, asked her if she had been raped and Mrs. Bailey said nothing about it. The next morning Mr. Furr went to the place where Mrs. Bailey said she had been let out of the car, and found a pillow case, an Army overcoat and later a hot water bottle (R. 50-56).

Besherse was arrested by Rex Clift, the chief of police of Fairfield, California, on the afternoon of 22 March 1944 and "booked" for being drunk in a public place and for investigation. In his possession were found Mrs. Bailey's wrist watch, an "A" gasoline ration book (Ex. 6), issued to Kay Bailey, and some money. He was questioned by Clift and other civil authorities, and stated that he and three other prisoners had escaped from Camp Haan in a stolen car, had stolen another car just outside Riverside at some small town and driven it to Bakersfield, where they stole another car and went to Sacramento. No physical force or threats of force were used nor any offers of reward made at any time, and before being questioned he was told that anything he said could be used against him. The following morning Besherse was questioned by Inspector Phillip Q. Fickert, of the Bakersfield police force. No physical force or threats of force were used nor any offers of reward made. Besherse stated that "they" overpowered their guard in the latrine at Camp Haan and took his gun and uniform, got in an Army truck and were later "run out" of that truck by civilian police officers, came back to camp that night and stole some clothes from the barracks, and went to Arlington where they stole a car, which he thought was an Oldsmobile, and drove to Bakersfield. The car developed battery trouble so they looked for another car, saw one near the hospital with a woman behind the wheel, and decided it was a good car to take. List and Sheridan got in the car with Mrs. Bailey and drove outside of Bakersfield, and Besherse and "Cannon" followed in the other car. The other car was then abandoned and Besherse and Cannon got into the car with Mrs. Bailey, List and Sheridan. Besherse at first denied but finally admitted that he "raped" Mrs. Bailey, and said, "I didn't use any force. I just got her in the back seat and committed the act of intercourse and didn't use any force on her". He further said that List had removed a roll of bills from Mrs. Bailey's purse while in the front seat.

Besherse admitted that while he was in the back seat with Mrs. Bailey he took some silver dollars, some small change and a ration book from her purse, and a wrist watch from her arm. He stated that they "split" the money and each got \$94.50. Upon letting Mrs. Bailey out of the car he tossed her an overcoat to keep her warm. They drove to Sacramento, buying some gas along the way and stealing some. From Sacramento they went to Vallejo where he got separated from the others. He stole a car there and got almost to Fairfield, where he was arrested (R. 14-17, 27-28, 57-61, 66, 74-79).

List and Sheridan were arrested in a De Soto sedan at Vallejo, California, on the afternoon of 23 March, and were then separately questioned by police officers. They were told there was "no use of their messing around or giving any false statements" as the police knew who they were and "had their complete trip". Chief Clift testified that no intimidation or threats were used, they were not abused, and no promise of reward was made. List gave substantially the same story as previously told by Besherse, except that he thought the car stolen in "this town" was a Buick rather than an Oldsmobile and that he denied a statement made by Besherse that they had been fired on by traffic officers near Redlands. List stated that they overpowered their guard and escaped from the guardhouse at Camp Haan, taking his rifle with them; they left in an Army vehicle and drove to another town where they stole another car, which was driven to Bakersfield; he and Sheridan, took a woman and her car from in front of a hospital there; one got in the back seat and forced her to "let them take the car and her" outside the city, where they met the other two men and all got in the same car; they drove on and List and "this woman" got in the back seat and had sexual intercourse. Besherse and List each stated that "they" had taken about \$400 from Mrs. Bailey and divided it equally among the four (R. 61-74).

4. Evidence for the defense: It was stipulated (Ex. A) that Mrs. Walter Furr, MacFarland, California, would testify that when Mrs. Bailey came to their house on the night of 20 March, she (Mrs. Bailey) was fully clothed, her clothing was not disarranged, and other than the fact that her coat was wrinkled in the back and her hair in disarray she gave no indication that she had been roughly handled or ill-treated; that Mrs. Bailey appeared hysterical but as soon as Mr. Furr left the room she became quite composed and proceeded to use the telephone; that Mrs. Bailey was far more calm and collected than Mrs. Furr could have been under the circumstances; and that in response to questioning Mrs. Bailey said the men had not harmed her (R. 80).

Accused List testified that at about 7:30 o'clock on the night of 20 March he got in the front seat and Sheridan got into the rear seat of the 1941 De Soto sedan in which Mrs. Bailey was sitting. Mrs. Bailey "acted first like she didn't know what was coming off" but when they told her they were

going to Los Angeles she wanted to go along. No one threatened or attempted to intimidate her. He drove the car out to Highway 99, and stopped three or four miles from the hospital. Besherse and Cannon, who had followed them in the Oldsmobile, got in the De Soto with them. When Besherse and Cannon changed cars they took the M-1 Army rifle out of the Oldsmobile and put it in the trunk of the De Soto. Neither List nor Sheridan had any weapon and List heard no clicking of a rifle. The rifle was the only weapon they had. When he entered the De Soto List smelled "an odor of whiskey or rum" and a remark was made about "the dame being drunk". There was half a quart of rum in the car, which the four of them drank. There were also Coca Cola and soft drink bottles on the floor of the car. After the Oldsmobile was "dropped", List and Mrs. Bailey were in the front seat of her car and the other three in the back. They continued two or three miles down the road and stopped. List and Mrs. Bailey got in the back seat while the others got in the front. She made no attempt to escape, but "opened the back door, and clumb right in". No one threatened her life. He put his arm around her shoulders, kissed her, gave her "a French kiss", and "that's when it all happened". There was no struggle, she "didn't say no", "we just rolled over on the back seat". She "wasn't afraid at all", she acted friendly and talked to all of them. He did not spread her legs apart. One leg was on the seat and the other on the floor and they did not have to be spread. He did not remove any of her clothing and he did not think she was wearing underwear. When she laid over on the seat, her clothing was up. He could not see that she was menstruating and he did not feel any Kotex on her. After the intercourse had started, when he was about finished, she said she was sick and "in her monthly", so he quit. He used a handkerchief and not a pillow case to clean himself after the intercourse. She did not resist or intimate that she did not want to have intercourse. At no time during the trip did anyone threaten her or warn her that something drastic might happen to her if she did not cooperate. During the trip Mrs. Bailey had her purse on her lap, List "laughed and asked her if she had any money", and she took it out of her pocket book and showed it to him. He reached for it and stuck it in his pocket. "She didn't resist - didn't try to hold onto it at all". She told them to go ahead and take the money. There was only about \$75 or \$80 in bills, and after they bought "gas and stuff" each had about \$20 and a little change left over. He did not say anything to her about getting out of the car. She said she knew where there was a filling station where they could get gas and she would stay there. After they had turned on "this road" she said "Let me out anywhere", so they let her out (R. 81-88).

On cross-examination and examination by the court, List testified that when he approached the Bailey car it was their intention to take it in order to get to Los Angeles. If Mrs. Bailey had said anything they "would have left her out right there". Nothing was said about her accompanying them when they started. About two blocks from the hospital she asked where they were going and they told her Los Angeles. She said nothing until they got out on the highway when she said she would go to Los Angeles. Sheridan never said

anything "about the gun in the back seat". Sheridan did talk about the number of shells the gun would hold but there was no gun in the car. List further testified that it was his impression that Mrs. Bailey was consenting to the intercourse because she made no objection. She told them to take the money. When they let her out of the car she said to take it. List had not been drinking prior to entering the car (R. 88-90).

Accused Besherse remained silent (R. 95-96).

General Prisoner Sheridan testified that he was 19 years of age with military service of 10 months. On the evening of 20 March he entered the back seat of the car in which Mrs. Bailey was seated in front of the hospital in Bakersfield. Only he and List entered the car. Sheridan smelled whiskey and said "She's drunk". He did not say "The dame is drunk". He was not armed in any manner, he heard no clicking sound, and made no statement that he had a gun or would kill her. He did not touch her nor tell her that if she watched herself and "played ball" she would not be killed. They drove about five miles out on Highway 99, where Besherse and Cannon transferred from the Oldsmobile to the De Soto. It was here that the M-1 rifle was taken from the Oldsmobile and put in the trunk of the De Soto. When they had driven a "couple" of miles List got in the back seat. Sheridan did not know what happened in the back seat, heard no outcry or signs of resistance from the back seat, and did not hear List or anyone else threaten Mrs. Bailey. There was some money taken from Mrs. Bailey. He "wouldn't say exactly whether it was against her will" inasmuch as she took the money out of her purse and made no effort to keep List from taking it. At no time on the trip did Mrs. Bailey give any indication that she was in fear of her life, she seemed very calm, and when they told her they were going to Los Angeles she said to take her along. When she said "to let her out anywhere along there" they pulled up and let her out. Until that time she had shown no inclination to get out. On cross-examination Sheridan said he got about \$18 as his share of the money taken from Mrs. Bailey. He denied making any statement in the car concerning the number of shells a gun held (R. 90-95).

5. a. It is believed unnecessary to recapitulate the evidence in detail at this point, as to the Specifications other than those alleging larceny of the Viero car. It is undisputed that the accused Besherse and List escaped from confinement at Camp Haan and carried away their guard's United States Army rifle, on 19 March 1944. It is likewise undisputed that on 20 March they carried away Mrs. Margaret Bailey in her husband's De Soto sedan, from Bakersfield, California, had sexual intercourse with her in the car, took her money and finally after releasing her near McFarland, California, drove away with the car. The only substantial conflict in the testimony concerns the question whether Mrs. Bailey accompanied them voluntarily, consented to the sexual intercourse, and gave up the money and the car voluntarily.

The conduct of Mrs. Bailey, as described in the testimony for the defense, is so inconsistent with the normal reactions of the average woman

under similar conditions, that the conclusion is compelled that such testimony is perjured and mendacious. It may well be asked what manner of woman would voluntarily associate herself with four desperados in their flight from confinement, submit freely to their sexual gratification in the promiscuous manner described; give them her money and car and then conclude the escapade by casually remarking, "Let me out anywhere". There is nothing whatever in the record of trial that even remotely indicates the likelihood of such actions on the part of this wife of a small town grocer, whose kindness in bringing a neighbor to the hospital for her lying-in period, involved her in this harrowing experience. There is an intimation in the testimony for the defense that Mrs. Bailey was intoxicated at the time the accused entered her car. List testified there was half a quart of rum in a bottle in the car. It seems wholly improbable that there would be drinking on a trip where a woman is being rushed to the hospital for child delivery. Mrs. Bailey unequivocally denied that there was any drinking or any liquor in the car. Her testimony in this respect was corroborated in every respect by Mr. Crafton. She did admit that at 10 o'clock in the morning of that day her mother had prepared her a drink of "brandy or rum or something" which she had taken for menstrual cramps. Obviously the effect of such a drink would hardly be felt eight or nine hours later.

The testimony of Mrs. Bailey was given with a frankness and candor that impresses the Board and compels acceptance. She asserted that when the accused entered her car they threatened her life, if she resisted, and that similar threats were thereafter made while she was in the car. She testified that she was afraid they would kill her if she did not let them do what they wanted. Her testimony is entirely consonant with all the surrounding circumstances. There is every indication that her mind and will were paralyzed by fear. Ample justification existed for her state of mind. She was under the domination of four men whose actions branded them as hardened and vicious characters. For the greater part of the time she was in the car, her captors drove on country roads. At the time of her rape they were at a lonely place where not even a farm house could be seen. It was in the night time. Under such conditions physical resistance would not only have been futile but foolhardy in the extreme. The law does not require a woman to defend her virtue to the extent of risking her life. Failure to resist under these circumstances does not minimize the seriousness of the offense committed.

The rules concerning the element of consent in criminal acts are well settled. The following are applicable to the offense of rape:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent. * * *

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent." (MGM, 1928, par. 148b)

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (Wharton's Criminal Law, Vol. 1, Sec. 701).

Concerning the offense of kidnapping, Wharton states:

"* * * In those cases where the female involved is of age to give consent, such consent will be no defense unless given freely and voluntarily, and is not procured by fraud and the like. * * *" (Wharton's Criminal Law, Vol. 1, Sec. 782).

Finally, in regard to the offense of robbery, the following rule is laid down:

"In order to constitute robbery, the taking of the property in question must be against the will of the owner or other person in possession. The requisite unwillingness may be evidenced not only by actual resistance, but by the fact that resistance would have been offered had it not been prevented by actual, overpowering force or violence, or by threat sufficient to frighten the victim into compliance. For example, a victim acting under compulsion through fear or possibly through physical pain, although ultimately placing his property in the hands of the robber without raising a protesting voice or hand, is not acting of his volition, but at the will of the robber; in other words, it is the act of the victim but not his deed - his submission but not his will. * * *" (46 Am. Jr. 150).

Applying the principles enunciated above to the evidence the Board concludes that Mrs. Bailey did not consent to the criminal acts of the accused, and that accordingly the allegations of the Specifications under consideration are proven beyond any reasonable doubt.

b. As to the Specifications alleging larceny of the Viero car, the evidence shows that at about 1:15 a.m. on 20 March 1944, the 1936 Oldsmobile sedan of Mr. Anthony Viero of Arlington, California, was parked in front of his home, and that it was stolen between that time and 8:00 a.m. A similar car was found on the highway near Bakersfield, California, on 23 March, and contained some articles which had been in the car of a Mr. Armstrong when it was parked in Bakersfield on 20 March. A suit belonging to Mr. Armstrong which also was in his car and which was "lost", was in the possession

of accused Besherse when he was apprehended. Mr. Viero next saw his car after its theft when he went to Bakersfield on 23 March in response to a call. Accused Besherse admitted to police officers that he and others stole a car, which he thought was an Oldsmobile, in Arlington, and then went to Bakersfield in it. Accused List admitted to police officers that he, Besherse and others stole a car in "this town", which he thought was a Buick, and drove to Bakersfield. He testified that after taking the Bailey car in Bakersfield, they abandoned the Oldsmobile.

The Board of Review is of the opinion that this evidence sustains the finding of guilty as to each accused, of larceny of the Viero car.

6. a. It does not affirmatively appear that accused Besherse and List were advised of their right to remain silent before they made their statements in the nature of confessions to police officers. However, it was shown that no physical force nor threats of force were used upon them, and that no offers of reward were made to them. The statements were made to civilian officers, and there is no indication in the record that they were anything other than voluntary. The Board is satisfied that these statements were freely and voluntarily made, and is of the opinion that they were properly admitted in evidence, for consideration as against the accused making the statement in each instance (see MCM, 1928, par. 114a).

b. The trial judge advocate was also the accuser in this case. A trial judge advocate should be free from bias, prejudice or hostility. (MCM, 1928, par. 41a). The Board has given careful consideration to the question whether the trial judge advocate was disqualified in this case by reason of being the accuser, and concludes that clearly he was not. He swore to the charge sheets on investigation of the facts and not on personal knowledge; he belongs to The Judge Advocate General's Department; and he obviously acted as accuser in an official capacity and not because of personal interest in the outcome of the case. The entire record discloses that the trial judge advocate was fair to the accused in presenting the case, and that all of their rights were protected. The Board of Review is of the opinion that there was no error on account of the dual role of the trial judge advocate.

7. The charge sheet shows that the accused Besherse is 23 years of age and enlisted on 14 December 1939, and that the accused List is 20 years of age and enlisted on 30 October 1940.

8. The court was legally constituted. 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

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sufficient, as to each accused, to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of a violation of Article of War 92.

Samuel M. Driver, Judge Advocate

(On Leave)

_____, Judge Advocate

J. J. Lottcher, Judge Advocate

SPJGN - CM 255335

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 29 1945

To: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of General Prisoners John W. Beshorse (7003315) and Keith E. List (15060259).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient, as to each accused, to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend as to each accused that the sentence to be hanged by the neck until dead be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

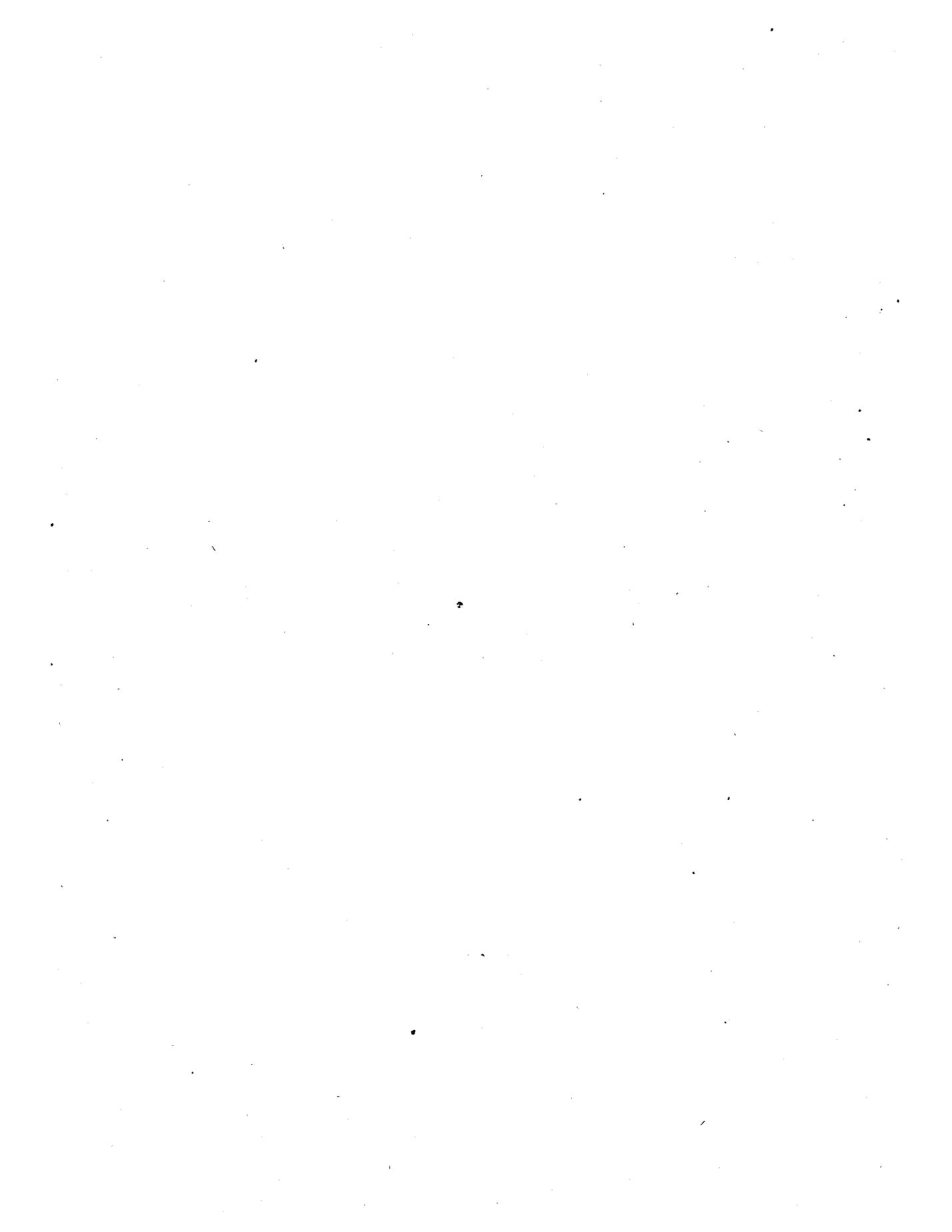


3 Incls

1. Record of trial
2. Dft ltr for sig S/W
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as to each accused confirmed. G.C.M.O. 361, 23 Jul 1945)



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(89)

SPJGH
CM 255335

27 JUN 1944

UNITED STATES)

CAMP HAAN, CALIFORNIA

v.)

Trial by G.C.M., convened at
Camp Haan, California, 18 April
1944. Confinement for life.
Penitentiary.

General Prisoner WILLIAM
J. SHERIDAN (33786577).)

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

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

Specification: In that General Prisoner William J. Sheridan, a general prisoner at Camp Haan Stockade, Camp Haan, California, having been duly placed in confinement in the Camp Haan Stockade, Camp Haan, California, on or about 15 February 1944, did, at Camp Haan, California, on or about 19 March 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: (Withdrawn by the appointing authority).

Specification 2: In that General Prisoner William J. Sheridan, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at Camp Haan, California, on or about 19 March 1944, without authority, wrongfully take and carry away a U.S. Army rifle, M-1, No. 1735260, of the value of \$35.00, property of the United States.

Specification 3: In that General Prisoner William J. Sheridan, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, wilfully, unlawfully, feloniously, forcibly and against her will, seize, kidnap and carry away from at or near the City of Bakersfield, County of Kern, State of California, to at or near the Town of McFarland, County of Kern, State of California, one Mrs. Margaret Bailey, a female human being, with the intent to hold and detain, and who did hold and detain, said Mrs. Margaret Bailey with intent and for the purpose of committing robbery.

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

Specification 1: In that General Prisoner William J. Sheridan, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near Arlington, California in or about 19 March 1944, feloniously and unlawfully take, steal and carry away one Oldsmobile sedan automobile of the value of more than \$50.00, the property of Anthony Viero. (As amended, R. 12).

Specification 2: In that General Prisoner William J. Sheridan, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, by force and violence and by putting her in fear, feloniously and unlawfully take, steal and carry away from the presence and possession of Mrs. Margaret Bailey one 1941 DeSoto sedan automobile, of the value of more than \$50.00, the property of Kay Bailey.

Specification 3: In that General Prisoner William J. Sheridan, a general prisoner at Camp Haan Stockade, Camp Haan, California, did, at or near the City of Bakersfield, County of Kern, State of California, on or about 20 March 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person of Mrs. Margaret Bailey lawful money of the United States in the sum of Three Hundred and Forty-three Dollars (\$343.00), in the lawful possession of Mrs. Margaret Bailey.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life. In view of the fact that accused had theretofore been dishonorably discharged the service with total forfeitures, the reviewing authority approved only so much of the sentence as involves confinement at hard labor for life and designated the United States Penitentiary, "McNeil's" Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

The Board of Review has held the record of trial legally sufficient as to General Prisoners John W. Besherse (7003315) and Keith E. List (15060259), who were tried with accused under similar Charges and Specifications and for another offense and who were sentenced to be hanged by the neck until dead. The Board has written an opinion in the case of General Prisoners Besherse and List.

3. The evidence for the prosecution in pertinent part follows:

An extract copy (Ex. 4) of the morning report of the Stockade, Camp Haan, California, shows accused confined on 15 February 1944 and escaped from confinement on 19 March 1944. Besherse, List and accused disarmed their guard at Camp Haan on 19 March 1944, forced him to accompany them to the outskirts

of the camp, where they released him, and left, taking with them his United States Army Rifle, M-1, No. 1735260, the clip and eight rounds of ammunition (Ex. 5). The rifle, clip and ammunition were in the possession of List and accused when they were apprehended. The stipulated value of the rifle was \$35 (Ex. 1; R. 12-13, 15-16).

The 1936 Oldsmobile automobile (a sedan) of Mr. Anthony Viero was parked in front of his home at 3696 Myers Street, Arlington, California, at about 1:15 a.m. on the morning of 20 March 1944. Between that time and 0800 that morning it was discovered that the car was gone. Mr. Viero gave no one permission to use the car. A 1936 Oldsmobile sedan "listed to" Mr. Viero was found by the state highway patrol "just north of Bakersfield, California", on 23 March. In the car were found a billfold and some papers, the property of one William J. Armstrong, which, together with a suit belonging to Armstrong, had been in Mr. Armstrong's car when it was parked at Bakersfield on 20 March 1944. The suit, which Armstrong "lost", was in the possession of Beshorse when he was placed in confinement. The next time Mr. Viero saw his car after it was stolen was in a garage at Bakersfield on 23 March after he was notified it was there. The stipulated value of the Viero car was over \$50 (Ex. 1; R. 12-14).

Between 6:00 and 7:00 p.m. on 20 March 1944, Mrs. Margaret Bailey, wife of William Kay Bailey, a Shafter, California, grocer, drove Mrs. J. A. Crafton, a neighbor who was with child, to the hospital at Bakersfield, California, for her confinement. Mr. Crafton was also in the car. The 18 mile trip was made in a 1941 De Soto sedan, owned by Mr. Bailey, which was of a stipulated value of more than \$50 (Ex. 1). There were a pillow and a hot water bottle in the car for Mrs. Crafton's use. Mrs. Crafton vomited twice on the way to Bakersfield. After arriving at the hospital Mrs. Bailey waited outside in the car while Mr. Crafton took his wife inside and made the necessary arrangements. Mrs. Bailey fell asleep and was awakened by the opening of the car doors. A man "grabbed" her around the neck while another pushed her from under the steering wheel and said, "Listen, dame, we are in trouble and you've got to get us out of it". The two men, Beshorse and List, got in the front seat with her and List took the wheel. Two other men, one of whom was accused, entered the back seat. Either Beshorse or List said, "Don't give us any trouble and you will get out of this alive". She heard "a gun clicking" in the back and begged them to release her. One of the men said, "Isn't this luck. The dame is drunk", and another said, "Yes, did you smell the scent in the car?". Mrs. Bailey replied, "That's what you dirty skunks think". She testified that about 10:00 a.m. that day she had taken "a drink of brandy or rum or something" which her mother had "fixed" for her because she was suffering from a menstrual cramp. She further testified that this was the only drink she had before going to Bakersfield, that there was no liquor or odor of liquor in the car, that there was no drinking during the trip, that she was not feeling the effects of the one drink she had in the morning, and that she was "plenty sober". Mr. Crafton testified that he saw no liquor in the car during the ride from Shafter to Bakersfield (R.20-26, 27, 29-33, 45, 56-57, 96-97).

List drove the car away from the hospital. Mrs. Bailey saw no car following them and nobody got out of another car and into the De Soto. She did not know where they drove. She was not watching the road, because she was so "torn up", although she did remember being on "99" and passing Minter Field. List reached over, took the bills out of her purse and said, "Keep quiet and you will get out of this alive". There was \$360 in \$20 bills in her purse. Her husband had gone to the bank that morning and had given her \$727 in bills. She had started to put the money in the cash register at the store but her husband had said it was not necessary to put it all in. Mrs. Bailey did not look to see if List took all the bills she had but there were none left the next morning. When List took the money she did not say anything. They drove on further and List stopped the car. He took Mrs. Bailey by the arm, opened the back door, put her in the back seat and got in with her. The other men entered the front seat. Afterward, Besherse was in the back seat with her and took between 23 and 27 silver dollars which she had in a black cosmetic bag and some money and her husband's picture which she had in a purse. When she reached her hand out for the car door, he grabbed it, found her wrist watch (Ex. 7), and removed it. At one time Besherse said, "We will take the dame's coat" and at another time, "Why don't we kill the dame and get it over with". Finally, Besherse said "Here's the dame's getting-off place", and the car stopped. She was afraid they were going to kill her so, after leaving the car, she stooped down behind it. Besherse started for the car but came back and asked "what the God-damn hell" she was doing. She told him "Nothing" and he made her get up. He then jumped in the car and they drove away. Besherse threw out the pillow case at the place where they left her. Mrs. Bailey ran up the road, saw some lights in a house, stopped and "yelled" to be let in. "Mr. Furr" and his wife opened the door. She told them that four men "had gotten" her at the hospital and had taken her car and money, but when they asked if "they hurt" her she told them, "No" (R. 27-30, 34-41, 45, 50, 97).

Mr. Walt Furr, a ranch worker, whose home was on a country road "hardly half a mile" from Highway 99, and near McFarland, California, 25 miles northwest of Bakersfield, testified that about 10:25 p.m. on 20 March, Mrs. Bailey knocked at the door and said, "Let me in, let me in. They will blow my brains out". She was crying and "more or less" hysterical, her coat was wrinkled and her hair was "messed up". When she calmed down she said four men drove off with her and took her car, money, watch, and gasoline stamps. The next morning Mr. Furr went to the place where Mrs. Bailey said she had been let out of the car, and found a pillow case, an Army overcoat and later a hot water bottle (R. 50-56).

Besherse was arrested by Rex Clift, the chief of police of Fairfield, California, on the afternoon of 22 March 1944 and "booked" for being drunk in a public place and for investigation. In his possession were found Mrs. Bailey's wrist watch, an "A" gasoline ration book (Ex. 6) issued to Kay Bailey, and some money. List and accused were arrested in a De Soto sedan at Vallejo, California, on the afternoon of 23 March, and were then separately questioned by police officers. They were told that there was "no use of their messing around or giving any false statements" as the police knew who they were and "had their

complete trip". Chief Clift testified that no intimidation or threats were used, they were not abused, and no promise of reward was made. Accused "gave a direct repetition, with very little prompting, of Keith List's story", and stated that "they" had taken about \$400 from Mrs. Bailey and had divided it equally among the four. List had stated that the "four men" had escaped from the guardhouse at Camp Haan by overpowering a guard and had taken his rifle; that they had left in an Army vehicle; that they had stolen a car in "this town" and driven it to Bakersfield; that later in Bakersfield they had "taken" a woman and her De Soto sedan in front of a hospital; and that List and accused drove in the car with the woman to a point about two miles out of Bakersfield, where the other two men abandoned the other car and entered the De Soto (R. 14-17, 27-28, 57-59, 61-74).

4. Evidence for the defense: It was stipulated (Ex. A) that Mrs. Walter Furr, McFarland, California, would testify that when Mrs. Bailey came to their house on the night of 20 March she (Mrs. Bailey) was fully clothed, her clothing was not disarranged, and other than that her coat was wrinkled in the back and her hair in disarray she gave no indication that she had been roughly handled or ill-treated; that Mrs. Bailey appeared hysterical but as soon as Mr. Furr left the room she became quite composed and proceeded to use the telephone; that Mrs. Bailey was far more calm and collected than Mrs. Furr could have been under the circumstances; and that in response to questioning Mrs. Bailey said the men had not harmed her (R. 80).

List testified that at about 7:30 p.m. on 20 March he got in the front seat and accused in the rear seat of the 1941 De Soto sedan in which Mrs. Bailey was sitting. Mrs. Bailey "acted first like she didn't know what was coming off" but when they told her they were going to Los Angeles she wanted to go along. No one threatened or attempted to intimidate her. List drove the car out to Highway 99, and stopped three or four miles from the hospital. Besherse and "Cannon", who had followed them in "the Oldsmobile", entered the De Soto with them. When Besherse and Cannon changed cars they took the M-1 Army rifle out of the Oldsmobile and put it in the trunk of the De Soto. Neither List nor accused had any weapon and List heard no clicking of a rifle. The rifle was the only weapon they had. When he entered the De Soto List smelled "an odor of whiskey or rum" and a remark was made about "the dame being drunk". There was half a quart of rum in the car, which the four of them drank. There were also Coca Cola and soft drink bottles on the floor of the car. After the Oldsmobile was "dropped", List and Mrs. Bailey were in the front seat of her car and the other three in the back. They continued two or three miles down the road and stopped. List and Mrs. Bailey got in the back seat while the others got in the front. She made no attempt to escape, but "opened the back door, and clumb right in". No one threatened her life. At no time during the trip did anyone threaten Mrs. Bailey nor warn her that something drastic might happen to her if she did not cooperate. She had her purse on her lap, List "laughed and asked her if she had any money", and she took it out of her pocket book and showed it to him. He reached for it and stuck it in his pocket. "She didn't resist - didn't try to

hold onto it at all". She told them to go ahead and take the money. There was only about \$75 or \$80 in bills, and after they bought "gas and stuff" each had about \$20 and a little change left over. List did not say anything to her about getting out of the car. She said she knew where there was a filling station where they could get gas and she would stay there. After they had turned on "this road" she said "Let me out anywhere", so they let her out (R. 81-84, 86-88).

On cross-examination and examination by the court, List testified that when he approached the Bailey car it was their intention to take it in order to get to Los Angeles. If Mrs. Bailey had said anything they "would have left her out right there". Nothing was said about her accompanying them when they started. About two blocks from the hospital she asked where they were going and they told her Los Angeles. She said nothing until they got out on the highway when she said she would go to Los Angeles. Accused never said anything "about the gun in the back seat", but did talk about the number of shells the gun would hold, although there was no gun in the car. Mrs. Bailey told them to take the money. When they let her out of the car she said to take it. List had not been drinking prior to entering the car (R. 88-90).

Accused testified that he was 19 years of age with military service of 10 months. On the evening of 20 March he entered the back seat of the car in which Mrs. Bailey was seated in front of the hospital in Bakersfield. Only he and List entered the car. Accused smelled whiskey and said "She's drunk". He did not say "The dame is drunk". He was not armed in any manner, he heard no clicking sound, and made no statement that he had a gun or would kill her. He did not touch her nor tell her that if she watched herself and "played ball" she would not be killed. They drove about five miles out on Highway 99, where Beshorse and Cannon transferred from the Oldsmobile to the De Soto. It was here that the M-1 rifle was taken from the Oldsmobile and put in the trunk of the De Soto. When they had driven a "couple" of miles List got in the back seat. Accused did not know what happened in the back seat, heard no outcry or signs of resistance from the back seat, and did not hear List or anyone else threaten Mrs. Bailey. There was no money taken from Mrs. Bailey. He "wouldn't say exactly whether it was against her will", inasmuch as she took the money out of her purse and made no effort to keep List from taking it. At no time on the trip did Mrs. Bailey give any indication that she was in fear of her life, she seemed very calm, and when they told her they were going to Los Angeles she said to take her along. When she said "to let her out anywhere along there" they pulled up and let her out. Until that time she had shown no inclination to get out. On cross-examination accused said he got about \$18 as his share of the money taken from Mrs. Bailey. He denied making any statement in the car concerning the number of shells a gun held (R. 90-95).

5. It is believed unnecessary to recapitulate the evidence in detail at this point. The evidence clearly shows that accused and three other men

escaped from the guardhouse at Camp Haan on 19 March 1944 (Spec., Chg. I); took and carried away their guard's rifle (Spec. 2, Chg. II); stole the Oldsmobile sedan of Mr. Anthony Viero at Arlington, California, on 20 March (Spec. 1, Chg. III); kidnapped Mrs. Margaret Bailey at Bakersfield, California, on 20 March, with intent to rob (Spec. 3, Chg. II); and robbed her of her De Soto sedan (Spec. 2, Chg. III) and of about \$343 (Spec. 3, Chg. III). The Board of Review is of the opinion that the evidence sustains the findings of guilty of all Specifications.

The contention made by the defense that Mrs. Bailey voluntarily accompanied accused and his companions, and voluntarily gave them her car and money, is rebutted not only by the testimony of Mrs. Bailey but by all of the surrounding circumstances.

6. a. It does not affirmatively appear that accused was advised of his right to remain silent before he made his statement in the nature of a confession to police officers. However, it was shown that no physical force nor threats of force were used upon him, and that no offers of reward were made to him. The statement was made to civilian officers, and there is no indication in the record that it was anything other than voluntary. The Board is satisfied that the statement was freely and voluntarily made, and is of the opinion that it was properly admitted in evidence (see MCM, 1928, par. 114a).

b. The trial judge advocate was also the accuser in this case. A trial judge advocate should be free from bias, prejudice or hostility (MCM, 1928, par. 41a). The Board has given careful consideration to the question whether the trial judge advocate was disqualified in this case by reason of being the accuser, and concludes that clearly he was not. He swore to the charge sheet on investigation of the facts and not on personal knowledge; he belongs to The Judge Advocate General's Department; and he obviously acted as accuser in an official capacity and not because of personal interest in the outcome of the case. The entire record discloses that the trial judge advocate was fair to the accused in presenting the case, and that all of the rights of accused were protected. The Board of Review is of the opinion that there was no error on account of the dual role of the trial judge advocate.

7. There is no limit of punishment established for the offense of kidnapping with intent to rob, either by the table of maximum punishments (MCM, 1928, par. 104c) or by Federal statute. Life imprisonment is authorized as punishment for this offense.

8. The charge sheet shows that accused is 19 years of age and was inducted on 22 June 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The

(96)

Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized under the 42nd Article of War for the offense of larceny of property of a value in excess of \$50 by section 22-2201, District of Columbia Code, and for the offense of robbery by section 22-2901 of the same code.

Samuel M. Davis, Judge Advocate.

(On Leave), Judge Advocate.

J. J. Pottelbos, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(97)

SPJGH
CM 255394

16 JUN 1944

UNITED STATES)

FIRST AIR FORCE

v.)

Trial by G.C.M., convened at
Selfridge Field, Michigan, 24
and 25 April 1944. Dismissal.

Second Lieutenant MILTON
R. HENRY (O-163603J), Air
Corps.)

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Milton R. Henry, Air Corps, 553rd Fighter Squadron, did, without proper leave, absent himself from his place of duty at the Communications Office, 553rd Fighter Squadron, Selfridge Field, Michigan, from about 0730, 9 March 1944, to about 1200, 9 March 1944.

Specification 2: Same as Specification 1, except "from about 0730, 10 March 1944, to about 1100, 10 March 1944."

Specification 3: Same as Specification 1, except "from about 0730, 12 March 1944, to about 0830, 12 March 1944."

Specification 4: Same as Specification 1, except "from about 0730, 13 March 1944, to about 1120, 13 March 1944."

Specification 5: Same as Specification 1, except "from about 0730, 16 March 1944, to about 0830, 16 March 1944."

Specification 6: Same as Specification 1, except "from about 0730, 19 March 1944, to about 1030, 19 March 1944."

Specification 7: Same as Specification 1, except "from about 0730, 20 March 1944, to about 1045, 20 March 1944."

CHARGE II: Violation of the 63rd Article of War.

Specification: In that Second Lieutenant Milton R. Henry, Air Corps, 553rd Fighter Squadron, did, at Selfridge Field, Michigan, on or about 15 February 1944, behave himself with disrespect toward Lieutenant Colonel A. R. DeBolt, G.S.C., and Lieutenant Colonel Charles A. Gayle, Air Corps, his superior officers, by saying to them, "I got my promotion through initiative and integrity; you officers can't say that. All revolutions have been initiated by minorities. Remember the French Revolution, and the Russian Revolution! In each case it was the minority who ruled and someday I, too, will be in a position to dictate," or words to that effect.

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

Specification: In that Second Lieutenant Milton R. Henry, Air Corps, 553rd Fighter Squadron, having been detailed for duty as Squadron Alert Officer, did, at Selfridge Field, Michigan, on or about 18 March 1944, wrongfully fail to report to the Squadron Adjutant or his commissioned representative at the end of his tour of duty as Squadron Alert Officer in violation of Paragraph 3, 553rd Fighter Squadron Memorandum No. 50-1 dated 8 February 1944.

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

Specification 1: Same as Specification 1, Charge I, except "from about 0730 21 March 1944, to about 1300 21 March 1944."

Specification 2: Same as Specification 1, Charge I, except "from about 0730 22 March 1944 to about 0930 22 March 1944."

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. a. Specification, Charge II: The evidence for the prosecution shows that at about 3:00 p.m. on 15 February 1944 accused reported to Lieutenant Colonel Charles A. Gayle, at that time commanding the 553rd Fighter Squadron, the organization of accused, at Selfridge Field, Michigan. Colonel Gayle had directed him to report because of a recent altercation between accused and a sergeant as a result of the sergeant failing to pick up accused in a jeep as accused had told him to do. On account of a shortage of transportation, officers had been instructed to walk if necessary. Lieutenant Colonel Arthur R. DeBolt, A-4 officer, First Fighter Command, and another officer were present in Colonel Gayle's office when accused reported (R. 11-12, 19-20).

Accused gave an explanation of the incident. After reminding accused of the instructions for officers to walk if necessary, Colonel Gayle asked Colonel DeBolt what he thought should be done, and the latter suggested

that the sergeant apologize and the incident be closed. Colonel DeBolt recommended to accused that he be "a bit more reticent" and that if he could not "acclimate" himself he take steps to get out of the Army. Colonel Gayle asked accused how he expected to get a promotion with the "general attitude" toward the Army which he had. Accused replied: "I got my promotion through initiative and integrity. You officers can't say that". Colonel Gayle described the manner of making this comment as "antagonistic, insubordinate and in a loud tone of voice". Colonel DeBolt then explained to accused the rapid promotions in the Air Corps. Just before he was dismissed by Colonel Gayle, accused stated: "All revolutions are caused by minorities. You will remember the French and Russian Revolutions. In each case it was the minority that ruled and some day I, too, will be in a position to dictate". This statement was made in a loud tone of voice, with emphasis on the words "I too". During the interview accused was "talking so fast we could not keep up with him, or get a word in edgewise". Colonel Gayle considered the conversation of accused "as being disrespectful and insubordinate due to his tone of voice and general attitude as he was talking". According to Colonel DeBolt, accused spoke in a "disrespectful manner", was "antagonistic" and "pretty boisterous", and his inflection was "high pitched" (R. 12-27).

b. Specifications 1-7, Charge I, and Specifications 1-2, Additional Charge I: First Lieutenant Hayward J. Burns, communications officer of the 553rd Fighter Squadron, identified a squadron memorandum (Ex. 1) dated 13 February, requiring all ground officers to report to their respective sections for duty at 7:30 a.m. daily, which he showed to accused on or before 9 March. Accused was assistant squadron communications officer and was required to report for duty each morning at 7:30. Lieutenant Burns, who kept a record of the time when accused reported to the office each day, testified that accused reported for duty on the dates included in these Specifications, as follows: 9 March, at about noon; 10 March, at about 11:00 a.m.; 12 March at 8:30 a.m.; 13 March, at 11:20 a.m.; 16 March, at 8:30 a.m.; 19 March, at 10:30 a.m.; 20 March, at 10:45 a.m.; 21 March, at 1:00 p.m.; and 22 March, at 9:30 a.m. Lieutenant Burns did not excuse accused from reporting on any of these dates, nor did he have knowledge of any superior officer excusing him. Lieutenant Burns made a written report of each absence of accused to the squadron executive officer. These reports (Exs. 2-9) for the dates shown above, except 22 March, were introduced in evidence (R. 28-45).

Lieutenant Colonel Sam P. Triffy, commanding the 553rd Fighter Squadron from 6 March 1944, testified that all absences from duty were required to be reported by written certificate. He called accused to his office about 15 March to account for his absences from duty. Accused asked "why all the flurry about him not being on duty" and stated that he "could not report", "could not get up in the morning", and "just could not wake up". When Colonel Triffy told him he would have to "come to work" or have an excuse from the medical officer, accused "invited" Colonel Triffy to wake him up, and suggested that Lieutenant Burns wake him up "instead of writing up certificates". After cross-examining Colonel Triffy, the defense introduced in evidence extract copies of morning reports (Def. Exs. A, B, C, D) showing accused "Fr dy to AWOL" at 7:30 a.m. on each of the dates

referred to in the Specifications, and "Fr AWOL to dy" on each of these dates at the times alleged (R. 51, 53-59).

Major Joseph P. Price, squadron executive officer, telephoned accused at about 4:30 p.m. on 9 March and asked him whether he was on duty that morning. Accused replied "No", because "he was not feeling very well and had stayed in bed". When Major Price asked whether he had thought to "contact" the squadron commander or his section head, accused replied: "How could I? I was asleep". Major Price questioned him further, and accused asked "what is the idea of all these questions?" On 16 March at about 8:30 a.m. accused telephoned Major Price and stated: "This is Lieutenant Henry. I am reporting for duty" (R. 59-62).

c. Specification, Charge III: Accused, who had served as squadron alert officer on prior occasions, was appointed to serve in that capacity from noon on 17 March to noon on 18 March. Squadron Memorandum No. 50-1, 8 February 1944 (Ex. 10) required that the old and new alert officers report to the adjutant or his commissioned representative at 11:50 a.m. daily. The memorandum was posted on the bulletin board in the day room. At the end of his tour of duty on 18 March, accused did not report to Second Lieutenant William H. Bailous, the adjutant, nor to Second Lieutenant Rice L. Carothers, the assistant adjutant, Colonel Triffy, or Major Price. All four of these officers were present in the office at 11:50 a.m. on 18 March, and accused was not excused from reporting (R. 45-50, 52-53, 61-62, 64-65).

4. Lieutenant Colonel Charles M. Caravati, Medical Corps, identified the file of accused from Percy Jones General Hospital, and parts of it were introduced in evidence, consisting of clinical records, pathological examinations and reports, and radiologic records (Def. Exs. E, F, G-1, G-2, G-3, G-4, H-1 & 2, H-3), containing entries in October, November and December 1943 and February 1944. Colonel Caravati testified that accused was admitted to the hospital on 1 October 1943, discharged on 29 December, re-admitted 4 February 1944 and discharged 9 February. The diagnosis was "Sarcoidosis Boecks" with enlargement of the lymph glands in the chest. The same general condition existed when examinations were made on 1 October, 5 December and 6 February. The disease referred to is one characterized by enlargement of the lymph glands of the body, notably those in the neck and chest. The cause of the disease is unknown, it progresses for an indefinite period, then regresses, is usually characterized by spontaneous recovery, and is seldom if ever fatal. Its symptoms are caused by replacement of normal tissue by encroachment of the enlarged glands, and no poison is produced. There is no specific treatment known to be of real value. The chief complaints of accused, more pronounced on the first admission to the hospital than on the second, were loss of weight, pain and numbness in the extremities after exertion, a feeling of tightness in the chest, some difficulty in vision, some cough, and mild shortness of breath. The disease is sometimes characterized by nodes, which are accumulations of connective tissue placed at strategic points to aid in the defense of the body against infections. The hospital records show that on 1 October there were numerous nodular masses, the largest four or five centimeters in

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diameter, in the chest of accused. Colonel Caravati was a member of a board of officers which about 13 December 1943 found that accused had "Sarcoidosis Boecks", that he had received maximum hospital benefit, and that he was temporarily incapacitated for full military service. The Board recommended that he be returned to a temporary limited service status. About 7 February 1944, another board found that accused had no disqualifying physical defects, and recommended that he be returned to a limited service status, for any duty of a non-strenuous nature, for two months, with automatic reversion to full duty at the end of that time. It was the opinion of this board that the physical condition of accused was much improved. On cross-examination the proceedings of the two boards (Exs. 11 and 12) were placed in evidence. It was the opinion of Colonel Caravati that the disease would not prevent accused from getting up in the morning at seven o'clock, unless there was some "intercurrent" condition since the last examination. The disease may cause a "lethargic condition" or "marked fatigue", but this is not usual (R. 69-85).

Captain William J. Cosgrove, Medical Corps, identified X-ray pictures of the chest of accused which he made on 25 September 1943, 30 December, 3 February 1944, 28 February, and 17 April. These pictures showed two groups of nodes, about 12.0 by 4.0 centimeters and 7.0 by 4.5 centimeters in size. Lieutenant Colonel Paul A. Petrie, Medical Corps, a member of the board which convened about 13 December, examined accused from a psychiatric standpoint. He had made a suggestion that it would be advisable to "retire" accused for psychological reasons. He found accused sane and free of neuro-psychiatric disease. Dr. Maureen Weaver, who had made a special study of pulmonary tuberculosis, examined the X-ray pictures of the chest of accused and observed a "bilateral enlargement of the mediastinal lymph nodes". She was not able to determine from the pictures whether accused had "Boecks Sarcoid". She testified that during the acute stages of this disease a patient usually suffers loss of appetite, loss of weight, and fatigue. A chest condition such as she observed in the pictures would not, in her opinion, be likely to cause loss of sleep or inability to sleep, but might result in general fatigue and lethargy (R. 85-98).

Lieutenant Carothers testified for the defense that after accused "mentioned" that he was turned in for being late each morning and wanted to be called, Lieutenant Carothers, who roomed across the hall from him, would "usually go in and shake him on the shoulder". Once or twice when accused asked why Lieutenant Carothers did not wake him up, Lieutenant Carothers told accused that he shook him but that he (accused) "rolled over and groaned". Accused usually went to bed about 10:00 or 11:00 p.m. Lieutenant Carothers could not fix the period during which he awakened accused, but it was in March. At the request of accused, Second Lieutenant Charles E. Anderson called him about every morning or every other morning, shortly after six o'clock, in March. It was his practice to call accused on the way to the washroom, on the way back, and on the way out of the barracks. When he called, accused would answer in a "mumbled-jumbled" manner. When asked whether he awakened accused from 9 March to 22 March, he replied "I guess I did". After 19 March Second Lieutenant Maurice L. Johnson had occasion to awaken accused more than once. He found it "extremely difficult" to awaken him. Accused usually went to bed between eleven o'clock and twelve-thirty at night (R. 99-106).

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When the rights of accused had been explained to him, he stated: "I feel that the facts in the case stand and I feel we are all sufficiently familiar with them that it will not be necessary for me to say anything. I think I will remain silent" (R. 106).

5. Captain Lambert J. Agin, Medical Corps, squadron flight surgeon, examined accused about three weeks before the trial and reviewed the clinical records. He was of the opinion that accused was suffering from "Boecks Sarcoid". Lieutenant Colonel Harry C. Kroon, Medical Corps, examined accused on 22 April 1944 and made a diagnosis of "Boecks Sarcoid". In his opinion accused was under "no disability" from the disease, and it would not prevent him from getting up at 7:00 a.m. from 9 March to 22 March (R. 106-115).

6. a. Specification, Charge II: The evidence shows that at about 3:00 p.m. on 15 February 1944 accused reported to Lieutenant Colonel Charles A. Gayle, at that time commanding the 553rd Fighter Squadron, the organization of accused, at Selfridge Field, Michigan. Lieutenant Colonel Arthur R. DeBolt, A-4 officer, First Fighter Command, was present. Colonel Gayle had directed accused to report to him because of a recent altercation between accused and a sergeant who had failed to pick up accused in a jeep as accused had instructed him to do. On account of a shortage of transportation, officers had been instructed to walk if necessary.

After accused had given an explanation of the incident, Colonel Gayle reminded accused of the instructions about walking and asked Colonel DeBolt what he thought should be done. The latter suggested that the sergeant apologize and the incident be closed, and recommended to accused that he be "a bit more reticent". When Colonel Gayle asked accused how he expected to get a promotion with his "general attitude" toward the Army, accused stated: "I got my promotion through initiative and integrity. You officers can't say that". At the end of the interview accused stated: "All revolutions are caused by minorities. You will remember the French and Russian Revolutions. In each case it was the minority that ruled and some day I, too, will be in a position to dictate". Accused made the statements in a loud tone of voice, emphasized the words "I too" in the second statement, was "antagonistic", spoke in a "disrespectful manner", and his inflection was "high pitched". He was talking so fast that the other two officers could hardly get in a word.

In the opinion of the Board of Review, the evidence clearly shows that accused behaved with disrespect toward his two superior officers in using the language set out above, under the circumstances shown.

b. Specifications 1-7, Charge I, and Specifications 1-2, Additional Charge I: During the period from 9 March to 22 March 1944 accused was assistant communications officer of the squadron and as such was required to report for duty at the communications office each morning at 7:30. On nine days during this period he did not report for duty until the following hours: 9 March, at about noon; 10 March, at about 11:00 a.m.; 12 March, at 8:30 a.m.; 13 March, at 11:20 a.m.; 16 March, at 8:30 a.m.; 19 March, at 10:30 a.m.; 20 March, at 10:45 a.m.; 21 March, at 1:00 p.m.;

and 22 March, at 9:30 a.m. Accused had not been excused from reporting at 7:30 a.m. on these dates.

It was shown that during this period, as well as for some time before, accused was suffering with a disease known as "Sarcoidosis Boecks", which consists of a swelling of lymph glands. These glands in the chest of accused were enlarged. The defense offered some evidence that this disease might cause fatigue. Two medical boards which examined accused prior to March found him qualified for limited service and for duty of a non-strenuous nature. After making a careful examination of the extensive medical testimony in the record, the Board of Review is satisfied that the disease with which he was afflicted did not prevent accused from reporting for duty and did not in any way excuse his failure to report.

The defense offered the testimony of three officers living in the same barracks with accused to the effect that at various times (dates not specifically shown) about March 1944, at his request, they attempted to awaken him in the mornings, and found him very difficult to arouse. It was the responsibility of accused to report for duty at the appointed time each day, and the fact that he was a sound sleeper and hard to awaken does not constitute an excuse for his failure to report.

The record of trial sustains the findings of guilty of these Specifications.

Although it would have been more appropriate for the Specification to have charged accused with failure to repair at the fixed time to the properly appointed place of duty, the evidence fully sustains findings that accused "did, without proper leave, absent himself from his place of duty at the Communications Office" between the hours and on the dates alleged. He was not charged with going from his place of duty without leave, but with being absent therefrom without leave. In the opinion of the Board of Review the accused was fully apprised of the offenses with which he was charged, and suffered no prejudice by the form of the Specifications.

g. Specification, Charge III: Accused was on duty as squadron alert officer from noon on 17 March to noon on 18 March 1944. A squadron memorandum of 8 February 1944, posted on the bulletin board in the day room, required the alert officer to report to the adjutant, with the new alert officer, at 11:50 a.m., prior to the end of his tour of duty. Accused had served as alert officer on prior occasions. Accused did not report to the adjutant at 11:50 a.m. on 18 March, as required, nor to any other officer to whom he might have reported in lieu of the adjutant. He had not been excused from reporting. His failure to report as required was a violation of the 96th Article of War.

7. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 23 April 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 12 September 1942.

These records also show that his correct serial number is O-1636030. Although the record of trial shows his serial number as O-1636060, it is obvious that this was a mere clerical error. Accordingly, the Board of Review has substituted the correct number.

8. The court was legally constituted. 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 the 61st, 63rd or 96th Article of War.

Samuel M. Driver, Judge Advocate.

Robert B. Cannon, Judge Advocate.

J. J. Lettichos, Judge Advocate.

1st Ind.

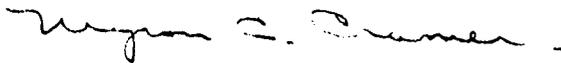
War Department, J.A.G.O., 23 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Milton R. Henry (O-1636030), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused behaved with disrespect toward two superior officers (Spec., Chg. II), was absent without leave from his place of duty nine times in one month (Specs. 1-7, Chg. I, and Specs. 1-2, Add. Chg. I), and failed to report to the squadron adjutant at the end of his tour of duty as squadron alert officer as required (Spec., Chg. III).

The proceedings of a board of medical officers introduced in evidence at the trial disclose that accused stated that the only reason he cannot perform duty is because of his attitude toward the service and expressed a desire to be separated from the service because he felt that he could be of no further constructive use to it. He was previously punished under Article of War 104 for absence without leave. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.



Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

Incl.2-Draft ltr. for sig. S/w.

Incl.3-Form of Action.

(Sentence confirmed. J.A.G.O. 441, 16 Aug 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(107)

SPJGK
CM 255438

8 JUN 1944

UNITED STATES)

FOURTH ARMY

v.)

) Trial by G.C.M., convened at
) Camp Barkeley, Texas, 19 April
) 1944. To be hanged by the neck
) until dead.

) Private FRED HURSE
) (37409681), 437th Quarter-
) master Gasoline Supply
) Company, Camp Barkeley, Texas.)

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Fred Hurse, 437th Quartermaster Gasoline Supply Company, did, at Camp Barkeley, Texas, on or about 22 March 1944, with malice aforethought, willfully, feloniously, and unlawfully kill one Private Eugene Pinckney, 434th Quartermaster Gasoline Supply Company, a human being, by shooting him with a Carbine.

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

Specification 1: In that Private Fred Hurse, 437th Quartermaster Gasoline Supply Company, did, at Camp Barkeley, Texas, on or about 22 March 1944, with intent to commit a felony, viz, murder, commit an assault upon Technician Fourth Grade Enoch F. Jenkins, 434th Quartermaster Gasoline Supply Company, by willfully and feloniously shooting him in the left upper arm with a dangerous weapon, to wit, a Carbine.

Specification 2: In that Private Fred Hurse, 437th Quartermaster Gasoline Supply Company, did, at Camp Barkeley, Texas, on or about 22 March 1944, with intent to commit a felony, viz, murder, commit an assault upon Corporal Joe H. Wayne, 434th Quartermaster Gasoline Supply Company, by willfully and feloniously shooting

him in the right shoulder with a dangerous weapon, to wit, a Carbine.

Specification 3: In that Private Fred Hurse, 437th Quartermaster Gasoline Supply Company, did, at Camp Berkeley, Texas, on or about 22 March 1944, with intent to commit a felony, viz, murder, commit an assault upon Private James C. Anderson, 434th Quartermaster Gasoline Supply Company, by willfully and feloniously shooting him in the right forearm with a dangerous weapon, to wit, a Carbine.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction by special court-martial for absence without leave for 13 days was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Accused fired either two or three shots from a carbine through the front door of Service Club Number 3 at Camp Berkeley, Texas, wounding three soldiers and killing a fourth soldier. There is no question that accused fired the shots. The only problem is that of his mental status and legal responsibility.

On the evening of 22 March 1944, a dance was held at Service Club Number 3, Camp Berkeley, Texas. It was sponsored by the enlisted men of the 434th Quartermaster Gasoline Supply Company, who had also invited enlisted men of the first three grades from the 435th, 436th and 437th Quartermaster Gasoline Supply Companies, which were the other components of the 2nd Quartermaster Mobile Battalion (R. 9,29,40). Most of the testimony concerning the shootings was offered by enlisted men of the 434th and 437th Companies (to the latter of which accused belonged) and by Second Lieutenant Clifford E. Williams, Quartermaster Corps, 434th Company, who was the officer appointed to attend (R. 40).

The dance took place in the main hall of the Service Club, a room 75 feet long and 33 feet wide. Entrance to the club was by a double door opening inward from a porch about 60 feet long and 10 feet wide (R.11,12; Pros. Exs. 1,2,3).

Accused was detailed as a member of the battalion guard that evening, and it appears from the defense's evidence that he was on the first relief, serving from 1830 to 2030. First Lieutenant Bernard E. Goldstein, Quartermaster Corps, 437th Quartermaster Gasoline Supply Company, was officer of the day. He had issued one empty clip to each member of the guard, but no ammunition. Accused carried a carbine as a sentry (R.14,16,20,21,80,120-127, 161-163).

The dance started some time between 2030 and 2100. Soldiers continued to arrive at various times, and the attendance was large. There were anywhere from 25 to 40 people out on the porch and around the door (R. 22,26,40,48,61,68,72,76,77,83,90). A few minutes after 2100, three of the men from the 437th Company, dressed in guard uniform, appeared at the door and asked to be allowed to enter. Although they were not supposed to be admitted, Private Luke A. Brown, 434th Company, on duty as the doorman, admitted them. He paid no further attention to them and was not certain whether accused was one of them (R. 68-70). Private Elvin King, 434th Company, arrived about 2115, engaged in conversation with Brown, and took Brown's place at the door while the latter went to the refreshment stand to buy a Coca-Cola (R. 23-27,68). Perhaps five or ten minutes later accused walked up. He was dressed as a guard and carried a carbine (R. 57,73).

King was still at the door, and had just admitted deceased, who apparently was acting as a sergeant and wore the chevrons of that grade, for several witnesses so described him. Accused asked King for admittance. King told him no more guards could come in, but there appear to have been no angry words between them (R. 23,57,73,80-82,87). Deceased came to the door and asked King if he wanted to let accused inside. King said he did not. Accused was perhaps a foot or two inside the doorway, but deceased closed the door in accused's face, pushing him back out on the porch (R. 58-60,74,81-82,87,88). One witness testified that accused was pushed perhaps three feet (R. 82), while another stated that deceased shoved him a "pretty hard blow, pretty hard shove", sending accused back about seven feet into the group on the porch (R. 88,89).

King testified that accused said that deceased "didn't have to try to be so smart" (R. 23,24,27). Then, without further words, accused brought his carbine from his shoulder to the position of "On Guard", opened the bolt, and without taking any particular aim, fired through the door (R. 58,59,62,75,77,83,84,89,90,94,95). Some witnesses heard two shots, others three, in rapid succession. One bullet went through the wooden framework of the door, and at least one other through the bottom of one of the lower panes of glass (R. 23-26,40,49,61,62,68,83,84,90,91; Pros. Exs. 4,5,6).

Deceased fell to the floor, while the crowd inside joined in a rush to doors and windows. Lieutenant Williams and First Sergeant Conway Dawson, who had been chatting near the main door, ran outside, to find a group of men struggling with accused for possession of the weapon in the driveway below the porch. Dawson rushed in, managed to get the gun and clip, and handed them over the heads of the crowd to Lieutenant Williams (R.40-44,49,50,53,54,69,71,75,77,78,91,94,95). Upon later examination the carbine, introduced in evidence as Prosecution's Exhibit 8, was found to have on the butt a piece of tape marked "F. Hulse", while the clip contained 12 unfired rounds of ammunition. A clip holds 15 rounds when full. In opening the bolt Sergeant Dawson also dislodged an unfired cartridge from the

chamber (R. 41,44,45,50-52; Pros. Exs. 8,9).

Deceased was found lying on the floor, a few feet inside the door of the hall. He was still alive, and was removed to the porch and covered with blankets, but upon arrival at the station hospital shortly thereafter was pronounced dead by Captain Theodore V. Gerlinger, Medical Corps, the surgical officer of the day. Cause of death was a gunshot wound in the lower right chest, which came out in the back of the left chest (R. 28,29,42,44,53).

Sergeant Dawson took accused and the three men who were merely wounded (see discussion of Charge II and Specifications, below) to the Station Hospital in a jeep (R. 42,52). Dawson made accused accompany him into the hospital. They were there about 10 minutes, during which time accused's actions were at all times normal, although accused said nothing, and was not examined until later. Accused was then taken to the stockade (R. 52,54-56, 69,71).

Upon Cross-examination, Lieutenant Goldstein testified that accused had been in his company for eleven months, had been "a very satisfactory soldier", and had never been known to leave his guard post before (R.15). Witness, however, "had reason to suspect" that accused smoked marijuana cigarettes. He described two instances when accused had either asked him for a cigarette, implying that he wanted something other than the ordinary commercial type, or had been found with a suspicious white, flaky, powder in his possession and had refused to give it up (R. 17-19). Private Willie L. Byrd, 437th Company, one of the witnesses to the shooting, testified that he had seen accused smoke marijuana cigarettes "lots of times", but had not seen him doing so on 22 March. Neither Byrd nor Lieutenant Goldstein had noted their effect on accused (R. 20,92,93). Byrd and another witness had seen accused at the PX between 2000 and 2030, but noticed nothing unusual about his actions at that time (R. 86,91). Lieutenant Goldstein did not know where accused might have obtained ammunition for the carbine (R. 20).

Charge II and its Specifications were proved by the testimony of the three men wounded, and by that of Captain Gerlinger and Major Aaron C. Ward, Medical Corps.

a. Specification 1.

Technician 4th Grade Enoch F. Jenkins, who did not know accused, had been at the dance for about 15 minutes. He was standing at a wall, observing the dance, when he heard a shot fired behind him, then felt that he was hit in his upper left arm. Thereafter he heard another shot fired (R. 65-67). The bullet was found to have entered above the elbow, traversing the soft tissue and lodging beneath the skin on the medial surface of the upper arm. It was removed the next day by Major Ward, marked by him, and offered in

evidence at the trial. Mr. Freeman A. Davis, an ordnance and ballistics expert, testified that it had been fired from an M-1 carbine (R. 30-32, 33-36, 38, 39; Pros. Ex. 7).

b. Specification 2.

Corporal Joe H. Wayne had witnessed accused's attempt to gain admission and deceased's refusal to allow him to do so (R. 56-62). He saw accused fire, but was struck in the right shoulder by the first shot. It passed through his shoulder, spun him around, and felled him to his knees. He was taken to the hospital in a jeep by Sergeant Dawson and Private Johnson (R. 59-61). Captain Gerlinger found that the bullet had entered the anterior surface of the shoulder, had passed through the top of the bone in the arm, and had come out low down on the chest wall in the back of the shoulder (R. 29).

c. Specification 3.

Private James C. Anderson had been in the club about five minutes, and was watching the dance, when he heard a shot fired, and then another immediately afterwards. The second hit him between the wrist and elbow of the right arm (R. 63-64). Captain Gerlinger found that the bullet had entered the arm, broken the radius, traveled downwards toward the hand and lodged between the radius and the wrist joint. It has not yet been removed (R. 30).

Evidence for the defense.

Defense counsel stated that accused's rights had been explained to him. Accused testified under oath in his own behalf (R. 96). Twenty-six years of age, he was born and "raised" in St. Louis, Missouri, and had one year of high school education. He suffers from an impediment in his speech. He had been in the Army for 16 months, and was a technician fifth grade and the company's sign painter at the time of the offenses (R. 97).

He testified that he had been on guard at PX Number 21 "from about 2030". At about 2100 the PX closed, and after he had helped the manager to pick up beer and soda water bottles, the manager allowed him to procure two pint bottles of beer. Accused took them outside with him and drank them. He had not eaten since 1645 (R. 97-99, 103).

He also smoked two and one-half marijuana cigarettes or "reefers", between 2000 and 2130 while on guard outside the PX. He started to walk to the Service Club, but remembered nothing after that. He did not know deceased nor any of the wounded men, did not remember picking up any bullets on the way (his clip was empty when he first went on guard), and did not remember that he had killed a man. He woke up the next morning in the stockade with bruises on his head and jaw (R. 98, 99, 102, 103, 105-111). He stated that he had been smoking marijuana cigarettes for the past five

or six years, on an average of ten a week while a civilian, and one or one and one-half every day in the Army (R. 98,99,104,105). He bought them from a Mexican in the negro quarter of Abilene for \$1 each. It requires "about a minute or * * * a minute and a half, at the highest" to smoke one cigarette, and about a minute until the desired reaction sets in. One cigarette "makes you feel kind of skipping in the head, * * * happy, just like you are floating on air". He would smoke a second one in order to increase and prolong this sensation (R. 99,101,106,109).

Private Walter Carlisle, 437th Company, had been in the company for three months, and slept in the bed opposite accused's. He had often seen accused smoking marijuana cigarettes, which he recognized from the unusual length, their strange smell, and the brown paper wrapping. It took from ten to fifteen minutes for accused to smoke one. Accused sometimes smoked two in close succession. After indulgence he was wont to make "kind of an unusual noise", a sort of clucking of the tongue. Witness heard accused making this noise about 1700 that afternoon, before he went on guard. Witness did not know whether accused had smoked marijuana that day. Accused was also in the habit of becoming silent and uncommunicative, and his eyes "keen and squinty" after smoking (R. 112-118). Corporal Edgar Alexander, 437th Company, slept in the same hut, in a bed near accused's, and had observed accused smoking some strange cigarettes. After doing so, accused's moods varied rapidly from moroseness and silence, to normal again (R. 119,120,122). Witness was Corporal of the first guard relief, which included accused, on the evening of 22 March. Accused "acted pretty peculiar, pretty jolly" at inspection, but witness did not talk to him, and in witness' opinion accused was qualified that night to carry out the duties of a sentry of the guard. He posted accused at Post Number 2, inside the PX, at 1830. The clip of accused's carbine was not loaded at that time (R. 120-127, 161-163). Accused was due to be relieved at 2030, but witness was delayed in relieving all of his nine or ten posts, and it appears that he had not yet reached accused when accused left his post. When the PX closed, it became the duty of the guard there to patrol in the immediate area (R. 126,163-166).

An almost entirely new aspect of the events leading up to the shooting was introduced by the testimony of two defense witnesses, which is best considered at this time. Miss Linnie Belle Washington of Abilene, was a guest at the dance, while Technician Fourth Grade Fred McDonald, Jr., was one of the members of the 434th Company who was present. Sergeant McDonald knew accused only by name, but Miss Washington had seen him several times in town in the theater and in taverns (R. 130,135,136,149,150). She was in the Service Club talking to another girl, whom she knew only as "Bernice", on the evening of the shooting, and noticed four soldiers at one of the opened back windows of the club. Two were inside, and two, one of them accused, were on the outside. Miss Washington recognized only accused. McDonald had seen all four, but did not know accused well enough to say that he was one of them. Two or three of them were dressed as guards, and had rifles (R. 131,

134,139-141,143,150-152). Accused said to one of the men inside that he wanted to come in (R. 131,146,147). After some conversation through the window one of the men inside told accused that he could come in, and said, "If they don't let you in, just take your rifle and shoot hell out of them". One of the men inside asked accused if accused had any ammunition, and accused replied that he had none (R. 131,134,135). Accused's companion on the outside said that he had some, and reached under his jacket, where he obtained a clip from a cartridge belt. This he handed inside, where one of the men inserted it in the piece, and handed the loaded weapon back out the window to accused. Miss Washington did not see any rifle passed in from outside, or see accused with a rifle until the loaded one was handed out through the window (R. 132,133,135,138,142,143,146).

Sergeant McDonald's version of the incident was somewhat different. He saw a rifle passed in through the window to one of the men inside, who had a clip. Witness did not know whether the clip was loaded (R. 150-152, 154,155,160). Someone on the inside said, "I am going out. If they don't let me in I am going to shoot one of them" (R. 150,153-155,157). The window was such a height from the ground that a man on the outside would have to crawl up in order to go through it (R. 153,157,158).

Miss Washington testified that after accused got the weapon he said, "I am going to make a scene if they don't let me in", and that the one who had loaded the rifle said, "If they don't, you start shooting" (R. 132, 137). Accused then left the window (R. 132,134). Meanwhile McDonald had walked up to Miss Washington and asked her to dance. As they moved out on the dance floor, she called McDonald's attention to what she had seen and heard, but he dismissed it as "latrine talk" among soldiers (R. 134,137,138,147, 150,152,153,157,158). The dance band had just begun to play its next selection when accused fired through the door. Miss Washington, who observed him, said that there were two shots, while McDonald heard, but did not see, four shots (R. 132,138,150,156,158). The two men inside the hall went out through the back window (R. 132).

Evidence in rebuttal.

The prosecution introduced as its rebuttal witness Captain Howard B. Sutton, Medical Corps, Station Hospital, Camp Barkeley, Texas. He had been the admitting officer at the hospital on the night of 22 March. He immediately sent the three wounded men for surgical treatment, and made two examinations of accused. The first appears to have been a casual observation after taking care of the wounded. The second took place about an hour later, when accused was brought back for about 15 minutes (R. 174,175,176, 180,183). Captain Sutton's testimony was of two kinds, - his personal observations of accused's conduct and demeanor in the hospital, and testimony concerning the nature and effects of marijuana. The defense objected strenuously to witness' qualifications as an expert, but were overruled. The court's ruling will be discussed below.

a. Witness' qualifications.

Captain Sutton had been a licensed physician for 7 years. He specialized in genito-urinary surgery, and was not a toxicologist. He had, however, had occasion to study the effects of marijuana upon human beings. His sources of information were textbooks and articles, exchange of observations with experts, and personal observations of some 8 or 10 of his own patients, civil and military (R. 167-171).

b. Symptoms and effects of using marijuana.

The effect of narcotics on their user, witness stated, depends upon the type of drug used (R. 170). Although classed as a narcotic drug, marijuana is not habit-forming in the sense in which other narcotics are so described, in that it does not produce in the user a tolerance or an addiction. Rather, the user returns to it solely in order to reexperience the pleasant sensations obtained from its use, and in this respect his liking for it resembles a desire for alcoholic drink (R. 181,186,191,193). The effect of marijuana, short of an overdose resulting in a poisoning of the whole system, is an elation, a sense of prolongation of time, and an impression of detachment of the mental faculties from the physical. There is no stoppage or impairment of the faculty of memory (R. 181). Within the above limitations, the effect of smoking marijuana depends upon and varies with the personality of the user, tending to bring into sharper relief the salient features thereof (R. 171,172,185, 188). If a person smokes two or three or more cigarettes, he develops a sort of intoxication, much like that from alcohol. This intoxication is particularly reflected in dilation of the pupils of the eyes, which may remain dilated "for the greater part of twelve hours", the intoxication effects sometimes lasting as long as twenty-four hours (R. 172,173,184). There may be other effects such as the locomotive paralysis found in alcoholic intoxication, or none at all (R. 173). A fifteen or twenty-minute examination of a patient is sufficient to show whether he is under the influence of intoxicants (R. 180).

c. Witness' observations of accused.

Upon examination accused did not exhibit any signs of being under the influence of marijuana. Witness asked accused whether he had been smoking it only because of the violent nature of the crime and because he knew of the tendencies of some negroes to use it. At first accused denied having smoked marijuana, but later said that he had smoked one cigarette which he had made himself from a leaf which he picked from the plant (cannabis sativa) growing by a roadside (R. 177,182,186). The pupils of accused's eyes appeared normal, and were not dilated. A moderate amount of marijuana would not produce dilation (R. 175,187,189). If accused had smoked enough to produce an intoxicating effect, however, this effect would still have been observable at the time of witness' examination (R. 182).

There was no evidence on accused's breath of liquor, and in response to witness' question accused first refused to answer, then later denied that he had been drinking, stating that he had had only two bottles of beer. It was stipulated that a test for alcohol in accused's blood showed none (R. 174-177, 188,194). He walked about the room in a normal fashion (R. 176). Accused refused, or "did not bother to answer" most of witness' questions. He was not excited, but was coherent and "showed no instability of speech" in what he did say (R. 177,185,189,190,192). He talked to the laboratory technician who took the specimen for the blood test, and when asked by Captain Sutton why he had shot deceased, replied that he did not know (R. 174,190).

4. The evidence is uncontradicted that accused was detailed as a sentry of the guard on the night of 22 March 1944, and that before being relieved of that duty (although some few minutes after the time when he would ordinarily have been relieved) he appeared at a Service Club within the camp, where an enlisted men's dance was in progress. It is likewise clear that upon being refused admittance to the dance because he was in guard uniform and because he was not a member of the company which was sponsoring the affair, he raised a carbine which he had with him and fired at least two shots, probably three. The bullets passed through the door of the building. One soldier inside was killed and three were wounded.

There is other evidence, not quite so conclusive, that the act was suggested to accused by two soldiers already in the dance hall, one of whom may have supplied accused the fatal ammunition, as a result of a previously unsuccessful attempt by accused to gain entrance.

Accused stated that he had drunk two bottles of beer and had smoked 2-1/2 marijuana cigarettes within a short space of time prior to the hour of the shooting, and that he remembered absolutely nothing after finishing his smoking.

Finally, there is rebuttal testimony of the physician who saw accused within two hours after the shooting, who was familiar with both the physical and mental effects of marijuana, and who testified that accused showed none of the signs ususally exhibited by marijuana smokers, and who further testified that the use of marijuana does not produce either stoppage or impairment of memory.

5. The Board of Review has concluded without doubt or hesitation that accused's offenses constitute murder, with respect to Charge I and its Specification, and assault with intent to murder with respect to Charge II and its three Specifications. Murder is the unlawful killing of a human being with malice aforethought. Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The intention to kill or do grievous bodily harm need only exist at the time the act is committed, and may be presumed

from the use of a dangerous weapon such as that here used by accused.

All of these requirements are fulfilled by the prosecution's evidence standing alone. The motive in accused's mind is clearly supplied by King's refusal to admit him to the dance, and supplemented by deceased's active concurrence in that refusal. This latter fact also supplies the added element of an actual ill-will towards deceased. Under no construction of the evidence can it be said that deceased's act of closing the door upon accused constituted provocation sufficient to reduce the degree of guilt to manslaughter, nor did the defense so much as contend that it did.

If, however, we consider also the defense evidence offered by Miss Washington and Sergeant McDonald, an actual intent to do grievous bodily harm is shown more concretely than even the strongest possible inference. Accused himself expressed the intention of making a scene if he were not admitted. That the ammunition was supplied to him and the actual thought of shooting placed in his mind by some other soldiers, evilly bent upon mischief, is no defense whatsoever, and on the other hand shows beyond all doubt that the malice and premeditation did exist in accused's mind.

Finally, there is the question of accused's mental status. He does not plead insanity, nor even intoxication, but a complete and blank forgetfulness from the time he finished smoking the cigarettes until he woke up in the stockade the next morning. The court was not required to believe this story, or lack of it. There is nothing in the record which requires, or even suggests that it is worthy of belief. It is true that accused and witnesses for both sides testified that he was a smoker of marijuana cigarettes. None, however, other than accused, testified that he had smoked any that day. The doctor who examined accused within two hours after the shooting, the sergeant who took him into custody, two witnesses who had seen him between 2000 and 2030, and the corporal who placed him at his post at 1830, all testified that his actions were those of a normal man in his right senses. All this was competent, first-hand, information. And finally, there was expert testimony by the same doctor that accused showed none of the signs of narcotic intoxication, that accused claimed to have smoked only one cigarette, that he was at that time aware of what he had but recently done, and that marijuana does not produce an impairment or stoppage of memory. Upon the record and upon all reasonable inferences to be drawn therefrom, accused is guilty of murder.

He is likewise as clearly guilty of assault with intent to murder Jenkins, Wayne and Anderson.

"* * * Where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group." (M.C.M., 1928, p. 179)

6. The Board of Review holds that the expert testimony of Captain Sutton concerning the effects of marijuana was properly admitted.

"A witness, to qualify as an expert, must have acquired such special knowledge of the subject matter about which he is to testify, either by study of the recognized authorities on the subject, or by practical experience, that he can give the jury assistance and guidance in solving a problem to which their equipment of good judgment and average knowledge is inadequate * * * He must * * * show that he possesses special knowledge as to the very question on which he proposes to express an opinion. This does not mean, however, that he must be more proficient on this subject than on any other within his field * * * He need not be thoroughly acquainted with the differentia of the specialty under consideration * * * A general knowledge of the department to which the specialty belongs would seem to be sufficient * * * if the court is satisfied that he has in some way or other gained such experience in the matter as to entitle his evidence to credit". (2, Wharton, Criminal Evidence, 11th ed., sec. 959. Underscoring supplied.)

"The question of the qualification of an expert witness rests largely in the discretion of the trial court * * *. Except in an extraordinary case, an appellate court will not reverse on account of a mistake of judgment on the part of the trial court in determining qualifications of this class. (id., sec. 968.)

7. The Charge Sheet shows that accused is 26 years old. He was inducted at Jefferson Barracks, Missouri, on 9 January 1943 with no prior service, to serve for the duration of the war and six months. He was a technician, fifth grade, at the time the offenses were committed.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The death penalty is authorized upon conviction of murder in violation of Article of War 92.

Irving A. Lyon, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
William M. Mays, Judge Advocate.
Samuel Conroy, Judge Advocate.

1st Ind.

War Department, J.A.G.O., **29 SEP 1944** - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Fred Hurse (37409681), 437th Quartermaster Gasoline Supply Company, Camp Barkeley, Texas.

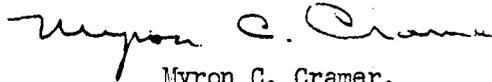
2. Accused was found guilty of the murder of one soldier in violation of Article of War 92, and of three offenses of assault with intent to commit murder on three other soldiers in violation of Article of War 93. He was sentenced to be hanged. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. On 7 August 1944, seven of the eleven members of the court which tried accused reconvened in revision proceedings to determine whether the vote of the court on the original findings of guilty of the Specification, Charge I, and Charge I alleging murder in violation of Article of War 92 was with the concurrence of all of the members present at the time the vote was taken. The duly authenticated record of such proceedings in revision affirmatively shows that upon the original hearing, all members present at the time the vote was taken, did concur in the findings of guilty of Charge I and its Specification alleging murder in violation of Article of War 92. Thus the vote upon the findings of guilty is in conformity with the recent decision of the United States District Court of South Carolina in the case of Hancock v. Stout. There is no reason why the President may not now confirm the sentence of take such other action as he may deem proper.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. In view of the nature of accused's offenses, I recommend that the sentence be confirmed and carried into execution.

4. Consideration has been given to letters addressed to the Judge Advocate General by the Honorable Bennett Champ Clark, the Honorable Harry S. Truman, United States Senate, the Honorable John J. Cochran, Member of Congress, and the Honorable Louis B. Miller, Member of Congress, all inclosing letters from Mrs. Lois Hurse and Mrs Ethel Hurse, accused's wife and mother, requesting clemency, and to a letter addressed to the President by Mr. S. L. Boyd of St. Louis, Missouri, to the same effect.

5. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive

action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



Myron C. Cramer,
Major General,
The Judge Advocate General.

8 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. ltr. for sig. S/W.
- Incl 3 - Form of Executive action.
- Incl 4 - Ltr. fr. Hon. Bennett C. Clark.
- Incl 5 - Ltr. fr. Hon. Harry S. Truman.
- Incl 6 - Ltr. fr. Hon. John J. Cochran.
- Incl 7 - Ltr. fr. Hon. Louis E. Miller
- Incl 8 - Ltr. fr. Mr. S. L. Boyd.

(Sentence confirmed. G.C.M.O. 13, 6 Jan 1945)



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

(121)

SPJGF

CM 257632

UNITED STATES)

v.)

Lieutenant Colonel FRANK C.
GREULICH, 0218733, Air Corps,
Army Air Forces Materiel
Command)

Major WALTER A. RYAN,
0267858, Air Corps, Army
Air Forces Materiel Command)

Major WILLIAM BRUCKMANN,
0190118, Air Corps, Army
Air Forces Materiel Command)

30 SEP 1944

FIFTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G. C. M. convened
at Cincinnati, Ohio, 3-26
April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER, and CONNER, Judge Advocates

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

2. The accused were tried at common trial upon separate, but corresponding, Charges and Specifications as follows:

As to Lieutenant Colonel Greulich:

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

Specification 1: In that Lieutenant Colonel Frank C. Greulich, Air Corps, then Captain or Lieutenant Colonel, Air Corps, being Inspection Officer, Central Procurement District, or Chief, Inspection Section, Materiel Division or Center, Army Air Forces, having been charged with the duties of said offices, including among other things, supervision of the Army Air Force inspection activities at the Wright Aeronautical Corporation plant,

Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about May 1942 to about March 1943, wrongfully neglect his duties aforesaid by failing properly to supervise the aforesaid inspection activities, resulting in improper inspection practices and faulty inspection at the said plant.

Specification 2: In that Lieutenant Colonel Frank C. Greulich, Air Corps, then Chief, Inspection Section, Materiel Center, Army Air Forces, having been charged with the duties of said office, including among other things, that of keeping his superior officers informed on all inspection matters at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about October 1942 to about March 1943, despite notice to him of improper inspection practices and faulty inspection at the said plant, wrongfully neglect his duties aforesaid by failing to inform his superior officers thereof.

Specification 3: In that Lieutenant Colonel Frank C. Greulich, Air Corps, then Chief, Inspection Section, Materiel Center, Army Air Forces, having been charged with the duties of said office, including among other things, the supervision of the Army Air Force inspection activities and the establishment of the inspection procedure at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about October 1942 to about March 1943, despite notice to him of improper inspection practices and faulty inspection at the said plant, wrongfully neglect his duties aforesaid by failing to take or cause to be taken the necessary corrective action.

Specification 4: (Finding of Not Guilty).

Specification 5: (Finding of Not Guilty).

CHARGE II: (Findings of Not Guilty of Charge II and of each of the four Specifications thereunder).

As to Major Ryan:

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

Specification 1: In that Major Walter A. Ryan, Air Corps, then Captain or Major, Air Corps, being Inspection Officer, Central Procurement District, Army Air Forces, having been charged with the duties of said office, including among other things, supervision of the Army Air Force inspection activities at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about July 1942 to about March 1943, wrongfully neglect his duties aforesaid by failing properly to supervise the aforesaid inspection activities, resulting in improper inspection practices and faulty inspection at the said plant.

Specification 2: In that Major Walter A. Ryan, Air Corps, being Inspection Officer, Central Procurement District, Army Air Forces, having been charged with the duties of said office, including among other things, that of keeping his superior officers informed on all inspection matters at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about October 1942 to about March 1943, despite notice to him of improper inspection practices and faulty inspection at the said plant, wrongfully neglect his duties aforesaid by failing to inform his superior officers thereof.

Specification 3: In that Major Walter A. Ryan, Air Corps, being Inspection Officer, Central Procurement District, Army Air Forces, having been charged with the duties of said office, including among other things,

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the supervision of the Army Air Force inspection activities and the establishment of the inspection procedure at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about October 1942 to about March 1943, despite notice to him of improper inspection practices and faulty inspection at the said plant, wrongfully neglect his duties aforesaid by failing to take or cause to be taken the necessary corrective action.

Specification 4: (Finding of Not Guilty).
Specification 5: (Finding of Not Guilty).
Specification 6: (Finding of Not Guilty).

As to Major Bruckmann:

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

Specification 1: In that Major William Bruckmann, Air Corps, then Captain or Major, Air Corps, being Army Air Force Resident Representative, Wright Aeronautical Corporation plant, Lockland, Ohio, having been charged with the duties of said office, including among other things, supervision of the Army Air Force inspection activities at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about March 1942 to about March 1943, wrongfully neglect his duties aforesaid by failing properly to supervise the aforesaid inspection activities, resulting in improper inspection practices and faulty inspection at the said plant.

Specification 2: In that Major William Bruckmann, Air Corps, being Army Air Force Resident Representative, Wright Aeronautical Corporation plant, Lockland, Ohio, having been charged with the

duties of said office, including among other things, that of keeping his superior officers informed on all inspection matters at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about October 1942 to about March 1943, despite notice to him of improper inspection practices and faulty inspection at the said plant, wrongfully neglect his duties aforesaid by failing to inform his superior officers thereof.

Specification 3: In that Major William Bruckmann, Air Corps, being Army Air Force Resident Representative, Wright Aeronautical Corporation plant, Lockland, Ohio, having been charged with the duties of said office, including among other things, the supervision of the Army Air Force inspection activities and the establishment of the inspection procedure at the Wright Aeronautical Corporation plant, Lockland, Ohio, designed to assure the delivery by said corporation to the United States of aircraft engines and parts suitable for the intended purpose in accordance with contractual requirements and Army directives, did, during the period from about October 1942 to about March 1943, despite notice to him of improper inspection practices and faulty inspection at the said plant, wrongfully neglect his duties aforesaid by failing to take or cause to be taken the necessary corrective action.

Specification 4: (Finding of Not Guilty).

Specification 5: (Finding of Not Guilty).

Specification 6: (Finding of Not Guilty).

Each of the accused pleaded Not Guilty to all the Charges and Specifications, except that Lieutenant Colonel Greulich is reported so to have pleaded to "the Charge", rather than the Charges, which error is harmless in the case. Each was found Guilty of Charge I and Specifications 1, 2, and 3 thereof as applicable to each; otherwise, Not Guilty. No evidence of previous convictions was introduced. Each was sentenced to be dismissed the service. The reviewing authority approved the sentences and forwarded the record of trial under Article of War 48.

3. The length of the record and the complexity of the testimony necessitate a departure from the prescribed form of Board of Review opinions. We will not attempt to cover in detail the mass of evidence, and will omit references to pages of the record and to exhibits by number. Attached to the opinion as Appendix A is a detailed summary of the evidence prepared in "rough". Appendix A includes page references. As an aid to clearness and conciseness, we will state conclusions drawn from the testimony where warranted. The accused will be referred to by their last names unaccompanied by their respective grades, and, in general, the complete names of witnesses will not be given.

Each accused testified in his own behalf, but the nature of the record makes it impracticable to set forth separately a summary of all of the testimony of each, and parts of it appear at various places in the factual summary. The balance will be treated separately.

4. Summary of the evidence.

This case arises out of conditions alleged to have developed in the inspection system at the Lockland, Ohio, plant of Wright Aeronautical Corporation (hereinafter referred to as Wright), near Cincinnati. Wright's home plant is at Paterson, New Jersey. The Lockland plant commenced operations during 1941, and manufactured for the United States Government the Wright Cyclone airplane engine, model R-2600 B. Contracts for the production of these engines involved well over a billion dollars, and resulted in rapid expansion of the plant prior to and during the period alleged in the Specifications. From an output of 443 engines produced in 1941, the figure rose to 11,504 in 1942 and 16,747 in 1943. Plant personnel increased from 3385 in July, 1941 to 27,959 in March, 1943. There was a rapid turnover of employees, due partly to losses to the armed services.

Poehlmann, a man of many years' experience in Wright airplane engines, was appointed Quality Manager at the Lockland plant, and as such had charge of company inspection there. He received copies of production schedules, which it was desired that the company maintain.

The Materiel Command, with headquarters at Wright Field, Dayton, Ohio, administered the procurement program of the Army Air Forces. Brigadier General Arthur W. Vanaman was in command. The Central Procurement District, with headquarters at Detroit, Michigan, was one of several procurement districts included in the Materiel Command. Colonel Alonzo M. Drake was in command as District Supervisor. The District was responsible for the execution of all field functions of the Materiel Command within the District, including inspection, and each plant therein was under the District's supervision. The Lockland plant was one of several thousand in the Central Procurement District, which comprised about fifteen states and the Dominion of Canada.

On the Staff of the Materiel Command there was an Inspection Section, charged with the functions of the Command relating to inspection, and under each District Supervisor there was an Inspection Section, headed by a District Inspection Officer.

The accused Greulich, an experienced airplane engine mechanic and inspector, with long service as a civilian Government inspector, was called to active duty on his Reserve Commission in 1942, and assigned as District Inspection Officer in the Central Procurement District on 18 May 1942, serving until 26 July 1942, when he was relieved by accused Ryan and assigned to the Inspection Section of the Materiel Command at Wright Field. After serving briefly as an assistant, he became Chief of the Inspection Section. As such his immediate superior was Brigadier General Vanaman. Since he served only a short time as District Inspection Officer, and the prosecution's case is referable to him as Chief of the Inspection Section, we will consider primarily his activities in the latter office.

The accused Ryan, who, as already noted, succeeded Greulich as District Inspection Officer on 26 July 1942, was an experienced inspector of airplane engines, having worked for Wright for several years and thereafter as an Army Air Corps civilian inspector. As District Inspection Officer, he was under the immediate command of Colonel Drake.

At each major plant in the District, an Army Air Forces Resident Representative was assigned. The accused Bruckmann held this position at the Lockland plant, where he was the only member of the Army on duty. Although a graduate of Purdue University in electrical engineering, he had spent the major portion of his career in his family's brewery business in Cincinnati and undoubtedly had no expert knowledge of gasoline engines. He reported to Lockland as Resident Representative on or about 16 March 1942. Colonel Drake, the District Supervisor, assigned him and was his immediate superior.

Ray W. Clark was Inspector in Charge at the Lockland plant. That title denotes the chief Army Air Forces inspector at the plant and is a civilian job. Ray Clark and his two Assistant Inspectors in Charge, McLaurin and Burleaud, were experienced men in airplane engine inspection.

Functions and Duties

The evidence relating to the functions, duties, and activities of the three accused and of certain other key witnesses is contained for the most part in a series of documents issued by the Inspection Section of the Materiel Command. Although these documents bear various names, we will refer to all of them by the generic term "directives." It was stipulated that the directives received in evidence were promulgated and distributed upon the dates which they bear.

Greulich: - As already noted, Greulich was Chief of the Inspection Section of the Materiel Command. That Section was charged in general with the duties of the Command relating to the inspection and acceptance of aircraft and aircraft parts, and with the supervision of the Command functions relating to the establishment of inspection procedure and the conduct of inspection, including the training of inspectors, execution of policies and instructions, etc. The Section was charged with the duty of making recommendations on inspection activities and personnel and of advising the Commanding General of the Materiel Command on inspection matters. It also had the duty of supervising standardization of inspection methods and procedure throughout all Districts. Provision was made for the issuance of Inspection Section directives, and the inspection personnel were charged with the responsibility of executing the instructions contained therein. The activities at Wright Field (Materiel Command Headquarters) were not to interfere with the detailed manner in which the Field Organization performed its functions. Greulich had no power of command over the District Supervisor, nor over the District Inspection Officer (Ryan), nor over the District Supervising Inspector, to whom reference will be made hereinafter.

Ryan: - As District Inspection Officer, Ryan was directly responsible to the District Supervisor for the direct supervision of all inspection matters within the District. He was directed to co-ordinate with and advise Resident Representatives and Inspectors in Charge on all inspection matters, including the establishment of adequate inspection staffs and satisfactory quality control in the plants under his jurisdiction. He or his representative was to visit factory organizations in the District at least once every sixty days and render a report on each to the District Supervisor. A copy of this report was sent to the Chief of the Inspection Section, Materiel Command. However, it was not required by directives that plants which had received an "A" Quality Control rating be visited regularly, but they were to be surveyed on request from the Resident Representative or Inspector in Charge or on special order. An explanation of the "A" Quality Control rating appears subsequently in this opinion. The directives also charged Ryan with the duty of making final decisions on inspection matters submitted to him or referring such matters to higher authority when necessary, and with the duty of making recommendations to the District Supervisor on assignments and replacements of inspection personnel.

Bruckmann: - As Resident Representative, Bruckmann was an assistant to the District Supervisor and directly responsible for the functioning of the Air Corps factory organization at the Lockland plant. Under one directive, it was expected that the Resident Representative would decide inspection questions not involving weight, change in design, performance, or cost. The same directive encouraged initiative on the part of Resident Representatives and stated that their responsibility was greatly increased due to maintaining the quality desired, in the face of the

necessity for quantity production. In the various Districts the Materiel Command established a number of Area offices, which were to take charge of plants having no Resident Representative. Each of these offices was under an Area Supervisor. Although the Area Supervisor had no control or supervision over the Resident Representative in a plant within the Area, Resident Representatives were directed to co-ordinate with the Area Supervisor in order to handle all matters of mutual concern locally without reference to District Headquarters, insofar as this was possible.

When Colonel Drake assigned Bruckmann as Resident Representative, he did not discuss specifically the subject of inspection. He told Bruckmann to come to him when necessary, but not for normal routine matters, and to keep him advised of the over-all situation. According to Bruckmann, Colonel Drake also told him to use his best judgment. Before assuming his duties as Resident Representative, Bruckmann visited District Headquarters and talked to Greulich, then District Inspection Officer, who explained the functions and purposes of the inspection activities, but told Bruckmann not to "monkey" with inspection until he learned the office and knew something about it. Bruckmann did not consider that he had anything to do with inspection in the sense of passing upon the acceptance or rejection of parts, although in a letter to his tire ration board he listed his duties as including a number of inspection activities, apparently copied from a directive on the subject which had been superseded at the time.

Charles F. Fidler: - Fidler was Control Chief of the Engine and Propeller Branch under the District Inspection Officer, and an experienced Army Air Forces inspector.

M. T. Clark: - M. T. Clark, an Army Air Forces inspector for many years, and an experienced airplane engine man, was appointed District Supervising Inspector of the Central Procurement District, and as such was assistant to the District Inspection Officer. He had the duty of co-ordinating with factory organizations and Inspectors in Charge in order to insure the carrying out of proper inspection policies, methods, and procedures. He made periodic trips to the various plants within the District and reported upon conditions there. He was to investigate the relations between the contractor and the Army inspection forces, and the inspection facilities and conditions, and to effect necessary corrections. He was also to make certain that the Resident Representative understood and complied with directives. He rendered reports to the District Inspection Officer. In making his reports he obtained the information from inquiry and observation. At the Lockland plant he customarily talked with Ray Clark and a number of inspectors, and made a trip through the plant, checking on equipment and inspection procedure. He also talked with the Resident Representative. Greulich had no authority over M. T. Clark. At one time Ryan had worked under Clark and there had been personal differences between them.

Charles W. Bond: - In addition to duties as Supervising Inspector in the Eastern District, Bond was detailed as Technical Supervisor or Technical Advisory Inspector for the purpose of co-ordinating and standardizing inspection procedure at all Wright plants. He was to co-ordinate with the District Inspection Officer and the Resident Representative or Inspector in Charge, and was to function in an advisory capacity only, making his recommendations through channels. He was "under" Greulich and "over" Ray Clark. Fidler was his brother-in-law. Bond never recommended to Ray Clark any changes in inspection procedure.

Ray W. Clark: - As already noted, Ray Clark was Inspector in Charge at the Lockland plant. As such he was responsible for satisfactory inspection, acceptance, and packing, promotion of harmony among the inspection personnel and the contractor's personnel, and supervision of inspection personnel. He was to assist the contractor in establishing and maintaining a satisfactory quality control. Bruckmann was his immediate superior, and M. T. Clark, Bond, and Fidler were "over" him in the inspection system.

A directive issued by the Central Procurement District provided that "matters of unusual importance" were "without exception" to be brought immediately to the attention of the District Supervisor.

Contractual Provisions and Directives Relating to Inspection.

The contractual provisions relating to inspection are general in nature. Materials were required to be of high quality and suitable for the purpose, and workmanship and finish on all parts to be in accordance with high grade engine practice. A series of directives, most of which were promulgated several months or more before the period covered by the present charges, may be summarized as follows: War acceleration of production requires Air Corps inspectors to approach their duties with a broader viewpoint and demands a very liberal attitude concerning quality. There is a need for maximum production of usable articles. Standards of workmanship naturally will be lowered, and materials may be accepted where deviations from specifications do not affect serviceability. Superfine finishes are superfluous, and should not be required unless demanded by specifications. Safety and utility must be the deciding factors in acceptance of parts, and articles must be sound and airworthy. Added surveillance must be exercised to keep from falling below minimum safety standards. The Air Corps inspector must exercise "opposite qualities of rigidity and flexibility." He must require the manufacturer's inspection organization to follow the exact standards of quality as established, but in connection with Salvage Committee action, must apply a very liberal attitude, during which safety and utility are the deciding factors. (As will be explained more fully hereinafter, the Salvage Committee decided which parts deviating from specifications should be accepted.)

The directives went on to say that the basic foundation of Air Corps inspection is supervisory control over the contractor's inspection

methods, and that Air Corps inspection should not parallel contractor's inspection. The responsibility of the Air Corps inspector is to determine initially that the manufacturer's inspection control is adequate, and then see that it remains adequate. The directives stressed the point that the Government would normally encounter little difficulty in maintaining proper standards in the case of older and more experienced manufacturers. The fullest use was to be made of established and proven manufacturing procedures and standards, using experienced field representatives from parent companies. Parenthetically, it may be stated at this point that Wright sent experienced representatives from Paterson to establish the Lockland plant.

Decisions of Army Air Forces inspectors were subject to review by higher authority, and inspectors were given a right of appeal. They were admonished to be loyal to their superiors and to uphold them in all their activities for the Government.

On 1 October 1942, a circular was issued by the Central Procurement District directing that although specification requirements had been liberalized on finish, workmanship, and interchangeability, there was to be no relaxation on quality. The directive stated that "the Inspection Section cannot concur in the adoption of any procedure that may lend itself to the possibility of the incorporation into aircraft of inferior or defective materials."

The "A" Rating

Manufacturing plants which had established their inspection systems upon a basis satisfactory to Army inspection authority received an "A" rating on quality control. The effect of the A rating, as set forth by the Inspection Section, may be summarized as follows:

(a) The contractor may now be entrusted with full responsibility that his products meet established requirements; (b) Duplication of inspection will now be eliminated, and Air Corps inspection will be confined to general supervision of the contractor's inspection; (c) Air Corps inspectors, while spot-checking to maintain confidence in the contractor's inspection system, will be called upon principally to render decisions on questionable parts or assemblies. Army inspectors are to supervise for the purpose of assuring maintenance of standards after the granting of the A rating.

The directives urged as "imperative" that contractors be placed upon an A rating as rapidly as possible, and stated that failure to do so would call for explanation and corrective measures. Continuation of the A rating status depended upon the Resident Representative's confidence in the contractor's system.

Major Lyon, Bruckmann's predecessor as Resident Representative, had reported by letter to the District Supervisor that in his opinion the Lockland plant would not be ready for the A rating for more than a year. His last report to that effect is dated 13 April 1942. Major Lyon believed that copies of the letters were in the file at Lockland.

In March 1942, after a visit to the plant, Bond reported that the plant would be eligible for the A rating in the near future, and both he and Poehlmann requested Ray Clark to approve it. The Paterson plant had already received such a rating.

On 8 July 1942, upon the recommendation of Ray Clark, Bruckmann approved the granting of the A rating, having read the directives concerning the policies in connection therewith. Ray Clark told Burleaud that except for pressure brought upon him by Bond, he would not have approved the rating.

Neither Greulich nor Ryan had any connection with the matter.

Renewal of the Production Award.

On 21 January 1943 Bruckmann wrote a letter to the Army Board for Production Awards at the Materiel Center, recommending the renewal of the Production Award for the Lockland plant, and in March 1943 Fidler prepared a favorable third indorsement thereto which Ryan signed, although the first indorsement, signed by one Lieutenant Colonel A. E. Howse, deferred action pending a showing of better progress in the improvement of the company's quality. Fidler admitted that at the time of his drafting and approving the indorsement, M. T. Clark, in Ryan's presence, showed him certain paragraphs of the minutes of the M. T. Clark meeting (referred to more fully herein-after), inferring that money was being paid for the approval of dangerous airplane parts, and also the minutes of the inspectors' meeting called by Ryan at the plant on 11 January 1943 (also discussed hereinafter).

Ryan testified that Fidler brought the indorsement for his signature and that he signed it because, from the official reports of M. T. Clark and Bond (not including the above-mentioned minutes which he claimed not to have seen) and his visit to the plant in January, he believed that conditions were satisfactory. In a statement before Lieutenant Colonel Outcalt, read into the record, Ryan denied any recollection relative to consulting records before signing the indorsement and said that he did not know "why the hell it was written".

It is to be noted that the production award has no relation to the continuance of the A Quality Control in a manufacturing plant.

The Inspection System.

The inspection system, both company and Army, followed the pattern in use at the company's home plant at Paterson, as required by directives,

and was installed and headed by experienced personnel sent from Paterson for the purpose, the company's force under Poehlmann and the Army's under Ray Clark.

The malpractices which were the subject of complaint in the case arose from acts and omissions of personnel concerned in the application of the system to practical inspection at Lockland, and not from any deficiency shown to be inherent in the system.

The Wright engine consists of some three thousand parts, composed of about eighty-five hundred units, and involves some fifty thousand inspection operations on each engine. Through the period involved in this case, from fifty to seventy-five Army inspectors and from 1291 to 3698 company inspectors were employed, the number increasing as the plant expanded. Turnover among company inspectors was about forty percent.

Army inspection was essentially supervisory, not to parallel company inspection of parts in detail, but to assure the maintenance of proper inspection by the company and pass upon questioned parts detected in the course of company inspection. Each inspector was to make his independent decision, subject to the ruling of higher authority. Appeal in cases of dissatisfaction was contemplated and authorized.

Parts manufactured at the plant or procured from vendors were subjected to various tests and inspections. The engine was then assembled. Each engine was given a "green run" for several hours and thereafter disassembled for complete inspection of parts. Any necessary corrections or rework were made before reassembly. "Penalty" runs were required to assure the elimination of defects discovered. Final runs after final assembly tested the performance of each engine.

Parts found to deviate from drawings or specifications beyond stated tolerances were sent to the Salvage Department for determination of their acceptance or rejection for use in engines or as spare parts. If the parts passed salvage inspection by the company, Army inspectors made the final decision.

Inspection operations occurred, similar in character but varying in manner and detail, in manufacturing, assembly, salvage, acceptance of parts received from vendors, and in packing and shipping.

Each part, as it moved through the plant, was required to be identified by accompanying "paper work" showing the action of company and Army inspectors. "Hold tickets" were used to refer questioned parts for action of the Salvage Department. Orders for transfer of parts to finished stores required signature by an Army inspector before the "A" rating, but passed on company inspector's signature, under Army "spot-check" supervision, thereafter.

Improper Practices and Faulty Inspection

Specification 1 of Charge I against each accused alleges wrongful neglect of duty by failing properly to supervise the Army Air Forces inspection activities at Lockland, "resulting in improper inspection practices and faulty inspection at the said plant." Out of a mass of evidence pro and contra, evidence introduced by the prosecution was sufficient to establish the existence, at some time and in some degree, of each of the following conditions:

(a) An undetermined number of cracked master rods and master rod bearings were placed in the "kitty," from which parts were taken for installation in final engines. Bond ordered the Army inspectors to accept the company's decision on whether these parts were cracked. In the words of Ray Clark, Bond and the Paterson plant "worked to put" master rods "into the Cincinnati plant," which Clark thought should have been turned down. The cause of cracking received diligent engineering study and was corrected.

(b) Some engines leaking gasoline and some leaking oil were accepted. The leaks were minor in degree. It was contended that they were harmless, but there was evidence that they were objectionable. After repair, some of these engines were not retested.

(c) Gears were accepted without complete dimensional inspection, and blueprint tolerances were exceeded, under instructions from superiors. A number of "galled" gears were accepted by order of Ray Clark, despite prior rejection by inspectors, which rejections had caused a number of engines to be tied up in the "hospital."

(d) Results of tests for tensile strength of aluminum used in cylinder heads were misrepresented on laboratory records by direction of a company supervisor. The supervisor testified that he was working under pressure from the foundry not to reject too many heats.

(e) Castings, which the X-ray laboratory recommended for rejection and which in the opinion of some witnesses should not have been put into engines, were accepted by the Salvage Department under orders of company executives, Poehlmann having said, "To hell with the laboratory; I am running this place." To McMahan, Chief of Army inspection in the foundry, Ray Clark stated that all McMahan needed to know about the laboratory was its location.

(f) Crankshafts, which some inspectors thought should have been rejected, were accepted and went into final engines. When Hunter, head of the company Salvage Department, upbraided Poehlmann for accepting them, the latter told him that times had changed.

(g) Parts rejected by Army inspectors, which they thought should have been scrapped, turned up later on the production line, and parts which Ray Clark thought should have been scrapped were allowed to go into engines.

(h) Company inspectors were instructed by their superiors to pass certain rejectable parts unless they were caught by Army inspectors.

(i) Company inspectors used "mating parts" instead of precision gages to test dimensions, and inspected parts without reference to blueprints. Inspection by mating parts consists of comparing a part with its complementary part.

(j) Lists of permissible deviations approved by the Engineering Department were furnished to vendors in order to save correspondence. This encouraged vendors to manufacture to salvage tolerances rather than to blueprint requirements. Gradually parts exceeding the approved deviations were received and used.

(k) Figures marked on hold tickets by inspectors were altered in the Salvage Department to show compliance with tolerances. The defense explained that different gage readings and the use of more precise instruments in the Salvage Department accounted for such changes.

(l) Company personnel skipped inspection operations and accepted rejectable parts when particular types of parts were "hot"; i.e., badly needed.

(m) Many "far from perfect parts" were placed in the "kitty."

(n) Parts rejected by one shift were held over for another shift and accepted.

(o) Ray Clark warned one of the Army inspectors that Wright was "a very powerful corporation," and that he would be "sent away" if he was too good an inspector. He told another inspector that his (Clark's) hands were tied so far as rejection of material was concerned, and he admitted that in a great many instances, Bond "reflected the wishes of" Wright.

(p) Sometimes when an Army inspector tried to reject a part, three or four company men would "throng around him" and try to argue him down.

(q) Under Ray Clark's orders, Burleaud passed parts which he considered defective. Ray Clark knew they were bad, and accepted them because he knew that Bond would force him to do so anyhow.

(r) Burleaud stated that after the A rating production increased so rapidly that adequate inspection became almost impossible. Ray Clark stated that quality became subservient to production, that manufacturing "took a nose dive," that standards of quality were lowered, and that he lost control of the situation.

The above list is not intended to be exhaustive as to practices complained of in the prosecution's evidence. It does not reflect a considerable volume of evidence introduced by the defense.

It is apparent that, in the course of actual production, the acceptance or rejection of parts showing some deviation from specifications was often, in large measure, a matter of opinion. The mere fact that an

inspector's opinion did not prevail does not show any impropriety, as determination by higher authority was contemplated and authorized. The fact that defective parts were made is not a malpractice. It is expected, and supplies the reason for inspection. That they were detected is the result of inspection. It is further apparent that, in many instances, directives recognized that deviation from standards might not impair safety and utility, and less than exact compliance was authorized. How much less was not clearly defined.

The statement of a condition in the above list of irregularities does not imply that the condition existed as to all of the millions of parts produced, nor at all times within the period concerned, but only that in some instances the acceptance occurred, and was complained of as a malpractice. Some are attributable to problems normally arising in the course of manufacture, which received attention and were corrected.

Derelections did not occur to any marked degree until after the "A" rating, but thereafter progressively became worse, as an over-all proposition. Some were corrected, others occurred. At the same time, the volume of production was growing by leaps and bounds, throwing an increasing strain on supervisory inspection to keep up with it.

By direction of higher authority in Washington, Lieutenant Colonel Edward G. Littel, Deputy Air Inspector of the Materiel Command, accompanied by Lieutenant Colonel Arthur M. Wentzel, an expert on Greulich's staff, visited the Lockland plant on 25 March 1943 for the purpose of observing the inspection system. The entire trip from Wright Field to Lockland and return took only one day, and Lieutenant Colonel Wentzel stated that the time allowed was too brief to enable a thorough investigation. In addition, in view of the date of the visit, it could not constitute notice of the alleged wrongs set forth in the Charge and Specifications. The testimony on this subject was presented in behalf of the defense, and it was shown that a report was made to Washington that there was some decline in quality, but that the decline had not been detrimental to the engine. However, the visit also resulted, upon the recommendation of Lieutenant Colonel Wentzel, in Bruckmann's informing the plant manager that the A rating would be taken away unless the plant "got up" the quality within thirty to forty-five days.

On 1 April 1943 a party which included Senators Kilgore and Ferguson of the Truman Committee visited Lockland and made a two or three-hour trip through part of the plant, escorted by company officials. This was part of an investigation by the Committee, in the course of which it held hearings during the last part of March and the beginning of April.

On 10 April 1943, Greulich prepared and sent a letter to the District Inspection Officer, stating that recent investigation disclosed that in one of the major engine plants proper quality control had not been maintained and directing that "gaps" in the inspection procedure be eliminated, and that an investigation be made of all engine plants within the District. Greulich testified that he believed that the letter referred to the Lockland plant and that it was written under instructions from his superior.

Shortly after the Truman Committee's investigation, the A rating was withdrawn, and the plant returned to a B classification. Bond was discharged from the Army Air Forces inspection service for "gross irregularity in inspection procedure." Ray Clark, McLaurin, and Burleaud were transferred from the Lockland plant, but remained in the employ of the Army Air Forces inspection service. Finlay was replaced as plant manager and Poehlmann as Quality Manager for the corporation. Bruckmann was relieved as Resident Representative on 14 April 1943.

Transfer of Inspectors: Long's Letter.

As in the case of the evidence concerning improper practices and faulty inspection, the evidence concerning many of the matters hereinafter related was sharply conflicting, and it was within the court's province to determine what to believe and what to reject. For this reason, we deem it unnecessary to set forth in general the countervailing evidence for the defense, and we will do so only when it seems called for.

In October 1942, Long and three other veteran Army inspectors were ordered transferred from the Lockland plant. Although admittedly capable inspectors, they were transferred, according to defense witnesses, because of their disrupting influence upon other personnel and because they delayed production by rejecting material contrary to the decisions of their superiors. Bond took a leading part in the proceedings culminating in the transfer, although he had no jurisdiction over transfer of personnel in the Central District. He insisted on transferring the four men at the same time, and dictated the letter recommending transfer, which Ray Clark signed. Bruckmann was not consulted, but after the letter recommending the transfer had been sent to Detroit, Ray Clark told him about the matter, assuring him of the necessity of getting rid of the men. Ryan signed the letter transferring them. The men were given no reason by Ray Clark for their transfer. To two of them who inquired of Bruckmann, the latter said that he knew nothing about the reason for the action, and to one he said, "You know they go around me with a lot of things." Bruckmann denied having made the statement.

On or about 29 October 1942, Long called upon Greulich to ascertain the reason for the transfer, expressing the view that he had been transferred because of his previous complaints to Bond and others about defective parts. According to Long, he told Greulich about various inspection malpractices at Lockland, but Greulich denied this and testified that they discussed only the transfer. Greulich told Long to report to Major Shepherd, the Area Supervisor, and the upshot of the matter was that Long sent a letter to Shepherd charging a number of malpractices at Lockland, allegedly resulting in the acceptance of many parts not proper for installation in engines.

The letter emphasized the power which Bond exercised with Wright; that "he would buy anything they offered, good or bad, and change Army personnel around to suit himself and Wright." Major Shepherd forwarded the letter to Greulich, who, after reading it, directed Lake, his assistant, to call the Central Procurement District, Greulich maintaining that it was a matter for the District to handle. Lake did not recall whether it was Ryan or Fidler with whom he talked, but he told whoever it was about the letter and suggested that someone be sent to Lockland to investigate, stopping en route at Greulich's office. M. T. Clark testified that Ryan instructed him to report at Wright Field and to interview Long concerning a letter which he had written. Ryan denied knowledge of the matter until after M. T. Clark's departure for Wright Field, when Fidler told him that Lake had called requesting that M. T. Clark be sent to Wright Field to pick up a letter known as the "Long" letter. The prosecution introduced an admission by Ryan that he knew that M. T. Clark had gone to Cincinnati to interview Long and understood that Long had some complaint to make.

The M. T. Clark Meeting at Cincinnati.

As arranged, M. T. Clark obtained and read the Long letter at Wright Field and on 25 November 1942 proceeded to Cincinnati, where he interviewed together seven Army Air Forces inspectors from the Lockland plant, including Long. A transcript of the meeting was made. Many of the charges made by the inspectors duplicated those contained in the Long letter. Some of them follow: Bond was responsible for the transfer of the inspectors. The Army had little or no control over inspection procedure. Wright could get any material accepted through Bond, who took the company's side in every controversy. No one could make a rejection "stick," because Ray Clark or a company official would call Bond, who would order acceptance. Army inspectors were ordered by their superiors to accept the decisions of Wright inspection heads. It did no good to go to Ray Clark, since he was "under pressure from someone." Rejected or doubtful material lost its identifying paper work and trickled back into "assembly." Men of no engine experience were made Army inspection supervisors over experienced inspectors. Bruckmann was circumvented and was told nothing. Sometimes material rejected by Army inspectors was accepted by their superiors sight unseen. Material was being accepted which was below the average quality maintained in other plants and which was unsafe. One inspector expressed the opinion that somebody was being "bought," although he admitted having no proof. It was stated that several of the men not at the meeting wanted to talk with somebody, the inference being that they had similar complaints. M. T. Clark stated that he was "dumbfounded" and did not see how things could "be so rotten" without his being told about it. He pointed out that inspection must be handled through channels, and that, as Technical Supervisor, Bond had the right to accept material over Ray Clark's objection.

M. T. Clark testified that the meeting disclosed "extensive material basis" for the statements made in the Long letter.

Although the contents of the Long letter and the minutes of the M. T. Clark meeting constitute hearsay as to the alleged malpractices, they are competent on the issue of notice of the complaints contained therein.

On 26 November 1942, M. T. Clark returned to Greulich's office at Wright Field. He had with him a copy of the minutes of the Cincinnati meeting. He delivered it to Greulich. Greulich, Lake, and M. T. Clark held a conference at which the report was read and discussed. According to Lake and Greulich, all three expressed the view that the meeting disclosed merely that the inspectors involved were disgruntled, probably because of transfers, fancied inequalities in promotions, or dissatisfaction with the decisions of their superiors. The three participants in the conference also discussed the transfer of the four inspectors, and Greulich testified that he expressed the opinion that Bond had no authority to transfer inspectors in the District and apparently was exercising too much authority over Ray Clark with regard thereto. Greulich instructed Lake to call a meeting in Detroit, in which Bond, M. T. Clark, Ryan, Fidler, and Ray Clark should participate. From Greulich's testimony, it may be inferred that his purpose in holding the meeting was to consider the question of Bond's interference with transfers, whereas, according to M. T. Clark, Greulich said that the purpose was to discuss the minutes of the M. T. Clark meeting, "determine what was wrong or take action on it." M. T. Clark testified that he made no recommendation concerning further action on the minutes, inasmuch as he had turned it over to Greulich and the latter had ordered the Detroit meeting.

With reference to the M. T. Clark meeting and minutes, Ryan testified in substance as follows: Fidler told Ryan that M. T. Clark had gone to Major Shepherd's office, had talked to five or six inspectors, and had brought back a transcript of "some minutes." Witness asked Fidler whether he had a transcript of the minutes, to which Fidler replied that he had none, and that M. T. Clark's trip was a confidential mission for Greulich. Later, witness talked to M. T. Clark. He asked Clark whether the latter intended to prepare a memorandum of the meeting to file in the office of the Engine Unit. M. T. Clark replied that the matter was a confidential one between Greulich and himself. He said that Greulich had a copy of the transcript. Because witness was thus informed by M. T. Clark that the report was confidential, and because Greulich was his superior officer, witness did not ask Greulich for a copy of the report, and dropped the whole matter. In a statement before Lieutenant Colonel Outcalt, Ryan said that, although M. T. Clark contended that Ryan had seen the report, he did not recall having seen it, and that Greulich told him that the purpose of the meeting at Detroit was to discuss the M. T. Clark report.

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There is nothing in M. T. Clark's testimony as to whether the report was confidential or whether he told Ryan that it was, but in March 1943 at the time of the production award renewal conference already referred to, he told Fidler (according to the latter's testimony) that it was confidential, despite which he read part of it to Fidler from a copy which he had retained.

To the Truman Committee, Greulich stated that the M. T. Clark report was "important."

To Lieutenant Colonel Outcalt, Bruckmann stated that he had "heard of" the investigation conducted by M. T. Clark, and that he was told that some of the men were "interrogated." So far as he knew, no "remedial action" was taken following the meeting.

The Detroit Meeting.

Pursuant to Greulich's instructions, Greulich, Lake, Ryan, Fidler, Bond and Ray Clark met in Ryan's office at Detroit on 3 December 1942. M. T. Clark sat outside in Fidler's office and nobody suggested calling him in. Ray Clark was not present during the first part of the meeting. Greulich asked Bond whether he had taken any part in the transfer of the four inspectors from Lockland or the issuing of the letter asking their transfer. Bond said that he had not. Greulich admonished Bond that he had no jurisdiction over plant personnel in the Central District and was not to interfere with such personnel nor influence the Inspector in Charge in their assignment or transfer. Greulich reprimanded Ray Clark for transferring the inspectors without telling them the reason for their transfer.

Greulich had with him a manila envelope believed to contain the M. T. Clark meeting report, and portions thereof were discussed. There was some discussion of inspection matters. The general impression of the group was that the complaints were extravagant and irresponsible expressions of disgruntled employees, and "a lot of lies," especially the speculation that somebody was being paid for accepting defective material. According to Ryan's testimony, Bond said that by reason of his long experience with Wright engines he accepted material so long as it had "safety and utility," even though it was a little off the drawing tolerances.

Ryan concluded that "there was a serious allegation." He testified that he asked Greulich whether the document Greulich had was the report, and Greulich said "It's a lot of lies." Believing that Greulich as his superior did not want him to see it, Ryan did not ask for the report. Neither did he talk with M. T. Clark about it, nor, at the time, with Ray Clark about the plant conditions concerned. Greulich did not ask Ray Clark about the charges nor discuss them with him.

Bond and Ray Clark complained that M. T. Clark was "interfering" and that they were having trouble with him. Ryan proposed that M. T. Clark be taken off Wright engines and testified that Greulich said "go ahead."

Greulich's testimony is not clear on whether he gave Ryan authority to exclude M. T. Clark. However, he testified that he did not so order M. T. Clark, nor ask that it be done, nor know that it had been done. None of these deny that he consented to its being done. He had testified before Lieutenant Colonel Outcalt that Ryan had suggested it and that it was all right with him. Lake did not hear Greulich say "go ahead."

At the close of the meeting, Ryan told M. T. Clark, waiting outside, to stay out of Wright plants. Then or shortly after, he told him that the reason was that Bond did not like the way he did things.

It was arranged that Fidler should take over M. T. Clark's duties as to the Lockland plant.

Ray Clark had told Bruckmann that he was ordered to attend the meeting, and told him some two weeks later that M. T. Clark was not coming to the plant anymore.

Events Following Detroit Meeting.

Greulich took no further action on the M. T. Clark report, taking the position that the matter was properly referred to Ryan and the Central District, and that he had taken such action as was called for on his part by rebuking Bond for exceeding his authority and by bringing the matter to Ryan's and Fidler's attention.

M. T. Clark went on sick leave for about two months. On his return, Ryan offered him a less important assignment as Inspector in Charge of a plant at Muskegon, Michigan.

About 5 January 1943, Major Shepherd at Cincinnati telephoned Ryan and told him that inspectors from Lockland were asking transfer to his Area organization, that there was a great deal of discontent and a lot of letter writing, and that some of the men thought that defective material was going into engines at Lockland. Ryan told Major Shepherd to have the men act through channels on transfers and to put an end to the letter writing, as the letters all came back to him. He testified that this was the first he had heard of defective material going into engines. There was no reference to the minutes of the Clark meeting or the Long letter, neither of which Ryan had seen.

About that time, Ray Clark called Fidler and advised him that there were still personnel problems at Lockland, with reference to the men wanting to transfer, and Fidler so advised Ryan.

Ryan reported on these conversations by telephone to Greulich and Greulich told him to "get some travel orders and get down there."

Ryan's Investigation at Lockland.

Accordingly, Ryan went to Cincinnati about 11 January, after first checking the reports of M. T. Clark on Inspection Surveys, Bond's reports as Technical Advisory Inspector, and the "unsatisfactory reports" from the field on performance of Wright engines, all showing nothing amiss. There, at Major Shepherd's office, he talked with Major Shepherd, Long, and Ratchford. Long said nothing, and Ratchford nothing substantial, about defective material going into engines. Ryan went with Captain Shepherd, Major Shepherd's assistant, to Lockland, was there informed that a group meeting of inspectors was desired, and there held such a meeting to which all male personnel of the Government inspection staff were invited. Fifty-four men attended, including Ryan and Bruckmann. It then developed that certain inspectors had written to Congressmen concerning conditions at the plant and Ryan spoke against the practice, directing that all paper work be put through channels, as he eventually received the letters written to Washington. He made extended remarks and asked the inspectors to get up and tell him of dissatisfaction. Witnesses at the trial failed to recall whether any inspector arose to air grievances, even though one of those in attendance had written the Truman Committee that practices were endangering the lives of aviators. Some of the inspectors did recall, at the trial, that full opportunity was given to tell of discontent and of claims that defective materials were being used.

Stenographic minutes of the meeting revealed that several inspectors spoke, but without criticism of the inspection system, one stating that to a large extent the discontent was over the company's attitude toward Army personnel, who were treated as a necessary evil. The minutes showed that Ryan informed the meeting that he had heard of much discontent and letter writing and emphasized that the men had a right to appeal to Bruckmann or to the Inspector in Charge. He asked the following three questions, without receiving any response: "(1) Is there anyone here who feels they have received a rotten deal? (2) Has anyone here been refused admittance to see Major Bruckmann? (3) Someone here has been writing letters. Who was it?" The meeting was productive of no tangible information suggesting the existence of serious inspectional malpractices. Nobody said that defective material was going into engines.

The meeting lasted from thirty to forty-five minutes and Ryan left the plant within one-half hour thereafter. As it was breaking up, Captain Shepherd (who had driven Ryan to the plant and attended the meeting) informed Ryan that an inspector had told him that if "they" would send somebody out on the floor for a week to live with the men, they would "spill their guts." Captain Shepherd also told him that if he would talk to one or two of the men alone, they would probably tell him something. Ryan did not go out onto the floor to discuss his investigation with individuals, giving as his reason that in a similar situation in Detroit an officer's interview with individuals about defective materials resulted in a strike. The prosecution questioned Ryan as to whether he said at this meeting, "Speak up now or forever hold your peace," as attributed to him in the hearings of the Truman

Committee and before Lieutenant Colonel Outcalt. He denied having made the remark, but explained his admissions of it by stating that it was first "injected" at the Truman Committee hearing and that he had heard about it so much that he supposed he had it on his mind and said "yes." The minutes show no such remark.

Bruckmann stated before Lieutenant Colonel Outcalt that he had been informed that the men would be reluctant to speak in an open meeting in the presence of their superiors, and thought that he so advised Ryan but did not remember what the latter said in reply. He also stated that no changes resulted from the January 11th meeting, although he felt that the men "were not bringing out everything they wanted."

Bruckmann sent the minutes of the January 11th meeting to Greulich, who testified that "he apparently went over it" but took no action because it was "a District matter." Ryan stated before Lieutenant Colonel Outcalt that he took no action as a result of the meeting, as he "didn't see any action to be taken there."

Notice to Bruckmann: Bruckmann Meetings.

The evidence shows that Bruckmann had no knowledge of the complaints made by Long, subsequently incorporated into the "Long" letter, or of the details of M. T. Clark's meeting with the seven inspectors, appearing in the transcript of that meeting. Such knowledge as he received came to him through other sources.

At different times during 1942, inspectors complained to Bruckmann about various inspection matters. He referred the complaints to Ray Clark for investigation and correction (if necessary), and in each case was later informed by Clark that everything was all right. After an interview with several inspectors in the latter part of 1942, at which complaints were made about various inspection malpractices, Bruckmann inaugurated a series of monthly meetings for all Army inspectors, which were attended by all those not prevented by duties on the various shifts. Forty to fifty, a majority, were always present. At these meetings full opportunity was given the inspectors to state anything on their minds, and full discussion took place. Technical matters uniformly were referred to Clark or McLaurin and answered by them in open meeting. Bruckmann made it clear that he was not an engine man, knew nothing about airplane engines, and depended on the inspectors to "see that we got a good engine," but wanted to co-operate with them and get any complaints straightened out. He reviewed the reported notes of the meetings after transcription. In addition, throughout his tour of duty at Lockland, Bruckmann held weekly meetings with his department heads for general discussion of problems. Ray Clark and McLaurin attended.

Co-ordination Meetings

Co-ordination meetings of company and Army inspectors were held weekly from January to April, 1943, at local clubs. Dinner and drinks were served at the company's expense. Problems between the inspectors were discussed. None of the accused attended any of the meetings.

Official Reports by Bond and M. T. Clark.

As part of their prescribed duties, M. T. Clark as District Supervising Inspector and Bond as Technical Advisory Inspector each made periodic visits to the Lockland plant and reported on inspection conditions there. Clark's were "Reports of Inspection Survey," on prescribed forms, to the District and to the Inspection Section, Materiel Command. Bond's were by letter. All were read by Ryan, Fidler, and Greulich. All showed inspection conditions at Lockland satisfactory and functioning properly. Bond's showed some of the matters complained of by the inspectors as problems encountered in production, which had received the attention of Bond and the local organization in conference, with satisfactory disposition made.

Clark's reports were made approximately every sixty days, January through October, 1942; Bond's, from March, 1942, through February 1943. A directive required that copies of all reports prepared by personnel of the Materiel Command as a result of visits to plants be furnished to the Resident Representative through the District Supervisor.

Reports to Superiors.

Colonel Drake, District Supervisor, testified that prior to April 1943 he received no report from any of the accused concerning improper inspection practices or faulty inspection at Lockland. (It will be recalled that Greulich had no duty whatsoever to render reports to Colonel Drake.) Brigadier General Vanaman testified that up to the latter part of March, 1943, Greulich did not inform him of any improper practices or faulty inspection at Lockland.

Throughout the time Bruckmann was there, Colonel Drake received fifty-four letters from him, about one a week. Bruckmann reported on general conditions at the plant, progress of construction, the extent to which production schedules were being met, labor matters, public relations, distinguished visitors, roads, water supply, procurement of parts and materials, and occasionally manufacturing difficulties encountered, as holding up production. There was no reference to inspection.

In response to Bruckmann's first letter, Colonel Drake wrote to him, saying that Bruckmann was "definitely on the right track"; that he, Drake, was much pleased with the situation; and that it was Bruckmann's

responsibility to "restore pleasant relations with the Wright Aero people, which unfortunately did not exist prior to (his) arrival."

In this connection Bruckmann testified that he thought he was using his best judgment. He took inspection matters up with Ray Clark, and held the inspectors' meetings previously mentioned.

Miscellaneous Evidence: Greulich.

Greulich described the vast amount of paper work passing across his desk daily, including important reports and policy matters. As a result of limited personnel, his office could make only occasional spot-checks of the plant, which even then could not reveal improper practices. He left technical matters to his experts and felt that he would have been remiss to have depended on his own judgment in their fields. Even if Bruckmann did talk to him by telephone relative to inspection matters (of which he had no recollection), he would have referred him to his specialists, as he never made decisions on engines. Despite the fact that he was a member of Brigadier General Vanaman's staff, he was summoned only once to a staff meeting. The witness stated that he "followed the directions of the General Orders and General Order No. 4". When M. T. Clark sought to resign after his illness, Greulich said that he would find a place for him at Wright Field if no other were available. In November 1942, Greulich wrote a letter to the Technical Executive, Materiel Command, setting forth an extensive consideration by Greulich of war-time problems resulting in the shortening of the time consumed in testing engines, to the impairment of their quality, and including his recommendation of a remedy, an additional test. His recommendation was rejected by higher authority as not necessary and not justifying the extra burden and labor involved.

Miscellaneous Evidence: Ryan.

Prior to making decisions on matters affected by the reports of Bond and M. T. Clark, Ryan always checked the file. He alluded to the thousands of plants under his jurisdiction and to his principal job of getting out engines, and agreed that many necessary things were left undone because of shortage of time. For the same reason he was not able to examine the record of his predecessors and he had not seen any reports from Bruckmann nor the latter's 54 letters to Colonel Drake. He questioned the Technical Executive for unsatisfactory reports, learning that there were none, and, except as already testified to, he received no indications from his subordinates, or from his own observations, of inspection deficiencies at Lockland. The witness made three trips to the plant during Bruckmann's tenure as Resident Representative, being accompanied through the factory variously by Ray Clark, Colonel Drake, McLaurin, and Bruckmann. On the last trip, in February 1943, Ryan was advised that everything relating to

inspection was satisfactory. A witness testified to Ryan's long hours of work and it was stipulated that he was graded "Superior" on his efficiency report in December 1942 and June 1943 by Colonel Drake. At the Outcalt proceedings, read into the record, certain testimony referred to a conference on 6 April 1943 with the Chief of Staff at Wright Field wherein parts of the minutes of the M. T. Clark inspectors' meeting were read aloud, followed by the remark "that something or some action should be taken and they wanted to know why action had not been taken." Before Outcalt, Ryan said he agreed "with that" and at the trial he remembered the testimony, but not "that exact wording."

Miscellaneous Evidence: Bruckmann

Colonel Drake's instructions to Bruckmann when he went to Lockland were extensive, but he did not discuss inspection duties. Greulich told Bruckmann that until he learned about the office he would have to take the word of the Inspector in Charge, the Supervising Inspector, and the others who had been sent there to organize inspection at the plant.

Bruckmann tried to familiarize himself with the work. He went over the files, and went through the plant almost daily. He tried to talk with all the Air Corps inspectors.

Company heads uniformly dealt with Ray Clark on inspection matters, not with Bruckmann. They understood that Clark was in charge, so far as inspection was concerned, and that Bruckmann's position was primarily administrative, M. T. Clark and Bond did likewise.

Bruckmann drew a salary of \$8,000 a year from his family's brewery, but never went there during duty hours except once to get some files on flood control while working on that subject for the plant.

He was principally engaged in activities relating to plant protection, new construction in progress, obtaining priorities, adequate power and water supply, road construction, etc., in which, according to one of the witnesses, he rendered valuable service.

Character Evidence

Testimony by general and field officers, public officials, and prominent citizens was introduced on behalf of each of the accused, that the accused bear excellent reputations as citizens and for truth and veracity, and that the witnesses would believe them on oath.

5. Comment. Conviction occurred only on three Specifications of Charge I, all of which were based upon neglect of duty and not upon intentional wrong. The findings of Not Guilty of all Specifications alleging intentional wrong, and of Charge II, remove from the case consideration of every element except neglect, and entitle the accused to the full benefit of every inference of good faith arising therefrom.

All three Specifications are in identical language as to all three accused, except for their names, ranks, assignments, and beginning dates of tenure.

In Specification 1, the gist of the offense as to each is wrongful neglect of duty by failing properly to supervise inspection activities at the plant: The condition, that each was charged with that duty, and the result, improper inspection practices and faulty inspection at the plant.

The Board of Review is satisfied that both improper inspection practices and faulty inspection occurred at the plant, but not as proximate consequences of neglect by any of the accused as alleged.

Greulich, as Chief of the Inspection Section of the Materiel Command, was not charged with the duty of supervision of inspection activities at any particular plant, but, on the contrary, was under express directive that "activities at Wright Field (would) not interfere with the detailed manner in which the Field Organization performs the functions required." His duty pertained to the inspection system in all plants manufacturing for Air Forces procurement everywhere, not to the action of individuals forming parts of that system in the acceptance or rejection of specific products in each plant.

Ryan, and briefly Greulich, as District Inspection Officer, was charged with the duty of supervision of the operation of the inspection system as a field function of the Command, but, again, as an administrative control of a District including thousands of plants, not of the specific acts of acceptance or rejection of items in a particular plant. His duty was not, by reasonable intendment, that stated in the Specification.

Bruckmann had the very general duty of heading the local organization responsible for the accomplishment of procurement field functions at the plant. These included inspection, but in a sense of general administration, along with all administrative affairs at the plant, not as a technician expected to supervise the detailed conduct of inspectional activities. For the technical duty, technicians were provided, above and below Bruckmann's place in the system, upon whose expressed judgment he was entitled to rely.

Specification 2 charges wrongful neglect of the alleged duty of each accused to keep his superior officers informed on all inspection matters at the plant designed to assure the delivery of aircraft engines and parts suitable for the intended purpose and in accordance with contractual requirements and Army directives. In the light of the evidence in the record, to state such duty is to refute its existence.

The duty of each accused in this respect was to inform his superior, not of all inspection matters so "designed", but of "matters of unusual importance", which, as a statement of such duty, adds nothing to the duty incumbent upon every officer of the Army to bring to the attention of his superior any deficiency which he knows, or in due care ought to know, and which he doubts, or ought to doubt, his own ability or authority to correct without reference to his superior.

The allegation that the accused violated a duty to report "all" such matters may be deemed to include an allegation of duty to report such matters as should have been brought to the attention of their superiors under the above standard. As such, the Charge is that the accused, despite notice of improper inspection practices and faulty inspection at the plant, wrongfully neglected their duties by failing to inform their superiors thereof.

The duty to report a defective condition necessarily implies, first, the recognition of the condition as such. The failure so to recognize it, if negligent, would be a violation of a corollary duty upon which the first depends, and would not excuse its non-performance. Secondly, the proposition necessarily implies the exercise of judgment on the part of the individual concerned. It is essentially a matter of judgment under all the circumstances.

In the instant case, the information shown to have reached the accused was not such as to remove from the realm of matters of judgment the determination whether to act on their own initiative or to inform their superiors of such information. This is true of all three accused, but especially so of Bruckmann, who showed unflagging zeal in informing the District Supervisor of matters which he recognized as calling for such report, and who was expressly instructed to use his initiative and to handle matters locally so far as possible.

As to Greulich, he was himself the top man in the whole national inspection system. If these complaints were matter for the Materiel Command, Greulich was the officer of that Command charged with the duty of handling them; if they were not, they were of no interest to Brigadier General Vanaman. As to Ryan, he might well feel fully justified in following Greulich's lead in such matters. Insofar as the needed investigation was a matter for the inspection system, there was nothing to report until such investigation was concluded.

Specification 3 alleges, as to each of the accused, that, being charged with the duty of supervision of the inspection activities at the plant, and despite notice to him of improper practices and faulty inspection, he wrongfully neglected such duty by failing to take or cause to be taken the necessary corrective action. The observations above made with reference to Specification 1 are applicable here as to the incidence of such duty in the case of each accused.

Each officer owed the duty of honest and diligent service in good faith, and of the exercise of his judgment on matters within the sphere of his determination. Honesty and good faith are not challenged by this Specification, and were resolved in favor of the accused upon the Specifications which did raise that issue. Diligence alone is in question.

Undoubtedly, the standard of diligence is the conduct of the ordinary reasonably prudent man acting under the circumstances in which the accused acted.

The prime requisite to invoke action on the part of each accused was notice—notice of the existence of deficiencies or of facts sufficient to put a reasonable man on inquiry as to their existence, and of the information obtainable by reasonable inquiry.

Greulich had the notice involved in the Long letter and in the report of the M. T. Clark meeting with seven complaining inspectors, which arose out of incidents complained of in the Long letter. This was notice that charges were being made of an unhealthy condition at Lockland. Greulich, after conference with Lake, his engine chief, called the Detroit meeting. The complaint directly invoking Greulich's own jurisdiction was that Bond was exercising influence over Ray Clark on personnel. Greulich reprimanded Bond for so doing and ordered him not to do it any more. The other complaints involved the exercise of field functions under the Procurement District and Greulich's duty was to exercise due care to refer them to the District. This he says he did, and perhaps did do after a fashion, though not by such clear-cut and decisive action as might have resulted in earlier detection of the existing deficiencies by prompt and effective action on the part of Ryan.

Ryan had the notice involved in whatever discussion of the Long letter and of the M. T. Clark meeting report occurred at the Detroit meeting.

The heart of the case against Greulich and Ryan, as to Specification 3, is to be found in their handling of the allegations made by Long and those made by the inspectors at the M. T. Clark meeting. When Greulich

received the "Long" letter, he immediately referred the matter to the Central Procurement District and considered the allegations serious enough to cause him to suggest that M. T. Clark or some other District representative go to Cincinnati to investigate. Despite Ryan's assertion to the contrary, it is reasonable to believe that Ryan knew about the letter and that he gave the order to M. T. Clark to make the investigation, as testified to by the latter. Believing this, we must conclude that Ryan was told something about the allegations contained in the letter. It is fanciful to think that Greulich would call the District about the letter without giving any inkling of its contents, or that Ryan would order M. T. Clark to Cincinnati without any knowledge of the reason for doing so. As a matter of fact, Lake told the person who answered the telephone about the letter and if that person was Fidler rather than Ryan, it is reasonable to believe that he relayed the information to Ryan. Ryan may not have known all about the Long letter, but he knew enough about it to be aware of its general tenor.

When M. T. Clark returned to Detroit by way of Wright Field, the evidence proves conclusively that Greulich read the transcript of the meeting and ordered the Detroit meeting, with Ryan, Bond, and others in attendance. Greulich's contention that he called the meeting only to reprimand Bond for interfering in District personnel matters does not appeal to our credulity, especially in view of the prosecution's contrary evidence that he announced that it was for the purpose of discussing the M. T. Clark "report," and of determining what was wrong and taking action on it. He could have reprimanded Bond by the simpler and less expensive method of telephoning or writing him. Nor do we believe Ryan's assertion that he was told that the M. T. Clark "report" of the inspectors' meeting was a confidential document for the eyes of Greulich alone, for why should Greulich, who referred the matter to the District in the first place, suddenly decide to keep from the District the results of the investigation? Greulich himself testified that M. T. Clark should have made a formal report of the matter to Ryan. In this connection it is significant that Ryan admitted that Clark contended that Ryan had seen the "report," although Ryan protested that he had not.

In any event, whether or not Ryan actually read the report, we believe that at the Detroit meeting he was informed of the substance of its contents. Although Greulich claimed that the group discussed only Bond's interference with the transfer of the four inspectors, it is evident from the testimony that the complaints concerning inspection malpractices at Lockland were also the subject of discussion, and it is unreasonable to believe that they were omitted, especially when substantially the same complaints, voiced in the Long letter, had previously stirred Greulich to action.

Why nothing was done as a result of the Detroit meeting we do not know. Greulich attempted to explain it upon the inconsistent bases that he considered the complaints "a lot of lies" and that he had effectively referred the matter to the District. Yet these same "lies" in the Long letter had prompted him to order the M. T. Clark investigation in the first place, and before the Truman Committee he stated that the Clark report was important. Moreover, if, as he claimed, he referred the matter to Ryan, why did he withhold from him the Long letter and the M. T. Clark minutes, and why did he not make such reference clear? Ryan's attempted explanation is equally anemic. Although he admitted that the allegations were serious, that some action should have been taken, and that since the matter concerned his District it was up to him to investigate it, he did nothing further because he concluded that Greulich did not want him to see the "report." Yet there is nothing in the evidence indicative of any such unwillingness on Greulich's part, although in fact he evidently did not turn the "report" over to Ryan.

The only plausible explanation of the inactivity following the Detroit meeting is that for some reason the participants, including Greulich and Ryan, decided to take no further action. Their abortive attempts to defend their positions in the matter obviously arose from the unfortunate situation in which they later found themselves. Their attempted alibis smack of "buck passing."

Since nothing further happened until over a month later, when the complaints from Lockland were received, the real question involved is whether the failure to take action amounted to negligence, for the failure to take corrective action would not be an offense in the absence of negligence.

If the Long letter was serious enough to warrant action, the information gleaned from the M. T. Clark inspectors' meeting may not be lightly brushed aside or consigned to limbo. Greulich's assertion that since M. T. Clark made no written report of the meeting to Ryan, he must have regarded the matter as not serious, does not coincide with the fact that it was Greulich, rather than Ryan, who started the investigation in the first place and took a leading part in its progress through the Detroit meeting. Furthermore, the transcript of the meeting shows M. T. Clark as having said that the picture had been painted so black that he felt that eventually he would be forced to come into the plant and see some of the material. And M. T. Clark testified that there was an "extensive material basis" for the Long letter, evidently meaning that the inspectors at the meeting confirmed Long's charges. Besides, M. T. Clark had turned over the minutes to Greulich and was justified in believing that he had done everything required of him.

There was evidence for the defense that at the Detroit meeting Bond said that by reason of his long experience with Wright engines he accepted material as long as it had "utility and safety" even though it was a little

off the drawing tolerances. But according to Greulich's and Ryan's own statements this assertion by Bond, if, indeed, he made it, does not appear to have offset in their minds the seriousness of the charges nor to have been the impelling motive for their inactivity, for, as already noted, each admitted that action was required and attempted to avoid responsibility by placing it upon the other's shoulders. We cannot avoid the conclusion that, for no reason good enough to have survived the ensuing developments and inquiries, the whole matter was shelved, and in our opinion the seriousness of the inspectors' allegations merited further action. Under the circumstances, to do nothing constituted negligence and hence a wrongful failure to take necessary corrective action or cause it to be taken. Whether the severity of the punishment was justifiable is not the point here in question.

In our opinion, then, the record is legally sufficient to support the findings of guilty of Specification 3, Charge I, and of Charge I, as to Greulich and Ryan, but legally insufficient to support the balance of the findings of guilty as to them.

In reaching our conclusion as to the guilt of Greulich and Ryan, we have attempted to appraise their conduct in the light of the situation then existing, and have exercised care to avoid judging them by "hindsight." We have also considered, as, indeed, it must be considered, their evasiveness and lack of candor in the various investigations and on the witness stand, which cannot be said to reflect confidence on their part in the propriety or reasonableness of their course at the time.

Bruckmann never received either the Long letter or the M. T. Clark meeting report, and nobody ever advised him of them during the period in question. No superior ever notified him of alleged malpractices. Such notice as he had was that inferable from the complaints to him made at divers times by four inspectors, plus whatever he should have observed at the plant.

He acted upon the complaints by referring them to his Inspector in Charge and receiving reports that they were looked into and corrected, and by inaugurating regular monthly meetings at which he sought diligently, in good faith and apparently with considerable success, to have all questions raised by the inspectors discussed and determined between them and his technical staff of experts, and at least two of the four inspectors who had complained to him considered that they had a full, fair and free hearing there.

He went frequently through the plant to seek all the information which he could derive from observation and conversation with the inspectors. This was productive of no notice of deficiencies to him, completely a non-expert, but such observation was likewise bare of such notice to the highly trained experts periodically sent there for that very purpose. If recognizable irregular practices were knowingly being employed, of course they

would cease at the approach of someone in authority seeking to detect them.

In the opinion of the Board of Review Bruckmann is clearly free of neglect of duty under his circumstances, and it follows that the record is legally insufficient to support the findings and sentence as to him.

In the consideration of the case at large, certain salient and controlling circumstances must be borne in mind to reach a correct evaluation of the conduct of those concerned, including the measure of any guilt which must attach. One is that the Command had selected and assigned the expert personnel in a carefully devised system of inspection and the review of inspection for the whole vast procurement program. Bond was the technician appointed to advise as an expert of the highest qualifications on the maintenance of production quality of these engines over the entire country, and at the beginning of the inquiry in this case his competency and trustworthiness stood unchallenged, and his examinations and reports were information of the highest authoritative then in the minds of the persons concerned, and all yielded to his decisions. With him discredited, the structure fell, but he was then the focal point of reliance upon the accumulated technical knowledge and experience of years of fabrication of this kind of engines. M. T. Clark was the expert charged with the duty and invested with the authority to supervise by visitation and searching examination the conduct of inspection of engines at the plants in the District. His competency and trustworthiness still stand unchallenged. Ray W. Clark was the expert in charge of inspection at the plant, and regarded as thoroughly competent. Bond's undue influence over him only gradually became apparent as the condition developed, and its undesirable effects, pervading Ray Clark's own work and that of his otherwise competent assistants, were finally established largely by Clark's own admissions, corroborated by events after the fact. The reports of these men to their superiors were uniformly favorable and of a nature to disarm suspicion, and were heavily relied upon. In large measure, that reliance was proper, and it was unavoidable in the working of the system in the vastness of the undertaking in progress.

It is easy now to minimize the effect of the terrific demands of other duties upon the attention of these accused officers, yet it would be wholly and patently unfair to judge their diligence in the performance of duty with our attention focussed only upon the discharge of one phase of it out of many. It is hard to say that men who are admittedly working diligently, long hours of every day, at important duties vital to the discharge of their proper functions, are guilty of neglect of duty for failure in some particular to accomplish all that needed doing, and the accused have had the benefit of full consideration of these factors in the case.

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On the record, the condition that developed was bad, but never as bad as it was painted after searching investigation, skeptical and often hostile, had substituted retrospect for foresight and the sharp focus of single purpose for the diffused light of a tremendous effort over a wide field of endeavor. Many of the imperfections disclosed were, in greater or less measure, matters of opinion, and, as to many, it was never established that their existence would or did affect the "safety and utility" of the product, which was laid down as the landmark in the purpose of inspection. In fact, it remains highly doubtful, even improbable, that the conclusion that faulty inspection and malpractices existed would have been reached or could have been supported, except for the ultimate admissions of Ray Clark, McLaurin and Burleaud, made long after the events in question and contrary to their position at the time.

The fact that Ray Clark was controlled by Bond, in part out of deference to superior position and in part out of consciousness that he owed his position to Bond originally and probably continued so to do, and by reason of that control permitted increasingly the laxities finally determined to constitute the defective condition in the conduct of inspection at the plant, is the explanation of the deterioration in the inspection system that followed. Its first manifestation to any of his superiors was when Long charged to Greulich that Bond had influenced Clark in the conduct of affairs at the plant, which was communicated to Ryan. It was never manifested to Bruckmann, who had no reason to withhold full reliance upon Ray Clark, approved as his administration appeared to be by all his superiors in the inspection system.

There is a vast difference between failure to detect the acceptance of faulty individual parts, clearly not a function of any of these accused, and failure to detect faults in the inspection system under their particular jurisdiction. The imperfections in trusted men are not as readily apparent as those in mechanical structure or dimensions, and must be determined by other means.

The impression is unavoidable from the record that Bruckmann was perhaps too little an aircraft mechanic and too much a business executive, Greulich and Ryan perhaps too much the reverse. These were circumstances bearing upon the conditions in which they acted. All of them acted in the course of a war procurement effort dwarfing every previous undertaking of the kind in history, of proportions which stagger the imagination, and at the accomplishment of which all nations still stand amazed. It is not to be expected that such a result would be accomplished without some mistakes and some imperfections, of materials, of procedures, and of men. In general, responsible officers did the best they could with what they had to do with, and in the end the mighty objective was won.

6. Counsel for the defense in oral argument before the Board of Review and by briefs have discussed a number of alleged errors in the conduct of the trial and in the admission and exclusion of evidence, and examination of the record and exhibits has disclosed further errors. Consideration has been given to every matter of import in the light of the entire record. The several questions of law considered most important will be briefly discussed, none of the phases of the case not especially treated, nor those especially treated, being deemed of sufficient weight to affect the final decision of the Board.

Jurisdiction of the Court.

Although each of the accused is a member of the Army Air Forces, general court-martial jurisdiction for the trial was assumed by the Commanding General of the Fifth Service Command, Army Service Forces, at the request of the Commanding General, Army Air Forces. The record sets forth the proper fulfillment of the requisite procedural steps for such assumption of jurisdiction in accordance with the provisions of paragraph 5c, Army Regulations 170-10 (R. 6-11). The detail of officers not under the authority of the Fifth Service Command as members of the court is authorized by law (CM 227864, Hayes, 15 BR 391).

Challenges.

The defense contended that the court erred in sustaining the prosecution's peremptory challenge of two members of the court, for the reason that the prosecution constituted only "one side" and was entitled only to one peremptory challenge; that the improper withdrawal of the additional member illegally affected the minimum fractional proportion required to sustain the findings. Article of War 5 entitles the accused to a trial by a general court-martial consisting of not less than five members, but provides no limit to the membership in excess of five. The sustaining of two peremptory challenges in favor of the Government, without objection by the defense, reduced the court to a membership of eleven, there being no challenges by the accused (R. 11-13). No error prejudicial to the substantial rights of the accused was committed by the court in so excusing two of its members upon peremptory challenge by the prosecution (CM 126527, Trefny; CM 133703, Kain; CM 195294, Fernandez et al, 2 BR 205).

Continuance.

Each of the accused moved for continuance at the opening of the trial, in order to allow more time to prepare his defense. The motions were denied (R. 35-44). No renewal of the motions in their original form was made at the close of the prosecution's case, but instead a two-day adjournment was granted the accused on their application to allow an opportunity to study the record and to enable the defense to be "in a position to make the necessary motions" (R. 1108-1113). No further motions for continuance were made. The granting of a continuance rests within the sound discretion of the trial

court (CM 110784, Mann et al; CM 124935, Williams; CM 134112, Smith). Whether or not the action of the defense in obtaining the two-day continuance amounted to a waiver of the original motions, the thoroughness of the preparation and presentation of their case showed that the court's discretion in denying the motions for continuance at the opening of the trial was not abused.

Severance

All of the accused strenuously argued in support of respective motions for severance, but the motion of each was denied (R. 45-54). This action of the court is urged as error. A motion for severance is addressed to the discretion of the court and in the absence of abuse the court's action will not be deemed error. Even if a court errs in denying a motion for a severance, the error does not warrant disapproval of the findings if it appear that the substantial rights of the accused have not been abused (CM 144367, Adcock, et al).

The possibility that in reaching its findings of guilty the court was influenced by evidence relating to other Specifications and that evidence relating solely to one accused was a controlling factor in the court's findings as to another accused, has been considered by the Board of Review. The findings of not guilty upon several Specifications and the clear-cut nature of the evidence supporting the Specification upon which, in our opinion, Greulich and Ryan were properly convicted, convince us that the denial of the motion did not prejudice the accused.

Exclusion of Exhibits and Testimony on Performance History of Engines.

The defense offered and in certain instances reoffered much testimony and a great mass of exhibit material relating to the performance and service history of Lockland engines after they had left the plant and sought to have the court admit condensations thereof and conclusions thereupon by the testimony of expert witnesses, upon the theory that the documents were voluminous and that the information was recorded in the regular course of business. All the proffered documents have been examined carefully. In our opinion the rejection of the evidence offered did not prejudice the accused, in view of the elements involved in the Specification upon which we believe conviction was proper.

Inflammatory Remarks.

The contention of the accused that the prosecution used inflammatory language in the opening and concluding remarks to the court has been carefully considered. It is observed that no objection thereto was made at the trial. References to "reverberations" of the case, "national scandal", "catastrophic implications" and the like were unwarranted by the evidence and had no proper place in the matter before the court. Innuendoes that defective

or dangerous aircraft were supplied to fliers as a result of remissness in inspection at the plant were neither sustained by the evidence nor consistent with the prosecution's protestations that there was no such issue in the case. As a matter of fact, the only evidence on that subject indicates that the engines performed satisfactorily in the field. However, the court disposed of this contention by its findings of Not Guilty of the more onerous charges, showing that it was not "inflamed" against the accused, and upon the conclusion here reached, the remarks were not substantially prejudicial.

7. The Board of Review has carefully considered the arguments presented by defense counsel orally and in the several briefs submitted.

8. War Department records show that Lieutenant Colonel Greulich is 53 years of age and married. He was a Captain, Specialist Reserve, from 1 May 1925, ordered to active duty from the inactive Reserve 16 May 1942, promoted directly from Captain to Lieutenant Colonel, Army of the United States, Air Corps, 20 June 1942. He had no previous military service, other than three two-weeks training periods in the Reserve. Originally an engine mechanic and tester, he has been engaged in aircraft inspection since 1915, in the employ of the Air Corps since 1918. He was District Manager and Executive Civilian Assistant to the District Supervisor, Central Procurement District, from 1936 to his activation. His efficiency ratings on duty were "Excellent" and "Superior." All of his education, training, and experience have been in mechanical fields, primarily aircraft inspection.

Major Ryan is 47 years old and married. He was a First Lieutenant, Specialist Reserve, from 5 December 1929; Captain from 15 October 1937. He was called to active duty 25 February 1942, promoted to Major, Army of the United States, Air Corps, 2 July 1942. His performance of duty has been rated "Superior," "Excellent," and "Satisfactory." Other than training periods as a Reserve Officer, he served in enlisted status on the Mexican border in 1915 and 1916 and as Sergeant in the 6th Cavalry in France in 1918 in the course of service from 1915 to 1920. He completed a number of Reserve courses of instruction, as well as two years high school, two years preparatory school, a six months course in aeronautical engines at New York University, and considerable correspondence school instruction. From 1920, after a two-year apprenticeship in the manufacture of precision tools, he has been engaged in inspection of aeronautical engines, since 1926 as an Army Air Corps employee, rising to Senior Aviation Engine Inspector and Chief of Aircraft Engine Sub-unit, Detroit District.

Major Bruckmann is approaching 51 years of age, married, with two children, one in the Army Air Forces. As a youth, he served in the R.O.T.C. and Indiana National Guard. He was a Second Lieutenant, Corps of Engineers, from 4 September 1917, First Lieutenant from 22 May 1919 to 15 July 1919,

commanding Company N, 21st Engineers in France at the close of the last war and at discharge. He participated in the Meuse-Argonne and St. Mihiel offensives. He was a First Lieutenant, Engineers, Reserve, from 2 January 1924; Captain from 9 September 1930. He was ordered to active duty 27 January 1942 and promoted to Major, Army of the United States, 30 November 1942. His ratings were "Excellent," with one "Very Satisfactory." He received a commendation from the Administrative Executive, Central Procurement District, 21 July 1943, for services as Reclamation Officer, being "instrumental in saving the Government a lot of money." He was graduated from Purdue University in 1915 with the degree of Bachelor of Science in Electrical Engineering, worked for a total of about four years before and after the last world war on electric motors, then entered his family's brewery business in Cincinnati, Ohio, in which he engaged until called to active duty in this war. He became President and General Manager of that business. He engaged extensively in civic activities in Cincinnati and in American Legion affairs there.

War Department records show no previous convictions, no punishment under Article of War 104, and no other action to correct deficiencies, neglects or misconduct, in the case of any of the accused officers.

9. The court was legally constituted and had jurisdiction of the persons and subject matter. Except as noted, no errors injuriously affecting the substantial rights of accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 3 thereof as to Greulich and of the Charge and Specification 3 thereof as to Ryan, legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge I as to Greulich and of Specifications 1 and 2 of the Charge as to Ryan, and legally insufficient to support the findings of guilty of the Charge and Specifications 1, 2, and 3 thereof as to Bruckmann. As to Greulich and Ryan only, it is our opinion that the record is legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized for violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate

W. A. [Signature], Judge Advocate

(see separate opinion
discussing in part)
[Signature], Judge Advocate

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

(159)

SPJGF

CM 257632

10 OCT 1944

UNITED STATES)

v.)

Lieutenant Colonel FRANK C.
GREULICH, 0218733, Air Corps,
Army Air Forces Materiel
Command)

Major WALTER A. RYAN,
0267858, Air Corps, Army
Air Forces Materiel Command)

Major WILLIAM BRUCKMANN,
0190118, Air Corps, Army
Air Forces Materiel Command)

FIFTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G. C. M. convened
at Cincinnati, Ohio,
3-26 April 1944. Dismissal.

SEPARATE OPINION

of

ELI T. CONNER, Judge Advocate,
DISSENTING IN PART

1. The evidence of Bruckmann's guilt of the Charge is so much stronger and clearer than the case upon which the majority saw fit partially to sustain the findings as to Greulich and Ryan that I am constrained to dissent, except that I concur in the majority decision as to Greulich and Ryan on all Specifications and as to Bruckmann on Specifications 1 and 3. To override entirely the Bruckmann findings would, in my opinion, make the court a nullity or dummy, and would likewise free Bruckmann as but a dummy in the inspection set-up at Lockland. Additional evidence, not required to be discussed in support of the principal opinion, of necessity will be considered in this dissent.

2. The military law upon the nearest parallel set of facts to the case at bar is found in GCMO 21-1889, Lydecker, a case also relating to neglect in an Army inspection set-up with military supervision of a civilian contractor. Distinguishing factors between Major Lydecker as superintendent in the construction of the Washington aqueduct and Bruckmann as Resident Representative at Lockland, include the fact that the former was a Regular Army officer in the Corps of Engineers, acting under the more leisurely opportunities of peacetime, whereas the accused, a Reserve

officer without engineering experience, was thrown into an ever-expanding job under the stress of wartime requirements. In addition, the inspection system provided for by the directives of the Air Corps, and creating in effect two lines of control of inspection, makes the 1889 decision not a controlling one here. Not infrequently the Judge Advocate General has had occasion to rule upon charges of neglect of duty, but, except for the Lydecker Case, no ruling upon facts similar to those under consideration has been found. Usually findings sustaining convictions for neglect of duty have involved also other charges and specifications (GCMO 82-1891, Compton; CM 145734, Newberry; CM 149231, Ferris; CM 238266, Campbell, 24 BR 216; CM 260658, Sumner). In the case at bar the proof does show a dual system of control of inspection, divided between the Resident Representative and the technical staff headed by Ryan. Therefore I concur with the majority of the Board that the findings as to Specification 1 are not sustained against Bruckmann.

I also concur with the majority decision on Specification 3 against Bruckmann. The duty of taking, or causing to be taken, corrective action appertained to the offices of Greulich and Ryan, and, since Bruckmann is not held under Specification 1, it is reasonable to concur in not holding him on Specification 3. A further reason for so concurring is the fact that the Specification is subject to criticism in stating a wrongful neglect in the alternative, one of the alternatives, that of failing to cause to be taken the necessary corrective action, being in legal effect so similar to the provisions of Specification 2 as to amount to multifariousness. For Bruckmann, in view of the decision as to Specifications 1 and 3, the informing of his superior officers would have been the same as causing the corrective action to be taken.

In concurring with the majority of the Board of Review as to Greulich and Ryan, it is sufficient to agree that the fact that they were not actually located at the Lockland plant absolves them of criminal liability in failing to supervise under Specification 1. Upon Specification 2 it can be properly stated that Ryan did give the requisite notice of inspection deficiencies to his superior, in the person of Greulich, who attended the Detroit meeting. Although Greulich might preferably have given similar notice to Brigadier General Vanaman, he is properly absolved thereunder by reason of the fact that he, the Chief of Inspection for the country, may be deemed the only superior officer to whom such notice had to be given.

3. Schematically, the questions which are presented for answer by the Board of Review upon Specification 2 against Bruckmann are the following:

1. Did Bruckmann have a duty to inform his superiors of improper inspection practices and faulty inspection at Lockland?

(a) Does Specification 2 state an offense which subjects an officer to court-martial?

2. Were there deficiencies in inspection?
3. Did he have notice?
4. Did he inform his superiors of the inspection deficiencies?—if not

(a) Did he act as a reasonably prudent man in failing to do so?

5. Is the proof of such a nature and in such a quantity as to entitle the Board of Review to set aside the action of the trial court under its power to weigh the evidence?

Although the questions may be thus briefly stated and can be as neatly answered, the discussion and reasons cannot be so simply set forth because of the size of the record and of the fact that various phases of the testimony relate to more than one question.

4. The law of the court-martial, being both criminal and disciplinary in purpose, finds its basis and precedents in the criminal authorities of the civil jurisdictions, as well as in its own corpus juris. Neglect, if culpable, is one of the crimes recognized by the law of the land.

Wharton states that "A negligent offense is an offense which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise by the offender of that care which is usual under the circumstances." Also, "A public officer is required to execute his office diligently. If he fails to do so, he is indictable for misconduct in office although the failure may consist in a mere omission" (1 Wharton on Criminal Law, Sec. 162, 168). In U. S. vs. Baldrige, 11 Fed. 552, it is held that an officer is bound to exercise the care and diligence in the discharge of his duties that a courageous and prudent man, acting under a full sense of his obligations, would exercise under the circumstances, and if he fails or neglects to do so, he is culpable. Numerous similar statements are to be found in the cases and text books (Regina v. Haines, 2 Car. K. 368, 175, Eng. Repts. 152; Res Publica v. Montgomery, 1 Yeates Pa. 419; McBride v. Commonwealth, 67 Ky. 231; Donnelly v. United States, 276 U.S. 505; State v. Irvine, 126 La. 434; Commonwealth v. Coyle, 16 Pa. 36, 40 Am. St. Rpts. 708; 46 C.J.S. 345; Russell on Felonies and Misdemeanors, 9th ed., p. 297).

The military law upon the subject of criminal negligence has followed the pronouncements of the civil jurisdictions. In addition, a military basis for prosecution not applicable to civil courts arises out of the enforcement of the customs of the service (Davis, Treatise on

Military Law, 3rd ed., p. 474). The duty to keep superiors informed is a custom of the service, but also in the case at bar a directive expressly enjoined the duty upon the accused as to "matters of unusual importance." The duty is recognized in the majority opinion as that "duty incumbent upon every officer of the Army to bring to the attention of his superior any deficiency which he knows, or in due care ought to know, and which he doubts, or ought to doubt, his own ability or authority to correct without reference to his superior." The duty is so fundamentally necessary to military service that it is more than a custom, rather it is an integral part of the service. It is a sine qua non of an army and justifies strictest enforcement, because the regularity of the system that is an army makes it so simple to do, and the protection it affords makes its fulfillment a benefit to the informer.

The reason why the duty applies to the particular subject of keeping Bruckmann's superiors informed of inspection deficiencies is answered by the directives, by the system which he headed as Resident Representative and by the course of action which he followed at Lockland. Exhibit 21, (3) (a) and (3) (b)1, and Exhibit 28, 9a make the Resident Representative responsible for the same field functions of the Materiel Command in his particular factory organization as is the District Supervisor for the District. The Materiel Command functions include inspection Ex. 20, 3a(4). Exhibit Y makes the Army Air Forces Inspector in Charge an assistant to the Resident Representative, and outlines his inspection duties. The Air Forces system of plant control, by making the Resident Representative the superior of the Inspector in Charge, thereby places inspection matters under the jurisdiction of the Resident Representative. The accused followed a course of action which included the acceptance of obligations relative to inspection. Exhibit 28, 1e directs that "Matters of unusual importance or urgency will, without exception, be brought immediately to the personal attention of the District Supervisor so that he will be advised of their presence in his District." It is therefore apparent that Bruckmann's general duty of informing his superiors included the giving of information relative to inspection matters.

Hence the answer to the first question is "Yes"; Bruckmann did have the duty to inform his superiors of inspection deficiencies. The answer to question "1g" is governed by the answer to "1". The failure to perform any military duty is an offense in some degree. Officers may be tried only by general court-martial, except in the case of proceedings under Article of War 104. The offense set forth in Specification 2 is not one required by law to be tried under Article of War 104. Therefore the answer to question "1g" is also in the affirmative; Specification 2 states an offense triable by court-martial. The failure to perform the duty stated is a justiciable question within the jurisdiction of a general court-martial.

The answer to question "2" I take from the decision of the majority, in which particularly I concur. The record fully substantiates the existence of deficiencies in the inspection system at Lockland, as carefully listed, in part, in the principal opinion.

The answer to question "4" is "No"; Colonel Drake, Bruckmann's immediate superior, testified that at no time did Bruckmann give him notice of any deficiencies in the inspection system at Lockland, and in this testimony the accused concurred. No proof showed information by Bruckmann to any other superior.

The answer to question "4(a)" relating to the reasonably prudent man is so inextricably involved with question "3", whether Bruckmann had notice, and with question "5" relative to the weight of evidence, that all of these questions, "3", "4(a)", and "5", will be treated together.

Notice, Knowledge and Admissions.

No logical separation can be made in the discussion of the evidence upon the various purposes under consideration, to wit, notice, knowledge, or admission.

The Lydecker Case (*supra*) provides a stern rule of practically absolute liability, regardless of notice to the accused. In invoking a less strict rule against Bruckmann, it is to be observed that he was not without notice of defective inspection conditions at Lockland. The law of notice and knowledge has been variously and frequently stated and interpreted by civil and criminal courts. The notice which sustains a finding of neglect for failure to heed is that which would ordinarily excite inquiry as to discoverable facts. Actual notice need not be actual knowledge, but may be notice implied from the facts. This implied notice is a presumption of fact relating to what one can learn by reasonable inquiry, and the person so placed under the duty of inquiry is chargeable with the knowledge which inquiry would reveal. It is knowledge of facts sufficient to put one on inquiry which, coupled with the exercise of due diligence, would have resulted in the ascertainment of the truth. The notice is held to be followed by the knowledge of the discoverable because of the duty to inquire on sufficient warning and because the inquiry called for would have produced the knowledge (United States v. Shelby Iron Co., 273 U.S. 571; The Lulu, 77 U.S. 192; United States v. Railway Employees, etc., 283 Fed. 479, 483; Cordova v. Hood, 84 U.S. 1; Jones v. NY Guardian & Indemnity Co., 101 U.S. 622; The Tompkins, 13 Fed. 2nd 552; NY Trust Co. v. Watts-Ritter Co., 57 Fed. 2nd 1012; Guardian Trust Co. v. Schram, 123 Fed. 2nd 579; In re Paris, 4 Fed. Sup. 878).

Referring to the quotation from the majority opinion upon the question of whether Bruckmann in due care ought to have known that he had a duty in relation to inspection, the proof shows that he knew and recognized that duty. Numerous factors reveal his understanding that the inspection phase of his Army work at Lockland came under his jurisdiction. Even though Colonel Drake was silent upon the subject of inspection prior to sending Bruckmann to Lockland, Greulich's instruction at that time not to "monkey" with inspection until--(record deficient here as to completion of sentence) told him of inspection obligations. Later, in May 1942, Bruckmann admitted that he held up promotion correspondence of Ray Clark concerning inspectors

in order to give it his further consideration, and that he was instructed by Greulich to "Get it out." In July he signed the "A" rating letter governing inspection. In October he stated in his tire application letter that inspection was among the duties of the Resident Representative. The language of that letter apparently came from some of the literature handed to Bruckmann on his activation, and although the particular document (Exs. 92, 93 for Identification) was excluded, the court heard Bruckmann admit that he had signed the cover. Bruckmann could not recollect where the information for the letter came from.

His weekly staff meetings were attended by either the Inspector in Charge or his assistant, or both. Bruckmann himself went daily through the plant where inspection was taking place and into the inspection cribs and the test cells.

Fifty-four weekly letters in less than thirteen months, admitted for the defense, evidence Bruckmann's understanding that he was to keep Colonel Drake informed. One half of them expressly use some form of the word "inspect" relative to the number of engines shipped, indicating that the writer recognized that as part of his Army duty at Lockland. Then, in the middle of November 1942, strangely, the "inspection" word drops from the epistles, although they still continue to tally the number of engines shipped each week--strangely, except that the court had heard evidence that Bruckmann admitted the development of inspection problems six months after his arrival at the plant, or in September, October, or November, as will be later shown. Yet not in September nor October nor at any time was Colonel Drake ever advised of inspection problems, except a reference to certain gears holding up production in February of 1943. But instead the letters after 8 November 1942 gave the same statistics without using a derivative of the verb "to inspect."

That there were inspection deficiencies at the Wright plant is agreed upon by the majority and the dissent. The fact that Bruckmann knew of them during his tenure of office as Resident Representative is shown by the following admissions during pre-trial investigations and at the court-martial:

a. Queried by the Senators as to what was "wrong with the service out there," Bruckmann replied "Well, from time to time boys (inspectors) come to me and say that certain things have gone back into the line," and were bought after rejection. At the trial the accused failed to deny the minutes read to him.

b. Lieutenant Colonel Outcalt asked him when he first began to learn of complaints about the methods of company and government inspection, to which he replied that he supposed it was about six months after he came (or toward the end of September 1942), and he told of the

way that the complaints came to his attention as follows: "By things being said by the different inspectors, Army inspectors. They would come along and say there were parts here that weren't just right and parts there that weren't just right." The accused at the trial recalled the questions and his answers and placed the time when "these inspection abuses were first brought to his (your) attention" as in September, October, or November.

c. Before the Truman Committee, Bruckmann told of talking to his employees about it, and added "I have got some fellows who sent notes to me about things."

d. To an involved question of Lieutenant Colonel Outcalt relative to an inspector becoming disgruntled and others refusing to pass parts not up to standard, and threats of transfer, he replied "I did not know that. Although I had it said to me that if the inspector would not accept the parts that they would turn over these parts to somebody else who would accept them. In other words, some of these parts were given to an Army inspector, the Army inspector said, 'Well, I won't accept those.' Then they said to him, 'If you don't accept them, somebody else will.' I heard that." At the trial he recalled his statement "to an extent, yes, sir."

e. Bruckmann admitted before the Committee that he was consulted about the transfer of the four inspectors prior to Ray Clark's drafting of the letter of transfer, although having heard Clark, on the stand, say that Bruckmann was advised after the transfer, he went along with the correction in his testimony at the trial. His testimony before Lieutenant Colonel Outcalt, relative to when he learned of the transfer was that he "was advised or recommended about, that the transfer was going to take place."

f. Bruckmann's language before the Committee shows that the matter of the transfer was also discussed with Bond, but Bruckmann hedged upon the subject throughout his Truman Committee testimony, although he admitted in court that he probably made the statements. He added that his recollection was not refreshed on the question as to whether he talked with Bond about the transfers.

g. Before Lieutenant Colonel Outcalt Bruckmann was questioned as to why the Ryan meeting on 11 January 1943 was an open one, instead of by individual interviews, but he didn't remember. However, he testified that he "was told that they would say, 'I am not going to be a damned fool and say these things'," adding that "he felt they were not bringing out everything they wanted" and that he thought he spoke to Ryan "about that." The testimony of Bruckmann at this point also indicates that he had heard, at or about the time, "that some inspectors had written to Senator Taft about some of the conditions at the place."

h. Senator Kilgore asked Bruckmann what he would do in his own beer business if he had 65 salesmen and 25 or 15 of them came to his office and said, "'Listen, this beer is lousy', what are you going to do?" The accused admitted that he would "Look into it", and repeated it as to Lockland and in answer to the question "Or are you going to say 'You boys are all crazy; the brewmaster says this is all right!'" The foregoing was elicited on questioning at Cincinnati and Bruckmann admitted that he did not tell anyone that fact on earlier questioning at Washington.

The general admissions by Bruckmann, before the various hearings, that he knew of inspection problems at Lockland beginning some six months after his appointment as Resident Representative is not the only evidence in the record that he did in fact know of the problems. One of the most serious matters requiring corrective action, and which the majority found sufficient to hold Greulich and Ryan, related to the chain of circumstances beginning with the transfer of the four inspectors and ending with the Detroit meeting. Examination of what Bruckmann knew shows that he was not as much in the dark as his counsel contend. Two of the inspectors expressly advised Bruckmann that they had been transferred and to one of them, Long, he made the statement, "You know they go around me with a lot of things." Next, the admissions of Bruckmann show that the matter was discussed by him with both Ray Clark and Bond. He was bound, from the directives, to know Bond's position in the inspection set-up and that he had none of the personnel duties into which he was injecting himself, regardless of Bruckmann's own absence of power to control the transfer. Then M. T. Clark had his meeting in down-town Cincinnati resulting in the preparation of his report or minutes. Of this meeting Bruckmann admitted his knowledge when he stated at the Outcalt hearing that he "heard of it", and "was told that some of the men," (Bruckmann's inspectors), "were being interrogated." Continuing chronologically, the record shows that Bruckmann knew that Ray Clark, his subordinate, had been summoned to the Detroit meeting and he was informed in at least a general way what was the purpose of Ray Clark's trip. The court heard his language before the Committee that Clark said the meeting related to personnel and Bruckmann's denial of the personnel statement but admitting Ray Clark said M. T. Clark "did not come into our plant anymore for his inspection work." With these facts in mind, the court was entitled to draw inferences as to what more Bruckmann knew, in support of finding him guilty of failing to keep his superior informed. Of none of the foregoing was Colonel Drake advised by Bruckmann.

It is no defense to Bruckmann that Greulich and Ryan knew of the situation after the meeting in Detroit for the reason that neither Greulich nor Ryan was Bruckmann's direct superior. Even if the failure to notify Colonel Drake of the fact that his subordinate Ray Clark was conferring with Ryan, also Clark's superior, might be condoned, it is to be remembered that this is but a part of an extensive episode and only one of many presented to the court, and that it covered some two months in time, during none of which period did Bruckmann advise Colonel Drake of what was going on.

In May 1942 Cook testified to discussing inspection problems with Bruckmann for over three hours. Cook presented a lurid tale covering many phases of inspection malpractices. Nothing in Bruckmann's letters to Colonel Drake reveals any thing of what Cook told him. On "a couple" of occasions, date unspecified, Ratchford, an Army inspector, went to Bruckmann's office to ask him to come down to the plant to look at defective parts, but Bruckmann was too busy and never came. Sometime in December Ginn told Bruckmann that inspection practices were faulty; that rejected material got back through inspection into engines; that tolerances were changed and paper work was altered. The proof is devoid of any notice of the above information being given by Bruckmann to his superiors. Walter Hough talked to Bruckmann on a date which he could not identify, except that it was in the spring of 1943, (Bruckmann had left Lockland by the middle of April). Hough could not remember the conversation exactly, but he stated that "other fellows were in there and they complained to him (Bruckmann) just how the parts that were not accepted got back into the production line." It is possible that the event testified to by Hough as having occurred in the spring of 1943 was the meeting of four inspectors with Bruckmann which Ginn placed in the latter part of 1942, and which Bruckmann identified as in November of that year. Ginn told the court that they "had quite a bit of evidence there, parts that we had picked up, paper work and so forth and so on that we showed Major Bruckmann." Bruckmann indicated that, as the result of that conference, he commenced calling the monthly Army inspectors' meetings, which began in January. On 25 March 1943 the Littel-Wentzel investigation took place, at which Ray Clark said the quality was going down. Bruckmann deemed the situation of sufficient seriousness to notify Finlay, the Plant Manager, that the A rating would be taken away if improvement should not take place in thirty to forty-five days; but even that was not brought to the attention of Bruckmann's superiors. After hearing all the testimony, the court could not help but conclude that no circumstance relating to inspection was deemed of sufficient importance by Bruckmann to bring it to the attention of his superiors.

DISCUSSION

Technical knowledge has no relation whatever to the ground on which the conviction is sustained, both because the warnings were non-technical and because Bruckmann admitted that he knew of the existence of the problem. The offense charged in Specification 2 does not call for a knowledge of galled gears, smoking cylinders, or cracked master rod bearings. Bruckmann's neglect of duty relates to the very thing which his civilian experience as brewery president must have taught him, and that is the ability to understand non-technical problems simply presented, which understanding he admitted in the pre-trial investigations. Within Specification 2, Bruckmann did not have to know a thing about an airplane engine. The system of the Army gave him

the protection of merely advising Colonel Drake of the continuous "red flags" waved before him, which he admitted he saw. Despite the fact that Ray Clark was an expert on technical matters and entitled to reliance, the court had Bruckmann's admission that he was advised that the inspectors would not speak out in open meeting against their superiors.

The agreed and logical issue between the majority and the dissent is whether Bruckmann's statements that he referred all inspection abuses to Ray Clark, the Inspector in Charge, to look into, see that they were corrected and then let Bruckmann know the outcome, followed by the explanation that Clark "would come back and tell me that everything was all right," followed by his monthly meetings of inspectors, constitute a sufficient answer to the question: Did the accused act as a reasonably prudent man in failing to inform his superiors of improper inspection practices and faulty inspection at the plant?

Of course, Bruckmann in so answering the question containing the word "abuses" admitted their existence, and the fact of the existence of inspection malpractices as found by the majority is an original tenet of this dissent. I accept the question as the kernel, the nub on which the appellate authority is to determine whether Bruckmann neglected the duty to report inspection deficiencies to Colonel Drake. The Board of Review has the right, power, and duty to weigh the evidence. To weigh the life out of supportable and believable inferences is an invasion of the function of the court, which had the advantageous position of observing the conduct and demeanor of the witnesses (CM 243466, Calder). Was, then, Bruckmann absolved of a duty to report any of the numerous warnings of inspection problems he received merely because of the magic of Ray Clark's correction and approval? Did Bruckmann, a soldier, act prudently in never once letting his soldier superior know what was coming to his attention from his civilian staff on the all-important subjects of whether the engines passed inspection and of whether his staff of over 60 inspectors was functioning properly, even when he finally concluded that monthly meetings were necessary?

In determining whether Bruckmann in fact acted reasonably, the light to be cast is that of what a normally prudent man would do in the circumstances. In deciding whether to believe the defense of Ray Clark's approval, the court was entitled to, and could not help but, consider the background of Bruckmann. As to the general test of ordinary prudence, Bruckmann is held to the standards of the assignment in which he accepted military placement, without complaint, or request for relief from a job he could not handle, over a period of thirteen months. The court observed that the office of Resident Representative at a large factory was filled by a Captain (or Major) in the United States Army, an important job which Bruckmann apparently sought. They weighed the duty to inform his superiors, against the defense of passing every phase of inspection matters to the "white-wash" of a junior civilian, the Inspector in Charge, and found that Bruckmann did not "act as a reasonably prudent man would under the same or similar circumstances" (Bruckmann's brief, p. 15; MCM, 1928, p. 155). I am not willing to say that the court found against

the evidence. As to the believability of the defense, the court saw and heard the particular man who was submitted to the test of acting with reasonable prudence and weighed his background. He was the president of a family brewery, a man in his fifties, a leader in social, community, and business life in a large city; a man so conscious of at least a part of his military duties as to work long hours, to observe inspection practices almost daily and to volunteer to offer to the Government flood control studies in which he had been interested and concerning which he wrote to Colonel Drake in one of 54 weekly letters. I am unwilling to upset the findings of the trial court in apparently not believing Bruckmann's defense that he thought he acted as a reasonably prudent man in not informing his superiors of inspection deficiencies because he referred all matters of inspection to Ray Clark or held open meetings (where ordinary inspectors would fear to speak freely against their civilian superiors). The court heard and weighed his cross-examination with its ambiguous replies concerning what he did on his daily inspection trips through the plant and how he might inquire about a testing machine "just out of curiosity."

The defense placed in evidence a number of favorable bi-monthly reports of Bond and M. T. Clark which might lull any suspicion that the inspection system at Lockland was on the wane. However, these reports constituted no defense for Bruckmann for the reason that he indicated that he did not see them. He could not assume anything from the absence of adverse reports or the silence of Bond and Clark, in the face of the periodic unfavorable information he was receiving. Even if the court accepted the theory of the defense that the civilian inspection system at Lockland designedly by-passed the Resident Representative, Bruckmann knew of the fact that a serious inspection problem existed. In failing to advise his superiors of his knowledge, he defeated one of the very purposes of his presence at the plant, that of ascertaining information in addition to the data set forth in the reports of visiting civilian inspectors. When he sent Bruckmann to Lockland, Colonel Drake stated that he expected the accused to keep the Colonel "advised of the overall situation" and shortly thereafter telephoned Bruckmann at the plant about inspection personnel. The very fact that the Bond and M. T. Clark reports were favorable would have made a true, or unfavorable, report from Bruckmann, the only officer at Lockland, of what he was learning a marked warning to Colonel Drake to find out the reason for the discrepancy. Bond and M. T. Clark were not Bruckmann's military superiors and their knowledge did not relieve Bruckmann of reporting to his military superior. His liability for neglect of duty is not absolved by another's (honest or dishonest) fulfillment of a similar duty, (Bond having been discharged for gross irregularities).

Bruckmann failed to heed and take advantage of certain correlative provisions of the directives and, while this failure is not an element of Specification 2, it is properly considered for the reason that had the failure not occurred, his neglect to inform also might not have occurred. Several of the directives require all visiting personnel, such as the Supervising Inspector (M. T. Clark) and the Technical Supervisor (Bond), to report to the

Resident Representative as to the purpose of the visit and to inform him of the recommendations subsequently made. Thereafter the Resident Representative is to receive from the District Supervisor a copy of the reports which the visiting inspection personnel are directed to prepare upon the results of the visit. Collaboration by the Resident Representative and the District Inspection Officer (Ryan) in establishing an adequate inspection staff is expressly directed. These provisions, whether addressed directly to the Resident Representative, are binding upon him wherever they appear and are for his benefit and protection and create a correlative duty. It is true that in the inspection system set-up, Bond and M. T. Clark were "above" Bruckmann, and therefore he could not have required them to submit copies of their reports to him. Nevertheless he could properly request, through channels, copies of their reports, and the directives, which he had read, put him on notice that he proceeded at his peril in not inquiring about copies which he was entitled to receive. Not having caused them to be sent to him pursuant to the directives, he lost the defense that his own failure to report to superiors was met by the contents of the reports of others. Had he read them he would have known that Colonel Drake was not receiving the true facts, which he (Bruckmann) was bound to supply.

Specification 2 refers to "superiors" in the plural. In view of the nature of the proof, it is not necessary to determine whether Bruckmann was bound to notify more than one superior. Assuming, but only for argument's sake, that Ryan and Greulich were his direct superiors, the majority opinion finds that they had sufficient notice of the defective conditions to sustain their conviction for not taking corrective action thereon. Obviously Bruckmann was not required to inform them of that which he knew they knew and which he gleaned from Ray Clark on his return from the Detroit meeting. Further, Ryan went through the plant with Bruckmann, discussing inspection matters, and at the meeting he called at the plant on 11 January 1943 he referred the inspectors to Bruckmann. However, in the chain of command neither Ryan nor Greulich can be deemed to be Bruckmann's superior. Of course, regardless of whether Bond and M. T. Clark were deemed above Bruckmann in the inspection system, they, being civilians, were not his superiors within the intent of Specification 2. To any superior above Colonel Drake notice to the latter would be notice to his superior. In any event, the question of the plurality of Bruckmann's superiors is academic for the reason that the whole record shows that he never notified any officer of any matter relative to inspection malpractices. Likewise, Bruckmann can take no defense in an assumption that Ryan would inform Colonel Drake of what he learned of inspection deficiencies because of the fact that he was not within Bruckmann's chain of command to his immediate superior, Colonel Drake, despite the fact that the latter was also Ryan's superior officer. If reporting to any other military superiors constituted fulfillment of the duty, proof thereof would be a matter of defense, as to which the record is devoid.

Not mentioned as in any way determinative of the issue but definitely to be observed in deciding whether the trial court's findings should be nullified are certain indications of the evidence for Bruckmann. When Exhibit 92-93 for identification was handed to him by the Trial Judge Advocate, he acknowledged that he had signed the cover, but parried "as to whether the contents were in it or whether there was any--there was more or some have been added", and the document was denied admission. Note should be taken of the 54 letters to Colonel Drake, in addition to the change in form after he admitted he recognized the arising of inspection problems. On 29 March 1943 he wrote of general

matters and concluded "As directed, I am in Washington, D. C., today, Monday, March 29, 1943." No explanation is made, nor is there any statement that he had undergone the Littel-Wentzel investigation of March 25 and advised Finlay of the possible withdrawal of the A rating. Then on April 5 he wrote the last letter in evidence mentioning his visit to Washington for the Truman Committee and spending the whole of "Saturday" with the Committee in Cincinnati; but without a word to indicate that he had been examined and made his various admissions, read into this record. He categorically denied that notes were taken at the February and March inspectors' meetings, only to be refuted on rebuttal by the testimony of his stenographer, apparently the only woman who attended the meeting, who identified them for admission into evidence. She stated that the transcribed minutes were presented to Bruckmann for review. On sur-rebuttal, Bruckmann said he searched his files and failed to find any minutes; the possibility that he was looking for them for his own purposes and assumed that in not finding them no one else could bring them to court is an inference which an appellate board should not deny to the trial court.

In defending himself upon the contention that he passed his inspection problems to Ray Clark for action and correction Bruckmann places himself in a dilemma. If he did not know enough about inspection problems to reach a decision upon their existence, he was clearly wasting Government time, as administrative head of the Army staff at Lockland, in his daily conversations with Ray Clark and McLaurin and in going daily through the plant and to the inspection cribs. However, these daily activities must certainly have been to satisfy himself in addition to obtaining the opinion of his experts. They show that he did understand about inspection. Hence the court's advantageous position to determine whether the self-interest of Clark, discredited as he was at the trial, might have prompted him to "white-wash" the complaints of inspectors under him, should not be nullified above. In other words, it was for the fact-finding lower court to decide whether the defense of referring all such matters to Clark was made up of whole cloth and in hindsight. The very insistence of Bruckmann that he was not a technical expert enlarges his duty to inform superiors, (not juniors). Failing to report even clues forestalled the opportunity to enable higher authority to turn to the proper Army channel, the Inspector General, and usurped his superior's prerogative of using the judgment which Bruckmann insisted he used. His decision to hold his meetings itself might have indicated to the court that Bruckmann knew that merely referring isolated complaints to Clark was not a sufficient excuse for not reporting what he was learning to Colonel Drake. This is so despite the fact that since the monthly meetings revealed no malpractices they were not "matters of unusual importance or urgency" requiring reports, because Bruckmann admitted he had heard that the men would not speak out against their superiors in open meeting. If the court so believed, it was justified in concluding that the commencing of the meetings nine months after his arrival was but a confession of the existence of a problem which he saw he was not properly handling, but which he persisted in neglecting to answer by taking the proper course of informing Colonel Drake. In any event the meetings proved that they were not the remedy, as Bruckmann, after the March 25 investigation, in effect admitted by telling Finlay that the A rating would be taken away. Of course,

it is not for the Board of Review to determine the proper remedy, nor to decide that an investigation by Bruckmann, or by Colonel Drake, had he been informed, would have been useless because the inspectors would have ceased in their improper practices on the approach of an officer. The chances are that an investigation, after proper reporting by Bruckmann, would not have been valueless, because the inspectors revealed by writing to Congressmen that they would not hide what they knew was wrong. Among the purposes of the military rule which requires a junior officer to keep his superiors informed of the problems of the junior is to remedy, from the senior's greater experience, just such a situation as arose at Lockland.

As pointed out by the majority, proof of an offense comes only after its commission, and the court must always be scrupulous not to judge in hindsight. This is particularly so when judges are called upon to determine what a reasonably prudent man would, or should, have done in that prior time which is being reconstructed by the evidence at the trial. By the same token, the court in seeking the true circumstances of that prior period, reconstructed before it by testimony, must always be mindful that witnesses are human and that their testimony cannot help but have at least the tinge of self-interest, resulting in an effort, conscious or otherwise, to paint the former event as the man on the stand earlier wanted the event to be, or felt that it should have been. For this reason the genius of Anglo-Saxon jurisprudence places the witnesses before the trial court and gives it broad discretion in deciding whether the hindsight of the man on the stand has applied so much hindsight to his story as to make it untrue. This discretion in the lower court to sift out the truth is not to be lightly treated, under the guise of weighing the evidence. As earlier averred, the appellate court should not weigh the life out of the evidence. The proof here is strong. To rule that its weight does not sustain the conviction would be to try and acquit this accused on appeal.

Abstruse interpretations of rules on the subject of inferences are not here required because the evidence sustains the findings upon proof so direct that not many have to be drawn, regardless of those discussed. The law of civil jurisdictions requires the proof of grossness to sustain a criminal conviction of neglect. In the military law neglect of even routine duty, or failure fully or properly to perform it, is included in the "sins of commission or omission," which Winthrop finds to be an offense under Article of War 96 (Winthrop's Military Law and Precedents, 2d Ed., Reprint, 1920, 722). For that reason questions concerning the intent or motive of the accused, as well as questions relative to courses which would have been preferable for him to have pursued, are not factors in reaching proper legal conclusions in the case.

No rule of law provides that a charge of continuing neglect of duty can only be sustained by proof of a single, sufficient wrongful omission. By the very nature of Specification 2 the offense was properly proven by showing a course of conduct from a series of acts and failures of action. Some of the elements revealed by the prosecution, and by the defense as well, alone sustain the conviction. Hence, the entire cumulative proof sustains the findings. Since Greulich and Ryan are legally convicted under Specification 3 for doing nothing after properly holding the Detroit meeting, despite their

statement that in their judgment nothing more was to be done, so Bruckmann's conviction under Specification 2 is equally sustained, in the light of the entire record, despite his defense that in his judgment, and because of the action he took, he deemed informing his superiors not necessary.

Two questions posed by the majority, both relating to the moral-legal word "ought", have been expressly answered by the proof. Ought Bruckmann have known of the malpractices and ought he have doubted his own ability to correct them? Whether he should have known of the deficiencies in the inspection system is answered by the fact that his testimony shows he did know of them and referred the matters to Ray Clark for correction, followed by calling his monthly meetings, where similar problems were there considered by Clark and McLaurin. Whether he ought to have doubted his own ability to correct them is answered by the fact that he did doubt his ability, referring his problems to Ray Clark, and when that did not satisfy him, calling the meetings. However, his admission that he had been told that the inspectors would not speak out in open meeting showed he knew (not merely ought to have known), that the meetings would not answer the problem. Hence, admitting, by the fact of calling the meetings, that there was a problem to be answered and knowing that the meetings would not furnish the answer, he ought to have known that his duty was to inform his superior. His failure to inform, of course, goes to the similar question of whether he did recognize, or ought in due care to have recognized, that inspection conditions were defective and of sufficient seriousness to report. The determination of the question of his guilt in failing to inform his superiors is particularly the province of the trial court, and in sustaining its finding it is not necessary for the appellate authority to determine whether the finding was based upon the fact of recognition or upon the duty to recognize. The Board of Review can observe that Bruckmann's admissions show that he did in fact recognize the existence of serious inspection malpractices, to which he could not shut his eyes on the duty of reporting them. In addition, the magnitude of the malpractices, as outlined by the majority, in and of itself, shows that the Resident Representative, on the spot, engaged in daily visits through the plant and hearing various complaints and monitory information, ought to have recognized them (as he did). The case then is clear. Conviction was incumbent on the court-martial. Sustaining the findings as to Specification 2 is the obligation of the Board of Review. Bruckmann had a duty to inform his superior of inspection malpractices. He recognized the improper practices and understood his duty. He failed to inform. His failure is a neglect of duty culpable in military law.

Counsel urge that the conviction of Bruckmann is a tragedy. The vastness of the project is stressed. Questions regarding the immensity of the operation and the personal circumstances of the accused are for the confirming authority in mitigation, insofar as they do not affect legality, upon which, alone, the Board of Review acts. The presumption of innocence has been continuously recognized and the size of the record has not caused it to be forgotten, the extent of the testimony merely serving to make more difficult its proper segregation. Although Bruckmann's testimony showed that he had multifarious duties, the proof negatives his inability to meet them without evidencing the affirmative defense that they were too onerous to permit of his fulfillment of their inspection phase (CM 145734, Newberry). Admittedly high standards were called for to meet the threats of an enemy smart in war.

Returning to the questions posed in the third subdivision of the dissent, "3" is answered "Yes"; Bruckmann did have notice, both actual and implied, of deficiencies in the inspection system, which he recognized. The answer to "4(a)" is "No". In failing to inform his superiors of the deficiencies he did not act as a reasonably prudent man. "No" also answers "5". The legal evidence is of such a nature and such a quantity as to compel the finding of guilty on Specification 2 (CM 211829, Parnell, 10 BR 173), and hence the action of the trial court may not properly be set aside as against the weight of the evidence.

I concur with the majority as to paragraph "6" of their opinion. No errors committed at the trial are of such a nature as to affect my conclusion upon the propriety of sustaining the findings of the court on Specification 2 against Bruckmann.

Conclusions

The evidence shows that there were inspection malpractices at the Lockland plant of Wright Aeronautical Corporation. By reason of the fact that Greulich and Ryan were not located at the plant, each is properly absolved of neglecting any duty to supervise its inspection system. Bruckmann is likewise absolved of neglecting to supervise by reason of the peculiar nature of Air Corps methods of conducting the system as related to the duties of the Resident Representative. Hence, all three accused were improperly convicted under Specification 1.

Ryan's duty to inform his superiors of inspection deficiencies known to him is deemed satisfied by his meeting with Greulich, Chief of Inspection, at Detroit, which obviated informing his direct superior, Colonel Drake, and this entitled him to an acquittal under Specification 2. Greulich, as the overall head of the system, may be deemed not culpably negligent in failing to have notified any superior above him, and entitled to acquittal under Specification 2, (as a matter of common sense and justice rather than pure legal logic). Bruckmann being under military duty to inform his superiors of improper inspection practices and faulty inspection at the Lockland plant, where he was Resident Representative, and there being such deficiencies known to him of which he failed to inform his superiors, his conviction under Specification 2 is sustained.

Ryan and Greulich each knew of improper inspection practices and of faulty inspection at the Lockland plant, and were each in a position of authority to take, or cause to be taken, corrective action. Each failed and each is properly convicted under Specification 3. By reason of the fact that the duty of taking, or causing to be taken, corrective action has been found to have rested in Greulich and Ryan, and because taking corrective action may be deemed a part of supervising, and because causing it to be taken may be deemed to include informing superiors, and his conviction under Specification 2 being sustained, Bruckmann is deemed entitled to be acquitted of Specification 3.

5. In my opinion the court was legally constituted and had jurisdiction of the persons and subject matter. Except as noted, no errors injuriously affecting the substantial rights of accused were committed. The record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 3 thereof as to Greulich and of the Charge and Specification 3 thereof as to Ryan, and of the Charge and Specification 2 thereof as to Bruckmann; legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge I as to Greulich and of Specifications 1 and 2 of the Charge as to Ryan, and of Specifications 1 and 3 of the Charge as to Bruckmann. As to each accused, it is my opinion that the record is legally sufficient to support the sentence. Dismissal is authorized for violation of Article of War 96.

 , Judge Advocate

SPJGQ - CM 257632

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

FEB 26 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review, and the separate opinion of one member of the Board of Review, dissenting in part, in the case of Lieutenant Colonel Frank C. Greulich (0218733), Air Corps; Major Walter A. Ryan (0267858), Air Corps; and Major William Bruckmann (0190118), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and of Specification 3 thereof (failure to take corrective action despite notice of improper inspection practices) as to Lieutenant Colonel Greulich and as to Major Ryan; legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge I (failure properly to supervise inspection and failure to inform superiors of inspection malpractices) as to Lieutenant Colonel Greulich and as to Major Ryan; legally insufficient to support the findings of guilty of the Charge and Specifications 1, 2 and 3 thereof as to Major Bruckmann; legally sufficient to support the sentence as to Lieutenant Colonel Greulich and Major Ryan and to warrant confirmation thereof; and legally insufficient to support the sentence as to Major Bruckmann. Considering the circumstances of the case and the previous record of Lieutenant Colonel Greulich and Major Ryan, together with the fact that each had a stupendous task, which, upon the whole, he performed in creditable fashion, I recommend that as to Lieutenant Colonel Greulich and Major Ryan the sentences be confirmed but commuted to a reprimand and that the sentences as thus modified be carried into execution. As to Major Bruckmann, I recommend that the findings and sentence be disapproved.

3. Consideration has been given to the following letters, all of which accompany the record of trial; Martin V. Coffey, National Vice-Commander, The American Legion, 3 May 1944; Mrs. Alice Purcell Bruckmann (wife of Major Bruckmann), 29 June 1944; V. J. Steele, Owensboro, Kentucky, 24 May 1944, forwarded by Hon. Albert B. Chandler, U. S. Senate, 9 June 1944; John H. Pugh, Commander, F. W. Galbraith, Jr. Post No. 515, The American Legion, 5 August 1944; Mr. Victor Heintz of Cincinnati, Ohio, 5 August 1944.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

8 Incls

- 1 - Record of trial
- 2 - Dft ltr for sig S/W
- 3 - Form of action
- 4 - Ltr fr Martin V. Coffey
- 5 - Ltr fr Mrs. Alice Purcell
Bruckmann
- 6 - Ltr fr V. J. Steele, forwarded by Hon. Albert B. Chandler
- 7 - Ltr fr John H. Pugh
- 8 - Ltr fr Victor Heintz

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence as to Major Bruckmann disapproved. Findings of guilty of Specifications 1 and 2 of Charge I. as to Lt. Col. Greulich and Major Ryan disapproved. Sentences of Lt. Col. Greulich and Major Ryan confirmed but commuted to reprimand. G.C.M.O. 144, 13 Apr 1945)



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(179)

SPJGK
CM 257824

13 SEP 1944

UNITED STATES)

v.)

Major HOWARD E. COX)
(O-308933), Air Corps.)

ARMY AIR FORCES MATERIEL COMMAND

Trial by G.C.M., convened at Wright
Field, Dayton, Ohio, 10,11,12 and
13 April 1944. Dismissal, total
forfeitures, \$1,000 fine, and con-
finement not exceeding 3 months
until fine paid.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

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

Specifications 1-14: (Finding of not guilty).

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

Specification 1: In that Major Howard E. Cox, Air Corps, being continuously, during the period from on or about 1 April 1943 to on or about 1 November 1943, Chief, District Contract Section, Eastern Procurement District, AAF Materiel Command, District Contracting and Purchasing Officer for such District, and Purchasing and Contracting Officer for the AAF Materiel Command at Colonial Airlines, Inc., and being in such capacities charged, among other things, with the duties of general supervision of Contract W 535 ac-35706 between the United States and Colonial Airlines, Inc., and contractual matters in connection therewith, the approval of vouchers submitted thereunder, the certification and verification of said contractor's expenditures for reimbursement under said contract, the transmission of said vouchers to Finance Officer at Wright Field, Dayton, Ohio for payment, and the supervision of the work performed in connection with said matters by other personnel in said Section and under his supervision, did wrongfully and grossly neglect and fail to perform his duties as aforesaid,

by failing and neglecting to exercise proper supervision over said contract and contractual matters in connection therewith, failing and neglecting to take proper action to prevent the presentation, approval and payment of false and improper claims of said contractor, and failing and neglecting to prevent certification and verification of improper expenditures of contractor appearing on said claims, whereby he did permit the presentation for approval, the approval, and the payment of the claims hereinafter mentioned against the United States presented by said Colonial Airlines, Inc., which claims were in fact false, in that each of such claims, among other things, covered charges for services and supplies alleged to have been rendered and furnished to the United States under the contract aforesaid in connection with an airplane (described in the pertinent vouchers as "Army Luscombe" or "Training Plane" or "Army Aircraft" No. 28433), but which were in fact furnished and supplied by said Colonial Airlines, Inc., to and for the individual use and benefit of said Major Howard E. Cox in connection with Luscombe Airplane No. NC 28433, the property of said Major Howard E. Cox, with the result that such false claims were presented, approved and paid on behalf of the United States, and public monies of the United States were devoted to payment of the private obligations of said Major Howard E. Cox; the vouchers containing such claims, the gross amount of each and the portions thereof representing charges for supplies and services furnished for the private use and benefit of said Major Howard E. Cox as aforesaid being as follows, to wit:

Colonial Airlines, Inc. Audit Voucher No.	Gross Amount of Voucher	Charges for Airplane No. 28433
192	\$4,580.06	\$42.42
199	4,805.92	33.76
208	4,278.37	30.17
210	6,126.06	1.57
218	4,046.56	10.98
230	3,995.51	3.80
243	4,021.55	14.99
241	8,044.50	13.63
248	3,988.28	25.55
261	7,326.82	9.60
266	4,702.77	8.30
275	5,489.22	2.27
277	3,578.07	7.02

Specification 2: (Finding of not guilty).

He filed a plea in bar of trial, which was overruled, and then filed a second interlocutory plea in the nature of a motion to elect combined with a plea of multiplicity and inconsistency, which was likewise overruled. He pleaded not guilty to all Charges and Specifications, and was found not guilty of Charge I and all of its Specifications and of Specification 2 of Charge II, and guilty of Specification 1 of Charge II and of Charge II. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of one thousand dollars (\$1,000), and to be confined at hard labor until said fine is so paid, but for not more than three (3) months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The sole offense to be considered by the Board of Review is that of wrongful and gross negligence and failure in the performance of his duties by accused, as set forth in Specification 1 of Charge II. Consequently there is no occasion for the Board to deal with the substantial amount of testimony adduced at the trial, pertinent only to Charge I and its Specifications and Specification 2 of Charge II, the inclusion of which in this opinion would merely becloud the real issue.

A brief resume of undisputed facts, gleaned from the testimony of witnesses for the prosecution and the defense, will serve as an informative and clarifying background for the consideration of the acts of omission and commission which are the basis of the charge.

On 9 September 1942 accused, then a captain, was appointed Chief of the Contract Section of the Eastern Procurement District, Army Air Forces Materiel Command, and was designated as District Contracting and Purchasing Officer (Pros. Ex. 3). On 7 October 1942 he was also named Purchasing and Contracting Officer of the Army Air Forces at a number of plants, including Colonial Airlines, Incorporated (hereinafter referred to as "Colonial" for convenience), La Guardia Field, New York (Pros. Ex. 4). The negotiation of contracts for the Flying Training Command with colleges and universities was made a part of his duties in the spring of 1943 (R. 305,306). By an order dated 23 October 1943, at which time accused was overseas, accused was relieved from assignment to the Eastern Procurement District and assigned to the Army Air Forces Materiel Command at Wright Field (R. 326, Pros. Ex. 5). On 29 October 1943 Lieutenant Colonel Neal D. Mooers was designated as District Contract Officer, vice accused (Pros. Ex. 6), and on 10 November 1943 the order naming accused as contracting and purchasing officer at various plants, including Colonial, was revoked (Pros. Ex. 7). Accused, who returned from overseas on 31 October (R. 323), remained at the office of the Eastern Procurement District until 11 or 12 November 1943. On the latter date he was formally relieved from assignment and

duties in the Eastern Procurement District (Pros. Ex. 8) and proceeded to his new duties at Wright Field (R. 326,327; Pros. Ex. 8).

During the period in which accused served as District Contracting and Purchasing Officer the volume of procurement increased considerably, jumping from about \$2,000,000 to about \$200,000,000 per month. In May 1943 the volume amounted to approximately \$13,000,000. The office suffered the loss of some of its experienced officers, but the office force, both military and civilian, was greatly augmented. According to accused, during the summer and fall of 1943 his office "was getting more and more work and less and less lawyers and capable officers" (R. 304, 305). Accused was frequently out of his office on official business, and was working very hard and keeping late hours. As the volume increased, detail work, such as examining and signing vouchers, was passed on to other officers, but accused retained and was responsible for general supervision over their work (R. 31, 329-331).

Important duties are assigned to and serious responsibilities placed upon an Air Corps District Contracting and Purchasing Officer under orders issued by the Air Corps Materiel Command (Pros. Ex. 11) and its predecessor, Air Corps Materiel Division (Pros. Ex. 10). Basically this officer is responsible to the District Supervisor for the proper performance of such contracting functions as are required of the District Supervisor's Office by directions of higher authority and such additional duties as the District Supervisor may specify (Pros. Ex. 10). It is specifically his duty to exercise general supervision of all contracts and contractual matters. General Orders No. 4, Addendum 5, Revision No. 1, 20 August 1943 (Pros. Ex. 11) more clearly defines some of his duties as follows:

"* * * The District Contracting Officer will be the Chief of the District Contract Section; will supervise directly the activities and personnel of such section; will be responsible to the District Supervisor for the proper performance of the functions and duties of such section; * * * will instruct, supervise, aid and assist the other contracting officers in the District, referred to in paragraph 4 hereof [additional commissioned officers assigned to the district for various duties, including those assigned to contractors' plants], in the performance of the functions and duties assigned and delegated to them; * * *".

A contracting and purchasing officer, assigned to a particular plant in connection with a Cost-Plus-A-Fixed-Fee-Contract, is specifically charged with verifying the contractor's expenditures for which reimbursement is claimed, with executing the certificates of approval on the vouchers submitted by the contractor, after audit by the Air Corps resident auditor, and with transmitting approved vouchers to the proper finance officer for payment (Pros. Exs. 10 and 11). While specific companies were not allotted

to the additional officers assigned to the office and placed under accused's supervision to take care of the increased work, these officers divided up the work more or less among themselves. In this group of officers were Captain Donald I. Melhado, and First Lieutenants Hebdon Harris and Thomas P. Cook (R. 31,116,152,292,293).

Among the Government contracts directly under accused's supervision was a Cost-Plus-A-Fixed-Fee-Contract with Colonial, executed under date of 1 February 1943 on the standard form approved by the Under Secretary of War, 24 December 1942 (Pros. Ex. 1). The type of work to be performed is expressed in broad terms. In effect the contract provides that whenever directed by service orders issued by the contracting officer in accordance with the contract, the contractor will perform any services capable of being performed by it. Without limiting the scope of this all-inclusive provision, the contractor's obligation includes the performance of services "in the operation, operational maintenance and servicing" and "the maintenance and overhaul of airplanes, engines, parts, accessories, instruments and all other equipment used in connection with airplanes" (Pros. Ex. 1). The contract contemplates that the service orders shall be broad in their scope (Art. 1, pars. (b) and (c)) and that the contractor shall be "deemed authorized by such Service Orders to do any and all things incident to, and necessary and appropriate for the preparation for, such services". These service orders are issued as called for by the various agencies which wish to use the contract for the purpose of obtaining service from the airline (R. 272). Four service orders were issued to Colonial, two pertaining to "Training of Military Personnel", and two pertaining to "Furnishing Ferrying Crews and Maintenance and Modification Work on Air Transport Command Operated Aircraft" (Pros. Ex. 1). As contemplated by the contract these orders were issued by the contracting officer at Wright Field.

During the entire period in which accused served as contracting officer, he was the owner of a Luscombe Airplane, NC 28433 (Stipulation, Ex. 2). The letters "NC" are used only in connection with civilian planes (R. 265,266). On or about 2 May 1943 this plane was hanged for accused by Colonial at La Guardia Field, and thereafter that contractor repaired, inspected and performed other services on the plane and furnished it with gasoline and oil (R. 83,169; Pros. Ex. 52). Charges for the cost of these services and supplies, totaling \$204.06, made up of 13 items, varying from \$1.57 to \$42.42, applicable to accused's plane, were billed to the Government between June and November 1943 on thirteen reimbursement vouchers for larger amounts totaling \$64,894.69, as described in Specification 1 of Charge II (Pros. Exs. 12 to 24). On only one of the vouchers do the letters "NC" appear in connection with the number of the plane (Pros. Ex. 15), which is variously described in the vouchers. These vouchers were first submitted by Colonial to the Army Air Forces resident auditor, Mr. Walter Wenk, and approved by him except in two instances in which the approval was by the acting resident auditor.

Initial responsibility for their correctness rested upon that official (R. 32,49,60). They were then submitted to and approved by contracting officers in accused's office, while these officers were under accused's supervision, except probably the last, which was transmitted on 4 November 1943, after accused's successor had been named (R. 326; Pros. Exs. 6,24). As thus approved they were transmitted between 26 June 1943 and 4 November 1943 to the Finance Officer at Wright Field and paid by that officer (Stipulation, Pros. Ex. 9). Two were approved by First Lieutenant Hebdon Harris, three by First Lieutenant Thomas P. Cook, and eight by Captain Donald I. Melhado, four while he was a first lieutenant. While on the date of the transmittal of the last voucher accused had been succeeded as District Contract Officer by Lieutenant Colonel Mooers, accused was still at his office in the Eastern Procurement District Headquarters. Colonial did not submit a bill for these services and supplies to accused until after accused had been apprised of the investigation undertaken by the military authorities, and accused did not pay Colonial until after such bill had been rendered (R. 396). Accused's financial position at all times was such that he was able to pay the charges (R. 314,315).

While there are vital differences between the prosecution and the defense as to the instructions and information given to Colonial by accused concerning his airplane and its care, there appears to be no real dispute as to the events leading up to its being hangared with that company. During the spring of 1943 accused discussed in a personal way with Lieutenant Colonel Norman D. Frank, of the Eastern Procurement District, the desirability of moving the plane nearer to New York from its then location at New Hackensack. That officer took the matter up with his brother to explore the possibility of having the plane hangared in Newark, but because of lack of facilities for furnishing gas and service at that point, he and accused concluded that better service could be obtained at La Guardia Field (R. 230-231,306). Accused then discussed with Colonel Hutchins, Supervisor of the Eastern Procurement District, and accused's direct superior, the propriety of purchasing gasoline and oil from Colonial, but the matter of hangaring and service by one of the Government's contractors was not brought up. Colonel Hutchins knew that accused's plane was hangared at La Guardia Field but did not know who was hangaring it for accused. Colonel Hutchins saw nothing objectionable in accused's purchasing oil and gasoline from a Government contractor (R.31).

Mr. Alfred M. Hudson, Supervisor of Service for Colonial's Military Transport Division, in the course of a conversation with the accused, suggested that accused bring the ship to the company's hangar at La Guardia Field. Accused did not adopt this suggestion at first because of the possible consequences, best described in the words of Mr. Hudson (R. 167):

"Well, the Major said that that was what he would like to

do, but he didn't want to do it at that time because he was going to lease the airplane to the Army and that if he kept the airplane at any contractor's or under the roof of any contractor that there was liable to be considerable trouble about it and he would rather not do it."

Subsequently accused changed his mind and brought the plane to Colonial's hangar sometime in the early part of May 1943 (R. 168,316). Authorization for the use by accused of his private plane in the Eastern Defense Area was obtained on a request by Colonel Hutchins, submitted 19 June 1943 (R. 29, Def. Ex. A).

The resumes of the testimony of the witnesses for the prosecution and defense, which follow, emphasize the irreconcilable conflict which exists between the parties on almost every other important aspect.

For the prosecution.

Mr. Branch T. Dykes, Vice President of Colonial, was in charge of operations for the company at La Guardia Field (R. 80). On or about 26 April 1943, accused informed Mr. Dykes that accused's airplane had been placed in storage in the company's hangar at the Albany Airport, Albany, New York, that accused had leased or was going to lease it to the Army for the duration of the war, and that it was to be serviced and maintained in the same manner that any other Army plane that was assigned to the company would be handled (R. 82). Thereupon on 26 April 1943 witness forwarded the following letter to the company's foreman at Albany, and a copy to Colonial's treasurer, Mr. Odenwalder, its Superintendent of Maintenance, and its General Foreman at New York:

"Major Howard Cox today advised us that the Luscomb airplane he owns which is now in storage at your station, has been leased to the U. S. Army for the duration of the war. The Army has assigned this airplane to Major Cox for his use, therefore, he has directed us to maintain and service the airplane in the same manner as any other Army airplane would be handled." (Pros. Ex. 27.)

Mr. Dykes was of the opinion that in this letter he fairly well quoted accused's statement to him, and that when accused gave him the instructions accused intended that this plane should be treated with regard to charges, as well as maintenance and service, just like any Army airplane. Witness could not recall that accused made any specific statement as to how the charges were to be made (R. 92), but accused at no time gave witness any instructions contrary to those already quoted or stated to him that no charges on the plane were to be made against the Government (R. 83).

Insofar as witness was concerned there was no confusion about the plane (R. 95,96). On 6 May 1943 witness sent an inter-office memorandum to Mr. Odenwalder (Pros. Ex. 28) advising that official of the presence of three aircraft in the company's La Guardia Field Hangar, including "Luscomb #NC 28433-airplane assigned to Major Cox arrived 5-2-43 at 6:50 P.M. Pre-Flight & Daily Inspection". A copy of this communication was sent to Mr. S. Janas, President of the company (R. 83).

Mr. Walter W. Wenk was the Resident Auditor for the Army Air Forces at Colonial in New York from May through November 1943 (R. 32). It was his duty to approve the costs incurred in the performance of the contracts. Subordinates audited the costs and submitted the reimbursement vouchers to witness, who, after examination and approval, forwarded them to the contracting officer, at that time the accused. After processing by the contracting officer, they were forwarded by that officer to the Finance Officer for payment (R. 32,33,49). Accused showed witness his plane at Hangar No. 8 at La Guardia Field, occupied by Colonial, and stated to him that he had leased the plane to the Government for \$1.00 (R. 33,35). This was prior to the approval of any vouchers by witness for the plane (R. 35). Witness got no flight reports on accused's plane, although he did on all others but felt no misgivings about processing items affecting the Luscombe without such reports (R. 51-53). Witness was never notified by the Materiel Command that accused's plane was to be maintained and serviced at the cost of the Government, nor were these costs specifically covered in any service order. He relied upon accused's statement that he had leased the plane to the Government, a memorandum that he received from Colonial's office, and his interpretation of the scope of the service orders issued by the contracting officer in connection with the contract (R. 64,68,70,77,78). The memorandum referred to by witness is one from Mr. Odenwalder, Treasurer, dated 12 May 1943, addressed to Mr. Myers, Mr. Readyoff and Resident Auditor (Pros. Ex. 26), in which that official notified the parties addressed of the receipt by Colonial at La Guardia Field of four planes, including "Luscomb No. NC-28433, received on May 2, 1943, at 6:50 P.M."

Witness admitted that if the plane had not been leased to the Government, it was erroneous for Colonial to put the charges on its bills and for him to approve the bills (R. 64).

Mr. E. P. Odenwalder was Treasurer of Colonial throughout 1943 until the latter part of July, with offices in the International Building, Radio City, New York (R. 109,110). A part of his duties was to "make claims or institute claims for reimbursement under the cost-plus-fixed-fee-contract". The preparation of vouchers came under his supervision, and while he signed some, most of them were signed by his assistant, Mr. A. S. Myers, who originated the vouchers, but for whose work witness was responsible

(R. 110). Witness saw the letter from Mr. Dykes dated 6 April 1943 (Pros. Exs. 27 and 29) when it was received in his office. He also recalled receiving the notification by Mr. Dykes on 6 May 1943 of the presence of the Luscombe at the company's hangar at La Guardia Field (Pros. Ex. 28), and transmitting this information to Mr. Myers, Mr. Readyoff and the resident auditor on May 12, 1943 (R. 111,112; Pros. Ex. 26). The resident auditor had nothing to do with the private business of Colonial (R. 113). Witness' work required him to be away from the office quite a bit of the time, and while his resignation from the company was dated in September 1943 and he continued in the service of the company until that time, he actually left the quarters where his office was located in the latter part of July (R. 113). Witness did not receive a letter from Mr. Janas, President of Colonial, dated 15 July 1943 (Def. Ex. "E") and did not see it until the Army Intelligence officers showed it to him in January or February 1944 (R. 114). Witness had a hazy recollection of a telephone conversation with accused concerning handling of expenses in connection with his plane, at which time he thought accused's answer was that "he was endeavoring or attempting to work it out". Witness was not interested in an immediate reply because he thought it was a routine matter that accused, being a contracting officer, would take care of in time (R.111).

Miss Ruth G. LaBar had been employed in the Contract Section, Eastern Procurement District, Materiel Command, constantly since 28 October 1942. While she had done some stenographic work, her principal work was processing vouchers on airline contracts administered by the office. She, as well as Captain Melhado and Lieutenants Cook and Harris, contracting officers, were under the supervision of accused. Form letters, transmitting to the Finance Officer at Wright Field for payment the thirteen vouchers described in Specification 1 of Charge II, were prepared by her and signed by one of the contracting officers for accused. Each of the thirteen vouchers contained a charge against accused's plane (R. 115,116,117,120). Witness showed a majority of these vouchers to accused, who merely expressed his thanks and made no further comment (R. 121,131). In presenting them to accused, witness would say, "For your Luscombe" or "Charges on your plane" (R. 122). In connection with the preparation of a letter to Colonial, not connected with the specification under consideration, accused asked witness whether the letters "NC" had appeared upon "any of the charges to the vouchers". Upon her reply that she was not sure whether or not they had appeared but that she thought that she had seen them on the charges, he remarked, "It hadn't been caught up with yet" (R. 124). Originally accused signed all vouchers himself, but as far as witness could recall, after 1 April 1943, most of the vouchers were signed by the other contracting officers who were under his supervision (R. 124,125,126). Accused had previously asked witness to show him all Colonial Airline vouchers which contained any charges for his

airplane and it was pursuant to these instructions that witness showed accused such vouchers that came in when he was there (R. 126,127). While witness could not recall any specific dates on which accused was absent, she knew that he went away frequently (R. 131). Accused's secretary was Miss O'Reilly, but witness wrote letters from time to time for accused (R. 128-129). To get to his office, accused had to pass through the office in which witness' desk was located, and witness may have shown accused one or two of the vouchers as he passed through the room, but the majority were shown to him in his office (R. 131).

First Lieutenant Hebdon Harris was placed in the airlines unit of the Contract Section, of which accused was the head, the first part of April 1943, as a contracting officer for contracts in general under the overall airlines setup (R. 152). No specific plant was assigned to him. He was authorized by accused to sign vouchers, including those in connection with the Colonial contract, after checking them (R. 152). Witness knew that accused owned a Luscombe airplane which, as he recalled it, accused told him he intended to lease to the Government (R. 152,153). In June 1943, a voucher (Pros. Ex. 12) came in from Colonial on which was a charge in connection with the Luscombe (R. 153). Remembering what accused had said, not knowing the status of the lease, and wanting to be certain that he was authorized to sign the voucher (R. 153), witness took the voucher into accused's office, at which time the following conversation took place (R. 154):

"I said, 'Major Cox, is this okay for me to sign? It is a charge appearing on a Colonial Airline Voucher involving your Army Luscombe'. He said, 'It is okay for you to sign it. I am glad you brought it to my attention and I want you to bring all future charges of a similar nature to my attention'".

Witness signed the voucher and later, when another one came in with charges against the Luscombe, he took it "into him also". The conversation on that occasion was as follows (R. 154):

"I said, 'Major Cox, this is another voucher containing a charge against your Luscombe airplane under the Colonial Airlines contract, is it okay for me to sign it'. He said, 'Yes, it is,' and, in this particular case he mentioned it was for checking equipment."

Accused did not enlarge upon what he meant by "checking equipment", but, according to witness, "when he told me it was okay to sign I returned to my desk and signed it" (R. 154). On Sunday morning, 16 January 1944, accused telephoned to witness at his residence in New York and after casual greetings, an inquiry as to whether witness was a Captain yet, and the remark that he had recommended witness for a captaincy,

accused asked witness to furnish him a certificate to the effect that it had never been accused's intention to charge to Colonial Airlines contract any item for the maintenance or servicing performed upon his (accused's) Luscombe, and that accused had asked Colonial Airlines "to accumulate those charges and to bill him thereafter". Witness expressed doubt to accused that he could give the certificate, adding, "I thought I called to your attention specifically a charge involving your Luscombe airplane, submitted in a Colonial Airline voucher under its overall airline contract and you told me it was okay to sign it" (R. 155,156). Later that day accused again telephoned witness and advised him that unless witness could give him the type of certificate he desired, not to send any (R. 156). Witness never saw any written papers transferring the airplane to the Government, but believed that he was justified in approving the vouchers upon accused's assurance that it was "okay" to do so (R. 161).

Mr. Robert A. Winter served as a statistician under accused when the latter was chief of the Contract Section. About 60% of his work was on airlines (R. 98,99). Witness knew that accused owned a Luscombe airplane and believed that he saw some vouchers come from Colonial Airlines with charges for an "Army Luscombe No. so and so" (R. 99). He believed that these charges were discussed in his presence on one occasion when Lieutenant Harris was there and possibly another time. He did not recall definitely whether Miss La Bar was present, but to the best of his memory the vouchers were twice discussed (R. 100). Likewise, to the best of witness' memory sometime in June 1943 accused stated in the presence of Lieutenant Harris that the airplane was leased to the Army and was to be treated the same as a Stinson, which had previously been assigned to the Eastern Procurement District (R. 101). Accused telephoned to witness at his residence in March 1944, at which time accused said -

"* * * that he was positive he had never seen the voucher and that he would like me to try hard and remember that the voucher wasn't there and he stated that he might have given me the general impression that the charges were to have gone through but he was referring to the Stinson aircraft in connection with the Luscombe; he merely meant that the Luscombe was available for general use in the Eastern Procurement District as the Stinson, and did not mean to suggest in any way that the charges were allowable" (R. 106).

According to witness, in the summer and fall of 1943 the volume of work in the Eastern Procurement District was very large. Accused was handling a great deal of work, his telephone was ringing rather constantly and usually one or two people at least were waiting while

some one else was talking to him, the overall constituting a "pretty hectic set-up" (R. 107-108). The college program was thrown in in April, procurement by the District began to expand, one of accused's mainstays was transferred, most of the officers there were new officers, without experience, and there was a lot of turmoil and new work. It was within the "realm of possibility" that because of the volume of work and the telephone ringing accused did not understand all the facts in connection with the conversation which witness heard Lieutenant Harris and Miss La Bar have with accused (R. 108).

For the defense.

Mr. Alfred M. Hudson, Superintendent of the Colonial Airlines, Military Transport Division, first met accused in October or November, 1942, and felt that it was he who "sold" accused on the idea of hangaring his plane with Colonial (R. 167). Accused had advised him of his pending negotiations for a lease of the plane to the Government, and when accused brought the plane down in May accused stated that the lease had not yet gone through (R. 168). Accused specifically instructed witness to keep the charges "against the ship" separate and stated that he would "settle up for any charges". Accused contemplated a lease for a dollar "if they would assign it to him to use in his services". In the middle of the summer accused told witness that he had not gotten a bill. Upon inquiry by witness from Mr. Myers, witness ascertained that these charges were less than a hundred dollars. Witness imparted this information to accused, explaining that Mr. Myers, who was exceedingly busy, would get to it as soon as possible. About 30 or 60 days later accused again asked witness about the bill. Witness promised but neglected to procure the bill and "then the Major was out of town" (R. 169). On 19 August 1943, after accused's first request, witness wrote accused as follows (Def. Ex. "F"):

"I have checked the work done to date on your Luscomb and from what I am able to learn the charges thru the present date have amounted to approximately \$100.00.

"I am told, at this time, that it will take a great bit of time to check off these charges and I am suggesting we wait until you know definitely whether or not the army is going to purchase this plane."

of a copy

This exhibit was a photostatic copy/ of the letter, procured by Mr. Hudson from his files after accused had telephoned him about "his troubles" (R. 179). About 30 or 60 days after this letter there was another request by accused for his bill, but witness failed to comply with the request.

Witness believed that there was a further conversation about the bill when accused was going overseas, at which time witness suggested, "Let's take care of this when you get back" (R. 171). The next conversation about the bill was at Dayton around 10 December 1943. Witness "laughed his way out" and did not hear from accused again until the end of December or the early part of January when accused angrily phoned witness that his (witness') neglect in not sending the bill had placed him in an embarrassing position (R. 173). After one of witness' conversations with accused, witness had reported to Mr. Janas, President of Colonial, that accused "was very much concerned about the charges and wants to be billed separately". Mr. Janas stated that he would take care of it (R. 173). Mr. Janas did not do anything with respect to it until he returned from Florida in the middle of January 1944 (R. 174). Witness did not mention anything about this conversation with Mr. Janas to the investigating officer, and when asked by that officer whether he had given any instructions to any one about the charges against the plane answered "no". Witness reconciled his statements on the grounds that he could not "tell the President of the company what to do". His conversation with Mr. Janas, he believed, was in the late spring or early summer (R. 191). It was the opinion of the witness that if the Government took over the plane on a lease, it should bear the costs, and in accordance with this view, probably before August 19, stated to accused:

"* * * "Major, if this lease for one dollar a year goes through, how are those charges going to be handled?" And he told me that that was something that would have to be determined at the time that the lease went through, and I stated that I didn't see any reason why they shouldn't pay for it" (R. 184).

Accused's answer was that he could not do that, but witness had that idea in mind when he wrote to accused on 19 August (R. 185).

Mr. Sigmund Janas, President of Colonial, had met accused only once and then only casually (R. 192). After a conversation with Mr. Hudson, Superintendent of Colonial's Military Transport Division, he wrote the following inter-office communication to "our comptroller", who was Mr. Odenwalder, under date of 15 July 1943 (Def. Ex. "E", R. 193):

"Captain Howard E. Cox of the Contracting Office of the Army Air Forces owns a Lescomb airplane which is at present stored in our hangar.

"From time to time certain work will have to be done on this airplane in order to keep it in flying condition.

"Captain Cox has asked Mr. Hudson, who is in charge of our contract work, to be very careful and see that none of the charges for work on the Lescomb are to become charges against our army contract.

"This is very essential and I want you to give it your personal attention as the Captain is deeply concerned that there will be no slip up."

This memorandum was dictated to witness' secretary, Mr. Carl Anthony. Witness never saw a copy of Mr. Dyke's communications of 26 April (Pros. Ex. 27) and 6 May 1943 (Pros. Ex. 28). Witness recalled having told two persons that the charges on the Luscombe plane were not to go on the Government contract, Mr. Odenwalder and Mr. Menk, "the Government Auditor", and recalled having told Mr. Odenwalder that he would send him a communication "in connection with the Cox plane" (R. 196). Mr. Odenwalder was asked to leave the company because of drinking too much and not doing his work (R. 194).

Mr. Carl L. Anthony, Secretary to Mr. Janas, testified that he "would say" that he typed the memorandum to Mr. Odenwalder (Def. Ex. "E") on July 15, 1943, and that there was a copy of the communication "in the folder or file on Mr. Odenwalder", kept in witness' office (R. 212,213).

Miss Genevieve Wojono was secretary to the treasurer of Colonial, Mr. Odenwalder, in the summer of 1943. The first time she recalled seeing the memorandum to Mr. Odenwalder from Mr. Janas (Def. Ex. "E") was when Mr. Readyoff, her present "boss", asked her whether "we had such a letter in the file". Witness checked through the files and found it for him. Witness normally stamped the mail as it arrived and did the filing for the office (R. 216-217). In the month of July, 1943, Mr. Odenwalder was not in the office very much, being out in the field and being occupied with various other business plans. Witness did not remember having stamped the Janas letter or of having filed it or of having seen it prior to her search at Mr. Readyoff's request (R. 222). It was her duty to place on Mr. Odenwalder's desk any communication addressed to him and not to file it until it had been placed in the proper basket, but it was possible for the Janas memorandum to have been filed before Mr. Odenwalder had placed it in the file basket (R. 224,225).

Mr. Robert W. Readyoff, who had been an employee of Colonial since 1939 and who had been serving as acting treasurer as successor to Mr. Odenwalder since about 26 July 1943, while in Mr. Janas' office in the middle of January 1944, was asked by the latter whether he had ever seen in the office file a letter of the type identified as Defense Exhibit "E", being the memorandum from Mr. Janas to Mr. Odenwalder. Witness did not know, and upon returning to his office instructed Miss Wojono to make a search. While he did not know whether or not the letter came from the file, Miss Wojono later turned it over to him. It bore a stamp "Date Received July 16, 1943". (R. 241,242.) Witness could not definitely remember when the letter was found, but knew it was before the visit of Colonel Winfree, investigating officer, on 17 January 1944 (R. 245). On 15 January 1944 he signed a letter to accused (Pros. Ex. 52), but

this communication had been prepared by Mr. A. S. Myers, his assistant, as witness had no personal knowledge of the Cox transaction. He did not recall whether he had seen the Janas letter (Def. Ex. "E") prior to signing the letter to accused, but admitted that when he was examined by Colonel Winfree on 17 January 1944 he stated that he had gotten the Janas letter out of Mr. Odenwalder's files a "couple of days" before January 17 (R. 247-248). The letter to accused is as follows:

"In response to your request for invoicing of charges applicable to Luscombe Aircraft #28433, we offer the following explanation.

"Since receipt of the airplane on May 2, 1943, it has been our impression that the ship was the property of Army Air Forces and assigned to you for the administration of your duties as District Contracting Officer. Lacking instructions to the contrary, we assumed the charges were applicable to the conditions in Service Orders supplementing Contract W535AC35706 for maintenance of A.T.C. aircraft. Accordingly charges were prepared, submitted to the Resident Auditor and reimbursed in the usual manner on Public Vouchers.

"Upon inquiry, Mr. Hudson acknowledges the responsibility for his failure to notify our Company of your instructions. Immediate steps are being taken to credit the Contract and invoice you for these charges.

"We regret exceedingly the misunderstanding occasioned by lack of instructions and trust that no inconvenience will be caused you."

Mr. Edward S. Ridley, Vice President of Colonial, recalled a conversation between Mr. Hudson and accused at Wright Field in December 1943, in which accused stated that he "hadn't gotten a statement yet" and asked Mr. Hudson to check and see that "the billing came through". Accused did not mention on what items he desired to be billed (R. 225,226).

Colonel William Phelps, Assistant District Supervisor of Eastern Procurement District in the spring and summer of 1943, knew that accused owned a plane, and rode in it on one occasion. Because of the tremendous amount of work, the transfer of key officers, and the assignment of new personnel, accused protested and asked for more help. In the meanwhile, accused worked such long hours that witness frequently went down and ordered accused out of the office "anywhere from 8:00 to 1:00". Accused's reputation for character and integrity "couldn't have been higher" (R. 231-234).

Major Edward M. Weld, Contracting Officer and Chief Airline Officer, Wright Field, gave his interpretation of the Colonial contract and the

Service Orders issued in connection with it. He expressed the opinion, in effect, that the work done by Colonial on the Luscombe plane was not of the type covered by the orders and that the charges were erroneously paid (R. 272-278). General Service Order No. 4, issued in October or November, 1943, but retroactive to 1 January 1943, covers cases in which repairs or supplies, not otherwise provided for, are required in an emergency (R. 273). Routine service, not covered by the contract or service orders, must be procured outside the contract (R. 273), and the contractor is not authorized to do anything which is not provided for in the contract or service orders (R. 272).

Major James S. Hand, formerly Area Representative at Baltimore, discussed the possibility of transferring or leasing accused's plane with accused and Captain Melhado, but the matter was dropped (R. 284-286).

Major Robert W. Kenworthy, District Engineering Division, Liaison Officer, Air Corps, wrote a letter to accused requesting the use of his plane in connection with certain experiments (Def. Ex. "L", R. 263) on 21 June 1943. Accused consented to its use, but it was not used (R. 264, 265).

Captain Donald I. Melhado was on duty in the Eastern Procurement District from 16 April 1943 until 4 December 1943. He was assigned to the Contract Section, Airlines Unit, in June, and as such he approved vouchers that came in from airlines. When witness joined the unit, accused called him into his office and told him that he (accused) had a Luscombe plane being hanged at La Guardia Field and cautioned witness that if any charges came through on the plane witness should notify him (R. 288). Only one such charge came through, according to witness' recollection. This was for \$18, sometime in August 1943. As witness recalled it, Miss La Bar called it to his attention. Witness made note of the charge and went into accused's office to see accused, but finding accused out of town proceeded to approve the voucher, as he "didn't feel like holding up the entire payment of the voucher for an item of \$18.00" (R. 288,299). Witness failed to call the matter to accused's attention upon his return, and assumed full responsibility for the negligence involved (R. 289,300). In mitigation, witness stated that the voucher had been approved by the Resident Auditor and that it was a physical impossibility to check every voucher, because of lack of time (R. 300). Witness has been shown other Colonial vouchers (of the 13 described in the specification), approved by him, on which charges against accused's plane appeared, but he recalled only the one (R. 290-291).

First Lieutenant Thomas P. Cook was also in the Airlines unit during the greater part of 1943. According to his recollection Colonial was assigned to Lieutenant Harris. It was customary, however, for one contracting officer to sign vouchers for another who was absent from the office.

Witness signed some Colonial vouchers containing charges against accused's plane, but was unaware of the presence of such items. While he knew that accused owned a plane, through casual references by accused in December (1942) and January (1943), he did not know its make and had he seen a charge against a Luscombe on a voucher he would not have recognized this as being a reference to accused's plane (R. 292,293). In January 1944, accused telephoned from Wright Field to witness at New Castle, Delaware, and asked witness to furnish him with an affidavit that accused never intended to have the charges on his personal plane billed against the Government, and to try to recall one or two conversations which accused had had with regard to the correct handling of these charges. Witness could not recall any such conversations, but mentioned to accused that he recalled a conversation with either Lieutenant Harris or Captain Melhado in which one of those officers remarked that there were some charges against accused's plane that he was going to take up with accused, and that upon that officer's return from accused's office witness was under the impression that he reported that the charges should not have been in there and that accused had stated that if the officer found any more such charges he should bring them to accused's attention (R. 294). Accused thereupon stated that it would be better to leave that part out of the affidavit (R. 294,297,298). No affidavit was executed (R. 298). In handling vouchers, witness depended largely on the Resident Auditor for the accuracy of quantities and amounts (R. 298).

Accused, after an explanation of his rights, testified in his own behalf, first emphasizing the vast increase in work in his section during 1943, the shortage and lack of experience of officers, the loss of key men, the overexacting burden of work which he carried, and the necessity for frequent trips by him (R. 303-306). Accused owned a Luscombe plane, and after careful consideration decided to hangar it with Colonial, making his arrangements with Mr. Hudson. Accused impressed on the latter that the charges were personal, and, after the plane had been there a short time, accused told Mr. Hudson to accumulate the charges (R. 307,308). He never told any official at Colonial that any costs for servicing or oil and gasoline should be charged against the Government, and he made an announcement to all personnel under him who had "a thing to do with processing vouchers" to watch out for any charge on his airplane because it was at Colonial (R. 308,309). The personnel so notified included Captain Melhado, Miss La Bar and Lieutenants Cook and Harris (R. 308). Accused tried to lease the plane to the Government and learned at the end of August that it was not the type desired (R. 308,311). He expressed his willingness to allow the Government to experiment with his plane when he received a request from Major Kenworthy in June, 1943, but the Government did not actually use it (R. 313). Accused used the plane on 45 or 50 trips on Government business, for some of which he received the usual travel allowance. The most of the trips were made under "VOCO's" for which there was no allowance and at his own expense (R. 311). Neither Captain Melhado, Lieutenant Cook, Lieutenant Harris

nor Miss La Bar ever showed him any Colonial vouchers with charges against his Luscombe (R. 314). At all times between May, 1943 and February, 1944, accused was in a position to pay any charges against his plane, as he carried a checking account of between \$2,000 and \$2,500 at the Chase National Bank, a larger joint checking account with his wife in the Fifth Avenue Bank, and a savings account at the Seaman's Bank of Savings (R. 314,315). Accused was not surprised when he did not get bills because in the four or five times that he spoke to Mr. Hudson about the matter he was told that the charges were small and it was agreed that they would be accumulated (R. 316,317). Mr. Hudson told him that he (Hudson) had had the president of the company issue a memorandum to the proper personnel that all the charges were to be billed to accused personally and not to the Government (R. 316). Accused had told Hudson sometime in the summer that he "wanted to put the top dog of the company on record" (R. 375). The amounts were so small that accused did not deem it necessary actually to demand a bill (R. 317). He was unaware of the fact that the charges were being billed to the Government (R. 316). Accused planned to pay the charges, and did not plan for the Government to pay them except under the condition that if the plane was leased to the Government there might be a possibility of the Government's taking it over, subject to these charges as in the case of the sale of a piece of real estate (R. 351). Accused went overseas around the end of the first week in October, 1943 (R. 317). When he returned on 31 October, he found that he had been replaced as District Contracting Officer, and his office was in a turmoil, with a tremendous amount of clearing up to be done (R. 323,326). Accused left New York on 11 November, but he phoned to Mr. Hudson for his bill before he left (R. 327). He next requested a bill when Mr. Hudson and Mr. Ridley called at Wright Field in connection with a controversy between Colonial and Mr. Wenk, the resident auditor (R. 327,328). At that time Mr. Hudson promised to send the bill but none had been submitted at the time that accused telephoned to Mr. Hudson early in January, 1944, after accused became aware that the matter of the charges against the Luscombe was being investigated. Up to that time accused had made no payment to Colonial for the maintenance or repair or servicing of his plane (R. 328).

Brigadier General Orval R. Cook, District Supervisor of the Eastern Procurement District until 2 May 1943, Lieutenant Colonel William Phelps, and Lieutenant Commander Leslie Glenn, Chaplains' Corps, United States Naval Reserve, rector of St. John's Church in Washington, D.C., testified to accused's ability, high character, and outstanding reputation. A number of witnesses were offered to show that accused had at no time attempted to conceal the fact that the plane was his private property, and that his Department of Commerce license was always on display. The tremendous amount of work in accused's section during the spring and summer of 1943 was testified to by several witnesses in addition to those whose testimony has been

summarized. There was testimony by a few other witnesses not pertinent to the charges under consideration.

Rebuttal.

Mr. Wenk, Mr. Odenwalder, and Mr. A. S. Myers are the only three witnesses called in rebuttal whose testimony refers to the specification of which accused was found guilty. Mr. Wenk denied that Mr. Janas had ever called him to notify him that the Luscombe was accused's private plane and that the charges in connection with it should not be made against the Government (R. 408). The first time Mr. Odenwalder saw the letter addressed to him by Mr. Janas (Def. Ex. "E") was in Colonel Winfree's office in January or February 1944, and Mr. Janas had never spoken to him about the Luscombe plane (R. 415,416). Mr. Aquila S. Myers, who had been Assistant Treasurer of Colonial since 1 October 1942, and who had served as such under Mr. Odenwalder, had never seen or heard of the Janas letter (Pros. Ex. "E") until Mr. Readyoff handed it to him on 17 January 1944 to have a photostatic copy made for Colonel Winfree (R. 408,409).

4. It is apparent from the testimony and offerings presented by the defense that when accused finally decided to hangar his private plane with a Government contractor engaged in servicing, maintaining and repairing Government planes under a Cost-Plus-A-Fixed-Fee-Contract, which accused was administering and supervising both as District Contracting Officer and as Plant Contracting Officer, accused was well aware that he was subjecting himself to possible criticism and making it possible for his personal bills to become confused with those of the Government, to be submitted to the Government and to be paid by the Government. According to the record this possibility materialized into an actuality, so that over a period of about five months small charges against accused's plane in varying amounts, totaling \$204.06, were included in thirteen separate vouchers, totaling \$64,894.49, that were presented to and paid by the Government through an authorized finance officer after these vouchers had been approved first by the Government Resident Auditor at contractor's plant, who was not under accused's supervision and then by contracting officers who were in the office of and under the supervision of accused. It is further clearly established that when accused made his agreement the work of his office was more than six-fold greater than when he assumed charge, and that the volume of procurement was increasing so steadily and rapidly that when accused was relieved at the end of October it had increased a hundredfold. It is equally clear that throughout the period in which the charges were incurred and billed to the Government accused was working under the burden of this large amount of work, that he suffered the loss of key men from his office, that he was furnished new and inexperienced men, that the personnel under his supervision had been greatly augmented, and that he was required to be out of his office frequently, one of his absences having been on an overseas mission from 8 October to 31 October 1943.

Whatever precautionary steps accused may have taken to prevent the inclusion of the charges against his private plane on the Government reimbursement vouchers proved futile and justified the fear that accused had expressed to Colonial's representative, Mr. Hudson, before hanging his plane with that company. The testimony as to what those steps were is hopelessly conflicting. It is a function of the Board of Review in a case which requires presidential confirmation to weigh the evidence. In doing so it is not bound by but should give considerable weight to the findings of the court as to the credibility of witnesses (CM 243466, Bull, JAG, June 1944, p. 231). This is in accordance with a salutary principle deeply ingrained in our system of administration of justice by military, as well as civil, tribunals, for the court alone has the opportunity to observe the witnesses, to study their conduct upon the stand, and to note the readiness with which they respond to examination and their desire to enlighten the court by presenting all information within their possession or knowledge. The Board of Review finds nothing in the record which requires or justifies its disagreement with the apparent conclusions reached by the court as to which witnesses were most worthy of belief.

Based on the record, it is the opinion of the Board that accused did not employ adequate means to prevent the inclusion of charges against his personal plane in the reimbursement vouchers subsequently submitted by Colonial to the Government nor to prevent their approval by the contracting officers who were under his supervision. Mr. Dykes' testimony as to accused's conversation with him in April 1943 is substantiated by the contemporaneous memorandum gotten out by Mr. Dykes to various employees and the president of the company. Accused denies that he made any statements to Mr. Dykes that could be interpreted as meaning that the charges against his plane were to be paid by the Government. Mr. Dykes is equally positive that there was no misunderstanding on his part as to accused's instructions. Mr. Dykes was in doubt at the time of the trial whether accused had stated that accused had leased or was about to lease the plane to the Government, but Mr. Dykes believed that the memorandum properly reflected the conversation. This memorandum, it may be stated at this point, was legally admissible not to prove what accused actually said, but to corroborate witness' recollection of his understanding at that time of accused's remarks, and to establish that the memorandum had been issued. Mr. Wenk, the Government Resident Auditor, testified similarly that in a casual conversation, prior to the approval by that officer of any voucher containing any charges against accused's private plane, accused advised him that accused had leased the plane to the Government. This accused likewise denied. While Mr. Wenk had no authority to rely upon accused's statement as the basis for the approval of the vouchers and was derelict in his duty in doing so, there is nothing in the situation which requires the Board to disregard his testimony. That at least the Treasurer's office of contractor

was not aware of any instructions contrary to those imparted to Mr. Dykes and that it was under the impression that the plane was to be treated like a Government plane is further evidenced by the testimony of Mr. Odenwalder and the letter written to accused on 16 January 1944, by Mr. Myers but signed by Mr. Readyoff, in which the latter, as acting treasurer, advised accused that Colonial had been under that impression, and that Mr. Hudson assumed responsibility for not having advised Colonial of accused's instructions. There also appear the further facts that after Mr. Odenwalder had been notified by Mr. Dykes of the arrival of accused's plane, that official in turn notified, among others, Mr. Wenk, who had nothing whatsoever to do with civilian planes but was concerned only with Army planes; and that on ten of the thirteen vouchers involved in these proceedings, accused's plane is described as "Army Luscombe #28433" with the letters "NO" appearing on only one of the ten, and on the other three merely as "Ship No. 28433". None of these witnesses appears to have been actuated by any hostility towards accused, and, with the possible exception of Mr. Wenk, none may be charged with having any personal ends to serve. As to the latter, he is not subject to military law, has apparently committed no civil offense, and if there should be any financial responsibility to the Government, he cannot rely upon a chance remark made to him by accused to exonerate himself.

To offset this testimony accused offered as witnesses principally Mr. Hudson, Superintendent of the Military Transport Division of Colonial Airlines, Incorporated, and Mr. Janas, President of the Corporation. Mr. Hudson was positive in his statement that accused had impressed upon him that the charges on accused's plane constituted a personal obligation of accused, not to be included in any claim against the Government, and that while accused was stationed in New York accused several times requested Mr. Hudson that a bill be forwarded to accused, the last request having been made prior to accused's overseas mission in October 1943. It will be noted that, in contradiction of this last statement accused testified that he had made another request in a telephone conversation with Mr. Hudson, after his return and prior to his departure for Wright Field. Both agree that another request was made in Dayton about the middle of December 1943. According to Mr. Hudson, he told Mr. Janas about accused's request, but Mr. Janas had done nothing about the matter until that official's return from Florida in the middle of January 1944. Mr. Janas, varying from this recital, testified that when Mr. Hudson imparted to him accused's desires and concern, he had gotten out a memorandum to Mr. Odenwalder on 15 July 1943. In addition Mr. Janas unequivocally stated that he had personally told Mr. Odenwalder and Mr. Wenk that these charges were not to be included in the Government vouchers. While Mr. Anthony, Mr. Janas's secretary, testified that he "would say" that he had written this memorandum for Mr. Janas on 15 July 1943, neither Mr. Odenwalder, nor Mr. Readyoff, his successor, nor Mr. Myers, who had been assistant treasurer for a number of years, nor Miss Wojono, who received, sorted, and filed all correspondence in the treasurer's office, had ever seen this memorandum until after the investigation into the charges against accused had started. In addition, Mr. Odenwalder and Mr.

Wenk denied unqualifiedly that Mr. Janas had ever mentioned anything about the matter to them. No mention of the conversation between Mr. Hudson and Mr. Janas was made in Mr. Hudson's statements to the investigating officer. While neither Mr. Janas nor Mr. Hudson had any personal interest in accused, there is present an element of self-interest in that had accused been found guilty of either of the other specifications, Colonial or some of its officials would probably have been subject to criminal charges under the Federal statute corresponding to the 94th Article of War. There is basis, therefore, for the inference that the Janas memorandum was an after-thought, prepared by Mr. Janas after his return from Florida in January 1944, as intimated by Mr. Hudson.

But regardless of what may have been accused's instructions to or conversation with officials of Colonial, the evidence shows that accused did not take adequate steps within his office to prevent the approval of the vouchers containing charges against his private plane and their presentation to the Finance Officer. At no time did accused advise the contracting officers in his office or Miss La Bar, who handled the clerical work for his office involving all airlines vouchers, that charges against his plane should not be paid. According to accused, his instructions were to watch out for any charges on his airplane because it was at Colonial. Accused was certain that he had advised all of the personnel in his office processing vouchers to that effect. Lieutenant Cook, one of the four that accused specifically recalled having notified, who was offered as a witness for the defense, and who had approved three of the vouchers, testified that he had received no such instructions from accused. Captain Melhado's recollection of accused's instructions to him was that he, Captain Melhado, should be particularly careful to advise accused if any charges came through on the plane. Miss La Bar's testimony is virtually to the same effect - that accused had requested her to show him any vouchers from Colonial, containing charges against his plane. Lieutenant Harris received no instructions until he showed accused the first voucher containing such a charge. At that time Lieutenant Harris, who had taken the voucher to accused, not because of any instructions but because he did not know whether accused had actually leased the plane to the Government was told by accused to bring all charges of a similar nature to his attention. Above all of this, however, Lieutenant Harris testified that he had presented two vouchers, containing charges against the plane, to accused, who had advised him that it was "okay" to sign them, and Miss La Bar testified that a majority of the vouchers, containing such charges, being all that came in while accused was in his office, were shown by her to accused, who merely expressed his thanks and made no comment. Accused denied that any vouchers had ever been shown to him. Mr. Winter's testimony, while of little probative force, and that part of Lieutenant Cook's testimony, dealing with his telephone conversation with accused after the investigation had started, add weight to the conclusion, apparently reached by the trial court and now concurred in by this Board, that the evidence establishes that at least some of the vouchers were actually

shown to accused, who made no objection to their approval and processing for payment. The Board finds no real basis in the record for the contention, advanced so vehemently by the defense, that Miss La Bar and Lieutenant Harris are unworthy of belief.

There is no need for a summarization of the undisputed facts. It is worthy of note, however, that accused was in hopes of leasing his plane to the Government and that according to his and Mr. Hudson's testimony, the small charges against accused's plane were to be allowed to accumulate to the end that if the Government did take over the plane, an effort would be made by accused to have the Government assume these expenses.

5. The Board is of the opinion that the record is legally sufficient to support the finding of guilty except as to the degree of neglect. Accused, a young man for the important, time-absorbing and exacting office which he occupied, with an unusual volume of work entrusted to him, and with a staff that was inexperienced and inadequate, despite its growth, entered into an arrangement for the maintenance of his private plane with a Government contractor, under his direct supervision, which was engaged in doing similar work for the Government in connection with Army planes. When he did so he fully realized, as evidenced by his words and actions, that he was creating a situation fraught with the possibility that charges against his plane might be billed to the Government. While there was nothing illegal in accused's arrangement, common prudence and discretion dictated that he should have refrained from dealing privately with a corporation whose cost-plus-a-fixed-fee-contract was directly under his supervision, particularly where the private services rendered could so easily become confused with services rendered the Government. That accused anticipated frequent absences from his office is best indicated by his decision to bring the plane to New York for use on his official trips. Added to this is accused's knowledge at the time of the lack of experience on the part of personnel in his office and of the constantly increasing volume of work, without a corresponding augmentation of the office force. A responsibility was, therefore, placed upon him, in order to avoid the potential danger which his own actions had created, to exercise extreme caution; first, to prevent the inclusion of charges against his private plane, in the reimbursement vouchers submitted by the contractor, and, secondly, to prevent their approval and transmittal for payment by officers, directly under his supervision. The evidence is that not only did accused fail to take adequate steps to accomplish either purpose, but that when the presence of charges against his plane in Government reimbursement vouchers was called to his attention, he permitted them to be approved and forwarded for payment. Pressure of work or a lack of comprehension of what was reported to him may be the reason for accused's failure to act, but neither excuses, although it mitigates the degree of, his neglect. It will be noted that, according to the testimony, accused never directed any one not to pay vouchers containing charges against his private plane, but merely instructed some of the personnel, processing airlines vouchers,

to advise him should any such charges be discovered; that he contends that he had agreed with Mr. Hudson that the charges should be accumulated; that he received no bills from Colonial; and that he at no time made any inquiry among the personnel, charged with processing vouchers, to ascertain whether or not any such charges had appeared.

It was indisputably accused's obligation under the orders and directives of the Materiel Command to verify the expenditures for which Colonial claimed reimbursement. While he could not be expected to give personal attention to and sign each voucher, he remained responsible for proper supervision over the work of the contracting officers assigned to the airlines unit of his section. As aptly expressed by Colonel Hutchins, District Supervisor, when that officer was being examined concerning the magnitude of accused's work, "Well, that was his job, to supervise the Contract Section". It was accused's duty to give positive instructions, to follow up and enforce them, and to know what was transpiring in the office for which he was responsible. To employ the words of Colonel Winthrop in discussing the element of knowledge in connection with the offense of knowingly making a false muster,

"* * * An officer will in general properly be charged with the knowledge of what it is his office to know, or what he is bound to know in the performance of the particular duty devolved upon him." (Military Law and Precedents, 2nd Ed., p. 553)

All acts to the prejudice of good order and military discipline are punishable under Article of War 96. Colonel Winthrop (supra, p. 722) in considering the comparable Article then in effect, the 62nd, lays down this principle:

"In this comprehensive term all disorders and neglects are included *** neglect or evasion of official or of routine duty, or failure to perform it ***".

In a much earlier discussion Hough (Practice of Courts-Martial (1825), p. 633) expressed similar views:

"Neglect of duty may consist in neglecting to observe standing orders and rgns., (sic) or, those orders which are issued and intended to be carried into immediate execution or shortly thereafter. There is then distinction between a disobedience and a neglect of an order, that in the one case it is wilful, while in the other it may be through forgetfulness, which, however, is no plea; since matters of duty ought to be recollected. If neglects are repeated, they become wilful.

"Neglects of duty are also those acts not commanded to be done specifically, or laid down to the very letter, but may be the

improperly executing an order given, the not taking proper precaution, or doing the best according to the ability and judgment of the party."

Colonel Winthrop (supra, p. 559) further differentiates between neglect under Article 96 (then 62) and Article 83 (then 15):

"In view of the fact that so severe a penalty as dismissal is made mandatory in all cases by this Article No. 15, it would seem that the 'neglect' here contemplated was a special neglect, and of a positive and gross character, and not merely such a neglect, to the prejudice of order or discipline, as is indicated in the General - 62nd - Article. * * *".

When the citizen accepts the important role of an officer in his nation's army, he is not casting aside his private obligations, but is assuming additional public ones. What may be a comparatively trivial neglect on the part of an individual frequently becomes a reflection upon the military establishment and, through it, upon the Government, when the person responsible for the act or the omission wears the garb of an officer. Applying this high standard and the quoted principles to the facts as established by the record, it is the opinion of the Board that accused's neglect and failure to prevent the approval and submission for payment of the vouchers described in the specifications constitute neglect to the prejudice of good order and military discipline of the type contemplated by and punishable under Article of War 96. The Board believes, however, that the term "grossly", as used in the Specification, implies a degree of neglect which is absent in the present case.

6. Before a final determination of the legal sufficiency of the record it is necessary to pass upon the legal objections raised by accused in the course of the trial and in the exhaustive briefs thereafter filed in his behalf.

a. Immediately after arraignment accused filed a "Plea in Bar of Trial" in which he contended that "all proceedings herein should be quashed because the investigation of the charges herein was conducted in violation of the 70th Article of War and paragraph 35 of the Manual for Courts-Martial, thereby injuriously affecting the substantial rights of the accused". Accused, who had been placed under arrest at Wright Field on 14 January 1944, on which day he was relieved from performing any duties, and who continued to be under arrest until after 20 January 1944, was not permitted to go to New York when the investigating officer examined Lieutenant Heddon Harris, Mr. Walter Wenk and Miss Ruth La Bar in that city on 17, 19 and 20 January, respectively. It is accused's contention that the witnesses were "available" within the purview of Article of War 70 and paragraph 35 of the Manual for Courts-Martial, and that had he been

given an opportunity to be confronted by and to cross-examine these witnesses at the time, entirely different testimony from that which they gave to the investigating officer would have been elicited. The basic purpose of the Article is to determine whether or not a prima facie case exists before subjecting an accused to trial (CM 201563, Davis). The record discloses that a thorough and impartial investigation was conducted; it is apparent that accused and his counsel were furnished copies of or allowed to see the statements made by the witnesses; there is no suggestion that counsel for accused were prevented from examining any of the witnesses between the dates of their statements to the investigating officer and the actual trial; and no contention is made that the defense was taken by surprise by their testimony at the trial. It further appears that at the trial they were subjected by defense counsel to grueling cross-examinations which in no material way changed the statements made by them to the investigating officer. It is difficult, therefore, to see any merit in the contention that the Commanding General of the Army Air Forces Materiel Command abused the discretion vested in him when he concluded that the three witnesses, residing in New York, were not available for cross-examination in that city by accused, who was under arrest in Wright Field, or in the contention that accused suffered any substantial injury when he was not allowed to be present at their examination.

In addition to the view of the Board that the rights of the accused were amply safeguarded and that the provisions of Article of War 70 and paragraph 35 of the Manual for Courts-Martial were substantially complied with, it will be noted that since 1934 the principle has been firmly established that the investigations required by that Article and that paragraph are matters of procedure and do not affect the jurisdiction of courts-martial (CM 201563, Davis, CM 202361, Walter, CM 202511, Godfrey, 206697, Brown, 229477, Floyd, 17 B.R. 149, and CM 244760, Cihos). Holdings by the Board of Review to that effect have been uniformly approved by The Judge Advocate General and then by the President, as confirming authority.

b. After this plea had properly been overruled by the court, accused filed a second interlocutory plea which partakes of the nature of a motion to elect and a combined plea of multiplicity and inconsistency. This plea was likewise properly overruled by the court. Paragraph 71a of the Manual for Courts-Martial (1928) disposes of a part of the contention in the following language:

"A motion to elect - that is, a motion that the prosecution be required to elect upon which of two or more charges or specifications it will proceed - will not be granted."

It will also be noted that while the Manual in paragraph 27 warns against unreasonable multiplication of charges growing out of one transaction, it lays down the rule that "there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis

for charging two or more offenses". Further, the Specifications of Charge I are based upon alleged misconduct by accused in his individual capacity whereas the Specifications of Charge II allege wrongdoing by accused in his official capacity. It has been the consistent holding of the Boards of Review, generally accepted in the administration of military justice, that it is not error to charge the same offense under different Articles of War when one of the charges is based on the civil aspect of the offense and the other is based on its military aspect, with punishment imposed only for the violation in its most serious aspect (CM 191695, Johnson, CM 209952, Berry, CM 218924, Foster, and CM 241597, Fahey, 26 B.R. 305).

c. While it was not suggested by defense counsel when this plea was argued or at any other time prior to or after arraignment that Specification 1 of Charge II failed to allege definitely any particular in which the accused failed to discharge his duty and, therefore, failed to allege an offense under Article of War 96, it is contended in a brief filed with the Board that the court erred in overruling the motion for dismissal of the charges under Article of War 96 on those grounds. Accused does not claim to have suffered any injury by having been tried on a specification which, it is now claimed, is vague, or to have been taken by surprise. The Board is of the opinion that the specification is sufficiently clear, but that if there was any vagueness, accused waived his right to object to its clarity at this stage of the proceedings by his action in going to trial without protest. If no offense were set forth, it would be the duty of the Board to dismiss the charge, but such is not the case, - a dereliction of duty on the part of accused is fully set forth.

d. Although the defense offered in evidence the inter-office memorandum of Mr. Janas to Mr. Odenwalder (Def. Ex. "E") and the letter of Mr. Hudson to accused (Def. Ex. "F"), and made no objection to the introduction of the inter-office memorandum from Mr. Dykes to the foreman at Albany (Pros. Exs. 27 and 29), it is now urged in counsel's brief that this latter offering was inadmissible. While it was not admissible as proof of any statements made by accused, it was admissible to establish that such a memorandum had been issued and to corroborate Mr. Dykes' testimony. Its use to refresh Mr. Dykes' memory was also proper. (Wharton's Criminal Evidence, 11th Edition, secs. 802 and 1278; Wigmore on Evidence, 3rd Edition, secs. 758, 1132 and 1770).

e. There is similarly no merit in the contention that the finding of not guilty of Charge I and its Specifications, and Specification 2 of Charge II legally bars a finding of guilty of Specification 1 of Charge II and of Charge II (Dunn v. United States, 284 U.S. 390, Dealey v. United States, 152 U.S. 539, CM 197115, Froelich, 3 B.R. 81). There are equally no legal or practical grounds for urging that in the light of the acquittal of all except the one specification, ^{the} court considered a trio of witnesses

for the prosecution as unworthy of belief for there are too many situations in which a court or a jury may believe every witness for the prosecution and still find an accused not guilty. For example, in every offense certain elements must be established. Where a court or a jury finds that there is insufficient proof of a single essential element it is obligated to render a verdict of not guilty, although it may implicitly believe every scintilla of testimony given by witnesses on all the other elements.

f. The Board has given careful consideration to other issues raised by eminent counsel for the defense in the briefs submitted by them to the reviewing authority and to the Board and orally urged by them at the hearing held at their request before the Board on 15 July 1944; and it is of the opinion that none of the matters complained of injuriously affected any of accused's substantial rights. The record discloses that accused was ably represented by competent counsel before a court composed of one general officer, three colonels, five lieutenant-colonels, and one major, who served as law member, and that he was afforded full opportunity to present his case, with noticeably few objections being made by the personnel of the prosecution. That the court was not prejudiced against accused by the remarks of the trial judge advocate or by the offerings complained of by defense counsel, is best evidenced by its findings.

7. War Department records show that accused is 33 years of age. He was graduated from Carthage College, Carthage, Illinois, in 1933 (B.A.), from Harvard Law School in 1937 (LL.B.), and from Harvard School of Business Administration in 1939 (M.B.A.) and practiced law for five years before going on active duty in 1941, the last two years with the firm of Breed, Abbott and Morgan, New York, New York. In 1933-34 he taught history in Burnside High School and from 1934 to 1939 was Director of Hemenway Gymnasium and a backfield coach in football at Harvard University. He had four months Civilian Military Training Corps training during 1929-1932, was commissioned Second Lieutenant, Cavalry Reserve, 3 May 1933, had six weeks active duty between 1933 and 1935, and was ordered to active duty 28 June 1941. He was promoted to First Lieutenant, Army of the United States (Cavalry), 23 July 1941, to Captain, Army of the United States (Air Corps) 25 March 1942, and to Major, Army of the United States (Air Corps) 30 November 1942. According to information in the review of the staff judge advocate, for the period preceding 1 January 1943, accused's efficiency rating was excellent; for the six months period ending 30 June 1943, superior; and for the remaining time until his transfer from Eastern Procurement District, very satisfactory. Accused spent 8-1/2 weeks overseas on two temporary duty missions, the first in 1942, and the second in 1943. He obtained an aeronautical rating as service pilot on 11 September 1943.

8. Consideration has been given to the brief filed with the reviewing authority, Wright Field, by Mr. Gordon S. P. Kleeberg, as civilian counsel to accused, to the brief filed with the Board of Review by Mr. Kleeberg and Colonel William C. Rigby (Retired) as counsel for the accused and

General Fred W. Llewellyn (Retired), of counsel for accused, and to the oral argument presented before the Board by Mr. Kleeberg, Colonel Rigby and General Llewellyn at a hearing held at their request on 15 July 1944 in Washington, D. C.

9. The court was legally constituted and had jurisdiction of the person and of the offense. Except as noted above 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, except the words "and grossly", and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Lucy E. Son, Judge Advocate.
Hermann Maysel, Judge Advocate.
Samuel Sonnenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 SEP 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Howard E. Cox (O-308933), Air Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge II and Specification 1 thereof, except the words "and grossly", and the sentence, and to warrant confirmation of the sentence. In view of accused's previous excellent military record and reputation for honesty and integrity, as evidenced both by testimony adduced at the trial and by numerous letters received, and in consideration of the possibility that accused's dereliction was due to the pressure of the unusually heavy burden of work under which he was laboring and his frequent absences from his office on official business, I recommend that the sentence be confirmed and commuted to a reprimand.
3. Consideration has been given to the exhaustive briefs submitted by private counsel for the accused to the reviewing authority and to the Board of Review, to the numerous letters of commendation attached thereto, to the oral arguments presented by private counsel for accused at a special hearing before the Board, held at their request on July 15, 1944, to the twenty-four letters, previously received by the reviewing authority and forwarded to the Board of Review, to letters to The Judge Advocate General from Honorable Robert A. Taft, Senator from Ohio, Honorable Scott W. Lucas, Senator from Illinois, Honorable David I. Walsh, Senator from Massachusetts, Dean Emeritus Roscoe Pound, Harvard Law School, and Professor John M. Maguire, Harvard Law School, to a letter to The Judge Advocate General from Honorable James W. Wadsworth, Member of the House of Representatives from New York, transmitting a letter to him from Judge Edward R. Finch (retired), father-in-law of accused, and to a letter to the President of the United States from Mr. Alexander G. Grant, Jr. The letters accompany the record.
4. Inclosed are a draft of a letter for your signature transmitting

the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



Myron C. Cramer,
Major General,
The Judge Advocate General.

12 Incls.

- Incl.1-Record of trial.
- Incl.2-Drft. of ltr. to
Pres. for sig. Sec. of War.
- Incl.3-Form of Ex. action.
- Incl.4-2 briefs submitted by counsel
for accused, w/ltrs. of commendation.
- Incl.5-24 ltrs. forwarded by rev. authority.
- Incl.6-Ltr. fr. Senator Robert A. Taft.
- Incl.7-Ltr. fr. Senator Scott Lucas.
- Incl.8-Ltr. fr. Senator David I. Walsh.
- Incl.9-Ltr. fr. Dean Roscoe Pound.
- Incl.10-Ltr. fr. Prof. Maguire.
- Incl.11-Ltr. fr. Congressman Wadsworth,
w/incl.
- Incl.12-Ltr. fr. Mr. Alexander G. Grant
to Pres.

(Findings disapproved in part in accordance with recommendation of
The Judge Advocate General. Sentence confirmed but commuted to
reprimand. G.C.M.O. 182, 9 Jun 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

(211)

SPJGK
CM 259228

- 7 SEP 1944

UNITED STATES)

v.)

Sergeant ERICH GAUSS)
(81G-28784), and Private)
RUDOLF STRAUB (31G-16830),)
German Prisoners of War,)
Camp Gordon, Georgia.)

ARMY SERVICE FORCES
FOURTH SERVICE COMMAND

Trial by G.C.M., convened at Fort
McPherson, Georgia, 13,14,15,16 and
17 June 1944. Each: To be hanged
by the neck until dead.

OPINION of the BOARD OF REVIEW

LYON, MOYSE and SONENFIELD, Judge Advocates.

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

2. Accused were tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specifications: In that Sergeant Erich Gauss and Private Rudolf Straub, both German Prisoners of War, acting jointly and in pursuance of a common intent, did, at or near Aiken, South Carolina, on or about 5 April 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Horst Guenther, German Prisoner of War, a human being, by strangulation.

Each pleaded not guilty to and was found guilty of the Charge and the Specification. Each was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each and forwarded the record of trial under Article of War 48.

3. Upon motion of the prosecution, the court ordered the trial proceedings held in closed sessions, as a matter of security. The defense did not oppose the motion (R. 17).

Each accused was notified more than a month prior to the trial of his rights under Article 62 of the Geneva Convention of 27 July 1929 to have

the assistance of qualified counsel of his own choice, and to have the services of a competent interpreter (R. 17,18; Pros. Exs. 1 and 2). A thorough study of the record shows scrupulous observance by the court and counsel for the prosecution of all of accused's rights in this regard.

Pursuant to Article 60 of the Geneva Convention, due notification was given to the Legation of Switzerland, as diplomatic representative of German interests, and the Protecting Power, of the nature of the charges, the place and date of trial, and the names of the regularly appointed defense counsel and assistant defense counsel (R. 18; Pros. Ex. 3).

4. Summary of the evidence.

a. In argument on preliminary motions, defense counsel stated that accused Gauss was captured on 27 July 1943 in Sicily by the British Army, and that accused Straub was captured on 18 July 1943 in Sicily by the Canadian Army; that subsequently thereto they were both transferred to the United States Government for safekeeping (R. 8). At the time of the offense for which they were tried they were inmates of a prisoner of war stockade at Camp Aiken, South Carolina. This camp was under the jurisdiction of the Prisoner of War Camp at Camp Gordon, Georgia (R. 34,35).

b. Another inmate of the prisoner of war stockade at Camp Aiken was Horst Guenther, the deceased. He was suspected by his fellow prisoners of increasing disaffection toward the German cause. They believed that he kept a notebook record of petty misdeeds by the prisoners, which he in turn reported to the American guards; that he was reporting the fact that prisoners on kitchen police were making off with rations intended for American use; that he had reported a threatened work strike by the prisoners at a time when they believed their mail was being delayed; that he was ingratiating himself with the Americans, and that he was a "traitor" (R. 61, 63-65, 75, 76, 90, 104, 118, 129, 146, 161, 162). In one or two instances harsh words and even blows had occurred between deceased and other prisoners (R. 61, 66, 91, 92, 97).

Deceased worked as a kitchen police and dining room orderly at the American mess at Camp Aiken (R. 49). He was among 45 prisoners scheduled to be transferred from Aiken to Camp Gordon on the 6th of April. This fact was "generally known" at the Aiken camp (R. 33, 34, 56).

One of deceased's tent-mates was "Lance Corporal" Rudolf Metzger (R. 72). He testified that on the evening of 5 April 1944 deceased ate with the other German prisoners, as was usual, at about 1830 or 1900. Some time after the meal, accused Gauss visited several tents, and gathered together accused Straub, Metzger, and Corporal Eugen Mueller (R. 55, 59, 79, 127, 167). He took them to the latrine, and into the shower room. Either there or on the way, he announced that deceased was to be transferred the next day and that

something should be done about him. Gauss' first thought appears to have been to give deceased a thorough thrashing, but almost immediately he and Straub decided that hanging was more appropriate (R. 55-57,59,61,68, 79,80,89,91). They planned that all were to meet in Tent A-5, in which Straub lived, after the camp's evening movie. Gauss would bring deceased to the tent. When the word, "dog", was spoken, a rope was to be thrown around deceased's neck and he was to be strangled. His body was then to be hung from a light pole or in a vacant tent (R. 56,57,70,80,92).

Metzger and Mueller testified that they secretly were opposed to hanging deceased, that they actually believed it would not go that far, and that they hoped to warn deceased, or otherwise prevent his death (R. 57,63,64,68, 70,81,83,96). In reply to Mueller's question whether the American authorities would investigate, accused Gauss replied, "This does not concern the Americans. This is purely a German matter" (R. 56,64). All thereupon left the shower room. Metzger and Mueller went to the movie together. They saw deceased there, and also accused Gauss (R. 57,80).

Tent A-5 was a wooden structure with a canvas top which came down over the sides. It had a wooden door in front, the screen in the upper portion of the door being covered by the canvas when the latter was rolled down. In addition to accused Straub, the tent was occupied by Corporal Josef Maidhoff, Corporal Erich Vollman, Lance Corporal Karl Matthes, Lance Corporal Simon Mrochen and Private Ernest Emde (R. 101,127,128,139,142,160). Matthes, Mrochen and Emde did not attend the picture show, and were in the tent during the evening. Maidhoff and Vollman returned first, then accused Straub, and still later accused Gauss and deceased. Mueller arrived some time during the events subsequently described (R. 81,93,98,99,101,102,128,133,137,143-145, 160,168,175).

Accused Gauss sat down on the foot of Maidhoff's bed, which stood parallel to the front of the tent to the left of the door as one entered the tent, while deceased sat down facing them, in a similar position on accused Straub's bed to the right of the door. Straub sat on the edge of his bed, behind deceased (R. 81-83,102,103,115,128,144,145,168; Pros. Exs. 14,15,16,17,18). Accused Gauss and deceased then engaged in a conversation in which the others apparently took no part. Gauss asked deceased whether he was a German, and deceased replied that he was. Gauss then took deceased to task for the memorandum book, the betrayal of the mail strike, his alleged toadyings to the Americans, and his other derelictions. Deceased denied the accusations, said that his brother was an officer in the (German) Army, and that he would not do such things (R. 82,94,104,105,129, 130,145,146,161,162). At some point in the argument accused Straub held a rope over deceased's head, but laid it aside again (R. 146,155). The argument grew more heated, and Gauss "became louder". He called deceased a "traitor", and spoke the word, "dog". Jumping up towards deceased, Gauss

shoved him in the chest. Deceased fell backwards on Straub's bed. The latter also got up and struggled with deceased. Maidhoff testified that Mueller also arose from his seat on a round stool in a back corner, and helped hold deceased's legs. Mueller denied any such active part in the killing, though he did admit that Gauss called to him, "come here and help me" (R. 82-84, 94,95,106,107,115,118,129,137,147).

Deceased uttered one or two feeble cries for help, but the struggle lasted only a few minutes, both accused bending over deceased during its course. When it was over deceased's body lay stretched out on Straub's bed, whence it was lifted by Straub, Gauss and Mueller, placed on the floor beside Maidhoff's bed, and covered with Straub's blanket. There was a rope about deceased's neck, and blood on his mouth and nostrils (R. 84-86, 95,96,107-109,131,139,147-150,162,165,169,170,172,175,176).

Metzger, who had not gone to Tent A-5 after the movie, but who had vainly sought for deceased in order to warn him, now arrived outside of the tent. It appeared to be dark to him, and after waiting and listening for several minutes for any sound from within, he called for Gauss. Gauss went outside. Metzger gave an excuse for having delayed his arrival, and asked Gauss where deceased was. Gauss replied that he had "discussed the whole business with him and then let him go", saying also that deceased had gone "into some tent in Row E", whereupon Metzger departed (R. 57,58, 69-71,85,96,134). Mueller left and returned to his own tent (R. 85,86).

Accused Gauss returned to the tent and said that the body must be removed. He ordered Vollman to carry it out, but Vollman's left foot was partly paralyzed as the result of a wound, and he said that he could not do so. Gauss then sent Vollman to see where the sentries were posted. He returned and reported, whereupon Gauss again sent him, this time with Matthes, to watch them (R. 109,111,116,131,132,149,150,172,173). Maidhoff and the two accused then carried deceased's body from the tent. They first deposited it on the ground behind a tent in Row V, its head resting on a piece of tent canvas. From there they carried it to a light pole in the same row, where Straub tied the rope which had been around the body's neck to the pole, with the body in a kneeling position and fully dressed in the prisoner of war uniform and an overcoat (R. 110,111,132-134,149,150).

Matthes and Vollman returned to their tent, followed shortly by Maidhoff and accused Straub. Straub tore in two pieces the blanket which had covered deceased and burned them in the tent stove. They also tried to scrub blood stains from the floor with soap and water (R. 111-113,117,132,134,151-154, 173,174). They went to bed (R. 113). The floor was scrubbed again the next morning at Gauss' direction. He told the inmates that they "were not to betray anything and if it should be discovered * * * he would take the blame on himself" (R. 135,174,177).

Deceased's body was found at 0245 on 6 April by Corporal Harold Willy, who

was acting Sergeant of the Guard, and who was informed of its presence by another unidentified American corporal. The body was hanging from a wooden pole used to support electric wires, in the center of a small square formed by the corners of four tents. It hung stiffly with its knees almost touching the ground, from a piece of tent rope tied to the pole some 50 inches above the ground, and about 17 inches above deceased's head. It was fully dressed, except for a hat. Willy called Lieutenant Robert H. Barnes, Corps of Military Police, who was the commanding officer of the camp. Lieutenant Barnes came from his quarters, cut the body down, and summoned Colonel Walter L. Anderson, Field Artillery, the commanding officer of the prisoner of war camp at Camp Gordon. The latter sent the body by ambulance to the Station Hospital, where Lieutenant David Rosenbaum, Medical Corps, pronounced it dead. Lieutenant Rosenbaum testified that the cause of death was strangulation, which had occurred not more than three hours after deceased's last meal (R. 20-25,26-34;35-40;44,50-54).

Photographs of the scene, of the position in which deceased's body was found, and of deceased prior and subsequent to his death, were received in evidence (R. 40-42,47,48; Pros. Exs. 4,5,6,7,8,9,11,12,13). Subsequent investigation by Lieutenant Barnes and Colonel Anderson disclosed the following facts: There was blood on a tent which lay folded on the ground 17-1/2 feet from the pole on which deceased was hanging; blood stains were found on the pole about 41 inches above the ground, and creases or impressions in the surface of the pole above and below the blood spots; the floor of the tent had been scrubbed vigorously, and damp ashes of the burned blanket were found in the stove (R. 29,31,32,37-39, 43-45; Pros. Exs.10,11).

The testimony of prosecution's witnesses concerning the illumination in the tent before, during, and after the incidents described is confused and no clear picture of it can be made out. There was a single light, which hung by a cord, and which was turned on and off by another cord. It was probably on when the group first gathered, may have been for at least part of the argument between deceased and Gauss, and was turned off by someone (who, no one seemed to know) during or after the struggle, and was off when Metzger arrived to call Gauss. The witnesses all differed on this matter, but their stories concerning the other events are sufficiently definite to result in the foregoing summary (R. 71,81,93,97,98,105,106,115, 130,138,140,147,163,170).

5. Accused's confessions.

a. Over strenuous objections by their counsel, a confession by each accused was introduced in evidence. While these confessions (to be discussed hereinbelow) differed almost not at all from the prosecution's other evidence, the Board feels that in view of the time devoted in the trial to establishing their voluntariness, of the concern shown by defense

counsel, and of the peculiar international implications of the case, the circumstances under which they were obtained merit consideration.

b. Evidence of these circumstances may be found in the testimony of Captain Winston E. Arnow, Judge Advocate General's Department, Headquarters, Fourth Service Command, Atlanta, Georgia, of Captain Henry N. Irlenborn, Corps of Military Police, Office of the Provost Marshal General, Washington, of Omer W. Franklin, Jr., Special Agent, Security and Intelligence Corps, Headquarters, Fourth Service Command, and of each accused himself. Captain Arnow was investigating officer in the case; Captain Irlenborn served as interpreter prior to and during the official investigation; Mr. Franklin made a separate preliminary investigation, while each accused, after an explanation by the law member of his rights, took the stand to testify as to the circumstances under which he made his confession (R. 195,203,211, 213,220,238,246). The prosecution also introduced transcripts of the testimony at each official investigation (R. 238-244,245-252). In the interests of brevity, the sources of information will be combined.

c. Captain Irlenborn was ordered from Washington to Camp Gordon in April to assist in an investigation of the incident (R. 213). This investigation was being conducted by Mr. Franklin, upon the orders of Colonel Stacy Knopf, Director of the Security and Intelligence Division, Headquarters, Fourth Service Command. It was then thought that deceased had committed suicide, but this theory was quickly dispelled by the salient features of the case and by the evidence which began to develop. The extent to which each accused had been questioned at that time is not clear from the evidence, but it is certain that no confession had then been obtained from either of them (R.213,275-278). When Captain Irlenborn arrived at Camp Gordon he found the investigation "virtually completed", and so "merely interviewed" each accused. The interviews with each man were separate. Accused were under guard (R. 213,220,226,231). No charges were then pending against either of them (R. 229).

d. Accused Gauss testified from the stand that he had been "literally locked up" for the two weeks prior to his first meeting with Captain Irlenborn (R. 226). [Note: This is probably an exaggeration, since he could not have been locked up before 6 April, at which time deceased was still thought to have been a suicide, and this meeting took place on 17 April.] Captain Irlenborn told accused that the latter "did not have to admit anything" to him (R. 213). According to Gauss, Captain Irlenborn told him that the statements of his comrades "were all against" him and that it was "very, very damning for" him (R. 227). Irlenborn testified that he told accused that the evidence pointed to him and to Straub, and "that it would facilitate matters if they would tell the truth". He did not base his appeal to accused to make a statement on accused's "duty as a German soldier" (R. 214,215). He cited to accused the example of Leo Schlageter, a German officer who had freely admitted crimes of sabotage to

a French court, and who had thereby become a German hero. Accused testified that Captain Irlenborn told him he "could also do the like" (R. 215,216,227). Captain Irlenborn admitted that he had discussed Schlageter's acts with accused, and that he "had hopes of obtaining a statement" (R. 216).

Accused testified that he asked Captain Irlenborn if he might confront his comrades who were his accusers. The captain was unable to answer this. Accused then asked Irlenborn if the latter believed that the whole matter would come before a court-martial, and if he might confront the witnesses there. Captain Irlenborn replied that he did not know exactly, but that it was possible, but that should accused tell "a straight story at this time the possibility might exist that it would not come before a court-martial". Whereupon accused demanded that he be tried by court-martial. They then fell to discussing places in Germany, in apparently an amicable manner. Accused said that he then trusted Captain Irlenborn, "because I saw before me a fellow countryman who, while he was in the American Army, was not an American" (R. 227-229).

Captain Irlenborn denied that he said anything to accused about what might happen to accused if he did confess his part, or "about his getting by without a court-martial" (R. 215). Accused made no statement at this time concerning his guilt in the murder (R. 217,229). There was no communication between accused and Captain Irlenborn thereafter until 4 May 1944, which was the day before the official investigation by Captain Arnow at Fort McPherson (R. 269). Between 17 April and 3 May Mr. Franklin talked to accused several times. Each time he did so he apprised accused of his right to remain silent, and apparently accused did so. On 3 May, however, accused answered Franklin's question whether he wished to make a statement by saying that he would do so if he might have Captain Irlenborn as his interpreter. Franklin had again told accused that he had been implicated by the other prisoners (R. 198-201). Captain Irlenborn was brought to Fort McPherson and saw accused alone on 4 May (R. 211,229).

Accused testified on the stand that he knew that he was not compelled to make any statement, and admitted that Captain Irlenborn made no promises or threats. He furnished Captain Irlenborn a written statement in his own handwriting, and replied in the affirmative to the captain's question whether he was "surrendering" it voluntarily (R. 211,230,254). Accused testified that after he had given his statement to Captain Irlenborn, and had been assured that the latter would translate it word for word, the captain told him that -

"* * * The whole would then be a gripping confession and I should look with assurance to the whole matter, that because of this I would surely get to see my homeland again. He said that he could not definitely make this promise because he was no judge, but that he had great hopes and that I should rest assured * * *." (R. 228,229).

The official investigation was held the following day at Fort McPherson. Present were accused Gauss, Captain Arnow, Captain Irlenborn, Mr. Franklin, and a reporter (R. 196,211,245). Captain Arnow announced to accused that he was the investigating officer under the provisions of Article of War 70, had the interpreter read it and the Charge and Specifications to accused, and explained to accused his right to present evidence and witnesses in his own behalf, and his right to ask questions of the prosecution's witnesses. Accused was fully apprised of his rights to speak or remain silent. Accused stated that he understood all this (R. 246,247).

Captain Arnow was then called and sworn as a witness, his capacity explained to accused, and questioned concerning his knowledge of the case. He testified upon what he had learned, and accused was given an opportunity to question him. Captain Arnow gave accused at least two more thorough warnings and explanations of his rights, and asked him if he cared to make a statement (R. 196-198,248,249). Accused then alluded to the written statement he had given to Captain Irlenborn on the previous day. Captain Arnow acknowledged this, again warned accused of his rights, and asked if he cared to make a verbal statement. Accused stated that he desired to make additions to the written statement of the previous day. He then proceeded to do so (R. 202,207,249,250). He thereafter declined a further opportunity to cross-examine Franklin. The substance of statements previously made by all of his fellow prisoners who later testified for the prosecution upon trial was narrated to him by Captain Arnow. He declined an opportunity to question these witnesses, and a similar opportunity to examine Captain Irlenborn on the subject of their previous talks together (R. 207,210, 250-252).

e. Captain Irlenborn talked to accused Straub for about one-half an hour on 17 April. According to Captain Irlenborn, their talk was "informal"; nothing was said about statements of other witnesses, and nothing "about becoming a hero". They did talk about the region in Germany from which accused had come. Witness made no promises or threats, and accused made no statement with reference to the killing, at that time (R. 216,217).

According to accused, Captain Irlenborn told him that "it would look pretty dark for" him, and that he "should stop denying it and should tell the truth". He also told accused about Leo Schlageter, who had admitted his deeds. Accused replied that Schlageter had been an officer, while he was only a private, and that there was no comparison between them. Captain Irlenborn then told accused that his act had been "a bold and shameless one" (R. 231,232). As a result of this interview, accused "did not have the same feeling of safety, of assurance with Captain Irlenborn" as he had had with his other interviewers (R. 233).

It does not appear that Captain Irlenborn saw accused Straub again

until 5 May which was the date of the official investigation at Fort McPherson by Captain Arnow. Also present were Mr. Franklin and the reporter (R. 195,204,211,238,269). Captain Arnow announced to accused that he was the investigating officer, read Articles of War 70 and 24, and explained them to accused. The Charge and Specification were read. The explanations were thorough, and accused said that he understood them all. He was told that he was not entitled to a lawyer at the investigation, but would be at any court-martial proceedings (R. 204,205,238-240). Mr. Franklin was then called and sworn as a witness, and in accused's presence made a lengthy and detailed statement concerning what his investigation had disclosed, in brief, that the evidence and the testimony of the other prisoners pointed irrefutably to the guilt of accused Straub and Gauss (R. 195,196,241,275-278). Accused was then invited to cross-examine Mr. Franklin and declined to do so (R. 196,207,241). The interpreter then read "more than half" of a long statement by Metzger, and accused declared that he did not wish to hear the rest of it, nor listen to any statements detailing the testimony to be expected from Vollman, Emde, Mrochen, Mueller, Maidhoff and Matthes (R. 207,209,242). Accused was then asked if he wished to make a statement. He said that he would because Captain Irlenborn had told him the day before that accused Gauss had made one (R. 205,206,242). It does not appear how or when on 4 May Captain Irlenborn had seen accused to tell him this. Accused thereupon made a statement, to which he refused to swear, but which, he declared, was the truth (R. 205,242,272,273) and a further statement later in the investigation (R. 279,280). He was warned of his rights under Article of War 24 prior to each portion of his statement (R. 242,243). Gauss' statement was shown to him, and the autopsy report read. He declined an opportunity to confront the witnesses (R. 207,209,243).

6. The confessions themselves.

a. In his written statement delivered to Captain Irlenborn accused Gauss did not describe the details of the crime. He merely stated that he alone had "carried out and executed this judgment" brought upon deceased by deceased's "unsoldierly" and "impossible bearing of a traitor and deserter", which judgment had "been demanded by the entire camp community". He declared that all his comrades were innocent, and that they had only known that it would happen and had happened. He called attention to previous desertions from the prisoners' ranks, the "moral right as German soldiers to protect the honor of his people", and the dead of two wars who "have given their lives for the honor of their German people". He asked to be permitted to "justify himself as a German before the German Law" (R. 267,268; Pros. Ex. 25).

b. In his statements during the investigation itself accused spoke of deceased's past misdeeds and betrayals, his intention to desert, and

the prisoners' feelings about this (R. 282). After Mr. Franklin had testified at length concerning what his investigations had disclosed (R. 275-280) accused admitted the commission by him of the act, in a brief statement in which he adopted his previous day's statement, and stated that "the declarations which have been made by Mr. Franklin in my presence are correct with the exception of a few points", which he then described (R. 279). He claimed for the prisoners "not only * * * the right but the duty to commit such a one to the just punishment of death" (R. 281). He reiterated the prisoners' complaints against deceased, at length, saying finally that, "we could not wait until Guenther did desert because we could not have been able to hold him responsible and thereby would have rested one more shame and injury on the honor of the German people" (R. 282,283).

Accused Straub's statement was then read to accused Gauss (R. 283). Accused then admitted that he had "only endeavored to assume the responsibility for everything myself and alone" (R. 285,286).

c. Straub's confession was brief and clear. Accused Gauss, Mueller and Metzger came to him on the evening of 5 April and told him that deceased was leaving the next day, that he was "entirely devoid of character", and that "someone had to give him something to remember them by upon his departure from Aiken". After the movie all gathered at accused's tent. The discussion took place between deceased and accused Gauss, the "key word" was spoken, and Straub pulled deceased back on the bed by the collar of his overcoat and the rope. Straub smothered deceased's cries with his free hand (R. 272,273).

7. Evidence for defense.

a. The highest ranking noncommissioned officer among the German prisoners was Sergeant Major Kurt Vogt. By virtue of this (and probably also because he spoke English well) he was leader of and spokesman for the prisoners. He was responsible for organizing their activities within the camp, and for their welfare and discipline (R. 312,314). Directly subordinate to him were eighteen sergeants, responsible for the performance of various duties and details. Accused Gauss was one of these sergeants; he also took charge of the prisoners' festivities on 30 January and on the German Memorial Day in March, which all the prisoners attended, and which had been held with the knowledge and permission of the American authorities (R. 314-316).

During the time the prisoners had been at Gordon and Aiken, eight or ten of their number had, at one time or another, been separated from the rest and placed under the protection of the American guards because they had indicated a desire "to go over to the American side". This was known to the prisoners (R. 316). Witness Vogt described the oath of the German

soldier, the conditions under which it was taken, and its binding nature. The German soldier remains under it "until he is relieved from the Army", and considers desertion "as the greatest crime of all" (R. 319,323).

Vogt had no disciplinary powers, however, and neither he as camp leader nor the other sergeants had power or authority to punish disciplinary infractions, much less to inflict corporal punishment. Witness had not authorized it in this case. In the German Army no sergeant could execute a man except by the judgment of a court-martial. A similar instance of disloyalty in the German Army would be reported to higher authority for court-martial proceedings, although at the front it would be a soldier's duty to shoot anyone caught in an act of desertion (R. 317,320,321).

The attitude of his fellow prisoners toward deceased was shown by testimony of Vogt and that of Sergeant Wilhelm Casselmann and Lance Corporals Wilhelm Bruecher and Johann Limbach. Deceased had disparaged the speeches and singing held on 30 January under Gauss's leadership, calling them "propaganda", and dissuading other prisoners from attending (R. 297,300, 302). He had refused to sign his name to a list of prisoners who would agree to the mail strike, and had told the camp doctor that the German cook was "not clean with his cooking" (R. 297,300). Deceased was quarrelsome in his work as an orderly in the kitchen and mess hall, and five men had threatened to quit working with him. They were ordered back to work by Vogt at the direction of "Lieutenant Williams", the commanding officer (R. 295,296,317,318,321). Mueller had called him a traitor (R. 298). He "was dragging the German homeland * * * into the dirt" (R. 310). The men felt that he deserved death. The whole camp had great confidence in accused Gauss and in view of the expected transfer of deceased to Camp Gordon expected Gauss to punish deceased (R. 300,306,309,310,311).

These witnesses, as well as Matthes, Maidhoff, and Vollman, all testified that Gauss was an excellent soldier, solicitous of the welfare of his men and popular among them, an efficient sergeant, and faithful to Germany, while Straub was a quiet individual, a "good comrade", of honorable character, and highly thought of among his associates (R. 289,291, 293,301,302,307,308,310,316,318).

b. Accused Straub's rights as a witness were fully explained to him by the law member. He elected to be sworn as a witness and to testify in his own behalf (R. 325,326). He stated that he was 38 years of age, had been born in Wurttemberg, and had a grade school and vocational school education. He was a motor mechanic in civil life. Except for one minor violation of traffic regulations he had never been before a court. He had volunteered for military service twelve times before he was finally accepted in 1943 (R. 327-329). He served in the "Air Corps Infantry" in Africa under Rommel, was captured in May of 1943, quickly escaped to Sicily,

and was again captured there in July of 1943. He had come to Camp Gordon in October, and to Camp Aiken on 19 November (R. 329,330).

He first heard of deceased in March of 1944, when he heard Metzger speaking derogatorily of him, and in the ensuing days he continued to hear similar statements by other prisoners (R. 330,331). His story of the events of the evening of 5 April, although set forth in considerable detail from the time he met with accused Gauss, Metzger and Mueller in the washroom of the latrine to the disposition of deceased's body by tying it to the light pole, differed only minutely from that established by the evidence of prosecution's witnesses (R. 332-339). They feared deceased would desert to the Americans once he got away from Aiken. "The whole camp" demanded "the execution of the judgment". Accused Gauss accepted the responsibility for their deeds as far as both the American and German authorities were concerned (R. 332, 333,339,346). Witness already had a rope in his tent. After the movie, when he arrived at the tent, he found the light out, and told the others that Gauss and deceased were coming. Mueller arrived, then Gauss and deceased, whom he himself had never seen before. The light was now burning. The various persons sat as described by prosecution's witnesses, and the heated colloquy between Gauss and deceased took place. Some of the accusations deceased denied; on others he was silent, some he admitted. Accused had now taken the rope from under his bed (R. 333-335). Gauss accused deceased of going over to the American Army, called him a traitor, and used the word, "dog" (R. 336,337). Accused Straub threw the rope, in a loop, over deceased's head and around his neck, pulled him back on the bed, and with accused Gauss and Mueller holding him, pulled it tight (R. 340,343; Pros. Ex. 20). Deceased put up only a feeble struggle (R. 343).

They then debated whether to throw the body in a freshly dug pit which was partially filled with rain water, but decided to hang it to a pole in full view of the camp, so the camp would know "that the traitor had gotten his just punishment" (R. 337,338,343,344). They were not trying to hide what they had done (R. 337). Accused said to the court:

"* * * I am no murderer. I merely fought for the honor of my Fatherland and for the respect as a soldier, and I believe that every decent German soldier would do likewise if fate had demanded it" (R. 342).

c. Accused Gauss' rights as a witness were fully explained to him by the law member. He, too, elected to be sworn as a witness and to testify in his own behalf (R. 348). He stated that he was born in Wurtemberg, and was 31 years of age. He had seven years of public school education and three years in vocational school. His father had intended that he become a butcher, but after three months he found himself unable to kill an animal, and was apprenticed to his uncle, a cabinet-maker. He entered the German Army in March of 1940, served in France, Yugoŝlavia, Russia, again in France,

and then in Sicily, where he was captured. He arrived at Camp Gordon in October 1943, and at Aiken in November. At the latter camp he was in charge of a work detail, and also of sports, entertainment and morale among the prisoners (R. 349,350,362).

The American Articles of War had never been read to the prisoners, but "something" had at one time been read to them to inform them that they would be punished by the Americans if they disobeyed orders (R. 352). Accused had led the prisoners' services in observation of 30 January, "the day of the foundation of the Third Reich", and of their Memorial Day. On these days, as well as leading the singing, accused had made short speeches, in which he reminded them of their homeland, and further pointed out to them their duties as representatives of Germany and the German Army, and their corresponding responsibilities of obedience to and respect for the Americans (R. 350,351).

Deceased, however, was detested by the prisoners for his acts, which they considered "honorless". He was quarrelsome. He slandered and disparaged Germany, and persuaded the men in his tent not to take part in the January celebration. He "had even thrown the honor of his own wife into the dirt in front of the American soldiers and * * * said his wife was seventeen years old and was a whore". He betrayed his German comrades to American soldiers and officers. He said that he was not going back to Germany (R. 352, 353). Accused did not know deceased even by sight, but first Bruecher and thereafter other prisoners had come to accused with increasing complaints about deceased (R. 352,354-356,363). "Seventy to eighty percent of the men" (260 or 280 were in the camp) were disgusted with deceased's behavior. The night before the killing, Sergeant Casselmann came into accused's tent, said that deceased was leaving, and that "the camp demanded" that accused "execute the judgment", and that this must be done before deceased could leave "and thereby have the opportunity to go over to the Americans" (R. 355,364).

This was further agreed upon by accused, Straub, Metzger and Mueller in the latrine on the evening of 5 April. The details were discussed and arranged in the manner described in the prosecution's evidence (R. 355,356). After the movie accused saw deceased as they were leaving, asked if he might speak to him, and they walked together through the darkness of the camp. In response to accused's questions deceased admitted all the charges which had been related to accused by their comrades (R. 356,357). Together they then went to Tent A-5, where, in the presence of the others, accused again questioned deceased, and received similar replies, although at first deceased denied some of them due to the presence of Mueller (R. 257,358). Enraged at deceased's admission that he planned to go over to the Americans, accused uttered the cue word. The killing then took place. Accused's description will not be detailed here, since it did not differ from the facts already established (R. 358-360,362,362).

Of his acts accused said that he considered them -

"As a complete, absolute German matter. I have never had the idea or plan to do anything against the American State, to harm it in any way or to do anything to hurt its honor, and I was completely convinced that the American military authorities could not punish us. * * * that all that was necessary of the Americans is that a report be given our homeland as to what happened to this individual" (R. 361).

d. Accused also submitted to the court an unsworn written statement (R. 365,366). It had been written by him in Atlanta on 1 June 1944 as a supplement to that previously made by him to Captain Irlenborn (R. 365). In it he reiterated his reasons for bringing about deceased's death. Again, they did not differ from the reasons given in his oral testimony, that of accused Straub, and the other witnesses. Accused relied upon the participants' honor and duty as German soldiers, disclaimed intent or desire to harm "the American State or its military might", compared his and his comrade's situation to what might have been a similar one of American soldiers, and finally, asked to be allowed to shoulder the full responsibility for it (R. 368-370).

e. Sergeant Vogt, recalled as a witness, testified that the Articles of War had not been read to the prisoners (R. 371,372).

8. We shall not recapitulate the evidence otherwise than to say that it shows beyond all doubt that accused Gauss, acting in pursuance of a previous agreement with accused Straub and others of their fellow prisoners, took deceased to a tent in the prisoner of war stockade at Camp Aiken, South Carolina. There both accused and another prisoner held deceased on a bed, strangled him with a piece of tent rope, and, with the assistance of others, tied his body to a light pole behind some other tents. They claimed that they did this as an example to all the other prisoners, and in the execution of what they believed to be the desires of a substantial number of the camp's inmates, because of deceased's quarrelsomeness, his disparagement of Germany, and his suspected intentions to desert their cause and take up with the Americans. Both accused confessed their parts, and freely admitted them from the witness stand.

9. The case was ably tried, by counsel for both sides, and by the court. A solicitous regard for the rights of both accused is found in

malice need not exist for any particular time before the act itself, and the intent to kill need exist only at the time of the act. (Manual for Courts-Martial, 1928, pages 162,163.)

It will readily be seen that the facts in evidence fall well within the limits of the crime of murder. While neither accused knew deceased personally, and had only hearsay knowledge of his past acts to which the camp attached opprobrium, it is obvious that they bore a violent and burning hatred for deceased, and that at least two hours prior to his death they had united in and resolved upon a plan for killing him. Their rage sharpened by the admissions wrung from him by accused Gauss in the tent, they fell upon him, and while Gauss pinned him down, Straub garroted him. The elements of malice, premeditation, intent, and participation in the act are clearly shown on the part of each accused.

The defense raised the issue of what is in effect provocation, as a result of deceased's past conduct. Accused's testimony is replete with this element - their contempt for and rage at a traitor who stood ready to desert them. We adopt with only a substitution of the names of the accused, the language of the Board of Review in a recent similar case, in which the same issue was raised (CM 248793).

"Such a contention [that accused had a right to kill a 'traitor' in order to prevent further acts of 'treason'] is wholly without foundation. As prisoners of war the accused are, under the Geneva Convention, subject to our Articles of War. Whether (deceased) was a 'traitor' to Germany is not at issue. The point is that neither our own soldiers nor prisoners of war have any authority as self-constituted judges to sit in judgment and to impose punishment upon one of their number for any cause. To contend otherwise is absurd."

The cited opinion goes on to discuss the case of one Pedro Corpus, a military prisoner of the United States in the Philippine Islands, decided in 1901, prior to the adoption of the Geneva Convention, in which the same result was reached, and states that:

"Accordingly, it must be concluded that regardless of whether or not (deceased) was a traitor to the German Government, the accused had no legal right as prisoners of war or as individuals either to inflict punishment on him or to take his life. Neither they nor any other self-constituted group may defy authority by taking the law into their own hands" (CM 248793).

It is true that both accused were highly incensed at deceased at the time they killed him. But we do not conceive this to present the issue of killing in the heat of anger under such circumstances as to reduce the degree

of the offense to manslaughter. The case previously cited and the principles just established forbid any such mitigation. Even viewing deceased's acts and accused's retaliatory measures through their own eyes, we are met by the fact that the intent to kill had long been present in their minds, and that their malice was deliberately heightened and sharpened by their own conduct. Rather than being rendered incapable of deliberation, they had chosen to deliberate, and in the course of this they sought to create a provocation as an excuse for killing. The law does not recognize this sort of provocation as sufficient to reduce a homicide from murder to manslaughter (par. 149, MCM 1928, CM 248793, and cases extensively cited therein).

We come, then, to the question of the confessions. As previously stated, we have devoted much time and space in the preparation of this opinion to the circumstances under which they were obtained for the reason that we are dealing here with the lives of men who have been placed within the power of our jurisdiction by the vicissitudes of fortune and the laws of war. They are, indeed, strangers in a strange land. It is obvious from a reading of their testimony that they think not as we do, but in a way alien and even abhorrent to us. Neither this nor the nature of their offense, however, relieves the court or this Board of the duty of enforcing in their behalf the most rigorous protection of their legal rights.

Little difficulty is posed by the admission of accused Straub's confession. No undue influence whatever appears to have been exercised upon him by Captain Irlenborn. Accused summarily rejected the captain's analogy of Leo Schlageter, and they parted with a feeling in accused's mind that he could not trust Captain Irlenborn. There is nothing in the record to show that the interview between them in any way induced accused to confess, and, in fact, he did not. The use on 5 May of the confession previously obtained from accused Gauss to induce accused Straub to make one does not violate the established principles concerning the admission of confessions, and is, in fact, a recognized method of obtaining them (R. Wharton, Criminal Evidence, sec. 623, 11th ed.). In addition, accused was informed of the overwhelming weight of the evidence against him. He was fully warned of and understood his rights under the 24th Article of War. We hold the court's refusal to exclude his confession to have been proper in all respects.

Accused Gauss' confession presents more difficulties. It is impossible for us to state with certainty the workings of the mind of a man whose tongue is foreign and whose concepts of the law must necessarily have differed from ours. At the time he first parted from Captain Irlenborn he certainly placed great trust in the captain, looked upon him as a "fellow countryman", and may well have thought that there was the person who could explain why he had committed the murder, and could persuade the Americans to let accused answer for it to a German court-martial at the end of the war. But in the interim between 17 April and 3 May accused was questioned

several times by Mr. Franklin. Each time he was warned of his rights. Finally he declared that he would make a statement if he might have Captain Irlenborn as his interpreter. Accused admits that he knew that he need not make the statement, and that prior to making it Irlenborn made no promises. Only after accused had voluntarily delivered up the statement did Captain Irlenborn tell him in effect, that he might "look with assurance" to the future. It was perhaps an unwise thing to say. We think that it did not, under all the circumstances, vitiate the confession. The statements made in the official investigation the next day were made after full and repeated warnings. To attempt to trace underlying motives back from them through the statement of the day before and to the first interview with Captain Irlenborn defies mortal powers. We can only say that considering all the record, accused had ample warning of his rights, that no promises or threats induced him to confess, and that his confessions were properly admitted.

The evidence aliunde is overwhelming against both accused. They admitted their deeds and explained their motives from the stand. Assuming only for the purposes of argument that the confessions of either were inadmissible, the court could not have found otherwise than it did. No error occurred (CM 206090, Dig. Op. JAG, 1912-40, sec. 395 (10), p. 206; CM 248793).

10. After the arraignment the defense counsel objected to further proceedings on the ground of want of jurisdiction of the court to try the accused. The reason advanced was that the prisoners had been captured by the British and Canadians, and subsequently transferred to us for keeping, and that the captor powers were solely responsible for their protection and discipline. This special plea was properly overruled.

The Geneva Convention on Prisoners of War of 27 July, 1929, provides that "Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining power" (Art. 44, FM 27-10, sec. 118, p. 29). This detaining power is bound to provide for their maintenance, which certainly includes the obligation to protect them against violence from whatever source (Art. 4, FM 27-10, par. 75, p. 17). One of the most likely methods to insure this protection is the maintenance of discipline and the deterrent effect of swift punishment for breaches of it. The question was considered at the Judge Advocates' Conference at the University of Michigan in March, 1944, and there answered in the affirmative (Report of Judge Advocates' Conference, p. 30). By the very fact of capture and transfer the right to try and punish must necessarily exist. That the Articles of War were not read to accused is no defense. Ignorance of or misapprehension concerning the law does not excuse its violation. Murder is contrary to the laws of all civilized countries. The Germans have never been reluctant to talk about the high degree of their own civilization and the vast rights which accrued to them because of it.

11. Other minor errors, none of them prejudicial to any substantial right of either accused, are discussed at page 6 of the review of the staff judge advocate, to which reference is made.

12. The record shows that accused Gauss is 31-4/12 years of age and that he was captured in Sicily July 27, 1943, and accused, Straub, is 38-6/12 years of age and that he was captured in Sicily July 18, 1943. Gauss stated that he was married, and had three children (R. 369), while it appears from accused's petition to the President for clemency (which is attached to the record of trial) that Straub is married and has one child. Both accused were German prisoners of war confined at Camp Aiken, South Carolina, on the date of this offense. The record contains no other information as to the past record of either accused.

13. The court was legally constituted and had jurisdiction of the persons and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Article 66, Geneva Convention of 27 July 1929, Relative to the Treatment of Prisoners of War, provides that:

"If the death penalty is pronounced against a prisoner of war, a communication setting forth in detail the nature and circumstances of the offense shall be sent as soon as possible to the representative of the protecting Power, for transmission to the Power in whose armies the prisoner served.

"The sentence shall not be executed before the expiration of a period of at least three months after this communication."

Wing A. Gou, Judge Advocate.
William W. Wayne, Judge Advocate.
Samuel Connelley, Judge Advocate.

1st Ind.

2 - OCT 1944

War Department, J.A.G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Prisoners of War Erich Gauss, Sergeant, German Army Serial Number 81G-28784, and Rudolf Straub, Private, German Army Serial Number 31G-16830.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The record shows that accused, Gauss, was a noncommissioned officer, and Straub, a private, in the German Army, were taken captive by the British and Canadians in Sicily in 1943, subsequently transferred by the captor powers to the United States for the purposes of detention, and eventually placed in a prisoner of war stockade at Camp Aiken, South Carolina. Among the prisoners there in confinement was one Horst Guenther, who was unpopular among many of the Germans because of his quarrelsomeness, his friendship with American guards, his reporting of breaches of discipline among the prisoners, his disparagement of things German, and his suspected intentions to "desert" to the American side. Although neither accused knew Guenther personally, they had heard their fellow prisoners' complaints. On the evening of 5 April 1944, accused, together with two other prisoners, met and resolved to punish Guenther, who was to be transferred to another camp the next day. After the evening movie, Gauss took Guenther to one of the tents, where accused Straub and other prisoners were waiting. After accusing Guenther of the various allegedly "traitorous" acts previously set forth, Gauss pushed him down on a bed, and held him while Straub strangled him with a tent rope. His body was then hanged to a pole in the stockade. The evidence shows, beyond a reasonable doubt guilt of every element of the crime charged, on the part of each accused, and further indicates a studied and calculated planning and execution of the murder on the part of both. Each accused, in separate confessions as well as in testimony from the witness stand, admitted the offense. Their defense was, in substance, that deceased was a traitor to Germany, and as such it was their duty as good soldiers of the Reich to execute him and that they considered this solely a German matter. Such summary "justice", of course, has no place in this country. I recommend that the sentence of each accused be confirmed and ordered executed.

3. General court-martial jurisdiction to try the accused is derived from the Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War. The Department of German Interests of the Legation of

Switzerland was given more than a month's notice of the place and date of trial. The accused had the services of a competent interpreter as well as the official interpreter of the court. They expressed themselves satisfied with the defense counsel assigned to them and with the court. They were ably and vigorously defended, and the court scrupulously observed every legal right granted to them and guaranteed by our own, or by international, law. Article 66 of the Geneva Convention provides that if the death penalty is pronounced against a prisoner of war, a communication must be sent to the protecting power for transmission to the power in whose Army the prisoners served, setting forth in detail the nature and circumstances of the offenses of which the prisoners have been convicted. This article also provides that the death sentence shall not be executed before the expiration of a period of at least three months after this communication.

4. Attached to the record is a letter dated 1 July 1944, signed by each accused and addressed to the President. Consideration has been given to this letter in making the within recommendation.

5. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



Myron C. Cramer,
Major General,
The Judge Advocate General.

- 3 Incls.
Incl.1-Record of trial.
Incl.2- Drft. of ltr.
for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence of each accused confirmed. G.C.M.O. 287, 6 Jul 1945)

WAR DEPARTMENT
Army Service Forces
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

(231)

Board of Review

CM 260194

UNITED STATES

v.

Private First Class GEORGE
R. COLLETT, JR. (37509169),
Will Rogers Reconnaissance
Supervisor Detachment.

2 SEP 1944

THIRD AIR FORCE

Trial by G.C.M., convened at
Will Rogers Field, Oklahoma,
1 June 1944. Dishonorable
discharge and confinement for
ten (10) years. Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

The record of trial in the case of the soldier named above has
been examined and is held by the Board of Review to be legally sufficient
to support the sentence .

James M. Tapp Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGN-CM 260194

1st Ind

Hq ASF, JAGO, Washington 25, D.C. MAR 23 1945

To: The Secretary of War.

1. Pursuant to the provisions of Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), there is transmitted herewith for your action the record of trial and the accompanying papers in the case of Private First Class George R. Collett, Jr. (37509169), Will Rogers Reconnaissance Supervisor Detachment, together with the holding thereon by the Board of Review.

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

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

Specification: In that Private First Class George R. Collett Jr, Will Rogers Reconnaissance Supervisor Detachment, Will Rogers Field, Oklahoma, did, at Salt Lake City, Utah on or about 22 March 1944, unlawfully, willfully and feloniously instill an unknown quantity of hydrochloric acid (H Cl) into his right ear causing almost complete destruction of the right ear drum.

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

Specification: In that Private First Class George R. Collett Jr, Will Rogers Reconnaissance Supervisor Detachment, Will Rogers Field, Oklahoma, did, at Salt Lake City, Utah, on or about 22 March 1944, with the intent and purpose of rendering himself unfit for overseas duty, willfully instill an unknown quantity of hydrochloric acid (H Cl) into his right ear causing almost complete destruction of the right ear drum.

The accused pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereunder. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved only so much of the Specification of Charge I and Charge I as involves a finding of guilty of that Specification in violation of Article of War 96, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review, in what is called a "Short Holding" and without giving its reasons therefor, has held that the record of trial is legally sufficient to support the sentence imposed. I do not concur in the board's holding and for the reasons hereinafter stated I am of the opinion that the record is legally insufficient to support the findings of guilty and the sentence and that both should accordingly be disapproved.

Since the evidence clearly establishes the offense alleged, the controlling issue is whether the accused was, at the time of the alleged offenses, mentally accountable therefor. The Manual for Courts-Martial states that:

"* * * A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par. 78).

The above test has long been recognized in military law and its principles have been sanctioned by the Federal courts, including the Supreme Court of the United States.

The Manual also provides that:

"Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. * * *" (MCM, 1928, par. 78).

This provision, which is similar to the provisions of the 1921 Manual, places the burden of ultimate persuasion on the issue of mental responsibility upon the prosecution and recognizes the fundamental principle that all men are deemed innocent until proven guilty beyond a reasonable doubt (see MCM, 1921, par. 219). On this point the United States Supreme Court has made the following authoritative pronouncement:

"* * * Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime * * *."

* * *
 "If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the

accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt" (Lavis v. United States, 160 U.S. 469).

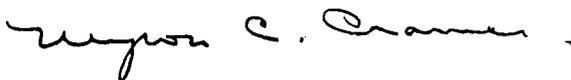
In the present case four medical witnesses, three of whom were conceded to be experienced psychiatrists, testified at the trial at considerable length concerning the disability affecting the mental condition of the accused. In addition, each specifically testified that, upon the basis of his observation and examination of the accused and the test of mental accountability as presented in our Manual for Courts-Martial, the accused was, at the time of the offense in question, unable to adhere to the right, and, therefore, was not mentally accountable for the act charged (R. 58, 70, 81, 86). One of the witnesses who had served on a medical induction board and one other who had served as the neuropsychiatrist, Station Hospital, Will Rogers Field, Oklahoma, testified that the accused, because of his mental condition, should never have been inducted into the service (R. 73, 81). Although two other medical witnesses, who were not experienced alienists or psychiatrists, testified that they had physically examined the accused in the past and had observed no mental abnormality in him, both conceded that they had never given the accused a mental examination and neither asserted that the accused was "so far free from mental defect, disease, or derangement, as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right".

Since the substance of the medical testimony set forth in the record of trial tends to prove that the accused was not mentally accountable for his act, and clearly raises a reasonable doubt as to whether the accused at the time of the alleged offense, was "so far free from mental defect, disease, or derangement, as to be able concerning the particular acts charged * * * to adhere to the right", and since there is no other substantial evidence in the record of sufficient clarity to overcome that reasonable doubt, the prosecution, in the light of the controlling principles above stated, in my opinion has failed to discharge its burden of proof on the vital issue of the accused's mental responsibility. Accordingly the findings of guilty and the sentence should be disapproved.

4. Subsequent to the trial of this case the reviewing authority directed that the accused be examined by a board of medical officers for the purpose of determining the accused's mental accountability for the offense charged. The findings of this board of officers were in conclusion identical with the testimony of the four medical witnesses who had testified at the trial that the accused was not mentally accountable for the act charged. At a later date the reviewing authority again directed that the accused be examined by a second board of medical officers for the purpose of determining his mental accountability. This second board expressed the opinion that the accused was free from

mental defect, disease, and derangement. The findings of these two medical boards were not part of the record and the conflicting opinions which they expressed tended only to increase the doubt which the record of trial had created as to the accused's sanity.

5. Accordingly I recommend that the findings and sentence be disapproved and that a rehearing be authorized before another court. Inclosed is a draft of action, prepared for your signature, designed to carry into effect the foregoing recommendation, should it meet with your approval.



2 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence disapproved and rehearing authorized before another court, by order of the Acting Secretary of War, 27 Mar 1945. Rehearing was not held.)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(237)

SPJGN
CM 260781

31 OCT 1944

UNITED STATES)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Unteroffizier EDGAR MENSCHNER;
German Prisoner of War, No.
58804, Company Eight, Compound
B, Camp Chaffee Prisoner of War
Camp.)

Trial by G.C.M., convened at
Camp Gruber, Oklahoma, 3, 4,
and 5 July 1944. Death by
hanging.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Unteroffizier Edgar Menschner, a Prisoner of War, Prisoner of War Camp, Camp Chaffee, Arkansas, acting jointly and in pursuance of a common intent with persons unknown, did, at Prisoner of War Camp, Camp Chaffee, Arkansas, on or about 23 March 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Hans Geller, a human being, by beating him to death with an instrument or instruments unknown.

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

Specification: In that Unteroffizier Edgar Menschner, a

Prisoner of War, Prisoner of War Camp, Camp Chaffee, Arkansas, did, at Prisoner of War Camp, Camp Chaffee, Arkansas, on or about 16 March 1944, wrongfully and unlawfully organize a group of Prisoners of War for the purpose of inflicting violence upon other Prisoners of War confined in the said Prisoner of War Camp.

The accused pleaded not guilty to and was found guilty of both Charges and the Specifications thereunder. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused is a German prisoner of war. The jurisdiction of the general court-martial which tried the accused for the offenses charged was derived from the Geneva Convention of July 27, 1929, Relative To the Treatment of Prisoners of War. The Department of German Interests of the Legation of Switzerland was given more than three weeks notice of the place and date of trial. The accused had recourse to the services of a competent interpreter and was defended by military counsel acceptable to him. Every right and privilege guaranteed by international law to prisoners of war against whom judicial proceedings have been instituted were strictly observed (R. 7-12).

4. The competent evidence for the prosecution shows that on 23 March 1944, the date of the alleged murder of Hans Geller, the accused and the deceased were both German prisoners of war in the Prisoner of War Camp, Camp Chaffee, Arkansas. The Prisoner of War Camp was divided into three separate compounds referred to in the record as compounds A, B, and C. There were four prisoner of war companies within Compound B, numbered 5, 6, 7, and 8. Both the accused and the deceased were members of Company 8. First Sergeant Franz Kaba, a German noncommissioned officer, was in charge of Company 8 and the accused was his company clerk and assistant (R. 39, 40, 134). In addition to his duties as company clerk and assistant company leader, the accused gave "orientation lectures" to the men of his company, made reports on activities at the front, taught German language classes and was described as an officer of the National Socialist Party of Germany and as the political leader of his company (R. 39, 40, 139, 140). On the other hand, the deceased, an able-bodied young German, was described as being disliked in his company and as being suspected of treacherous activities (R. 128-131, 140).

On the night of 23 March 1944, between 8:00 and 8:30 p.m., the deceased and two other prisoners of war were in their barrack engaged in repairing a radio. A "stranger" entered and asked "Is anyone here from

Sundein?" The deceased replied, "I am from Sundein". Prior to that time his two comrades had not known the name of the German town where the deceased had previously lived. The deceased walked over to the "stranger" who "told him that there was a man from Sundein at the wire fence of Compound C who wanted to talk to him" (R. 37-38, 48, 92). The deceased told the "stranger" that he would "be right with" him and forthwith left his barrack (R. 39).

At approximately the same hour, a commotion and the cry of "Ow" was heard in the vicinity of the fence separating Compound B from Compound C and five to seven men were seen running. Two of the men had pieces of wood in their hands (R. 50-59). At about this time Prisoner of War Werner Albrecht, a member of Company 6, came out of building #5155, and collided with the deceased who was being chased by a large, robust individual dressed in prisoner of war clothes with a cover over his head. He had a piece of wood in his hand with which he was seen to strike the deceased four blows over the head. The deceased was holding up his hands in an effort to protect his head and was shouting that he was not guilty. The man beating the deceased was not the accused (R. 59-68). Two other prisoners of war saw the deceased pursued by a man with a stick of wood in his hand. The stick was from two to four inches wide and about thirty centimeters long. As one blow was struck the accused's knees buckled. He succeeded, however, in running into the orderly room of Company 7. His pursuer then turned and departed into the area of Company 5. The two witnesses followed the deceased to the orderly room and recognized him as the man who had been pursued and beaten (R. 69-87).

When the deceased entered the orderly room he was out of breath, and was holding his hands to his head. He acted as if he were drunk. When asked what his trouble was he replied "Oh, nothing" but later said "Oh, those swine" (R. 88-91). The deceased remained in the orderly room from two to five minutes and then went to the dispensary. Later, when he returned to his barrack, he was walking slowly and gnashing his teeth. When asked who had beaten him, he said that he "wasn't going to tell anything, and he was going to take up that matter with each man by himself" (R. 40-41, 50). Shortly thereafter, however, he stated to Prisoner of War Schober "That was your comrades from Barrack 33". The accused and Prisoners of War Burnester and Beck lived in Barrack 33 (R. 93-94).

The deceased went to bed at about 9:40 p.m. During the night he cried out and vomited. On the following morning he was unconscious and could not be aroused (R. 40-41, 69, 77, 85, 86). On the following day, 25 March 1944, at 12:25 a.m. the deceased died without having regained consciousness. His death is described as resulting from the rupture

of the middle meningeal artery, secondary to a fractured skull. The appearance of an x-ray picture of his skull was compared to a shattered egg shell with numerous cracks running through it. In the opinion of a medical witness, the injury to the deceased's head was caused by a blow from a blunt instrument and could not have been caused by a fall from his bed (R. 19-25).

The prosecution presented various related instances and circumstances in support of its allegations that the accused had organized a group of prisoners of war for the purpose of inflicting violence upon other prisoners of war, and that he had employed that agency to accomplish the murder of the deceased.

Sometime prior to the alleged murder of Hans Geller a German sergeant named Koch, a close friend of the accused, had been transferred from Compound B. There had been a rumor in Company 8 at that time that the deceased had procured Koch's transfer and Koch had himself expressed that opinion to Sergeant Raba. On the day of Koch's departure, the accused was heard to tell him in a soft voice that, "We shall see. If we can prove anything on him, we shall send you a death notice". The witness then added "And I would like to call your attention to the fact that this 'on him' referred to Geller because it was common rumor in the company that Sergeant Koch was transferred through Geller" (R. 127-139).

A short time prior to 23 March 1944, Prisoner of War Franz Endlein, a member of Company 8, was called in by the accused and reprimanded for talking through the fence to a prisoner of war confined in Compound C. It appears that the man with whom Endlein had talked had previously been in Compound B and had been transferred. The accused said of him that, "he had separated himself from us, and therefore it is sure that he is not a National Socialist, * * *" (R. 114-115). Although Endlein stated that this individual was a relative, the accused suspected him of talking politics. Endlein stated, however, that he didn't "talk about political matters at all". In this conversation, the accused, according to Endlein's testimony, told Endlein that "it didn't matter whether I [Endlein] was related to him or not, and if I go over there once more I knew what was coming, I knew what means of power they had at their disposal" (R. 114-115). Thereafter, on the evening following the attack upon the deceased, Endlein was called out of his barrack by another prisoner of war. When Endlein came out of his barrack the accused said to him "Endlein, I shall have to talk with you alone, that is, man to man". "Endlein, you probably know what this is all about, concerning this matter which happened. You can go to sleep all right. You don't have to be afraid of anything. I give you my word of honor nothing is going to happen to you" (R. 117-118).

Approximately eight days prior to 23 March 1944, the American

authorities called for prisoners of war in Compound B to serve as drivers of motor vehicles. Prisoner of War Joseph Baguette, a member of Company 8, volunteered for such service. As a result of Baguette's volunteering, the accused talked to Sergeant Raba, the leader of Company 8, and in the course of the conversation stated that "Tonight Baguette will get a beating". Sergeant Raba asked the accused who was going to do the beating, and the accused told him that he, the accused, had organized a group of men from Company 7 for such purpose. The accused also explained that the "beating detail" was so organized that "one man did not know the other". Sergeant Raba remonstrated with the accused saying to him "We don't want to do that. We don't want to set ourselves up as judges. Everyone should know himself what he should and what he should not do". The accused replied, "O.K., then as far as I am concerned you can let them all go over to the other side". Thereupon the accused rather disconcertedly left the orderly room (R. 99, 135-136). This evidence was presented by Sergeant Raba who admitted that he did not like the accused because "The accused didn't quite recognize him as Company Leader". On the night following this conversation Baguette attended a class and was absent from his barrack. During his absence a "stranger" called at Baguette's barrack and asked for him, stating that "There are some people at the fence and they want to talk to him". After Baguette returned to his barrack he was told of the incident. Apprehensive of danger because of his previous act in volunteering to serve the American authorities, he went to his company orderly room to discuss the matter with the accused. During the conversation the accused told him that he had nothing to fear and "that if the company had some beating to do then the company itself would take care of that" (R. 100-110).

During the month of March the deceased and Burmester and Beck had worked together on work detail 36. On the morning of 23 March 1944 both Burmester and Beck were dismissed from the detail and returned to their barrack where the accused also lived. There they discussed their dismissal with the accused and blamed the deceased for it. The accused came over to Burmester's bunk and said, "Burmester, listen here. Nothing is to be done against Geller. Nothing will be said about it. Nothing will be done. Just wait". The accused also told Burmester to wait for later developments and to "wait and see" (R. 125-131). Later on the same day the accused stated to Sergeant Raba that "That bum Geller; he ought to be killed" (R. 137). To this statement Sergeant Raba replied, "that is easy to say; to kill somebody; but we can't do that just because we have a suspicion that he did something, that isn't right". The accused then replied, "Well, that is not the only case. We have several cases involving him of which he was the cause". Sergeant Raba then said, "Yes, it's clear that he is a bum and that he deserves punishment, but we can't kill him. He gets a good beating but we can't kill him". The accused made no further comment and left (R. 137-138). On the morning following the beating of the deceased, the accused came into his barrack and said to Burmester,

"Burmester, come to the orderly room. The officer, Captain Kubitschek, an American officer, is in the orderly room. You don't know anything; is that clear? And can you prove where you were last night?" Burmester then went to the orderly room with the accused (R. 126).

Evidence was introduced to the effect that a card system was maintained in the orderly room of Company 8 showing the name and residence in Germany of each prisoner of war in the company. Only two American sergeants, the accused, Sergeant Raba and Prisoners of War Schuh and Homeyer had access to these records. The orderly room was kept locked when it was not being used by one of these persons (R. 136-137).

The evidence further shows that between 8:00 and 9:00 o'clock on the night of 23 March 1944, the time during which the deceased was beaten, the accused was engaged in teaching a German language class (R. 102). The evidence also shows that the accused attended the funeral of the deceased (R. 144).

5. After the law member had explained to the accused his rights relative to testifying or remaining silent, the accused stated that he understood the explanation which had been given and that he "refused to talk" (R. 5, 165). No evidence was presented by the defense.

6. The Specification of the Charge alleges that the accused

"* * * acting jointly and in pursuance of a common intent with persons unknown, did, at Prisoner of War Camp, Camp Chaffee, Arkansas, on or about 23 March 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Hans Geller, a human being, by beating him to death with an instrument or instruments unknown."

The Specification of the Additional Charge alleges that the accused wrongfully and unlawfully organized a group of prisoners of war for the purpose of inflicting violence upon other prisoners of war. Obviously the crime of murder is the more serious of the two offenses alleged.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "a homicide done in the proper performance of a legal duty * * *". An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a

lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder requires that the death of the victim. "* * * take place within a year and a day of the act or omission that caused it * * *" (par. 148a, MCM, 1928). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which it may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

"* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * * * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of the intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

"Malice aforethought - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act

is committed.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony * * *" (MCM, 1928, par. 148a).

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 Criminal Law, vol. 1, sec. 420).

Since the Specification alleges that the accused murdered Hans Geller by acting jointly and in pursuance of a common intent with persons unknown, it is only necessary, if the findings of guilty under the Specification are to be sustained, that the proof show that the fatal beating of the deceased resulted from the concerted action of the group of which the accused was a part or that the accused encouraged, assisted or commanded the attack. It is not necessary to show that the accused struck the death blow or was present at the time and place of the fatal beating for the United States Code provides that, "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (35 Stat. 1152; U.S.C. Title 18, sec. 550).

The doctrine which imposes responsibility upon a man for the act of his agent in the perpetration of a crime is a very ancient one. In Carlisle v. State (31 Texas Criminal Appeal, 537, 21 S.W. 358), the court in sustaining a conviction for murder against an accused who was not present at the scene of the crime said:

"The correctness of this doctrine is clearly supported in the death of Uriah, which was caused by David. The Lord, speaking through Nathan, said to David: 'Wherefore hast thou despised the commandment of the Lord to do evil in his sight? Thou hast killed Uriah, the Hittite, with the sword, and hast taken his wife to be thy wife, and hast slain him with the sword of the children of Ammon'. Now, David was not pre-

sent when Uriah was killed. David did not with his own hands slay Uriah with a sword, but when Joab placed Uriah in a position in which death was inevitable, and thereby had him killed, under the command of David, David killed Uriah with a sword just as if he had slain him with his own hands."

Similarly in 1854 in Brennan v. the People (15 Ill. 511), the court said:

"The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story; and that he was killed in the attempt to execute the common purpose" (2 Hawk. P.C. ch. 29; 1 Hale, P.C. ch. 34; 1 Russell on Crimes, 24; 1 Chitty, Criminal Law, 264).

In 1919 in the court-martial case of Cook et al, CM 123414, the Board of Review in reviewing the record of the trial of nineteen general prisoners tried for a murder committed in the United States Disciplinary Barracks, in which some but not all of the accused participated in the final fatal attack, said:

"In the present case, to constitute any of the accused aiders and abettors, it is not necessary that they should have assisted in the particular acts of criminal violence resulting in the death of the deceased; but it is sufficient if they were acting in general concert with the actual perpetrators of such acts in their commission."

The evidence must be examined in the light of the above concepts. If the accused either ordered, directed or encouraged the beating of the deceased, he is guilty of murder as charged. The evidence showing the guilt of the accused is circumstantial in character. Because of this fact it may be helpful to the present analysis to distinguish between so-called circumstantial evidence and so-called positive or direct evidence and to observe the relative points of strength and weakness which adhere in each type of proof. The Manual for Courts-Martial explains the nature of direct and circumstantial evidence as follows:

"If a statement made by a witness or contained in

a document is such that if true it would directly prove or disprove a fact in issue, the statement is called direct evidence. If the statement would, if true, directly prove or disprove not a fact in issue but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact, which is in issue, then such a statement is called indirect or circumstantial evidence. For example, on a charge of larceny of a purse, testimony of a witness that he saw the accused take the purse from the owner's overcoat is direct evidence, and testimony of a witness that he found the purse hidden in the accused's locker is circumstantial evidence of the taking.

"Circumstantial evidence is not resorted to as a secondary or inferior species; i.e., because there is an absence of direct evidence. It is admissible even when there is direct evidence. There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of an eyewitness, who is absolutely trustworthy in every respect, may be more convincing than the contrary inferences that appear probable from circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness" (MCM, 1928, par. 112b).

In the famous case of Commonwealth v. Webster (5 Cush. 296, 52 Am. Dec. 711), Chief Justice Shaw states that:

"Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood.

"But in a case of circumstantial evidence, where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in

question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when foot-prints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence."

The same degree of certainty is required to warrant a conviction when it is direct as when it is circumstantial. Obviously the reverse is also true. In all cases the court must be satisfied beyond a reasonable doubt of the guilt of the accused. Appellate courts frequently assert that in criminal cases resting upon circumstantial evidence alone that the different circumstances established must be "consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis" (Wharton's Criminal Evidence, 11th Ed., sec. 10). The statement is, however, merely another way of saying that the evidence in every criminal case must show the guilt of the accused beyond a reasonable doubt.

A chronological summary of the evidence shows that some time prior to the events in question the deceased was generally regarded within Company 7 as being responsible for the transfer from Compound B of a fellow prisoner of war named Koch, a friend of the accused. Upon the occasion of Koch's departure, the accused was overheard to tell him in a low tone, "We shall see. If we can prove anything on him we shall send you a death notice". From the evidence showing that the deceased was generally accused of being responsible for Koch's transfer and from the evidence showing that Koch himself so regarded the deceased, it is

reasonable to infer that the accused in his conversation with Koch was referring to the deceased. The evidence, therefore, justifies the conclusion that the accused promised to send his friend Koch a message announcing the death of the deceased at such time in the future as the accused's political group referred to by the accused as "we" could "prove anything" on the deceased.

Approximately eight days prior to 23 March 1944, Prisoner of War Baguette had offended the accused by volunteering to drive a truck for the American authorities. As a result of Baguette's conduct, the accused had said to Sergeant Raba, "Tonight Baguette will get a beating". The accused also explained that he had organized a "beating detail" from Company 7 for that purpose and that the detail was so organized that "one man did not know the other". Although Baguette was not beaten that night, a stranger called at his barracks and following the same modus operandi as that later employed to entice the deceased from his barrack on the night of his fatal beating, stated that "there are some people at the fence and they want to talk to him". When Baguette returned to his barrack and was told of the incident, he became frightened and sought out the accused who assured him that he had nothing to fear. This proof shows that the accused organized a "beating detail" composed of men from companies other than his own. It also shows that the accused considered himself in a position of authority over the "beating detail" as well as over the administration of unlawful punishment within the compound to the extent that he could assure the frightened Baguette that he had nothing to fear from such source.

About the time of the incident involving Baguette, another prisoner of war, Endlein, offended the accused by talking with a prisoner in Compound C who was suspected by the accused of political disloyalty. Endlein was warned by the accused of the power which he had at his disposal and ordered not to repeat the offense.

Thereafter on the day preceding the attack upon the deceased, Prisoners of War Burmester and Beck were suspended by the American authorities from work detail 36. The accused discussed this incident with Sergeant Raba and accused the deceased of being responsible for the action of the American authorities, stating that, "That bum, Geller; he ought to be killed". When Raba remonstrated with the accused by stating that Geller was only suspected of disloyal conduct, the accused replied, "Well, that is not the only case. We had several cases involving him of which he was the cause". On the same evening the accused discussed the deceased with Burmester. As a result of this conversation the accused ordered Burmester to take no action against the deceased, saying to him,

"Burmester, listen here. Nothing is to be done against Geller. Nothing will be said about it. Nothing will be done. Just wait. * * * to wait for the later developments. * * * to wait and see". This order, in the light of the previous events and the avowal by the accused that Geller "ought to be killed", was a veiled promise to Burmester that action would be taken against the deceased. A few hours later the deceased was so brutally beaten that he died therefrom. The above evidence presents a sequence of closely related events which justify the following summarization:

(1) On the occasion of Koch's transfer from the compound the accused made a conditional promise to send Koch a message of the deceased's death as soon as satisfactory evidence could be secured against him.

(2) The accused warned Endlein, whom he suspected of political disloyalty, of the power he had at his disposal.

(3) The accused told Sergeant Raba that he, the accused, had organized a "beating detail" of men from Company 7, for the purpose of beating Baguette and that the detail was so organized that one man did not know the other.

(4) After Burmester and Beck were suspended by the American authorities from work detail 36, the accused in effect told Sergeant Raba that satisfactory evidence had been procured against the deceased and that the deceased "ought to be killed".

(5) The accused, assuming the role of one having authority, ordered Burmester and Beck to take no action against the deceased but to wait "for later developments".

(6) The subsequent attack upon the deceased on the same night on which the accused had ordered Burmester to "wait for later developments" was carried out by a group of men one of whom was described as having a cover over his head.

(7) The same modus operandi appears to have been employed against the deceased as was previously described by the accused as the plan to be used in such cases.

The evidence against the accused does not end with the death of the deceased. Following the attack upon the deceased he revealed a

sense of fear and guilt by endeavoring to placate Endlein, whom he had previously reprimanded by saying, "Endlein, you probably know what this is all about, concerning this matter which happened. You can go to sleep all right. You don't have to be afraid of anything. I give you my word of honor, nothing is going to happen to you". Later, when an American officer called at the compound to question Burmester, the accused warned Burmester by saying to him, "You don't know anything; is that clear? And can you prove where you were last night?" Such language and conduct show that the accused desired Burmester to conceal all that he might know concerning the accused's attitude, statements or actions toward the deceased.

No one of the above circumstances or elements of proof would be sufficient, standing alone, to have warranted the court's finding of guilty. Together, however, they warrant by inexorable logic the inference that the accused organized a political gang for the terrorization of those who deviated from the ideology of the Third Reich and that he employed this cowardly weapon against the nonconforming deceased. The intent to kill the deceased, the method and plan for his execution, the prophesying of the death of the deceased, and the fulfillment of that prophecy in pursuance to the orders of the accused may all be reasonably deduced, not from any direct testimony of the ultimate fact in issue, but from a series of other facts, which, as Mr. Justice Shaw has stated, are "so associated with the facts in question, that in the relation of cause and effect they lead to a satisfactory and certain conclusion". Since the various elements of proof came from different witnesses and different sources, the likelihood of their being perjured or distorted is extremely remote. The strength and trustworthiness of such testimony lies in the phenomenon that, although each is independent and disassociated from the other, they all are consistent one with the other and all point to the accused's guilt. Considered in the light of logic and experience, the record establishes beyond a reasonable doubt every element of the crimes charged.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of murder, in violation of Article of War 92. Article 66, Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, provides that:

"If the death penalty is pronounced

against a prisoner of war, a communication setting forth in detail the nature and circumstances of the offense shall be sent as soon as possible to the representative of the protecting Power, for transmission to the Power in whose armies the prisoner served.

"The sentence shall not be executed before the expiration of a period of at least three months after this communication."

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

(Dissent), Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(253)

SPJGN
CM 260781

31 OCT 1944

UNITED STATES)

v.)

Unteroffizier EDGAR MENSCHNER)
German Prisoner of War, No.)
58804, Company Eight, Compound)
B, Camp Chaffee Prisoner of War)
Camp.)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Gruber, Oklahoma, 3, 4
and 5 July 1944. Death by
hanging.

Dissenting Opinion by GOLDEN, Judge Advocate.

1. Although I am impressed by the sincerity of the majority opinion and am filled with admiration for the dexterity with which a few circumstances and conclusions therefrom are marshalled against the accused, I cannot in good conscience concur therewith and, therefore, I am compelled to dissent therefrom.

2. The facts concerning the beating of the deceased by unknown persons and his actual demise, as recited in the majority opinion, are substantially correct except as hereinafter noted. The statement that the accused was the political leader of his company is based upon a pure assumption of only one of the witnesses (R. 115). The word "stranger" is used in the record as merely designating a person unknown to the witness and not in the sinister sense attributed to it in the majority opinion. Since any language has many peculiarities and usually suffers by interpretation only the plainest and most reasonable construction of the thought sought to be conveyed should be gleaned from the interpretation. Any other construction and especially strained, unreasonable and conjectural inferences must be avoided if a reasonable conclusion concerning the interpreted words is to be reached. Applying such rules, the evidence is clear that at about 8:30 p.m. on 23 March 1944 the deceased was called from his barracks by a person unknown to him and his associates to the compound fence where he was, within a few minutes, severely beaten by at least two persons of undisclosed identity who were armed with clubs. One of the assailants had a covering over his face. Shortly after the beating he identified his assailants as being from Barrack 33 in which among numerous others were quartered the prosecution's witnesses Burmester, Beck and Raba, as well as the accused. Shortly thereafter the deceased went to bed and never regained consciousness, dying at 12:25 a.m. on 25 March 1944 from the injuries inflicted during the beating. It is likewise clear by the application of the same rules that between 8:00 and 9:00 o'clock on the night of 23 March 1944, the time during which the deceased was beaten, the accused was engaged in teaching a German language class. Concerning the material facts, I do not believe

that one can go further without relying upon rumor, surmise, suspicion, hearsay, lay opinion, assumption, conclusion and innuendo, which have never been held sufficient, either separately or collectively, to supplant proof beyond a reasonable doubt regardless of the difficulty which may confront the prosecution in the production of that required degree of proof.

3. The prosecution sought to connect the accused with the deceased's beating by the Raba testimony and four incidents which may be appropriately designated as the Koch, Endlein, Baguette, and Beck and Burmester, incidents. Scrutiny of such incidents and the Raba testimony is therefore required.

a. Koch Incident: Sometime prior to the deceased's beating a German Sergeant named Koch, a friend of the accused, had been transferred out of the compound because, according to rumor in the company and Koch's expressed opinion to Sergeant Raba, the deceased, had so arranged it. On the day of Koch's transfer the accused was overheard to tell him, "We shall see. If we can prove anything on him, we shall send you a death notice". The witness then voluntarily added "And I would like to call your attention to the fact that this 'on him' referred to Geller because it was common rumor in the company that Sergeant Koch was transferred through Geller." (R. 116, 127-139). Koch's opinion as expressed to Raba is not only a lay opinion but is also obviously hearsay and the witness' voluntary explanation that "on him" referred to Geller is obviously a surmise, a suspicion, an assumption and a conclusion. Furthermore, both Koch's opinion and the witness' testimony are based upon rumor. Legally, therefore, the Koch incident has no probative value whatsoever. (Underscoring supplied).

b. Endlein Incident: Sometime prior to 23 March 1944 the accused told Endlein that he should not talk to his relative at the fence late at night because the relative, who had theretofore been transferred out of the compound, was not a National Socialist. Endlein stated that politics were not discussed but the accused told him that he, Endlein, knew what was coming as he, Endlein, knew what means of power "they" had at their disposal. The accused used the word "they" and not I which amounts to a disavowal of power in himself and compels the inference that the word "they" referred to the National Socialists who maintained in the camp the beating squad known as "Rollkommando". True it is that on 24 March 1944 the accused sought to assuage Endlein's hostility to him by assuring him that nothing was going to happen to him. This the prosecution contends is a manifestation of guilt. Is it not just as reasonable the act of an innocent person, who has been selected for the sacrifice, to forestall a wrongful accusation by a known enemy? Certain it is that Endlein's actions belie the prosecution's theory that the accused through a beating squad exercised the power to control life and death in the compound. Equally is it certain that if the accused was the mastermind of his own beating squad or the "Rollkommando", he would not have so crudely and clumsily approached Endlein subsequent to the deceased's demise. Would not one or all of the members of the squad have waited upon him?

The Endlein incident, therefore, is impaled upon and rendered probatively valueless by the very principles, which are undoubtedly correct, governing circumstantial evidence which are asserted in the majority opinion.

c. Baguette Incident and the Raba Testimony: Sometime in March, 1944, Prisoners of War Baguette and Kreisselmeier of Company 8 in an effort to secure light work volunteered to serve as truck drivers for the American authorities. Although they received no warning of punishment for their act, they realized its unpopularity and voluntarily withdrew. Sometime later they determined to report their withdrawal to the company's orderly room. The orderly room was closed but the accused was standing outside. They recognized him as being employed in the orderly room and reported their withdrawal as truck drivers. The accused in substance told them that he had nothing to do with the matter and that if the company had any punishment to administer or beating to do, the company itself would take care of it. Baguette only knew that the accused worked in the orderly room; he had not been sent for by the accused; he had not searched the accused out to make the report; and as far as he knew the accused did not have charge of any punishment. (R. 98-109).

According to Sergeant Raba, the authorized company leader and self-admittedly the accused's enemy, about 14 March 1944 he and the accused had a conversation in the orderly room. During the conversation the accused said "Tonight Baguette will get a beating". The testimony continues:

"Q. All right. What if anything did you say to him?

A. I asked him from whom he would get a beating.

Q. And what did he say in response?

A. He said he had already organized it. It was men from the 7th Company.

Q. Did you say anything to him then?

A. And then I told him, 'We don't want to do that. We don't want to set ourselves up as judges. Everybody should know himself what he should do and what he should not do.'

Q. Did he reply to that?

A. He answered, 'O.K. Then as far as I am concerned you can let them all go over to the other side.'

Q. Did he then leave the Orderly Room?

A. Yes, he left, rather disconcertedly, and I was of the opinion that he would call off this beating.

Q. And then what happened that evening?

A. On that same evening a man came to the barracks of Baguette and wanted to call him to the fence of Compound A. Fortunately enough Baguette was in a class which they were holding in the compound there, and the man then left again; and Schumaker went after him and went down to the fence, and saw there five or six men and heard in a conversation that they wanted to beat him.

Q. Was Baguette ever beaten?

A. As long as I was there, not.

Q. Did Sergeant Menschner ever tell you just how he organized this beating group -- this beating squad?

A. He only told me once that there was a beating detail in the compound and it was organized so that one man did not know the other.

Q. What did you call that? Let's have the German word for that.

A. Rollkommando." (R. 136).

The same witness upon examination by the court, however, testified as follows:

"Q. Do you know of your own knowledge whether Menschner organized a group of Prisoners of War to beat up other Prisoners of War?

A. No.

Q. Did Menschner ever speak to you about organizing such a group?

A. No." (R. 144).

The reasonable import of this interpreted testimony is that the accused merely told Raba about the "Rollkommando" in Company 7 and that, if Raba, the company leader, was not interested in it, as far as the accused was concerned; all the prisoners of war could go over to the other side. This most reasonably is a complete disavowal of the accused's connection with a beating squad by the prosecution's star witness which is strengthened by subsequent events.

Raba's testimony, quoted above, relative to the "stranger" calling for Baguette that very night and the group of men at the fence is obviously pure hearsay and conclusion with which the record abounds and which in many instances, as here, was not excluded by the Court. Witness Johann Schumaker

was the man in Baguette's barracks when someone called for him. Schumaker places the time as a few days before 23 March 1944 and did not even tell Baguette about it for a day or two. Schumaker didn't see the "stranger" but merely heard the request. Baguette was at a class and was not in the barracks (R. 109-112). The salient feature of the Baguette incident is that Baguette was not punished, harmed or beaten. Would his mere attendance at a class and consequent absence for a short time from his barracks thwart a mastermind of a beating squad who had decreed and ordered his punishment or would the "stranger" have delivered his message later that night, or the next night or the next?

The Baguette incident, therefore, not only fails to connect the accused with any beating squad but reasonably shows his disassociation therefrom and his complete subservience to the company leader, Raba. The Raba testimony in connection with the Baguette incident reasonably shows the same and only by the most fallible surmise, suspicion and conjecture even suggests any connection of the accused with the beating of the deceased because either the conversation relative to the organization of a beating squad did not occur or the accused was merely reporting the existence of the "Rollkommando" in Company 7 and disassociating himself therefrom and any other beating squad. So crumbles the Baguette incident and the Raba testimony relative thereto.

d. Beck and Burmester Incident and the Raba Testimony: During the early part of March and for a few days immediately preceding and including 23 March 1944 the deceased and Burmester and Beck had worked together on work detail 36. On the morning of 23 March 1944 Beck and Burmester were relieved from the detail and returned to their barracks where the accused and Sergeant Raba also lived (R. 145). Here Beck and Burmester charged the deceased with causing their removal from the detail. They were overheard by the accused who told Burmester: "Burmester, listen here. Nothing is to be done against Geller. Nothing will be said about it. Nothing will be done. Just wait. * * * Wait and see." (R. 125-131). This occurred at about 10 o'clock in the morning. The same day, according to Raba, he and the accused discussed the incident.

"Q. Did you have occasion to talk with Sergeant Menschner that same day about the dismissal of Beck and Burmester from this work detail?

A. Yes.

Q. What did Sergeant Menschner say to you?

A. When he heard about this case that the two men had been sent back, he said, 'That bum, Geller; he ought to be killed.'

Defense counsel: Did he say 'killed' or 'beaten'?

Interpreter: The word means 'to kill'.

Q. What did you say in answer to that.

A. I said, 'That is easy to say, to kill somebody; but we can't do that just because we have a suspicion that he did something that isn't right.'

Q. Well, what did he say to that?

A. Then he said, 'Well, that is not the only case. We had several cases involving him of which he was the cause.'

Q. When Sergeant Menschner noticed that you didn't readily join him in the idea of doing something Geller, what did he, Sergeant Menschner, then do?

A. I didn't disagree with him. I agreed with him and said, 'Yes, it's clear that he is a bum and that he deserves punishment, but we can't kill him. He gets a good beating, but we can't kill him.'

Q. And then what did Sergeant Menschner do or say?

A. He said nothing." (R. 137-138).

On the morning following the beating of the deceased, the accused, not by way of searching Burmester out to tell him something but in response to the direction of the investigating American authorities, "fetched" Burmester from his barracks to the Orderly Room and in the process told him, "Burmester, come to the Orderly Room. The officer, Captain Kubitschek, an American officer, is in the Orderly Room. You don't know of anything; is that clear? And can you prove where you were last night." (R.126). Significantly Burmester also testified that on the evening of the beating he learned about it while sitting in his barracks between 8 and 9 o'clock (R. 1d). One further part of Raba's testimony must here be recounted. Upon cross-examination in response to the question, "What did you do to keep Geller from being whipped?", he replied, "Nothing. I didn't know that anybody wanted to beat him. I knew all right that he might get a beating, but I didn't know that it would happen that evening. I knew that because everybody had threatened him, but I didn't assume it would happen that evening, and I intended to talk to him about this matter." (R. 142). There were 900 men in the compound (R. 143). (Under-scoring supplied).

Reasonably construed the accused's remarks to Burmester on the morning of his removal from the detail are a mere caution to a comrade not to get himself into trouble and the remarks to Burmester on the next morning while going to the Orderly Room reasonably construed merely conveyed the information that an investigation was underway and that if Burmester could show where he

was, he had nothing to worry about. The construction that the former conversation, which can be construed as an order only by assumption, constituted a "veiled promise" by the accused that action would shortly be taken against the deceased is not only a strained conclusion but is wholly untenable when considered with Raba's testimony underlined above. Everybody had threatened Geller. Just as reasonably the accused's words, "Nothing is to be done against Geller. Nothing will be said about it. Nothing will be done", are also susceptible of the construction that neither Burmester, the accused nor anyone else should take any action. During the day the accused told Raba that the deceased should be killed but 900 men had already threatened the deceased and most significantly it was Raba who said, "He [Geller] gets a good beating but we can't kill him." The accused's words expressed the view of everybody but Raba's words are positive, affirmative and direct. Geller got a beating that very night while the accused was teaching his classes and while the whereabouts of Beck, Burmester, Raba and hundreds of others, all of whom had threatened the deceased, are unrevealed.

4. The Koch and Baguette incidents obviously have no legally probative value and the shreds of the Endlein and Burmester incidents and the Raba testimony not only are patently self-impeached and untrustworthy but wholly fail to meet the requirements of proof beyond a reasonable doubt as hereinabove shown when tested by the legal principles governing circumstantial evidence which are correctly asserted in the majority opinion and with which there can be no quarrel. The most exhaustive study of the record leaves unanswered the question of who caused Geller's death and to a moral certainty warrants only the conclusion that his death was caused by persons unknown. It is my considered opinion that even the possibility of the accused's implication therewith is shrouded in nebulosity which is not dispelled by evidence of the nature and to the degree required by law. The presumption of innocence is not so lightly overcome. A noose should not be woven of such few and such flimsy threads.

5. I am, perforce, compelled to conclude that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Isidore H. Golden, Judge Advocate.

SPJGN
CM 260781

1st Ind.

War Department, J.A.G.O., JAN 3 1945 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review, and the dissenting opinion of one of the members of the Board in the case of Unteroffizier Edgar Menschner, German Prisoner of War, No. 58804, Company Eight, Compound B, Camp Chaffee Prisoner of War Camp.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of both the crime of murder as alleged in the Specification of the Charge and the offense of unlawfully organizing a group of prisoners of war for the purpose of inflicting violence upon other prisoners of war as alleged in the Specification of the Additional Charge, and legally sufficient to support the sentence.

The opinion of the dissenting member of the Board maintains that the evidence in the record is legally insufficient to support the findings of guilty as to both offenses charged and legally insufficient to support the sentence.

In my opinion, the correct disposition of this case lies in a solution which falls between the extremes of the two opinions referred to above. Accordingly, I concur with so much of the dissenting opinion as states that the record of trial is legally insufficient to support the findings that the accused murdered the deceased as alleged in the Specification of the Charge, and I concur with so much of the majority opinion of the Board of Review as states that the record of trial is legally sufficient to support the findings that the accused unlawfully organized a group of prisoners of war for the purpose of inflicting violence upon other prisoners of war, as alleged in the Specification of the Additional Charge.

3. An analysis of the majority opinion reveals the tenuous and conjectural basis upon which it reached its conclusion that the evidence was legally sufficient to sustain the finding that the accused murdered the deceased as alleged. Although the evidence points with suspicion toward the accused as the murderer of Hans Geller, it fails to prove beyond a reasonable doubt that the accused organized the particular group that killed him or that the accused in any way directed or cooperated in his murder. The missing proof which might have shown the accused's connection with the crime charged cannot be supplied by mere conjecture. Suspicion and speculation, and the opportunity which the accused might have had to

participate in the crime, are obviously inadequate in law to warrant a finding of guilty.

On the other hand, there is direct evidence that on or about the date alleged the accused admitted to a fellow prisoner of war that he had organized a "beating detail" of men from Company 7 for the purpose of beating Hans Geller and that "it was organized so that one man did not know the other" (R. 136). There is further evidence that the accused warned Endlein, whom he suspected of political disloyalty, of the power which he, the accused, had at his disposal to punish those who were regarded as offenders. Subsequent to the attack upon the deceased, the accused reassured Endlein by saying to him, "You can go to sleep all right. You don't have to be afraid of anything. I give you my word of honor, nothing is going to happen to you". From the accused's own admissions as well as from various circumstances in evidence, the court was warranted beyond a reasonable doubt in concluding that the accused had unlawfully organized a beating detail as alleged. Obviously such conduct involves a very serious species of disorder and one that cannot be tolerated.

The maximum legal confinement which may be imposed in this case for a violation of Article of War 96 is imprisonment at hard labor for life.

4. In view of the evidence in the record, I recommend that the findings involving the charge of murder as set forth in the Specification of the Charge, and the Charge, be disapproved; that the findings that the accused unlawfully organized a group of prisoners of war for the purpose of inflicting violence upon other prisoners of war as alleged in the Specification of the Additional Charge, and the Additional Charge, be approved; that only so much of the sentence as involves confinement at hard labor for twenty years be approved; and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for
sig. Sec. of War.
- Incl 3 - Form of action.
- Incl 4 - Dissenting opinion by
member of the Board.

(Findings of guilty of the Specification of the Charge and the Charge disapproved. Only so much of sentence as involves confinement for life confirmed, but confinement reduced to twenty years. G.C.M.O. 335, 20 Jul 1945)



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

29/1/45
with T-16-27

SPJGK
CM 272901

25 JAN 1945

UNITED STATES)

PACIFIC DIVISION
AIR TRANSPORT COMMAND

v.)

Flight Officer ROBERT VAN
LEUVEN (T61286), 13th Air
Force Replacement Depot.)

Trial by G.C.M., convened at
APO 953, 2 and 3 November
1944. Dishonorable discharge
and confinement for six (6)
months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates

1. The record of trial in the case of the flight 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 58th Article of War.

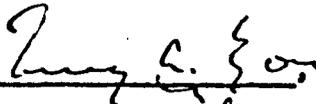
Specification: In that Flight Officer Robert Van Leuven, 13th Air Force Replacement Depot, APO #12892-AM7, did, at APO #953, on or about 3 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by military police on 5 October 1944 at Honolulu, T.H.

He pleaded not guilty to the Charge and its Specification, and was found guilty of the Specification, except the words "desert" and "in desertion", substituting therefor the words "absent without leave" and "without leave", and not guilty of the Charge but guilty of a violation of Article of War 61. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

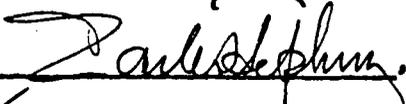
3. The record of trial is legally sufficient to support the findings of guilty except as to the period of absence. No documentary or other proof having been offered of any administrative action, establishing

the beginning of the unauthorized absence, recourse must be had to the evidence otherwise adduced for its determination. From the testimony offered by the prosecution, accused appears to have been at the Transient Officers Barracks at A.P.O. 753, during June and probably a part of July. On what day he left the Barracks without permission and took up his residence at the Moana Hotel in Honolulu is not fixed by any direct testimony. The records of this hotel, quoted, without objection, by the Personnel Manager, testifying as a witness for the prosecution, show that accused registered there for the first time on 23 July 1944. The continuity of his residence at the hotel from that day until 4 October 1944, with the exception of a few days, was similarly established. Accused, in a pre-trial statement, offered in evidence by the prosecution, made the following declaration: "*** it was nearly the end of June when I even thought of getting a room in town. I was there day and night in the barracks, waiting for orders". With this paucity of evidence showing any earlier date, the Board is constrained to fix 23 July 1944 as the date on which the absence without leave began, rather than 3 June 1944, as found by the court.

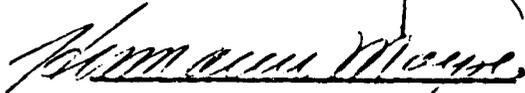
4. For the reasons above stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty as involves absence without leave from 23 July 1944 to 3 October 1944, and the sentence.



Judge Advocate.



Judge Advocate.



Judge Advocate.

JAN 27 1945

Hq ASF, JAGO, Washington 25, D.C.

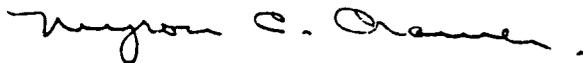
TO: Commanding General
Pacific Division, Air Transport Command
APO 953, c/o Postmaster
San Francisco, California

1. In the case of Flight Officer Robert Van Leuven (T61286), 13th Air Force Replacement Depot, I concur in the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves finding accused guilty of absence without leave from 23 July 1944 to 3 October 1944 in violation of Article of War 61. Upon compliance with the foregoing holding you will have authority to order the execution of the sentence.

2. Without minimizing the seriousness of the offense committed by the accused it is apparent from the record of trial that his initial absence without leave was due in part to oversight or lack of diligence on the part of military authorities in the performance of their administrative duties. In view of this fact and in further view of the previous good record of the accused it is suggested that consideration be given to such mitigation of the sentence as may seem just and proper under all of the circumstances.

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 272901).



1 Incl
R/T

MYRON C. CRAMER
Major General
The Judge Advocate General

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(267)

SPJGQ
CM 272994

19 JAN 1945

U N I T E D S T A T E S	)	THIRD AIR FORCE
)	
v.	)	Trial by G.C.M., convened at
	)	Columbia Army Air Base,
Private BENJAMIN DANIELS	)	Columbia, South Carolina,
(32506004), Squadron C,	)	8 and 9 December 1944. Dis-
329th Army Air Forces Base	)	honorable discharge and
Unit.	)	confinement for three (3)
	)	years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, 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 several Charges and Specifications, of which only Charge III and the Specification thereof need be made the subject of comment in this holding. The remaining Charges and Specifications involve absence without leave (Charge I and Specification) and wrongful application by accused of a United States Government truck to his own use (Charge II and Specification). The Charge and Specification with which this holding is concerned are as follows:

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

Specification: In that Private Benjamin Daniels, Squadron C, 329th AAF Base Unit, Columbia Army Air Base, Columbia, South Carolina, did, at Heath Springs, South Carolina, on or about 27 October 1944, wilfully, feloniously and unlawfully kill Ruth H. Hunter by striking her with the automobile which he, the said Private Benjamin Daniels, was then operating in a grossly negligent manner.

3. The finding of guilty of the Specification to Charge III without exception of the word "wilfully" in effect represents a finding of guilty of voluntary manslaughter. The Specification, as indicated by the inclusion of the phrase "was then operating in a grossly negligent manner", was obviously intended to charge the accused with involuntary manslaughter and the evidence adduced at

the trial would not justify conviction of any greater offense. Accordingly, the word "wilfully" as contained in the Specification should have been excepted in the finding of guilty (See C.M. 217590, Lamb, 11 BR 275).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the finding of guilty of the Specification, Charge III, except the word "wilfully"; legally sufficient to support the findings of guilty of Charge III and all other Charges and Specifications, and legally sufficient to support the sentence.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

William J. [Signature], Judge Advocate.

SPJGQ - CM 272994

1st Ind.
JAN 25 1945

Hq ASF, JAGO, Washington 25, D.C.

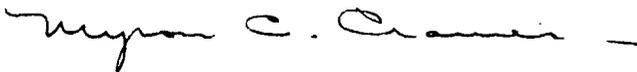
TO: Commanding General
Third Air Force
Tampa, Florida

1. In the case of Private Benjamin Daniels (32506004), Squadron C, 329th Army Air Forces Base Unit, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of the Specification of Charge III be approved as finds the accused guilty thereof excepting the word "wilfully". Upon compliance with this recommendation, under the provisions of Article of War 50½ you will have authority to order the execution of the sentence.

2. It is noted that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement. Under Article of War 42 and Title 18, sections 453 and 454, United States Code, penitentiary confinement is authorized for involuntary manslaughter. In view of that fact and of the serious nature of the offense, it is recommended that a Federal penitentiary be designated as the place of confinement.

3. When copies of the published orders 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 orders to the record in this case, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM 272994).


1 Incl
R/TMYRON C. CRAMER
Major General
The Judge Advocate General

