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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH - CM 307004

16 MAY 1946

UNITED STATES v. Private CHARLES C. BUTTERS (35131820), Service Battery, 84th Field Artillery Battalion, and Private LEE R. YELTON (34491202), Battery D, 376th Antiaircraft Artillery Weapons Battalion.	CHANOR BASE SECTION Trial by G.C.M., convened at Liege, Belgium, 1 and 2 November 1945, Each accused: To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

2. In a common trial directed by the appointing authority, the accused Butters was tried upon the following Charges and Specifications:

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

Specification: In that Private Charles C. Butters, Service Battery, 84th Field Artillery Battalion, did, at or near Ratt, Germany, on or about 6 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 16 August 1945.

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

Specification 1: In that * * *, did, at or near Liege, Belgium, on or about 9 July 1945, unlawfully pretend to the Army Exchange Service, Liege, Belgium, that he was authorized to receive rations for twenty-five men, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said Army Exchange Service merchandise of the value of about $28.75.

Specification 2: In that * * *, did, at or near Liege, Belgium, on or about 16 July 1945, unlawfully pretend to the Army Exchange Service, Liege, Belgium, that he was authorized to receive rations for twenty-five men, well knowing that said

pretenses were false and by means thereof did fraudulently obtain from the said Army Exchange Service merchandise of the value of about $28.75.

Specification 3: In that * * *, did, at or near Liege, Belgium, on or about 23 July 1945, unlawfully pretend to the Army Exchange Service, Liege, Belgium, that he was authorized to receive rations for twenty-five men, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said Army Exchange Service merchandise of the value of about $28.75.

and accused Yelton was tried upon the following Charges and Specifications:

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

Specification: In that Private Lee R. Yelton, Battery D, 376th Antiaircraft Artillery Weapons Battalion, did, at or near Verviers, Belgium, on or about 10 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 16 August 1945.

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

Specification 1: In that * * *, did, at or near Liege, Belgium, on or about 9 July 1945, unlawfully pretend to the Army Exchange Service, Liege, Belgium, that he was authorized to receive rations for sixty-four men, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said Army Exchange Service merchandise of the value of about $73.50.

Specification 2: In that * * *, did, at or near Liege, Belgium, on or about 16 July 1945, unlawfully pretend to the Army Exchange Service, Liege, Belgium, that he was authorized to receive rations for sixty-four men, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said Army Exchange Service merchandise of the value of about $73.50.

Specification 3: In that * * *, did, at or near Liege, Belgium, on or about 23 July 1945, unlawfully pretend to the Army Exchange Service, Liege, Belgium, that he was authorized to receive rations for sixty-four men, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said Army Exchange Service merchandise of the value of about $73.50.

Each accused pleaded not guilty to, and was found guilty of, all Charges and Specifications involving him. Evidence was introduced of two prior convictions of accused Butters, one by special court-martial for disobeying a lawful order by absenting himself from bed check and the other by summary court for appearing in an off-limits area. All of the members of the court present at the time each vote was taken concurring, each accused was sentenced to be shot to death with musketry. As to accused Butters, the reviewing authority disapproved the finding of guilty of Specification 2 of Charge II, approved the sentence and forwarded the record of trial pursuant to Article of War 48. As to accused Yeiton the reviewing authority approved only so much of the findings of guilty of Specification 3 of Charge II as involved a finding of guilty of fraudulently obtaining rations for 32 men of the value of about $36.75 at the time, place and in the manner alleged, approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3a. Accused Butters

The prosecution introduced evidence to show that on 6 October 1944 accused Butters absented himself without leave at APO #9 and remained absent until 16 August 1945 when he was apprehended by military authorities at the home of his fiancee, Maria Joskin, near Liege, Belgium (R.68,69; Pros. Ex. 8). Mme. Joskin had known accused since 8 September 1944 and had never been with him publicly when he was not clothed in his uniform (R.92,94).

When accused Butters was apprehended on 16 August 1945, the arresting authorities found one hundred and two Army Exchange ration cards in his possession, fifty-five of which bore the signature "Capt. John Y. Mason, Jr." and purported to have been issued to various enlisted men named thereon. The balance of the ration cards were blank (R.69-71; Pros. Ex. 10). The fifty-five prepared cards bore penned and pencilled marks drawn through boxes on the reverse side thereof for the weeks of 9-15 July, 16-22 July and 23-29 July, the method used at the Post Exchange to indicate that rations had been issued for the period of time so marked. The value of bulk rations during that month was around $1.15 to $1.20 each (R. 82,85; Pros. Ex. 10). At the time of this accused's apprehension a substantial number of rations, including cigarettes, candy, soap, shaving cream and razor blades, were found at Maris Joskin's house, these rations having a total value of $2966 (R.73,86,87; Pros. Ex. 11). Among the records of the Post Exchange at Liege, Belgium, were two inartfully prepared documents, one dated 10 July 1945, authorizing accused Butters to purchase Post Exchange rations for twenty-five enlisted men, and the other dated "7-11-45" authorizing him to draw such rations for thirty enlisted men. The second document also bore an unsigned, pencilled notation, "Rations Received By Charles Butters" (R.62,63; Pros. Exs. 6,7). Each document bore the following penned signature (Pros. Exs. 6,7):

"John Y. Mason, Jr.
C. M. Floyd
1st Lt."

Although it was not essential that the person drawing Post Exchange rations for others present such an authorization, normally he was required to do so if he were unknown to Post Exchange personnel (R.84). During the month of July accused Butters had been observed drawing rations in the Post Exchange at Liege (R.66,67).

Accused Butters made a confession to Corporal Carl Morganhesser of the Criminal Investigations Division after the latter had informed him that if he made a statement it would be better for him and also "easier for him and everyone concerned" (R.72,73). This statement was admitted in evidence over objection of the defense (R.73; Pros. Ex. 9). The contents of this statement are not here summarized for reasons set forth in paragraph 5a hereof.

b. Accused Yelton

On 10 September 1944 accused Yelton absented himself without leave at Verviers, Belgium, and remained absent until 16 August 1945 when he was observed in uniform standing in front of the Post Exchange in Liege, Belgium, with three large boxes of Post Exchange rations beside him. He was trailed by military authorities as he made either two or three trips with the boxes of rations to a Mr. Bruskin's home at 78 rue Basse Sauveniere after which he was taken into custody. The boxes contained cigarettes, candy, razor blades, shaving cream and similar items (R.16-18, 24-26, 32,33; Pros. Ex. 4). When asked by Corporal Milton Schwartz at the time of his apprehension what he was doing with the rations, accused Yelton stated that he was drawing them for men in his organization and exhibited sixty-four Army Exchange ration cards (R.18,27; Pros. Ex. 1). These cards bore the signature "Captain Lockhart" and purported to have been issued to various enlisted men of the 377th Antiaircraft Artillery Battalion. These sixty-four cards bore pencilled and penned marks drawn through boxes on the reverse sides thereof for the weeks of 9-15 July, 16-22 July, 23-29 July and 30 July-5 August, the method used at the Post Exchange to indicate that rations had been issued for the period of time marked (R.57,81; Pros. Ex. 1). The value of bulk rations during July was around $1.15 to $1.20 each, with sixty-four bulk rations being worth about $75.52 (R.60,82). Accused Yelton had been seen in the Post Exchange by an employee, Technician Third Grade Allen E. Anglemyer, drawing bulk rations on these cards "numerous times" during the month of July (R.57,66, 67). The Post Exchange officer, First Lieutenant David E. Thompson, had observed accused Yelton in the Post Exchange on 8 or 9 July 1945 drawing an undisclosed number of rations (R.79,80). Among the records of the Post Exchange was a document dated 16 July 1945 signed "James Lockhart, Captain, AAA Commanding" and purporting to authorize accused Yelton to purchase post exchange rations for fifty men of "H.Q. Battery 377 T.H. A.A.A." (R.58; Pros. Ex. 5). That document plus its possession by the Post Exchange indicated probably that rations for fifty men were drawn under it (R.64). Generally if a soldier had such a document authorizing him to receive rations for fifty men, that is all he would receive although he possessed cards for more than that number of men (R.67).

Mme. Sara Starck, fiancee of accused Yelton, had seen accused Yelton in possession of Post Exchange rations every week, generally on Monday, during the month of July 1945. The court took judicial notice that 9, 16, and 23 July 1945 all fell on Monday (R.38,40). These rations included cigarettes, candy and chocolate which were all deposited at the home of Mr. Bruskin, 28 rue Basse Sauveniere (R.39). On three different Mondays Mme. Starck saw accused Yelton in possession of about forty cartons of cigarettes at the home of Mr. Bruskin (R.39). Mme. Starck knew accused Yelton was obtaining rations for more than one man with the Post Exchange cards (R.35).

Monsieur Henri Bruskin had seen accused Yelton, accompanied by Mme. Starck and a Mme. Paulwels, bring boxes of rations to his home on three Mondays in July and on a Monday in August 1945 when he was arrested. At Bruskin's house the rations were placed in bags and removed promptly thereafter (R.52-55). Sometime the latter part of May 1945 Madame Paulwels commenced buying rations, particularly cigarettes, from Mme. Starck. She would make her purchases on Mondays and promptly thereafter resell the commodities (R.89,90). On 16 August 1945, Madame Starck turned over a package containing 100,000 francs to Corporal Milton Schwartz, a military policeman. Accused Yelton had accumulated this fund from selling Post Exchange rations (R,44,74,75,99,100).

Accused Yelton made a confession to Corporal Milton Schwartz and Corporal Carl Morganhesser after they, in order to assure accused that it would be to his advantage to make a statement, informed him that if he made a statement it would "help him out in the case and save him and us headaches later on" and that it would be "that much better for him" or "that much quicker" (R.21, 22,28,29; Pros. Ex. 2). This statement was admitted in evidence over objection of the defense (R.22-24). The contents of this statement are not here summarized for reasons set forth in paragraph 5b hereof.

Without objection being made by the defense, the prosecution introduced in evidence a letter that accused Yelton had delivered to his fiancee, Mme. Sara Starck, the morning of the second day of trial. The prosecution stated it was offered in evidence for the purpose of impeaching a hostile witness (R.96,97; Pros. Ex. 12). In addition to expressing his love and affection for Mme. Starck, accused Yelton also stated in the letter that he was glad she "spoke for me today at my trial" and expressed the hope that "Margaret and Mama" would not say anything "wrong" against him. He assured Mme. Starck that he would not be shot since the Army did not shoot men upon conviction of the type of offenses with which he was charged.

4. After their rights had been fully explained, each accused elected to remain silent and the defense introduced no evidence in their behalf.

5a. Accused Butters

The evidence offered to establish the desertion alleged in Charge I and its Specification shows that accused Butters absented himself without leave on 6 October 1944 and remained absent until he was apprehended on 16 August

1945, a total of ten months. If an absence without leave is much prolonged and there is no satisfactory explanation of it, a court is justified in inferring from that alone the intent not to return which is essential to the offense of desertion (MCM, 1928, par. 130a). It is well established by numerous opinions of The Judge Advocate General that such an unexplained absence as was here established was sufficient to warrant the court in inferring that accused intended permanently to remain away. The evidence is ample to sustain the findings of guilty of this Charge I and its Specification.

Accused Butters was charged in three Specifications under Charge II with obtaining by false pretenses post exchange rations for twenty-five men on 9, 16 and 23 July 1945. In accordance with the recommendation of the staff judge advocate, the reviewing authority disapproved the findings of guilty of Specification 2 of this Charge II which involved the alleged acquisition of rations by false pretenses on 16 July 1945. Accordingly, we are only concerned with the incidents occurring on 9 and 23 July 1945.

That statement of accused Butters which was admitted in evidence was clearly a confession to at least certain of the offenses charged against that accused. Indeed, it is quite apparent that matters stated therein molded to a substantial extent the contents of these Specifications 1 and 3. The prosecution's evidence reveals that before accused Butters made his statement, he was informed by the investigator that the giving of a statement would be better for him and easier for him and everyone concerned. It is settled by the opinions of this office that a confession is not voluntarily made when the investigating officer informs an accused that if he makes a confession "things would be much easier" on him (CM 284729, DeNoni and Avino, 4 Bull JAG 421), or that making a confession "would be better for him" and "a lot easier on all of us" (CM 261242, Willis, 40 BR 163) since such statements constitute promises of leniency. Consequently the confession of accused Butters was improperly admitted in evidence.

The only other evidence to establish that accused Butters acquired post exchange rations for twenty-five men on 9 July 1945 is (a) his possession of fifty-five ration cards bearing pencilled and penned marks drawn through boxes on the reverse sides thereof indicating, in accordance with Post Exchange methods of cancellation, that bulk rations had been issued on these cards for the week of 9-15 July 1945; (b) the Post Exchange's possession in its files of two documents, one dated 10 July 1945 purporting to authorize accused Butters to purchase rations for twenty-five men, the other dated "7-11-45" purporting to authorize him to draw rations for thirty men and bearing an unsigned pencilled notation "Rations Received By Charles Butters;" (c) the findings of a substantial number of rations at the house where accused Butters was apprehended on 16 August 1945; and (d) sometime during the month of July 1945 accused Butters had been observed drawing rations at the Post Exchange.

Considering first the ration cards, there is no evidence that the cross marks thereon were made by Post Exchange personnel. Further, there is no evidence accused Butters possessed and presented those cards to Post Exchange

personnel on or about 9 July 1945. The purported cancellation markings on the cards are clearly hearsay, being at most statements by some unidentified person that rations were issued for the particular weeks crossed off. Such markings would only have evidential value if admissible under some exception to the hearsay rule. The only applicable exception is the so-called entry in the regular course of business rule (28 USC, sec. 695; CM 261107, DuBoff, 3 Bull JAG 468, 40 BR 131). Under that rule an entry or memorandum is admissible in evidence "if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter" (28 USC, sec. 695). This rule was designed to facilitate the admission of entries appearing on business books or on business records "which experience has shown to be quite trustworthy" and which were "made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." The records must be maintained for the "systematic conduct" of the business, the trustworthiness of the records being based upon the fact that they are "routine reflections of the day to day operations of a business" (Palmer v. Hoffman, 318 US 109, 63 S. C. 477). It has also been said that entries in the regular course of business "must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations" (New York Life Insurance Company v. Taylor, 147 Fed. (2d) 297). To constitute entries in the regular course of business, the entries must be habitually and systematically made (Wigmore, on Evidence, sec. 1522) and "must of course be a part of a series of entries or reports, not a casual or isolated one . . . . . Thus, a single entry in a book, made after it has been closed or put away, or without using it again, or a memorandum casually made, would not answer this requirement"(Wigmore, supra, sec. 1525).

It is apparent from the foregoing that the rule applies to entries in books or records of a business where it is the routine, habitual procedure of the business systematically to make such entries. Here, these ration cards were not even books or records of the Post Exchange. Even when properly issued, they are possessed by the enlisted men to whom issued and constitute no part of the business records of the Exchange. Furthermore, there is no evidence to indicate that the marks appearing thereon were made by the Post Exchange in the course of its business as required by the rule (28 USC 695). Although they may have been similar to marks made on such cards by Post Exchange personnel, these marks, appearing as they do on cards which constituted no part of the books or records of the business, could have been made by anyone. None of the guarantees of trustworthiness required by the rule attach to the entries on these cards and, accordingly, they were not admissible as entries in the regular course of business to establish that rations had been issued for the periods marked.

Turning next to the authorization dated "7-11-45" on which appeared the unsigned pencilled notation "Rations Received by Charles Butters" (upon which

the staff judge advocate apparently leanedheavily in sustaining the findings of guilty of this Specification 1 of Charge II), it is apparent that this entry can only constitute competent evidence of the fact recited therein if admissible as an entry in the regular course of business. As stated above, such an entry must be one habitually and systematically made as a matter of routine practice in the conduct of a business. Not only does the proof fail to show that it was the habitual, routinepractice of business at this Post Exchange to make such pencilled entries on these authorizations but, indeed, the very evidence before us reveals that, of the two authorizations bearing the name of accused Butters and the one bearing accused Yelton's name, only one has on it the pencilled notation. It can hardly be said that when an entry is made once out of three times that it is an entry habitually and systematically made as a matter of routine business procedure. Rather it falls in the classification of casual memorandum and such entries are not admissible as entries made in the regular course of business. Accordingly, that memorandum appearing on the authorization was inadmissible to establish the truth of the matter asserted in it.

With the incompetent evidence stripped from the record of trial, we are left only with proof that accused possessed numerous ration cards; that the Post Exchange possessed authorizations purporting to allow accused Butters to receive rations for particular numbers of men; that accused was seen drawing an unidentified number of rations at the Post Exchange at some unspecified time in July while absent without leave; that at the house in which he was apprehended there was found a number of articles referred to by a witness as "rations." Such proof may cause one to suspect that over a period of time accused Butters obtained rations improperly from the Post Exchange. However, it certainly does not establish beyond a reasonable doubt the allegations of Specification 1 of Charge II. There is nothing in the record sufficiently establishing that on or about the time alleged this accused obtained the alleged number of rations or indeed any rations whatsoever that he was not entitled to. Accordingly, the findings of guilty of that Specification cannot be sustained.

So far as Specification 3 of Charge II is concerned which involves the fraudulent acquisition of Post Exchange rations on 23 July 1945, there is no other competent evidence to establish commission of that offense than we have recited above in our discussion relative to Specification 1 of Charge II. Indeed, it appears from the staff judge advocate's review that he relied upon the accused's inadmissible confession to sustain the findings of guilty of this Specification 3. Accordingly, the findings of guilty of Specification 3 of Charge II likewise cannot be sustained.

It may be observed in concluding our discussion of these Specifications that the staff judge advocate found the confession and the authorization dated "7-11-45" not relevant as to Specification 2 of Charge II and, analyzing the remainder of the evidence, he concluded that it was insufficient to sustain the findings of guilty of Specification 2. With that conclusion we agree and it is the same conclusion we have reached as to Specifications 1 and 3 of Charge II after striking the incompetent evidence.

b. Accused Yelton

The proof offered to establish the desertion alleged in Charge I and its Specification shows that for a period of eleven months, from 10 September 1944 until apprehended on 16 August 1945, this accused was absent without leave. As in the case of accused Butters, an unexplained absence for such a period of time amply warranted the court in inferring the intent permanently to remain away, an essential element of the offense of desertion. Accordingly, the evidence sustains the findings of guilty of Charge I and its Specification.

Accused Yelton was also charged in three Specifications under Charge II with obtaining by false pretenses post exchange rations for sixty-four men on 9, 16 and 23 July 1945. In accordance with the recommendation of the staff judge advocate the reviewing authority approved only so much of the findings of guilty of Specification 3 of Charge II as involved the fraudulent acquisition of rations for thirty-two men on 23 July 1945.

Accused Yelton's confession was made to an investigator after the latter, to assure him that it would be to his advantage to make one, had informed Yelton it would be "that much better for him" if he made a statement. From what we have said above with respect to the confession of accused Butters, it is apparent that the making of such a representation by the investigator rendered this confession inadmissible in evidence and it should not have been received by the court (See par. 5a above). Furthermore, for reasons stated above in our consideration of the ration cards bearing Butters' name, the court erred in admitting in evidence the marks on the sixty-four ration cards to establish that in fact rations had been issued to accused Yelton for the weeks so marked. Such markings were hearsay evidence as to the fact that rations had been so issued and no proper foundation having been laid to warrant their admission as entries in the regular course of business, their acceptance in evidence was improper. It is true that when apprehended on 16 August 1945 while in possession of rations not here involved, accused Yelton exhibited these sixty-four ration cards and stated he was drawing rations for men in his organization. Exhibition of the cards coupled with his statement constituted an admission that the three particular boxes of rations then in his possession had been obtained by him from the Post Exchange. However, accused Yelton made no statement at that time with respect to previous weeks nor did he in any way indicate he had any connection with the marks appearing on these cards for the period from 9-30 July 1945, or even that he had been in possession of the cards during that time. Accordingly, his exhibition of these cards to the arresting officer and his statement made at that time constituted no admission that he had any connection with the acquisition of rations over the period alleged.

Notwithstanding the foregoing, there is competent evidence in the record of trial to indicate that accused Yelton had been seen in the Post Exchange by Technician Third Grade Allen E. Anglemyer "numerous times" during July 1945 drawing rations on these cards and had been seen there on 8 or 9 July 1945 by Lieutenant Thompson drawing an undisclosed number of rations; that he had been seen in possession of rations for more than one man every week

during July 1945, generally on a Monday on which day of the week 9, 16 and 23 July 1945 fell, and in possession of over forty cartons of cigarettes on three different Mondays during that month; that he had been seen bringing post exchange rations to Mr. Bruskin's home on three different Mondays during July; that he had accumulated over 100,000 francs from the sale of rations. All during the time he acquired these rations, he was absent without permission from his organization and station and clearly would have no authority to acquire such rations for other military personnel. Such accumulation of evidence is sufficient to support so much of the findings of guilty of each of the three Specifications of Charge II as involves the fraudulent acquisition by false pretenses of some rations of an undetermined value on or about the time and at the place alleged.

c. General Comments

It is believed advisable here to make some observations with respect to contentions not previously considered herein and urged by civilian counsel for accused Butters in his appearance before the Board of Review and in his brief filed therewith.

The missive accused Yelton handed to his fiancee, Mme. Starck, the morning of the second day of trial expressed the accused's opinion that he would not be shot for the offenses it had been alleged he had committed. That letter had been admitted to impeach Mme. Starck, characterized by the prosecution as a hostile witness. It is difficult to see how any of the statements made by accused Yelton in that letter could be effective further to impeach Mme. Starck, particularly since it was already in evidence that she was the fiancee of accused Yelton. Further, it may be that Yelton's expression of opinion as to probable sentence had an effect upon the court in its determination of the penalty to be imposed on the accused. However, upon review, such facts may be taken into consideration in determining the appropriate penalty finally to be imposed upon both of these accused and, accordingly, if error was committed in admitting this letter, it did not substantially prejudice the rights of the accused so as to compel disapproval of the findings and the sentence (SPJGJ 1944/4686, 12 May 1944, 3 Bull JAG 186).

It appears that during argument after all evidence had been introduced defense counsel interrupted the trial judge advocate and objected to a remark by him commencing as follows (R.101): "Neither of the accused has testified . . .". The objection was sustained and the court was instructed to disregard the remark. After subsequent colloquy the trial judge advocate was permitted to state that, if he had not been interrupted by defense counsel, his complete remark would have been as follows (R.102):

> "Neither the accused has testified in his confession that he did or did not intend to return to duty and it has, therefore, been necessary for the prosecution to show the true intent by presenting to you the numerous witnesses you have just heard."

Clearly, it cannot be said that the foregoing circumstances constituted reversible error.

No prejudicial error was committed by the trial of these two accused in a common trial. Certain of the offenses with which they were charged occurred at substantially the same time and place and certain elements thereof were to be established by the same witnesses. Neither of the accused objected to the common trial at the time thereof. Under such circumstances, it cannot be said that the common trial constituted prejudicial error as to either accused (CM 195294, Fernandez, Smith and Stowell, 2 BR 205).

6. On 5 April 1946 Attorney George E. Fee of Dolle, O'Donnell and Cash, counsel for accused Butters, appeared before the Board of Review and was accorded a full hearing. Thorough consideration has been given to contentions advanced both in his oral argument and in the brief submitted to the Board. In addition, the Board has also considered the numerous communications and other documents received relative to this case by various authorities, all of which are forwarded herewith.

7. Accused Butters is 25 years of age and was inducted into military service on 12 November 1941. He has been confined in Brussels Area Guardhouse since 2 September 1945. Accused Yelton is 26 years of age and was inducted into military service on 4 November 1942. He has been confined in the Brussels Area Guardhouse since 16 September 1945.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of the accused, except as noted above, were committed during the trial. In the opinion of the Board of Review the record of trial (a) as to accused Butters is legally insufficient to support the findings of guilty of Specifications 1 and 3 of Charge II and Charge II, but is legally sufficient to support the findings of guilty of Charge I and its Specificaton and to support the sentence and to warrant confirmation thereof and (b) as to accused Yelton is legally sufficient to support the findings of guilty of Charge I and its Specification and to support the findings of guilty of Charge II and so much of the findings of guilty of each of Specifications 1, 2 and 3 of Charge II as involve findings of guilty of acquiring by false pretenses some post exchange rations of an undetermined value on or about the time and at the place alleged, and legally sufficient to support the sentence and to warrant confirmation thereof. Death is authorized upon conviction of a violation of Article of War 58 committed in time of war.

Thomas N. Tobey, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert E. Trevellen, Judge Advocate.

(12)

JAGH - CM 307004 1st Ind

WD, JAGO, Washington 25, D. C. JUN 1 0 1946

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 Charles C. Butters (35131820), Service Battery, 84th Field Artillery Battalion, and Private Lee R. Yelton (34491202), Battery D, 376th Antiaircraft Artillery Weapons Battalion, who were tried in common trial.

2. As approved by the reviewing authority, accused Butters was found guilty of desertion (Charge I, Specification) and of obtaining by false pretenses on two separate occasions (9 and 23 July 1945) rations for twenty-five men from the Army Exchange Service, Liege, Belgium, (Charge II, Specifications 1, 3). As approved by the reviewing authority, accused Yelton was found guilty of desertion (Charge I, Specification), and of obtaining by false pretenses on two separate occasions (9 and 16 July 1945) rations for sixty-four men from the Army Exchange Service, Liege, Belgium (Charge II, Specifications 1, 2), and of similarly obtaining rations for thirty-two men on 23 July 1945 (Charge II, Specification 3). Each accused was sentenced to be shot to death with musketry. I concur in the opinion of the Board of Review that the record of trial (a) as to accused Butters is legally insufficient to support the findings of guilty of Specifications 1 and 3 of Charge II and Charge II but legally sufficient to support the findings of guilty of Charge I and its Specification (desertion) and to support the death sentence imposed and to warrant confirmation thereof, and (b) as to accused Yelton is legally sufficient to support the findings of guilty of Charge I and its Specification (desertion) and to support the findings of guilty of Charge II and so much of the findings of guilty of each of Specifications 1, 2 and 3 of Charge II as involves findings of guilty of acquiring by false pretenses some rations of an undetermined value on or about the time and at the place alleged and legally sufficient to support the death sentence imposed and to warrant confirmation thereof.

In view of the sustained findings of guilty and considering the circumstances of this case as well as War Department policy relative to the offense of desertion plus the maximum sentence that may be imposed for the false pretense offenses, as sustained, of which accused Yelton was convicted, I recommend that the sentence as to accused Butters be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for seven (7) years, and that the sentence as to accused Yelton be confirmed but commuted to dishonorable discharge,

forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight (8) years. I further recommend that each sentence as commuted be carried into execution and that as to each accused an appropriate Disciplinary Barracks be designated as the place of confinement.

3. Consideration has been given to the brief filed by counsel for accused Butters and to the numerous communications and other documents received on this case by various authorities, all of which are forwarded herewith.

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 recommendation meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Dft Ltr for sig S/W
3 - Form of action

(GCMO 242, 31 July 1946).

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

SPJGN-CM 307005

JUN 6 1946

UNITED STATES	)	70TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Gummersbach and Weilburg, Germany, 28-29 August 1945. To be shot to death with musketry.
Private FREDDIE IRVIN (33196980), 599th Quartermaster Laundry Company	)	

OPINION of the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

2. The accused was tried at a common trial with Private John P. Covel, who was acquitted, upon the following Charges and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Freddie Irvin, 599th Quartermaster Laundry Company, did, in conjunction with Private John P. Covel, 599th Quartermaster Laundry Company, at Rommelsohl, Kreis Gummersbach, Province of Rhineland, Germany, on or about 26 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Marianne Schilling.

Specification 2: In that Private Freddie Irvin, 599th Quartermaster Laundry Company, did, in conjunction with Private John P. Covel, 599th Quartermaster Laundry Company, at Rommelsohl, Kreis Gummersbach, Province of Rhineland, Germany, on or about 26 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Elsbeth Felder.

He pleaded not guilty to, and was found guilty of, the Charge and the Specifications. Evidence was introduced of one previous conviction by special court-martial of breaking restriction and of absence without leave for two days, in violation of the 96th and 61st Articles of War, respectively. 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 Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

At approximately 2330 hours, 26 April 1945, the doorbell rang and shots were heard at the house of Hubert Felder in Remmelsohl, Germany. Mrs. Maria Felder, wife of Hubert Felder, answered the door, after switching on a light, and found two masked American soldiers, armed with a rifle and a pistol (R. 7, 16, 21, 31 and 35). The soldier having the lighter complexion of the two, and subsequently identified as the accused, entered the house first, and pushed Mrs. Felder inside with his rifle (R. 7). Followed by a darker skinned negro soldier, subsequently identified as Private John P. Covel, 599th Quartermaster Laundry Company (R. 14), the accused entered the bedroom on the first floor where Mrs. Felder's daughter, Miss Elsbeth Felder, was sleeping, and awakened her (R. 7, 12, 14). When accused approached the couch and shook her, she, apparently believing a robbery was in progress, took off her jewelry. She also knocked on the wall to awaken her sister (R. 12, 13). At this demonstration, the accused left the room but the darker skinned negro remained. Using the wooden part of the rifle, the latter beat Miss Felder as she attempted to put on her shoes and get out of bed (R.13). Mrs. Felder put her arms around her daughter and led her to the kitchen (R. 8, 13). The dark skinned soldier followed them, beckoned to Elsbeth, and attempted to induce her to return to the bedroom with him (R. 13). Both Mrs. Felder and Elsbeth were crying (R. 13). When Elsbeth pretended not to understand him, the darker skinned soldier stepped away from them, and, operating the bolt of the rifle, put a cartridge in the chamber (R. 13, 15). Seeking help, Elsbeth then went to the bedroom occupied by her sister, Marianne Schilling, and husband, Paul, and by her sister-in-law, Mrs. Elsbeth Felder, but the dark soldier followed and sent Mr. Schilling upstairs. The soldier again beat Elsbeth and her mother and finally forced them to go upstairs (R. 8, 11, 13, 21).

Meanwhile, the accused had followed Mrs. Elsbeth Felder and Marianne Schilling upstairs. The latter was six or seven months pregnant (R. 10, 22, 37). The two women had been able to lock the bedroom door behind them but this was opened when the accused fired a shot into it (R. 21, 29, 37). Thereupon the accused entered the bedroom, "forced Mrs. Schilling into the bed", and attempted to open some dresser drawers in the room, as though looking for something. Mr. Felder, who was in the room with the two women, helped the accused open the drawers. The accused struck him and the two women several times with his pistol while in the bedroom with them. Finally, after entering an upstairs apartment occupied by Mathias Seuven and his wife Maria, and striking them, the accused forced his five hostages into their kitchen (R. 8, 29, 30, 37, 38).

When Miss Felder and her mother entered the upstairs kitchen at the direction of the dark soldier, they found Mr. Felder, Mr. and Mrs. Seuven, Mr. and Mrs. Schilling and Mrs. Elsbeth Felder standing in a semi-circle with their hands raised (R. 8, 13, 21, 32). According to Mrs. Felder the accused "* * *lined us up, pointed his pistol at us, took out his knife, sharpened it, and brought it close to our throats" (R. 8, 27). The accused was drinking cognac from a bottle during this demonstration and requiring them to do the same, while the darker soldier was standing in the hall covering them with the rifle (R. 9, 22, 24 and 30). Mrs. Felder held on to her daughter, Elsbeth and the accused attempted to separate the two. When Mrs. Felder resisted the accused cut her on the arm with his knife, causing her to fall to the floor (R. 13, 22, 24, 27, 30). After she had released her daughter, the other soldier, by using his rifle butt and kicking, forced Miss Elsbeth into the bedroom (R. 13, 22). There he took off her pajamas, struck her several times, and for approximately one-half-hour attempted to have intercourse with her (R. 13, 15, 30, 38). Being unsuccessful, he became angry and finally returned with her to the kitchen.

Although during that interim the accused had bandaged Mrs. Felder's arm with a towel or handkerchief, he nevertheless beat and threatened those remaining in the kitchen (R. 22, 23, 30). According to Paul Schilling, the assailant "* * * got out his pocket knife and was playing with it right in front of our faces. He pointed the knife at our eyes. Several times he hit us with his pistol, and he always beat us, especially Mr. Seuven and my father-in-law." He beat them "by using his left fist. He was holding the pistol in his right hand" (R. 23). Although the witness stated that he was sure he could recognize "the tall one" he failed to identify anyone in the courtroom (R. 25). Upon the return of the dark soldier and Miss Felder, the accused made one of the women raise their nightgowns, and he struck

Marianne Schilling "in the belly with his pistol". She was crying at the time and telling him "I'm going to have a baby" (R. 27, 31). The accused, using his knife and pistol, nevertheless forced her into the bedroom while the other soldier stood guard with his rifle in the hall (R. 27, 28, 31).

Once alone with her in the bedroom, the accused threw Mrs. Schilling on the bed, grabbed her by the throat, and struck her in the chest, abdomen and arms with his pistol. At that time, in the words of Frau Schilling, "I was covering my body with my hands, because you could feel the movement of the child * * * He was grabbing for my hands, and I figured maybe that's the best thing to do to protect my baby, and he felt for the baby and was laughing like a devil* * *". After "carrying on like that" for five or ten minutes, pointing his pistol at her chest, holding his knife up to her eyes and forcing her legs apart, the accused finally succeeded in having intercourse with her (R. 39-41). Some twenty minutes after taking Mrs. Schilling into the bedroom, he pushed her back into the kitchen (R. 31, 41). During the time spent with the accused, she had noticed that "* * *he was wearing a cross with four stones" (R. 41). She subsequently saw the same cross at an identification parade when Mrs. Felder, her sister-in-law, "* * *walked over to where he [the accused] was standing and produced that cross" (R. 42). Mrs. Schilling was "100% sure" of the identification of the accused (R. 41, 42).

The accused then singled out Mrs. Elsbeth Felder and forced her to precede him into the bedroom. In Mrs. Felder's words:

> "I had to walk ahead, and he followed me holding the two weapons and since he had fixed the pistol before and used the knife on my mother-in-law, I figured if I didn't do what he wanted he was going to do the same thing to me" (R. 31).

In the bedroom, by employing the pistol and knife, he forced her to lie crosswise on the bed and took off her underclothing. Mrs. Felder pushed the accused away from her but finally ceased resisting because of the knife and pistol. The accused unbuttoned his trousers and let them down. Then he "had his knife in front of my [Mrs. Felder's] eyes, his pistol on my chest. He cut off my blouse and then he was on top of me * * * I was so scared of losing my eyesight at that moment that I gave up * * * I was afraid, I didn't resist any more." The accused thereafter had intercourse with Mrs. Felder (R. 32, 33, 34). Of the fifteen to twenty minutes the accused had been in the bedroom with Mrs. Felder, he was unmasked five to ten minutes of the time,

while attempting to kiss her. During the time he was unmasked, Mrs. Felder had the opportunity to "take a good look at him" and she observed especially "his lips, his size, and his eyes" (R. 32, 33, 35). Also, "while he [the accused] was at our house, I [Mrs. Felder] noticed he had a wound on his ring finger of his left hand. [At the identification parade two days later] He had his hand in his pocket. I asked him to show me his hand. He didn't want to do so, so I pulled his hand out of his pocket and showed the officer that wound" (R. 35). At that time Mrs. Felder also made him produce a cross he was wearing (R. 35). Miss Elizabeth Felder identified the accused by his "elongated eyes" and recalled having seen him the night before the incident on a motorcycle in front of their house. "He was wearing red socks, and one of those field jacket liners" at that time (R. 17.

After the accused had returned Mrs. Elsbeth Felder to the kitchen, the darker of the two soldiers went downstairs and whistled, whereupon the accused followed (R. 28). It was between 0200 and 0300 on the morning of 27 April 1945 when the two soldiers left the Felder home (R. 17, 28, 35).

On 27 April 1945, Doctor Fritz Bachman, a medical practitioner from Vollmershausen, examined Mrs. Hubert Felder and her daughter Elsbeth (R. 42, 43). Contrary to the testimony of Mrs. Marianne Schilling, Doctor Bachman did not examine her (R. 42, 43). Mrs. Felder, he found, had a cut approximately eight to ten centimeters in length on her lower left arm. Several days later he discovered quite a few blue spots on her lower leg (R. 43).

4. Evidence for the defense: The rights of the accused and his co-accused, Private John P. Covel, were explained, whereupon each elected to testify under oath (R. 45). The accused later changed his mind, however, and elected to remain silent (R. 64).

Private Covel was sworn and testified that on the night of 26 April he was on guard near the supply tent of his organization, the 823rd Fumigation and Bath Company (R. 46). His testimony in this respect was substantiated by that of the corporal of the guard (R. 53), by a Private Sturges who was a guard on the same post at that time (R. 61), and by the introduction of the unit's guard Duty Roster (R. 64, Def. Ex. 1).

Technician Fifth Grade James McDougall, a "permanent K.P." with the accused's organization, who was billeted in a room just to the rear of the unit kitchen, testified that when he retired, between

2030 and 2045 that evening the accused was in the room. Corporal McDougall did not notice when the accused went to bed but saw that he was in his bunk at 2330 (R. 65, 66, 67). There was only one door in the room and it was kept locked from around 2000 until the following morning. The one key to the door was in the possession of the mess sergeant. Corporal McDougall awakened the sergeant at 2330, obtained the key, went to the latrine, and on his return gave the key back to the sergeant. The accused was still in his bunk when Corporal McDougall retired for the second time. On the following morning he awakened the accused at about 0545.

It was stipulated that if Technical Sergeant Madison Washington, the unit mess sergeant, were present he would testify:

> "I am mess sergeant of the 823 Quartermaster Fumigation and Bath Company of which Pvt Freddie Irvin is a member. Pvt Irvin is assigned to my kitchen as permanent KP. His quarters are on the first floor of the building which houses our mess hall. There is only one door to this building, and just inside this door is the mess hall and our kitchen. Back farther in the building are the rooms in which Pvt Irvin and the other cooks' helpers and cooks sleep. This door previously referred to is kept locked between meals and at night to prevent any persons from entering for the purpose of eating or removing food. When this door is locked there is no other way in or out of the building. I personally carry the key to this door, and there is no other key to my knowledge. When any of the kitchen personnel want to go in or out, they must see me in order to get the door unlocked." (R. 64, Def. Ex. 2)

5. Specification 1 and Specification 2 of the Charge, of which the accused stands convicted, involve rape of Marianne Schilling and Elsbeth Felder at the time and place alleged, in violation of Article of War 92. Since the two offenses were committed at the same place within a comparatively short period of time, the evidence in support of each specification and the issues of fact are necessarily similar. Applicable legal principles are likewise practically the same. For these reasons, they will be so treated by the Board insofar as possible.

Rape may be defined as "* * *the unlawful carnal knowledge of a woman by force and without her consent* * * the force involved in the act of penetration is alone sufficient where there is in fact no consent" (par. 148c, MCM). The evidence, though resting entirely upon the testimony of German witnesses, is clear and convincing that

two negro soldiers, armed and masked, terrified a German household for several hours on the night of 26 and 27 April 1945. Also, that one unmarried and two married German women were taken into an upstairs bedroom at different times by these two soldiers after a display of deadly force including a vicious assault with a knife upon a mother attempting to protect her daughter. The testimony of the two married women that penetration, by force and without consent, was effected by the same soldier, stands unchallenged in the record and is corroborated by compelling testimony of others with respect to facts attendant to the entrance and exit of these women from the chamber. Undisputed also is the fact that the one woman was six or seven months with child and was trying desperately to protect her unborn from a bestial attack. Without question then, rape was committed on the night of 26-27 April 1945 upon Marianne Schilling and Elsbeth Felder.

The only real issue raised by the record concerns the identity of the offender. The accused was tried at a common trial with Private John P. Covel. The latter was acquitted. The reason for his acquittal must have been predicated upon some reasonable doubt as to his identity. Although the soldier identified as Private Covel did not himself succeed in effecting a penetration, manifestly he would have been guilty as an accomplice under the terms of 18 U.S. C., Section 550 (March 4, 1909, Ch. 321, 332, 35 Stat. 1152).

The case against the accused from the standpoint of identity, as well as from the standpoint of his actual participation, is far stronger. Miss Elsbeth Felder testified that she had seen the accused on the day prior to the offense and remembered his "elongated eyes". Mrs. Schilling observed that the accused was wearing "a cross with four stones" while she was in the bedroom with him, and she saw him wearing this at a subsequent identification parade. Mrs. Elsbeth Felder saw the accused unmasked for five or ten minutes when she was alone with him and also noticed a wound on his finger. She called this to the attention of an officer at the subsequent identification parade. Opposed to this, the record contains testimony and a stipulation advancing a most unusual, if not unreasonable, account of a mess sergeant locking himself and his subordinates in their billet from eight or eight-thirty in the evening until morning. The accused predicated his defense on this evidence. With the conflict in the evidence squarely before it, the trial court resolved this issue of fact against the accused. No reason appears from the record for disturbing this finding. Inasmuch, however, as the court acquitted Covel they should have excepted, in their findings as to accused, all reference to the fact that he acted in conjunction with Covel (MCM par. 78c, p. 64).

6. The charge sheet shows the accused to be twenty-three (23) years and five (5) months of age. Without prior service, he was inducted on 14 April 1942 at Fort Myer, Virginia.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial as to both Specifications is legally sufficient to support only so much of the findings of guilty as involve a finding that accused did, at the time and place alleged, commit rape on the persons alleged and legally sufficient to support the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (A.W. 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 U.S.C.A. 457, 567).

Wilmot T. Baughn, Judge Advocate

Robert Glomor, Judge Advocate

Jerome Adams, Judge Advocate

JAGN-CM 307005 1st Ind

WD, JAGO, Washington, D. C. JUL 2 1946

TO: The Secretary of War

1. Herewith transmitted for action of the President are the record of trial and opinion of the Board of Review in the case of Private Freddie Irvin, ASN 33196980, 599th Quartermaster Laundry Company.

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 thereof. I recommend that the sentence be confirmed, but, because of the special circumstances of the case, that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life; that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement; and that the sentence, as thus modified, be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 245, 31 July 1946).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH - CM 307006

22 MAR 1946

UNITED STATES v. Private First Class EARL L. FOLAND (34725534) and Private OSCAR L. GARNER (34727911), both of Battery D, 398th Antiaircraft Artillery Automatic Weapons Battalion, Self Propelled.	THIRD UNITED STATES ARMY Trial by G.C.M., convened at Munich, Germany, 23,30 June 1945. As to each accused: To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, 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. In a common trial accused Foland was tried upon the following Charges and Specifications:

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

Specification 1: In that Private First Class Earl L. Foland, in conjunction with Private Oscar L. Garner, both of Battery D, 398th Antiaircraft Artillery Automatic Weapons Battalion Self-Propelled, did at Semerskirchen, Germany, on or about 4 May 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the person of Herman Shafer a watch of some value; from the person of August Fabian, 280 Reichmarks, of a value of twenty-eight dollars, United States currency; from the person of Joseph Pollinger, 100 Reichmarks, of a value of ten dollars, United States Currency; from the person of Fanny Grundner one silver ring and one gold wedding band of some value.

Specification 2: In that Private First Class Earl L. Foland, * * *, did at Semerskirchen, Germany, on or about 4 May 1945 commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Theresa Serepinski.

Specification 3: In that Private First Class Earl L. Foland, * * *, did at Semerskirchen, Germany, on or about 4 May 1945 commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Fannie Fischl.

Specification 4: In that Private First Class Earl L. Foland, * * *, did at Semerskirchen, Germany, on or about 4 May 1945 commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Maria Fischl.

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

Specification 1: In that Private First Class Earl L. Foland, * * *, did at Semerskirchen, Germany, on or about 4 May 1945 forcibly and feloniously against her will have carnal knowledge of Theresa Serepinski.

Specification 2: In that Private First Class Earl L. Foland, * * *, did at Semerskirchen, Germany, on or about 4 May 1945 forcibly and feloniously against her will have carnal knowledge of Fannie Fischl.

Specification 3: In that Private First Class Earl L. Foland, * * *, did at Semerskirchen, Germany, on or about 4 May 1945 forcibly and feloniously against her will have carnal knowledge of Maria Fischl.

CHARGE III: (Findings of guilty disapproved by reviewing authority).

Specification: (Findings of guilty disapproved by reviewing authority).

and accused Garner was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Oscar L. Garner, in conjunction with Private First Class Earl L. Foland, both of Battery D, 398th Antiaircraft Artillery Automatic Weapons Battalion Self-Propelled did at Semerskirchen, Germany on or about 4 May 1945 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Herman Shafer one gold pocket watch and chain of some value.

Specification 2: In that Private Oscar L. Garner, * * *, did at Semerskirchen, Germany on or about 4 May 1945 by force and violence and by putting them in fear, feloniously take, steal and carry away from the person of August Fabian 280 Reichsmarks of a value of twenty-eight ($28.00) dollars United States currency, from the person of Josef Pollinger 100 Reichsmarks of a value of ten ($10.00) dollars United States currency, from the person of Fannie Grundner one silver ring and one gold wedding band of some value.

Specification 3: In that Private Oscar L. Garner, * * *, did at Semerskirchen, Germany on or about 4 May 1945 commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Fannie Fischl.

Specification 4: In that Private Oscar L. Garner, * * *, did at Semerskirchen, Germany on or about 4 May 1945 commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Maria Fischl.

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

Specification: In that Private Oscar L. Garner, * * *, did at Herrngiersdorf, Germany on or about 4 May 1945 wrongfully assault Ottille Kraibicka by grabbing hold of her breast.

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

Specification 1: In that Private Oscar L. Garner, * * *, did at Semerskirchen, Germany on or about 4 May 1945 forcibly and feloniously and against her will have carnal knowledge of Fannie Fischl.

Specification 2: In that Private Oscar L. Garner, * * *, did at Semerskirchen, Germany on or about 4 May 1945 forcibly and feloniously and against her will have carnal knowledge of Maria Fischl.

CHARGE IV: (Findings of guilty disapproved by reviewing authority).

Specification: (Findings of guilty disapproved by reviewing authority).

Each accused pleaded not guilty to, and was found guilty of, the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced as to either accused. Each accused was sentenced to be shot to death with musketry. As to accused Foland, the reviewing authority approved so much of the finding of guilty of Specification 1 of Charge I as involved a finding that accused Foland did, in conjunction with accused Garner, at the time and place and in the manner and from the persons alleged, take a watch, 280 Reichsmarks, 100 Reichsmarks, one silver ring and one gold wedding band, all of some value; disapproved the findings of guilty of Charge III and its Specification; approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commuted to dishonorable discharge, total forfeitures and confinement for life. As to accused Garner, the reviewing authority approved so much of the finding of guilty of Specification 2 of Charge I as involved a finding that accused Garner did, at the time and place and in the manner and from the persons alleged, take 280 Reichsmarks, 100 Reichsmarks, one silver ring and one gold wedding band, all of some value; disapproved the findings of guilty of Charge IV and its Specification ; approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commuted to dishonorable discharge, total forfeitures and confinement for life.

3. Between 4:45 and 5:00 p.m. on 4 May 1945, accused Garner, two other American soldiers and two Polish men drove in a dark blue, closed automobile to a brewery operated by Georg Martin and located in Herrngiersdorf, Germany, where they demanded beer. The town of Herrngiersdorf is about two kilometers from the town of Semerskirchen where certain events subsequently related occurred (R.19-21,25,26). Around 5:00 p.m., a few minutes after this visit to the brewery, accused Garner and another soldier entered the living quarters of Ottilie Krabicka, the daughter of Georg Martin, Garner conducted Ottilie to a dark vestibule, placed his hands on her breast, lifted her dress and sought to throw her to the floor as she cried out and resisted his advances. Thereafter accused Garner and his companions drove off in a dark blue, closed automobile (R.26-31).

About 6:00 p.m. this same evening, accused Foland accosted Hermann Shafer as he was entering the home of a Mr. Grundner in Semerskirchen, Germany. Believing that accused Foland had asked him the time of day, Shafer removed his watch from his pocket whereupon accused Foland pulled the watch, ripped the chain from Shafer's vest and pocketed the watch. Accused Garner was about eight meters away, mounting the steps to the house when this occurred (R.33-35,43,44,46). Accused Foland then exhibited a pistol, pushed Shafer into a hallway of the house and asked for a "fraulein." Shafer replied that they were in the kitchen and he was ordered to proceed there (R.34-36).

Two sisters, Fanny and Maria Fischl, were in the kitchen along with certain other individuals and they saw Shafer and Grundner pushed into the kitchen by the two accused (R.35,36,56-58). Brandishing a pistol accused Foland asked for whiskey and Grundner left the room to procure some,

returning promptly (R.36,37,80). It is not possible from the prosecution's evidence definitely to determine the exact sequence of the alleged robberies as compared to the alleged rapes and sodomies. Accordingly, we shall first summarize the evidence as to the remainder of the alleged robberies before summarizing that relating to the balance of the offenses charged.

Shortly after the incident involving Shafer's watch, August Fabian entered the kitchen and observed accused Garner brandishing a pistol at the people there present. Accused Foland asked Fabian for a watch and then for money. Fabian took his wallet from his pocket and removed 250 Reichsmarks therefrom. Accused Foland then snatched the money and the wallet, emptying the latter of its contents and taking a total of 280 Reichsmarks from Fabian (R.37,39,42, 48-50,98,114). Thereafter, the town clerk, Josef Pollinger, who was walking past the house was called into the kitchen where accused Foland, holding a pistol, asked him for "uhr" or "gelt." Pollinger removed his wallet from his pocket and accused Foland snatched it, taking 100 Reichsmarks therefrom. Accused Garner was out of the kitchen with Fanny Fischl at the time this money was taken (R.38,52-54,98,115).

Mrs. Fanny Grundner arrived at her home about 6:45 p.m. this evening, observed a dark blue or black, closed automobile parked outside her house and on entering the kitchen found accused Foland armed with a pistol. In a corner were Mr. Grundner, Shafer, Fabian, Pollinger and others. Accused asked Mrs. Grundner if she had a watch or "gelt" and receiving a negative answer he then ordered her to remove a gold wedding ring and an "ordinary" ring which she was wearing. She did so and accused Foland took the rings. Accused Garner was out of the room with Fanny Fischl when this incident occurred (R.39,42, 97,114,123-126,129). These incidents and those hereinafter related occurred over the period from 6 to 7 p.m. on the day in question (R.43,44,57,75,78, 103,116).

Soon after the two accused had first entered the Grundner kitchen and obtained the schnapps from Mr. Grundner, accused Foland pointed a pistol at Maria Fischl, a girl almost 15 years of age, and directed her to leave the kitchen with him (R.58,80,81,103-105). Taking her to a room upstairs, accused Foland pushed her on a bed and said "Hose weg," meaning "pants off," meanwhile pointing a pistol at her. She complied with accused's direction whereupon he placed his revolver in its holster, laid upon her and inserted his penis in her private parts, remaining in that position for a few minutes. She did not fight or scream because she feared that if she did so she would be shot (R.81-84,87,88). Thereafter he permitted Maria to sit on the bed and standing in front of her he pushed her head down and forced her twice to take his penis in her mouth, each incident lasting about a minute. Then he again pushed her down on the bed and inserted his penis in her private parts and remained in that position for several minutes (R.85-88).

Accused Foland and Maria eventually returned to the kitchen having been gone therefrom about ten minutes. During that time accused Garner had been waving his pistol at the others in the kitchen (R.59,105,117). Upon his

return Foland brandished his pistol at Maria's sister, Fanny, age 20, and ordered her to follow him from the room. Soon after they left, accused Garner pointed his pistol at Maria and took her from the kitchen into a hall (R.59,77,89,97,100,101). Maria had her dress on but her panties were upstairs in the room where she and Foland had recently been. In the hall accused Garner raised Maria's dress as she stood in a corner and inserted his penis into her privates. In a few minutes he withdrew it and pushing her head down he forced her to bend over and take his penis into her mouth. Thereafter he raised her skirt again and placed his penis in her privates for a few minutes. They then returned to the kitchen having been in the hall about five minutes. She did not resist the overtures of accused Garner or cry out because she feared she would be shot if she did so (R.90-97).

In the meantime accused Foland had taken Fanny to an upstairs bedroom where he removed her pants as she stood before him. She did not resist because she was fearful of the pistol he held pointed at her. He then pushed her on the bed, opened his trousers, placed himself upon her and inserted his penis in her private parts, leaving it there for about two minutes. During commission of this act he placed his pistol beside him on the bed. After he arose from the bed accused Foland stood in front of Fanny who was sitting on the bed and pointing the pistol at her, he motioned that she was to take his penis into her mouth. He then pushed her head down and placed his penis in her mouth where it remained for about a minute. Fanny did not cry out or resist this act committed by accused Foland because she was fearful of what he would do with the pistol he held aimed at her. Thereafter they returned to the kitchen having been in the bedroom for a total of about ten minutes (R.60-62,73,74,106,117).

Next accused Foland pointed his pistol at Theresa Serepinski, a 19-year old girl, who had entered the kitchen after having been working in the fields, and pushed her from the kitchen into the living room where they remained about ten minutes while accused Garner, who had apparently returned with Maria, held his pistol on the various other individuals standing in the kitchen (R.62,63,97,100,101,103-105,107,116). Pointing his pistol at Theresa accused Foland directed her to remove her pants which she did. He then placed her on the floor, returned his pistol to its holster, opened his trousers and put his penis inside her privates. She did not cry out or resist because of the pistol accused Foland possessed. After remaining in this position for about five minutes, accused Foland arose, grasped her hands as she sought to leave the room and pulled her to a sitting position beside him on a sofa. He then pushed her head down and placed his penis in her mouth but she promptly drew back causing it to withdraw. Twice more he forced his penis into her mouth but each time she ejected it by withdrawing her head. Accused Foland then brought her back to the kitchen (R.108,113,117,118).

Accused Foland then turned to Fanny and pointing his pistol directed her to leave the kitchen with him for the second time. Taking her to the living room, he removed her pants, pushed her onto a couch, spread her legs and placed his penis in her private parts where it remained for about two

minutes. During this act his pistol was on the couch beside him and Fanny did not resist because she was fearful of it. Thereafter she sat up and accused Foland, motioning with his pistol, pushed her head down and inserted his penis in her mouth where it remained about a minute. He then took her back to the kitchen (R.63-66).

Upon Fanny's return to the kitchen, accused Garner pointed his pistol at her and conducted her to an upstairs bedroom where he said "Alles weg", meaning "Take everything off." While he held his pistol on her she removed all of her clothing. He then pushed her onto the bed and placed his penis inside her private parts where it remained about a minute. She offered no resistance because of her fear of his pistol. After accused Garner arose she commenced to dress but before she could don her pants, he threw her back on the bed and again placed his penis inside her privates for about a minute. Thereafter they arose but he promptly threw her on the bed a third time and again inserted his penis in her privates where it remained about a minute. As she sat on the bed following this act, accused Garner stood in front of her with his pistol, pushed her head down and placed his penis in her mouth. He withdrew it in about a minute, pushed her over on the bed and again placed his penis in her privates where it remained about two minutes. Accused Foland then called from downstairs whereupon Fanny and accused Garner returned to the kitchen, having spent about fifteen minutes in the bedroom (R.67-72,76). Shortly thereafter, about 7 p.m., the two accused drove off with a third soldier in a dark blue, closed automobile (R.51,56,72,128).

Not only did Maria, Fanny and Theresa each testify as to the trips taken by each other from the kitchen but Shafer and Fabian also testified that while they were in the kitchen each accused took turns going out with these girls several times (R.40,43,45,46,50,51).

On 5 May 1945, the day following the occurrences recited above, First Lieutenant Richard J. Duggan was instructed to investigate certain rapes alleged to have been perpetrated in Semerskirchen. Lieutenant Duggan picked up the two accused and a third soldier approximately a mile from the town of Langquaid and conducted them to the house in Semerskirchen from which the rapes had been reported. People by the names of Grundner, Shafer and Fischl were in the house at the time (R.133). Lieutenant Duggan had the two accused empty their pockets and then he sent Sergeant Elmer Miller to search the vehicle in which accused had been riding when picked up (R.134,135). It was stipulated by the prosecution, defense and the accused that if Sergeant Miller were present he would testify that he searched a small, black civilian sedan and found a roll of over 200 paper Reichsmarks of German issue and on top of the automobile battery found one silver-plated ring, one plain gold-plated engagement or wedding ring, and a gold-plated ring of simple design (Pros. Ex. 5). Lieutenant Duggan testified that the occupants of the house identified accused Foland and Garner and that Shafer identified as his property a watch worn by accused Garner (R.134,140).

4. The defense offered no evidence and, after their rights had been fully explained to them, both accused elected to remain silent.

5. As approved by the reviewing authority, accused Foland was found guilty of robbing particular individuals of the following property, all of some value, viz: a watch, 280 Reichsmarks, 100 Reichsmarks, one silver ring and one gold wedding band, and he was also found guilty of committing rape and sodomy upon each of the following German women, viz: Theresa Serepinski, Fanny Fischl and Maria Fischl. The prosecution's evidence abundantly establishes that, while armed with a pistol, accused snatched a watch from the person of Hermann Shafer. Later, while brandishing his pistol, he demanded money from August Fabian and Josef Pollinger and ordered Mrs. Fanny Grundner to turn over to him a gold wedding ring and another ring she was wearing. He took 280 Reichsmarks from Fabian, 100 Reichsmarks from Pollinger and the two rings from Mrs. Grundner.

Robbery is committed when property is feloniously taken from another against his will by violence or intimidation. Intimidation may consist of menaces or threats which induce in the victim such a well-founded apprehension of present danger as warrants him in making no resistance. Violence may consist of the application of such force as "suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person" (MCM, 1928, par. 149f). Considering the fact that accused Foland was a soldier in hostile armed forces which had but recently overrun a portion of his victims' homeland and that he was armed at the time he took possession of the particular property, the court was well warranted in concluding that these individuals only delivered their property to him because of their fear of the weapon he carried. The evidence fully sustains the approved findings of guilty of accused Foland under Specification 1 of the Charge I pertaining to him.

The prosecution's evidence shows that during the period from 6 to 7 p.m. on the evening of 4 May 1945, accused Foland had sexual intercourse with and committed acts of sodomy upon Maria Fischl, Fanny Fischl and Theresa Serepinski. Indeed, the evidence indicates such numerous instances of sexual penetration, both normal and perverted, that had accused experienced an ejaculation each time, the testimony would have been unbelieveable. However, none of his victims testified that he had an emission on any of these occasions. Furthermore, many of his penetrations were maintained for but a brief period of time while others clearly appear to have been successive variations of a single incident of sexual relations. Notwithstanding the fact that his victims were German women and fully realizing all that such fact may indicate, nevertheless, unimpeached evidence of a most substantial quantity does show that accused Foland indulged in the alleged orgy of sexual experiences. Quite probably he was more impelled by a libido that demanded intimacy with all of these young females he found within his power than he was by a desire to experience normalsexual satisfaction. In any event, whatever instincts may have propelled him to such an orgy, uncontroverted and substantial testimony establishes commission of the various acts alleged.

It is also apparent that the acts of sexual intercourse were not committed with the consent of any of the females involved. They all submitted

without resistance to accused Foland's overtures because they feared the pistol he displayed. Considering the fact that their armed assailant was clothed in the uniform of an enemy which had but recently entered their home territory, their fear of death or at least severe bodily harm was well founded. Submission to sexual intercourse under such circumstances does not constitute consent (CM 227809, 1 Bull JAG 364; CM 236612, Tyree, II Bull JAG 310, 23 BR 67). So far as the sodomies are concerned, the acts of sexual perversion here established constitute the offenses alleged, force by the accused or consent by the pathic being inessential thereto (MCM, 1928, par. 149k). Accordingly, the evidence supports the convictions of accused Foland under Specifications 2, 3 and 4 of the Charge I and Specifications 1, 2 and 3 of the Charge II pertaining to him.

Substantially the same quantity and quality of evidence was offered by the prosecution to prove the rapes and sodomies alleged to have been committed by accused Garner upon Maria Fischl and Fanny Fischl as was introduced to establish the similar offenses committed by accused Foland. All observations made and conclusions reached above with respect to the similar offenses committed by accused Foland are applicable here and repetition thereof is unnecessary. In our opinion the evidence supports the convictions of accused Garner under Specifications 3 and 4 of the Charge I and Specifications 1 and 2 of the Charge III pertaining to him. There was also uncontroverted evidence before the court establishing commission of the alleged assault upon the person of Ottillie Kraibicka and warranting the court's findings of guilty of the Specification of the Charge II pertaining to accused Garner.

There remains finally for consideration Specifications 1 and 2 of the Charge I which allege that, in conjunction with accused Foland, accused Garner robbed Hermann Shafer of his watch (Spec. 1) and that accused Garner robbed Fabian of 280 Reichsmarks, Pollinger of 100 Reichsmarks and Fanny Grundner of a gold wedding band and another ring (Spec. 2). The evidence shows that accused Garner was ascending an outside stairway about eight meters, approximately twenty-five feet, from Shafer when accused Foland snatched Shafer's watch and he immediately joined Foland, assisting him in compelling Shafer to lead them to the kitchen. When Fabian had his money taken by accused Foland in the Grundner kitchen, accused Garner was present flourishing his pistol at the others herded in the room. Accused Garner was out of the kitchen with Fanny Fischl, however, when Pollinger and Mrs. Grundner were relieved, respectively, of money and rings.

At the time of the robbery committed on Fabian, accused Garner was present and was using his pistol in such manner as to cow the others in the kitchen. From such facts the court was warranted in concluding that accused Garner was aiding and abetting accused Foland in that robbery, and consequently he was chargeable as a principal (CM ETO 1453, 3 Bull JAG, p. 284, 285; CM 240646, 3 Bull JAG 188). Accused Garner was also in the immediate vicinity when the robbery on Shafer was perpetrated and he promptly joined his comrade, Foland, who was then menacing Shafer with a pistol. When an

individual is present at the scene of a crime, lends his approval to the commission thereof, and is able to come to the assistance of his criminal comrade if necessary, he is an aider and abettor and chargeable as a principal (CM ETO 1453, supra). From the fact that accused Garner did not disapprove of Foland's conduct toward Shafer but indeed promptly collaborated with him in making material threats against the victim, the court was well warranted in concluding that accused Garner was lending support and approval to Foland's conduct (See CM ETO 1453, supra). Thus, it is clear that accused Garner was aiding and abetting Foland in commission of the robbery on Shafer and he was properly found guilty as a principal in the perpetration of that offense.

Accused Garner may have been in another room in the Grundner house when Foland committed robbery upon Pollinger and Mrs. Grundner. However, he collaborated with Foland in two other robberies committed at substantially the same time and place as the Pollinger and Grundner robberies and he was well within hailing distance of his companion, Foland, when these last two robberies were committed. When a bystander is a friend of the perpetrator of a crime and is in such a situation as to be able readily to come to the perpetrator's assistance, knowing that his presence will give encouragement and confidence to the perpetrator, he is chargeable as an aider and abettor to the perpetrator and is criminally responsible as a principal for the offense committed (Wharton's Criminal Law, 12th ed., Vol. 1, p. 246,247). Accordingly, in our opinion the evidence supports the conviction of accused Garner of the robberies committed upon Pollinger and Mrs. Grundner.

It may well be that the testimony of Lieutenant Duggan was competent evidence as to identification made by third parties of the accused and of property found in their possession (See CM ETO 3837, 4 Bull JAG, p. 175). However, even if such testimony was hearsay and inadmissable, the introduction thereof did not constitute reversible error since the other evidence in the record of trial is of such quality and quantity as practically to compel in the minds of reasonable men the findings of guilty (CM ETO 1693,3 Bull JAG, p. 185).

6. Accused Foland is 25 years of age and entered military service on 17 March 1943. Accused Garner is 21 years of age and entered military service on 3 April 1943. The staff judge advocate's review contains a resume of the civilian life and military service of both accused.

7. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of either 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 as approved by the reviewing authority and to support the sentences and to warrant confirmation of the sentences. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

Thomas H. Tolley, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trevellian, Judge Advocate.

SPJGH - CM 307006 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 1 9 1946

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 First Class Earl L. Foland (34725534) and Private Oscar L. Garner (34727911), both of Battery D, 398th Antiaircraft Artillery Automatic Weapons Battalion, Self-Propelled, Third United States Army.

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 as approved by the reviewing authority and to support the sentences and to warrant confirmation of the sentences. The various rapes committed by the two accused were not aggravated by the application of any personal violence or the infliction of any personal injury greater than that necessarily involved in the physical contact inherent in the commission of such offenses. In his action the reviewing authority recommended that, because of the circumstances of these cases including the combat service of each accused, each sentence be commuted to dishonorable discharge, total forfeitures and confinement for life. I concur with the recommendation of the reviewing authority and I recommend that each sentence be confirmed but that each be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life, and that the sentences as thus commuted be carried into execution. I further recommend that the United States Penitentiary, Leavenworth, Kansas, be designated as the place of confinement.

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 recommendation meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Dft Ltr for sig S/W
3 - Form of action

(GCMO 142, 27 May 1946).

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

SPJGK - CM 307018

6 MAY 1946

UNITED STATES v. Captain ALVIN A. SHOWALTER (O-488557), Corps of Military Police.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Butner, North Carolina, 18 January and 1 February 1946. Dismissal.

OPINION of the BOARD OF REVIEW
KUDER, CARROLL and WINGO, Judge Advocates.

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

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

CHARGE I: Violation of the 85th Article of War.

Specification 1: In that Captain Alvin A. Showalter, CMP, Army Service Forces, District No. 2, SCU 1416, Fourth Service Command, Wilmington, North Carolina, was, at Wilmington, North Carolina, on or about 3 November 1945, found drunk while on duty as Commanding Officer, MP Detachment No. 1, District No. 2, Fourth Service Command.

Specification 2: In that Captain Alvin A. Showalter, ***, was, at Wilmington, North Carolina on or about 26 November 1945, found drunk while on duty as Commanding Officer, MP Detachment No. 1, District No. 2, Fourth Service Command.

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

Specification 1: In that Captain Alvin A. Showalter, ***, did, at Wilmington, North Carolina, on or about 3 November 1945, wrongfully and unlawfully operate a Government owned motor vehicle while under the influence of alcoholic beverages.

Specification 2: In that Captain Alvin A. Showalter, ***, did, at Wilmington, North Carolina, on or about 17 October 1945, wrongfully convert to his own use a government owned motor vehicle furnished for official use, by transporting therein George W.

Lyons and Irene Lyons, civilian persons who were not then properly authorized such transportation.

NOTE: Specifications 3, 4 and 5 similarly allege wrongful conversion by transporting Irene Lyons on 23 October, 1 November and 7 November, respectively. Specification 6 similarly alleges wrongful conversion by transporting George Lyons on 26 November.

He pleaded not guilty to the Specifications of Charge I and Charge I, and to Specification 1 of Charge II. He pleaded guilty to the other Specifications of Charge II, "except the words, 'convert to his own use a government owned motor vehicle furnished for official use, by transporting therein', substituting therefor the words, 'transport in a government owned motor vehicle furnished for official use', of the excepted words, not guilty, of the substituted words, guilty," and guilty to Charge II. He was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

There were offered by the prosecution and admitted into evidence without objection by the defense fourteen exhibits which consisted of 12 stipulations concerning sworn testimony of 12 witnesses, a copy of Army Regulations 850-15 dated 1 August 1945 and Change Number 1 thereto (R. 7; Pros. Ex. 1), and a report of an automobile accident, written by accused (R. 9; Pros. Ex. 8). It was orally stipulated by the prosecution and accused, without objection by defense counsel, that accused was a member of the armed forces (R. 7). No other evidence was offered by the prosecution.

Specification 1, Charge I and Specification 1, Charge II.

During the entire months of October and November 1945 accused was commanding officer of Military Police Detachment Number 1, District Number 2, Fourth Service Command (R. 7; Pros. Ex. 2). "On the night of" 3 November accused "came into Military Police Headquarters at Wilmington, North Carolina." He "clearly showed evidence of having been drinking *** seemed perturbed over something and acted not at all in his usual manner. *** his face was drawn, he was perspiring freely and seemed quite jittery about something *** there was a distinct odor of intoxicants" on his breath, and he "was sufficiently under the influence of intoxicants so as to be sensibly impaired in the rational and full exercise of his mental and physical faculties should he have been called upon to perform his duties at that time," according to the testimony of Master Sergeant George B. Thomason, Jr., who was on duty at that headquarters (R. 8; Pros. Ex. 3). "Some 20 minutes "after accused thus entered headquarters he left, and shortly thereafter, while driving an "official MP car" (Pros. Ex. 6) to the Plantation

Club on duty in answer to a trouble call that had been received from that establishment, he swerved to avoid hitting an automobile which had stopped in front of him (R. 9, Pros. Ex. 8). Accused's car "caught the rear bumper of another car that was parked." Damage to the parked car was estimated at $10. "Damage to (accused's) car was windshield broken mashed right rear fender estimated at $25," according to a report written by accused about an hour after the collision (R. 9; Pros. Ex. 8). A deputy sheriff saw accused at the scene of the accident. According to his testimony, accused "was definitely in too much of an intoxicated condition to be permitted to drive an automobile; *** he had a heavy tongue and was a little unsteady on his feet; however, he talked with sense." Witness did not smell whiskey on accused's breath (R. 8; Pros. Ex. 6). Another deputy sheriff stated at that time accused "was in an intoxicated condition, too much so to have been driving an automobile *** (his) face showed up more red or ruddy and from his manner of speech, he was not as steady on his feet as (witness) had seen him." Witness was "well acquainted with" accused. He thought accused was intoxicated because when he questioned accused about the wreck, accused's "answers were at first not clear," and he "seemed a bit jittery" (R. 9; Pros. Ex. 7). Military Police Corporal Jerome Goldberg stated that accused "seemed somewhat excited *** there was an odor of alcohol about (accused's) breath." Accused's "movements were slightly erratic *** his speech was loquacious, face flushed" (R. 9; Pros. Ex. 8). Each of the three witnesses stated that in his opinion accused's "degree of intoxication was sufficient sensibly to impair the rational and full exercise of his mental and physical faculties."

Specification 2, Charge I.

On 26 November accused "came into headquarters at 2300 clearly under the influence of intoxicants *** was on duty as the officer in charge *** had he been called upon to perform official duty on the evening of 26 November 1945 he was sufficiently under the influence of intoxicants so as to sensibly impair the rational and full exercise of his mental and physical faculties," according to Sergeant Thomason (R. 7; Pros. Ex. 3). Corporal Goldberg stated that accused "was in headquarters and clearly had been drinking *** was pretty well under the influence of intoxicants *** such degree of intoxication was sufficient to impair the rational and full exercise of his mental and physical faculties." Witness' attention was attracted by accused's "gay and jocular mood, and at intervals, his displays of drowsiness." Witness overheard accused "ask Sergeant Thomason to call the Cape Fear Hotel to see if he could get some whiskey." Witness stated that the date had been fixed in his mind "by reason of the fact that (accused's) personal .38 caliber pistol was discovered to be missing" (R. 9; Pros. Ex. 8).

Specifications 2,3,4,5 and 6, Charge II.

During the entire months of October and November 1945 accused was furnished military vehicles for his use as military police officer (R. 7; Pros. Ex. 2). Paragraphs 28c and 29, AR 850-15, dated 1 August 1945, provide that motor vehicles will be used for official business only, including the

following special uses:

"29a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized recreational, welfare, and morale building activities.

c. Conveying children at posts, camps, and stations to and from schools not conveniently accessible by public transportation.

d. Transportation of personnel and supplies necessary to the operation of field or mobile exchanges when authorized by the commanding officer in accordance with AR 210-65, and when no other form of transportation is available" (R. 7; Pros. Ex. 1).

These provisions were strictly construed, and no exceptions were allowed, in District Number 2 (R. 7; Pros. Ex. 2). On 17 October accused transported Mr. George Lyons and Mrs. Irene Lyons, civilians not on official business of the United States, in a government vehicle (R. 9; Pros. Ex. 10). On 23 October accused was seen with Mrs. Lyons in a government vehicle (R. 9, 10; Pros. Exs. 9, 11,14). On 1 November accused transported Mrs. Lyons in a government vehicle while helping the Lyons family move to another residence, "a distance of about a mile" (R. 8,9,10; Pros. Exs. 5,8,13,14). On 7 November accused was seen transporting a civilian woman in a government vehicle at Carolina Beach (R. 8; Pros. Ex. 3). At 1815 hours 26 November accused was seen driving a government vehicle with a male civilian in the front seat (R. 9; Pros. Ex. 9). Accused had no authority to transport Mr. or Mrs. Lyons in government vehicles (R. 7; Pros. Ex. 2). On the various occasions when they rode in military vehicles with accused during the months of October and November, "none of our trips were on official business," according to the testimony of Mr. and Mrs. Lyons (R. 10; Pros. Ex. 12).

4. Evidence for the defense.

Evidence for the defense was contained in the stipulations admitted as prosecution's exhibits and similar stipulations offered by the defense and admitted in evidence without objection.

Mr. Lyons stated that accused "has developed into rather a close friend of the family." His rides with accused were not prearranged and he simply went as a passenger when accused was driving "to or from work" or on other duty, except on one occasion when Mr. Lyons drove accused home in "the official M.P. car" from a party at which accused had become ill. On a "night late in November," witness was in Military Police Headquarters while accused, "very much agitated," was searching for a .38 caliber pistol of his which was missing. On this occasion, witness "states definitely," that neither he nor accused was "in any way under the influence of intoxicants" (R. 10; Pros. Ex. 13).

Mrs. Lyons stated that she "has ridden in the Army official M.P. car in company with (accused) because (he) happened to be going someplace

and asked (her) to accompany him" (R. 10; Pros. Ex. 14).

Sergeant Cosper B. Kingrey stated in an affidavit:

"'That he was present on duty as desk sergeant at Military Police Headquarters on the night of 3 November 1945 until he went off duty about 2330; that Captain Showalter was in Headquarters during this time; that affiant's attention was not attracted to Captain Showalter at the time and therefore he is unable to make any statements regarding the captain's condition on that night; that, in his opinion, had the captain been drunk, he would have noticed it, but did not'" (R. 10, Def. Ex. A).

Technical Sergeant Joseph J. Curcio, Military Police Detachment Number 1, stated in an affidavit:

"'That on the night of 3 November 1945, affiant was on radio patrol together with a Marine MP; that message was relayed to him about some trouble at the Plantation Club; that affiant in MP car started in direction of the Club and that within a couple of blocks of Military Police Headquarters, Captain Showalter passed in official MP car and motioned with hand for affiant to follow which affiant did; that at corner of Third and Orange Streets, the Captain's car was seen to swerve to the right as a civilian car turned sharply to the left at the street intersection; that the captain's car collided with a civilian car parked on the right side of the street beyond the intersection; that the captain stopped and later parked his car; that affiant rode up, got out, assisted the Captain to pull the rear fender off the rear wheel and was present while report was sent to Headquarters and Corporal Goldberg, Detachment investigator came up in Jeep and made his investigation; that after this, the Captain drove his car back to Headquarters and then continued on to the Plantation Club in car with affiant; that at the Club, the Captain handled the matter of a lieutenant who was reported as having given trouble and returned to Wilmington in the County Police car while affiant with Marine MP continued on with patrol duty; that two deputy sheriffs and Sergeant Dewey Watson drove up to the scene of the accident shortly after it occurred and then were next seen at the Plantation Club; that throughout the above time, affiant did not notice anything unusual about the captain's manner or demeanor and did not notice anything that led affiant to regard the captain as being intoxicated; that the captain seemed a little excited at the scene of the wreck and also at the Plantation Club, which affiant attributed to the captain having had a wreck." (R. 8; Pros. Ex. 5)

Sergeant John Holota, Jr. stated in an affidavit:

"'That he was on duty as desk sergeant at MP Headquarters on the night of 26 November 1945; that affiant recalls this date due to the incident which occurred in which Captain Showalter found his personal pistol missing; that Captain Showalter was in the Headquarters,

but that affiant did not notice anything unusual about the Captain's condition or appearance; that nothing that the captain did or said attracted affiant's attention, except the remarks and search for the missing pistol; that in affiant's opinion, had the Captain been drunk at the time, affiant believes that he would have noticed it but did not'" (R. 11; Def. Ex. B).

Sergeant Dewey F. Watson, Military Police Detachment No. 1, stated in an affidavit, that after the collision 3 November,

"***affiant set to work at helping to control traffic at the scene and for this reason did not get very close to Captain Showalter; that affiant did not at that time notice anything unusual about the captain's manner nor appearance; that upon leaving the scene of the wreck, the County car proceeded on to the Plantation Club at which place affiant observed Captain Showalter and Sergeant Curcio talking with some Lieutenant; that affiant and the two named deputies went about handling the merchant marine, arrested the latter and brought him back to Wilmington in the County Car; that Captain Showalter also rode back to Wilmington in the County car on the front seat with Deputy Sheriff Singletary, with affiant, Deputy Sheriff Carter and the drunk merchant marine riding together on the rear seat; that at no time mentioned above did affiant notice anything unusual about the captain's manner or demeanor which appeared natural and normal in every respect.

"That affiant was present at MP Headquarters on duty as Desk Sergeant on the night of 26 November, 1945, that he relieved Sergeant Holota at the desk about 2345; that Captain Showalter [accused] was then already in the headquarters and asked affiant if affiant had seen or knew anything about the Captain's pistol found missing; that affiant assisted the Captain by looking through the Captain's desk; that affiant did not get very close to Captain Showalter at any time and affiant did not notice any odor of whiskey about the captain nor anything unusual in the Captain's manner" (R. 8, Pros. Ex. 4).

Accused, after having been informed of his rights (R. 11), elected to make an unsworn statement, the material portions of which were substantially as follows: He "came into the service" in March, 1926, became a first sergeant and was commissioned first lieutenant in September 1942. He has served as Provost Marshal of the Middle Eastern Service Command and as company commander of a Military Police company. He later worked with the British Intelligence and served as a courier officer for the Middle East, and was then transferred to Provost Marshal's offices in London and in France (R. 11,12). While he was in the Middle East, his teeth were knocked out and he suffered a bad jaw injury. He was given false teeth which were not satisfactory. His dentist recommended a mouth wash called "Kalox," which has "about 30% alcoholic base." He used this mouth wash on 3 November; "it does have a distinct alcoholic odor." He "definitely

was not drinking" on the night of 26 November, and since he "generally used the mouth wash when I come in" he might have done so that night. "One thing I don't put up with is drinking on duty and I don't do it myself" (R. 12,13). On various occasions, he has transported Mr. and Mrs. Lyons in a Government vehicle but "was always on duty" when he did so. "I was very particular about that because I was always on duty when I picked them up, either going to the office or coming from the office or someplace ***. I live in Maffitt Village, the only place I could get quarters in town and this going to and from town I'd pick up Mr. Lyons or Mrs. Lyons or if I was going to the beach to check that area, which Fort Fischer is a part of, and I'd go and ask Mrs. Lyons if she wanted to ride down with me ***. I never took them out of town or anything like that, but just riding around the locality I'd maybe ask them to go with me" (R. 13).

5. Specifications 1 and 2, Charge I and Charge I, and Specification 1, Charge II and Charge II.

Accused was found guilty of having been found drunk at Wilmington, North Carolina, 3 November 1945 and 26 November 1945, while on duty as commanding officer of Military Police Detachment No. 1, in violation of Article of War 85, and guilty of wrongfully and unlawfully operating a government owned motor vehicle in Wilmington on 3 November 1945, "while under the influence of alcoholic beverages," in violation of Article of War 96. To establish a violation of Article of War 85 it is necessary to prove (a) that accused was on a certain duty as alleged, and (b) that he was found drunk while on such duty (MCM, 1928, par. 145, p. 160). Accused was shown to have been commanding officer of Military Police Detachment No. 1, at his headquarters at Wilmington, North Carolina, on the dates in question and on 3 November in what capacity had responded to a call to quell a disturbance at the Plantation Club. On 26 November he was "on duty as officer in charge." The court could properly infer from these facts that he was as alleged on duty as commanding officer. He was "found drunk" within the meaning of Article of War 85. "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the Article" (MCM 1928, par. 145, p. 160; CM 234711, Sandlin, 21 BR 137). There was sufficient evidence to show that accused was thus intoxicated on 3 and 26 November and had been driving a government vehicle while in this condition 3 November. On 3 November he "clearly showed evidence of having been drinking *** there was a distinct odor of alcohol on his breath," his face was flushed and more ruddy than usual and he was "a little unsteady on his feet." He had a heavy tongue and his speech was loquacious. On 26 November one witness noticed accused's "gay and jocular mood and at intervals his display of drowsiness." From accused's appearance, a master sergeant on duty in the Military Police Headquarters and a Military Police corporal concluded that on both dates accused was intoxicated to a degree sensibly to impair the rational and full exercise of his mental and physical faculties; two deputy sheriffs were of the same opinion with reference to accused's condition on 3 November and one of them stated that on that date accused "was definitely in too much of an

intoxicated condition to drive an automobile." In the opinion of the Board of Review these witnesses were competent so to testify and, by reason of their special experience with military police duties and operation of automobiles, respectively, were qualified as "quasi experts" to state these conclusions as to the extent of accused's intoxication (see Hoag v. State (Texas Crim. Ap. 1920),223 S.W. 472, 473; State v. Cather (Ia. 1903), 96 N.W. 722; Wigmore on Evidence, 3rd Ed., sec. 1794):

> "***, military witnesses, with proper rank and experience to enable them to testify as quasi experts may be asked their opinion as to whether the accused was or was not capable under the circumstances of the case of properly executing the duty indicated in the specification" (Winthrop, 1920 Reprint, p. 615).

Driving an automobile under the influence of alcohol constitutes a violation of the 96th Article of War (CM 225896, Smyth, 14 BR 378, 379).

6. Specifications 2, 3, 4, 5 and 6 of Charge II and Charge II.

Accused's plea of guilty and the evidence are sufficient to support findings that he wrongfully transported George W. Lyons and Irene Lyons in government owned motor vehicles at the times and places alleged. Since it appears that in each instance accused was on an official mission, it cannot be said that he converted the vehicle to his own use (see CM 296630, Seidentop; CM 256706, Siddon, 36 BR 343; CM 252620, Watterson, 34 BR 101,102), but the allegations that he did so may be treated as surplusage. Such transportation of civilians clearly violates the prohibition contained in AR 850-15. These civilians were not on "official business" and none of their missions was included within the special uses authorized by paragraph 29 of said Army Regulations. Unauthorized transportation of civilians in Government vehicles constitutes a violation of the 96th Article of War (CM 302849, Hertz; CM (ETO) 2966, Fomby, 8 BR (ETO) 215). Therefore, it is the opinion of the Board of Review that the record of trial with respect to these offenses is legally sufficient to support only so much of the findings of guilty of Specifications 2, 3, 4, 5 and 6 of Charge II as involves findings of guilty of wrongfully transporting civilians in government owned motor vehicles at the times and places alleged.

7. War Department records show that accused is 41 years of age, is married, has two children and is a high school graduate. He enlisted in the Army 12 March 1926 and attained the grade of first sergeant. He was discharged for the convenience of the Government, appointed first lieutenant, Army of the United States, and entered on active duty, assigned to the Corps of Military Police, 3 September 1942. He was promoted to captain 3 September 1943. He served overseas in the Levant Service Command and in the European Theater of Operations from 3 May 1943 until 18 February 1945. He was recommended for award of the Legion of Merit for his "superior handling of the casuals attached to his company" and training of recruits from November 1941 to June 1942, while he was a first sergeant. This recommendation was dis-

approved by order of the Secretary of War 16 November 1943. He has been authorized to wear the Good Conduct ribbon and medal.

8. Accused was initially sentenced "to be restricted to the limits of his post for three (3) months and to forfeit one hundred dollars ($100.00) of his pay per month for a like period." Thereafter the reviewing authority returned the record of trial for revision of the sentence in accordance with the mandatory requirement of dismissal provided by Article of War 85, and the court revoked its former sentence and sentenced accused to be dismissed the service. Each of the seven members of the court, the trial judge advocate, the assistant trial judge advocate, the defense counsel and the assistant defense counsel thereupon recommended to the reviewing authority that, in view of accused's "excellent record over a period in the neighborhood of twenty (20) years in the Armed forces of the United States, and taking in mind the fact that, although the war has not been officially declared over, but, as a fact, hostilities have ceased, *** the utmost clemency be granted to this officer."

9. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted above, 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 of the Specifications of Charge I and of Charge I and Specification 1 of Charge II and of Charge II, and legally sufficient to support only so much of the findings of guilty of Specifications 2, 3, 4, 5 and 6 of Charge II as involves findings of guilty of wrongfully transporting civilians in government owned motor vehicles at the times and places alleged, and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 85, and is authorized upon a conviction of a violation of Article of War 96.

William B. Kuder, Judge Advocate

Donald K. Carroll, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307018 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 21 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Alvin A. Showalter (O-488557), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of being found drunk on duty as a Commanding Officer of a Military Police Detachment on two occasions, in violation of Article of War 85 (Charge I), of wrongfully operating a government owned motor vehicle while under the influence of alcoholic beverages, in violation of Article of War 96 (Specification 1, Charge II), and of wrongfully converting to his own use a government owned motor vehicle by transporting unauthorized civilians on five occasions, in violation of Article of War 96 (Specifications 2,3,4,5 and 6, Charge II). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of the Specifications of Charge I and of Charge I and Specification 1 of Charge II and of Charge II, and legally sufficient to support only so much of the findings of guilty of Specifications 2,3,4, 5 and 6 of Charge II as involves findings of guilty of wrongfully transporting civilians in government owned motor vehicles at the times and places alleged.

On the night of 3 November 1945 the accused, who was Commanding Officer of a Military Police detachment, came into his headquarters at Wilmington, North Carolina, under the influence of intoxicants, and left twenty minutes later, driving a government vehicle, to quell a disturbance at a club. On his way to the club he swerved to avoid an automobile which had stopped in front of him and inadvertently caught the bumper of a parked car with his rear fender. Damage to both vehicles was slight. He then successfully completed his mission. On 26 November he again appeared at his headquarters under the influence of intoxicants. His intoxication was stated to have been sufficient on both occasions to impair the rational and full exercise of his mental and physical faculties, and he was therefore drunk within the meaning of the 85th Article of War. During October and November on five occasions he transported one or both of two civilian friends of his in a government vehicle, contrary to regulations, while he was on various authorized missions.

The accused enlisted in the Army 12 March 1926 and attained the grade of first sergeant. He served continuously until 3 September 1942, when he was commissioned first lieutenant, Army of the United States, and assigned to the Corps of Military Police. He was promoted to captain 3 September 1943. He served overseas in the Levant Service Command and in the European Theater of Operations for nearly two years. A recommendation for the award of the Legion of Merit in recognition of his "superior handling of the casuals attached to his company" as a first sergeant from November 1941 to June 1942 was disapproved by order of the Secretary of War 16 November 1943. The accused is entitled to wear the Good Conduct ribbon and medal. The court initially sentenced the accused to be restricted to the limits of his post for three months and to forfeit $100 pay per month for a like period. Thereafter the reviewing authority returned the record of trial for revision of the sentence in accordance with the mandatory requirement of dismissal provided by Article of War 85, and the court revoked its former sentence and sentenced accused to be dismissed the service. All members of the court, prosecution and defense recommended to the reviewing authority that the "utmost clemency" be granted to the accused, in view of his "excellent record over a period in the neighborhood of twenty (20) years" in the Army, and in view of the fact that his offenses occurred after the cessation of hostilities.

Under the foregoing circumstances, it is recommended that the sentence be confirmed but suspended during good behavior.

4. Consideration has been given to requests for clemency contained in a letter from Honorable Harley M. Kilgore, United States Senator from West Virginia, addressed to Colonel Earl B. Wixcey, and in a letter inclosed therewith from the accused to Senator Kilgore, copies of which are hereto attached, and to the attached copy of a report by Captain Charles E. Bailey, Headquarters, District Number 2, Fourth Service Command, commendatory of the accused's command of his detachment from 17 August 1945 to 6 October 1945, sent by the accused to The Judge Advocate General.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Form of action
3. Cpy ltr fr Sen H.M. Kilgore w/ltr fr acc'd
4. Cpy report signed by Capt Chas E Bailey

(GCMO 157, 4 June 1946).

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

SPJGN-CM 307028

UNITED STATES	)	XII CORPS
v.	)	Trial by G.C.M., convened at Regensburg, Germany, 2 July 1945. Dismissal and confinement for five (5) years.
Lieutenant Colonel MAYFIELD M. MORRIS (0-397249), Finance Department.	)	

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

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

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

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

Specification 1: In that Lieutenant Colonel Mayfield M. Morris, 77th Finance Disbursing Section, did, during October and November, 1944, at Nancy, France, wrongfully gamble with enlisted men of the 77th Finance Disbursing Section then under his command.

Specification 2: In that * * *, did, on or about 4 April 1945, at Schlitz, Germany, wrongfully gamble with enlisted men of the 77th Finance Disbursing Section then under his command.

Specification 3: In that * * *, did, during October and November, 1944, at Nancy, France, wrongfully gamble for money while a disbursing officer.

Specification 4: In that * * *, did, at Bad Kreuznach, Germany, during the period between 21 and 27 March 1945, wrongfully gamble for money while a disbursing officer.

Specification 5: In that * * *, did, on or about 4 April 1945, at Schlitz, Germany, wrongfully gamble for money while a disbursing officer.

Specification 6: In that * * *, did, at Luxembourg City, Luxembourg, on or about 29 December 1944, wrongfully exchange for Gastone Smidt, a Luxembourg civilian, 99,000 French francs, by receiving from the said Gastone Smidt 99,000 French francs and returning therefor the equivalent in Belgian money.

Specification 7: In that * * *, did, at Bad Kreuznach, Germany, on or about 24 March 1945, wrongfully conspire with Lieutenant Colonel August C. Pavlatos, 101st Evacuation Hospital, to retain and appropriate for the use and benefit of the said Lieutenant Colonel Mayfield M. Morris and Lieutenant Colonel August C. Pavlatos about 24,970 German marks, United States value about $2,497, which had been taken by the said Lieutenant Colonel Mayfield M. Morris and Lieutenant Colonel August C. Pavlatos from a German military hospital at Alzey, Germany.

Specification 8: In that * * *, having, in conjunction with Lieutenant Colonel August C. Pavlatos, 101st Evacuation Hospital, taken from a German military hospital at Alzey, Germany, about 24,970 German marks, United States value of about $2,497, did at Bad Kreuznach, Germany, on or about 24 March 1945, in conjunction with the said Lieutenant Colonel August C. Pavlatos, wrongfully fail to give notice of and turn over without delay to the proper authority, the said 24,970 German marks.

CHARGE II: Violation of the 79th Article of War.

Specification: In that * * *, did, on or about 24 March 1945, at Bad Kreuznach, Germany, in conjunction with Lieutenant Colonel August C. Pavlatos, 101st Evacuation Hospital, wrongfully appropriate to his own use and benefit, and that of the said Lieutenant Colonel August C. Pavlatos, the following public property of the United States taken from the enemy: about 24,970 German marks, United States value of about $2,497.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, and to be confined at hard labor for five years. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Army Forces European Theater, for action under Article of War 48. The latter, who was empowered to act as confirming authority until 19 January 1946 when such power was terminated by W.D. Radio WCL 39392, confirmed the sentence on 18 January 1946, but disapproved the findings of guilty of Charge II and its Specification. He designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and, pursuant to Article of War 50½, withheld the order directing the execution of the sentence. In accordance with instructions contained in the above mentioned radiogram and a letter of the same date, the record of trial has been forwarded to The Judge Advocate General.

3. The evidence for the prosecution briefly summarized, is as follows:

The accused, who had been a Disbursing Officer operating under a symbol since May of 1944, was the commanding officer of the 77th Finance Disbursing Section, APO 403, during October and November 1944, and continued in that capacity until sometime after 4 April 1945 (R. 70-74). While present with his unit stationed at Nancy, France, during October and November 1944, the accused played poker once or twice a week, or about a dozen times in all, with some of the enlisted men under his command (R. 73, 74, 104, 118). At Bad Kreuznach, Germany, between the 21st and 27th of March 1945, the accused played poker with an officer of his own unit and officers of the 841st Ordnance Depot Company (R. 74, 75). On or about 4 April 1945 at Schlitz, Germany, the accused again played poker with enlisted men of his organization (R. 105, 106, 119, 120). In all of these games bets were made and money exchanged with a limit of two to five francs and two or three raises (R. 74, 75, 105, 119, 120).

On 29 December 1944 the accused instructed his cashier to exchange 99,000 French francs into Belgian money at the current rate of exchange for one Gastone Smidt, a civilian, who owned the building that the accused's organization was occupying at the time, in Luxembourg City, Luxembourg. The cashier made the exchange of monies in the presence of the accused, giving the Belgian money to Smidt (R. 76, 110, 111, 123).

On or about 22 March 1945, Lieutenant Colonel August C. Pavlatos, Executive Officer of the 101st Evacuation Hospital, who had known the accused since October or November of 1944, left his unit, then stationed near Mayen, Germany, on a reconnaissance for a new hospital location. Accompanied by Technician Fifth Grade Joseph G. Ward, the driver of his one-quarter ton vehicle or "jeep," Lieutenant Colonel Pavlatos went first

to the Surgeon's Office at the XII Corps Headquarters and then to Bad Kreuznach, where he and his driver spent the night at the 314th Ordnance (R. 27, 31, 37). While at Bad Kreuznach, he encountered the accused who wanted to accompany him "for the ride" to Alzey, Germany, the recommended site for the new hospital location (R. 37). The following morning the two officers and the driver proceeded to Alzey where they spent the night at the Landsie Heil Flegeschteit (State Nursing and Hospital Institution), owned by the State of Hessen (R. 13, 14, 19, 29, 37). On the next morning, Technician Fifth Grade Ward drove the accused back to Bad Kreuznach and proceeded on to his organization near Mayen (R. 28, 37). Later in the day Lieutenant Colonel Pavlatos instructed the administrative secretary and others of the German hospital staff to leave their office within ten minutes (R. 21, 39). While they were packing the contents of the safe, which included some 98,419 reichmarks and 76 pfennigs remaining from 100,000 reichmarks paid to the hospital on 17 March 1945 by the Wehrmacht for rental on hospital beds, Lieutenant Colonel Pavlatos returned and informed them that the money was Army property (R. 21, 39). Then he placed the money back in the safe, locked it and retained the keys (R. 21, 22, 38, 39).

The same day Lieutenant Colonel Pavlatos obtained a vehicle and driver from the Chaplain of the 30th Field Hospital and returned to Bad Kreuznach where he telephoned the accused and stated, "I have a problem for you" (R. 39, 40, 50, 51). That evening the accused, in a weapons carrier assigned to his section and driven by Staff Sergeant Paul T. King, followed Lieutenant Colonel Pavlatos back to Alzey. Enroute the accused told Sergeant King they were going there to pick up some money that Lieutenant Colonel Pavlatos had found (R. 103-107). After spending the night at Alzey, the two officers went to the adminstration building where Lieutenant Colonel Pavlatos opened the safe in the office, removed the money, placed it in a box and turned it over to the accused, saying, "This is your baby" (R. 41,42). The box containing the money was placed in the weapons carrier (R. 41, 42). Later, Sergeant King, Technician Fifth Grade Ward, and First Sergeant Frank L. Fields, of the 101st Evacuation Hospital, who had returned with Technician Fifth Grade Ward from Mayen to Alzey on the night before, noticed the box when they were loading some hospital equipment in the vehicle (R. 29, 30, 69, 107).

Following the jeep in which Lieutenant Colonel Pavlatos, Sergeant Fields and Technician Fifth Grade Ward were riding, the accused and Sergeant King proceeded to Bad Kreuznach in the finance weapons carrier (R. 30, 40-42, 63). Enroute the accused informed Sergeant King that the money was in the vehicle with them (R. 107). At Bad Kreuznach the money was taken to the accused's office where the accused asked Lieutenant Colonel Pavlatos to assist him in counting it. According to the latter:

"He asked me to help him count it. He had asked me the second time and I said, 'Yes, I will help you count it.' I counted part of it. At the completion of these several bundles that I handled, I counted, he was in the process of counting the remainder and suddenly he stopped and said, 'Col. Pav., you have done a good job, you should have a reward.' I said, 'Reward'. I said, 'What for?' He said, 'If it hadn't been for you and your men there wouldn't have been any money here.' He said, 'We all helped to recover this money and a reward is appropriate.' I inquired by several different types of questions and I was assured that it was proper to accept this reward, with the statement that other combat units had received rewards and that it was proper. * * * He was counting while he was talking and putting some figures, I guess, on paper, and he said, 'Two thousand marks would be appropriate for the men, your men, and have two thousand for Sergeant King' - his man - and the balance, whatever it was, I should have a reward and he should have a reward. * * * Approximately ten thousand marks. Not exactly; it was in other figures. * * * He said that he would give me American marks." (R. 43).

Thereafter, the accused approached Technical Sergeant George W. Elia, cashier of the 77th Finance Disbursing Section and asked him for fourteen thousand Allied military marks, which Sergeant Elia gave him (R. 85). The accused then gave this money to Lieutenant Colonel Pavlatos who "asked for receipts and the proper forms" but did not receive them at the time (R. 44, 45, 49, 55).

After remaining at the 77th Finance Disbursing Section at Bad Kreuznach for approximately an hour, Lieutenant Colonel Pavlatos, Sergeant Fields and Technician Fifth Grade Ward departed for the 101st Evacuation Hospital (R. 31, 65, 69). Lieutenant Colonel Pavlatos was riding in the jeep driven by Technician Fifth Grade Ward and Sergeant Fields was following in the finance weapons carrier (R. 65, 69). Before reaching Mayen, the party stopped and Lieutenant Colonel Pavlatos called the two enlisted men over to him (R. 31,65, 70). According to Sergeant Fields,

"He [Col. Pavlatos] had some invasion German marks in his hand and he said there had been some money found at Alzey and we were to receive two hundred dollars each as a reward, that he was getting a reward, Col. Morris was getting a reward and Col. Morris was giving a reward to Sergeant King" (R. 70).

Thereafter Lieutenant Colonel Pavlatos gave Sergeant King and Technician Fifth Grade Ward two thousand Allied military marks each (R. 66, 67, 70).

On the same morning the accused delivered a bundle containing 96,694 German Reichmarks to Technical Sergeant George W. Elia, his cashier, and said to him, "Don't say anything about it." Thereafter accused requested and received from the cashier an additional twelve thousand Allied marks and War Department Finance Department Form No. 38, the latter being a receipt normally filled out in triplicate, signed by the finance officer or his deputy, and given for miscellaneous collections (R. 83, 85, 86, 92, 99, 103; Pros. Ex. 2). Of this twelve thousand marks, the accused, who had previously stated to Sergeant King, "you earned yourself two hundred dollars," gave him two thousand marks (R. 107, 108, 113). Sergeant King put the money in his billfold in the usual manner but several days later removed it, wrapped it in a piece of paper, and placed it in a separate compartment therein (R. 115).

In "running a tape" on the amount of German marks handed him by the accused, the cashier's first total was 76,694, which he "knew * * * was twenty thousand under * * *." The accused happened to walk in at that particular time and, finding the error "right off," marked through the figure made by the adding machine and wrote in the amount 70,696 without making any explanation (R. 90-93; Pros. Ex. 5). As a consequence, the cashier entered only 70,696 German marks on his daily cashier's report for March 24th as money received from Lieutenant Colonel Pavlatos (R. 96-98; Pros. Ex. 7). Actually the cashier had turned over 93,700 or more German marks to Captain Frederick C. Darmstadt, the accused's assistant deputy finance officer, after counting the money, and did not know why the full amount was not entered (R. 71, 79, 97, 99, 101). He had made the entry, "Exchange of Marks German for Military 26,000," with respect to the two transactions that day wherein he had given the accused 14,000 and 12,000 marks (R. 94-96, 98; Pros. Ex. 6).

On the same day the accused submitted for typing a rough draft of the following letter to Technician Third Grade Donald E. O'Bryant, his administrative clerk:

"SUBJECT: Captured Enemy Funds.

TO : Finance Officer, 77th Finance Disbursing Section, APO 654, U. S. Army.

1. Amount 70,694 German marks.

2. The above total is 468 Retenmarks and 70,226 Reichmarks, all were issued at Berlin, Germany.

3. The undersigned had been on reconnaisance to find a suitable location for an evacuation hospital 23 March 1945. The German military hospital at Alzey, Germany was on the list of prospective sites tendered by XII Corps Surgeon. Upon arrival

at Alzey, Germany, it was discovered that there was no one in charge, the military medical authorities having fled. Civilians were attempting to remove hospital property and the undersigned immediately took charge and put a stop to the removal of everything. All keys were obtained and doors locked. One civilian was apprehended in the act of taking this currency from the safe. It is not known whether any more money was stolen from this safe previously, but what was on hand was then put under safeguard over night and turned in to the 77th Finance Disbursing Section 24 March 1945.

s/ AUGUST C. PAVLATOS
AUGUST C. PAVLATOS
Lt. Col., M.C." (R. 115, 116; Pros. Ex. 3).

After typing the above letter, Technician Third Grade O'Bryant "* * * typed this miscellaneous receipt of money W.D.F.D. Form No. 38 to be sent with the report" (R. 116; Pros. Exs. 2, 3). The letter or report, prepared for Lieutenant Colonel Pavlatos' signature was handed to Sergeant King by the accused who said to him: "Here, you can probably copy this better than I can; copy this signature on the letter for me, * * *; I have told Colonel Pavlatos we would, that I would sign it or have it signed and it is allright." As a consequence Sergeant King "* * * just picked it up and wrote it [Lt. Col. Pavlatos' signature] down as he [the accused] told me to do" (R. 109; Pros. Ex. 3). The original of the War Department Finance Department Form No. 38, acknowledging receipt of 70,694 German marks from Lieutenant Colonel Pavlatos as "Funds believed to be captured enemy funds" and a copy of this letter were mailed to the latter by Technician Third Grade O'Bryant (R. 116). Lieutenant Colonel Pavlatos, who knew that a letter similar to Prosecution's Exhibit 3 had been written but did not authorize anyone to sign such letter for him, admitted receipt of W.D.F.D. Form No. 38 bearing the accused's signature, but denied receiving this letter which was purportedly mailed with it (R. 45-48, 116).

On the next day, the following letter was prepared for and signed by the accused:

"SUBJECT: Captured Enemy Funds Turned in to Finance Office.

TO : Commanding General, Third U. S. Army, APO 403, U.S. Army
ATTN: G-5 Financial Branch.

1. Amount turned in 70,694 German marks - $7,069.40.

2. German marks issued at Berlin, Germany.

3. Funds acquired from Lt. Col. August C. Pavlatos, O-358275,

M.C., 101st Evacuation Hospital, APO 403, U.S. Army. Copies of his letter attached.

4. 'The dollar amount of the funds reported herein has been entered in the Special Deposits account of the undersigned, pending determination as to whether or not the funds are to be considered as captured enemy funds. Request that this office be notified of this decision, and, in case the funds are to be repaid, request that the name of the payee and the authority for repayment be furnished.

s/ M. M. MORRIS
M. M. MORRIS
Lt. Col., F.D.,
Finance Officer."(R. 116, 117; Pros. Ex. 8).

Incl: Ltr fr
Lt. Col. Pavlatos
dated 24 Mar. 1945.

Technician Third Grade O'Bryant sent this letter to the Third Army inclosing copies of the executed W.D.F.D. Form No. 38 and the letter which Sergeant King had signed for Lieutenant Colonel Pavlatos (R. 117; Pros. Exs. 2, 3, 8).

The 93,700 German marks, which Captain Darmstadt had received from Sergeant Elia on 25 March, remained in one of the safes under the former's surveillance until 10 or 11 April when he put the money in bags, made up transfers thereon in favor of a Major Laboury of Third Army and turned these over to the accused for delivery to Frankfurt (R. 79, 80).

On 13 April 1945 during an interview with Lieutenant Colonel Joe A. Stamper, Assistant Inspector General of the XII Corps, the accused, after having been advised of his rights, admitted: that he helped recover the enemy funds from a German medical installation at Alzey; that such funds amounted to "* * * all the money that was on a Form 38 that was made on the turn in of money, plus money retained by him and others"; that the latter sum totalled 24,970; that this 24,970 and some German marks he had in his pocket were exchanged for Allied invasion marks by his cashier, making a total of 26,000; that of this amount, he retained 10,000 [a net of 8,970] marks and "* * * gave two thousand marks to Sergeant King and fourteen thousand marks to Col. Pavlatos"; and, as to the disposition of the sum he gave Lieutenant Colonel Pavlatos, stated, "We decided since the men were on the trip it would be simply nice to split a little with them" (R. 124-131).

4. Evidence for the defense, briefly summarized, is as follows:

It was stipulated that at the trial of Lieutenant Colonel

Pavlatos (U.S. v. Lt. Col. Pavlatos), Doctor A. R. Schlapp was asked the following question and gave the following answer:

"Q. Was your hospital a civilian or a military hospital?
A. It was partly civilian and partly a military hospital" (R. 138).

Colonel George L. Blossom, Finance Officer, XII Corps, and accuser in the case, testified that he had known the accused for approximately one year during which time the accused had worked under his general supervision. According to Colonel Blossom, the accused's general reputation as to character and integrity was good. This opinion was based upon "the way he has gone along with units which he has served and the general feeling that people had toward him as to the service which he had rendered to them" (R. 138-139). Lieutenant Colonel Joe A. Stamper, who upon being recalled as a witness for the defense, stated that he made an inspection of the accused's office 6 April 1945 and counted 93,700 indigenous German marks which were returned to one of the safes (R. 140-143).

The accused's WD AGO Form No. 66-1, introduced by stipulation, indicated that from the period of 11 September 1942 until 31 December 1944, he had one superior and five excellent efficiency ratings (R. 140; Def. Ex. 1). It was also stipulated that Major Harrison F. English, M.C. and Major William H. Maryanski, M.C. of the 101st Evacuation Hospital were qualified psychiatrists, and, that after examining the accused between the dates of 9 June and 13 June 1945, diagnosed him: "Anxiety state, moderately severe, manifested by depression, apprehension, weight loss, gastro-intestinal disturbances." Further, that he was sane at the time of the examination and able to stand trial (R. 114, 145; Def. Exs. 2, 3).

After having been fully advised of his rights, in open court, the accused elected to remain silent (R. 145, 146).

5a. The Specification of Charge II and Charge II, having been disapproved by the confirming authority at a time when his powers to so act had not been revoked, will not be considered.

b. Evidence of record adduced in support of Specifications 1 and 2 of Charge I clearly establishes that the accused, while a disbursing officer, gambled at poker with enlisted men of his command in October and November of 1944 and on 4 April 1945. Since he was not charged in these Specifications with gambling while a disbursing officer, conviction in each instance must necessarily, and can, be predicated upon the well established rule of law that gambling by an officer with enlisted men constitutes conduct prejudicial to good order and military discipline in violation of Article of War 96. CM 232017, Marinelli, 18 BR 377; CM 241176, Petty, 26 BR 213; Winthrop's Military Law and Precedents, Sec. 1129, Reprint 1920, p. 727.

c. That the accused gambled for money at poker while a disbursing officer, at the time and places alleged in Specifications 3, 4, and 5 of Charge I, stands undisputed. Since such conduct has been held to contravene, by necessary implication, the prohibitions contained in paragraph 6, AR 35-120 as well as being in itself conduct to the prejudice of good order and military discipline, both violative of Article of War 96 (CM 203000, Pruit, 7 BR 1), the record is legally sufficient to support these Specifications. The multiplicity of charges involved in Specifications 1 and 3, and 2 and 5, of Charge I, although considered improper, is of no legal consequence since there is no indication that the sentence imposed was in any way affected. MCM, 1928, par. 27; CM 120542 (1918), CM 122371 (1918), CM 196619 (1931), Sec. 428(5), Dig. Ops. JAG 1912-40, pp. 294, 295.

d. Specification 6 of Charge I alleging that the accused, on or about 29 December 1944 wrongfully exchanged for a Luxembourg civilian equivalent French for Belgian money, is supported by competent uncontradicted testimony insofar as the facts attendant thereto are concerned. The only question posed with respect to this Specification is whether or not such exchange was wrongful as charged. It is too well established to require discussion that the violation or disobedience of legal orders issued by competent higher military authority constitutes conduct to the prejudice of good order and military discipline in violation of Article of War 96. This is true even though such disobedience or contravention of orders may also violate one or more of the other punitive Articles of War. With respect to the facts presently under consideration, Administrative Memorandum Number 35, Supreme Headquarters, Allied Expeditionary Force, published 25 October 1944 and revised 7 December 1944, subject: "Transactions in Currency and Foreign Exchange Assets," provided in part:

> "2. Except as authorized, personnel in occupied German territory or liberated territory are prohibited from * * *
>
> b. Participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies * * *
>
> e. Participating in the transfer of any currency against any other currency on behalf of persons not belonging to the Allied Forces in liberated or occupied territory."

This directive, being published by competent higher authority, was binding upon the accused, and also subject to judicial notice by the

court. The accused's violation of its terms, therefore, constituted an offense in violation of the Article of War charged. It is of no final consequence that he may not have had knowledge of its contents, as suggested by the testimony of his assistant deputy finance officer and cashier. This consideration, as well as the fact that the accused apparently received no personal gain from the prohibited transaction, is in mitigation only.

e. Ample evidence has been adduced in support of the court's finding accused guilty of wrongfully conspiring with Lieutenant Colonel Pavlatos to retain and appropriate for their own use and benefit 24,970 German marks (value $2,497) taken from a German military hospital at Alzey, Germany, on or about 24 March 1945, in violation of Article of War 96, as charged in Specification 7 of Charge I. Although the redundant word "wrongfully" is used in the Specification, the gravamen of the offense is conspiracy, which is defined in paragraph 150e, Manual for Courts-Martial, 1928, as "* * * the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end." Thus it is evident that the word "conspire", or "conspiracy", of itself denotes the wrongful or unlawful character of an act. With respect to the elements of conspiracy as defined above, other than as to the unlawful purpose, the specification alleges and the facts indicate concert or combination on the part of two persons, i.e. Lieutenant Colonel Pavlatos and the accused. These two officers had known each other for some months and, on the day prior to the date of the alleged offense, had gone to the hospital together. After the accused's return to his station and after Lieutenant Colonel Pavlatos' driver had been sent on another mission, Lieutenant Colonel Pavlatos discovered the money whereupon he immediately borrowed a vehicle and returned to the accused's station. After reporting his discovery to the accused, both returned to the place where Lieutenant Colonel Pavlatos had locked the money in a safe and then they transported the money to the accused's office. Thereafter both agreed upon a "reward" for themselves as well as for every other person participating in the recovery of the funds. It appears that even the amount of the "reward" for the enlisted men was agreed upon. All of this happened prior to or during the time the actual exchange of German marks for Allied military marks was made. Taking the record in its entirety it is also quite apparent that a large amount of German marks would be very difficult to dispose of without the assistance of a finance officer or one of similar situation. All of these factors are chargeable to the accused prior to the time of the actual exchange of currency and appropriation of the money to his own use. The existence of an agreement or conspiracy prior to the actual time of the physical exchange of German marks for Allied military marks also finds support from the sequence of events subsequent to its being effected. Lieutenant Colonel Pavlatos, for instance, paid his two enlisted men the amount "suggested" by the accused and the latter also paid his enlisted assistant a similar amount. The accused executed a receipt

which falsely stated that a lesser amount had been received and drafted a letter indicating receipt of a lesser sum for Lieutenant Colonel Pavlatos' signature. At the accused's direction, the same enlisted man, who had accompanied him to recover the money, signed this letter for Lieutenant Colonel Pavlatos, purportedly without the latter's authority. In addition Lieutenant Colonel Pavlatos not only denied receiving this letter, although it was mailed with the W.D.F.D. Form No. 38 which he admittedly received, but made no protest at the improper lesser amount shown on the W.D.F.D. Form No. 38. Since proof of the agreement, combination, or confederation may be established by inference (Sec. 1667, 2 Wharton's Criminal Law 1932, pp. 1938, 1939), the court in the present case was unquestionably justified in its findings in this respect based on the facts above discussed as well as other competent evidence of record of similar import. On the basis of evidence adduced also it cannot be seriously questioned that the purpose of the agreement was unlawful. Both the accused and Lieutenant Colonel Pavlatos appropriated the money to their own use without any reasonable color of right. It is immaterial whether the money was in fact public or private property for, in either case, neither the accused nor Lieutenant Colonel Pavlatos had any right to it. Actually, under then existing military requirements, it was necessary to turn in private property captured from the enemy as well as public property so taken, and retention of any property so classified, for the benefit of one or more individuals, would be wrongful. See AW 79, 80, Par. 327, FM 27-10; Administrative Memorandum No. 49, SHAEF, 7 March 1945; Par. 6, SOP No. 11 Fiscal Procedure, Hqs. ETO, 23 March 1945. With respect to this specification also, it is considered an immaterial variance that the money was exchanged for Allied military marks, which were those actually misappropriated.

f. Specification 8 of Charge I alleging that the accused in conjunction with Lieutenant Colonel Pavlatos wrongfully failed to turn over to proper authority 24,970 German marks, taken from a German military hospital at the time and place alleged, is sufficient to allege an offense under Article of War 96 in that the accused is charged with wrongfully committing certain acts as therein alleged. See CM ETO 18176, Powell, 1945. Although the accused has been found guilty of a conspiracy to commit the offense which he is herein charged with actually committing in conjunction with another, there is no legal inconsistency in so doing. A conspiracy to commit a crime is not merged in the commission of the completed offense, but is a distinct offense of itself and punishable as such, notwithstanding its object, the attempted crime, has been accomplished. 11 Am Jur Conspiracy, Sec. 9, p. 549. The failure of the accused to turn over to and account to higher authority for 24,970 of the German marks recovered by Pavlatos as required by provisions in paragraph 6, Standing Operating Procedure Number 11, Fiscal Procedures, Headquarters European Theater of Operations, 23 March 1945, of which the court could take judicial notice, would be in violation of standing orders and an offense

under Article of War 96. The evidence is undisputed and it was admitted by the accused prior to trial (R. 129) that he failed to turn over to proper authorities 24,970 German marks as alleged. The fact that the marks originally came from a state hospital rather than a military hospital is a minor variance. Similarly it is of no consequence that all of the German marks were physically retained in his office and that Allied military marks were in fact those physically removed from the Finance Office safe. From the standpoint of the recorded transaction, German marks were those actually withheld. The gravamen of the offense was his wrongful failure to turn over to proper authorities certain monies which it was his duty to do.

6. War Department records show that the accused is 37 and 4/12 years of age, has completed high school and studied one year at the University of Tennessee. Civilian experience includes nine years in the banking business, one year as purchasing agent for the Chattanooga Box and Lumber Company, Chattanooga, Tennessee, and approximately one year as junior typist-clerk, Office of the Finance Officer, Fort Oglethorpe, Georgia. The accused was appointed Second Lieutenant, Finance Department, Army of the United States, on 13 August 1940; reported for extended active duty on 25 April 1941; promoted to First Lieutenant on 30 April 1942; promoted to Captain on 14 November 1942; promoted to Major on 8 June 1943 and promoted to Lieutenant Colonel on 15 September 1944. He is married.

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 and to warrant confirmation of the sentence. Dismissal and confinement are authorized upon conviction of a violation of Article of War 96.

Carl A. Hoffman, Judge Advocate.

Wilmot T. Vaughn, Judge Advocate.

Robert J. Clarner, Judge Advocate.

SPJGN-CM 307028 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War APR 17

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Mayfield M. Morris (0-397249), Finance Department.

2. Upon trial by general court-martial this officer was found guilty of gambling with enlisted men of his command, gambling while a disbursing officer, wrongfully exchanging French for Belgian money for a Luxembourg civilian, conspiring with another officer to retain and appropriate to their own use 24,970 German marks, value about $2,497, and wrongfully failing to give notice of and turn over without delay to proper authority the above amount in German marks, in violation of Article of War 96; and of wrongfully appropriating to his own use and benefit and that of another, public property of the United States taken from the enemy, to wit: 24,970 German marks, value about $2,497, in violation of Article of War 79. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority disapproved the findings of the accused guilty of wrongfully appropriating to his own use and benefit and that of another, public property of the United States taken from the enemy, to wit: 24,970 German marks, value about $2,497, in violation of Article of War 79 (Chg. II and its Spec.). He confirmed the sentence and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, but withheld the order directing the execution of the sentence pursuant to Article of War 50½. Prior to action by the Board of Review in the Office of The Judge Advocate General, United States Forces European Theater, and prior to publication of the order, the confirming authority vested in the Commanding General, United States Forces European Theater, was terminated and the record has accordingly been forwarded to the Office of The Judge Advocate General.

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

The record shows that the accused, who was the commanding officer of the 77th Finance Disbursing Section, gambled with enlisted men of his command at Nancy, France, in October and November of 1944, and at Schlitz, Germany, on or about 4 April 1945. While a disbursing officer he wrongfully gambled for money at the time and place above indicated

and at Bad Kreuznach, Germany, between 21 and 27 March 1945. On 29 December 1944, at Luxembourg City, Luxembourg, the accused exchanged for one Gastone Smidt, a Luxembourg civilian, 99,000 French francs for an equivalent in Belgian money, in violation of orders published by competent higher military authority. On or about 23 March 1945, Lieutenant Colonel August C. Pavlatos, 101st Evacuation Hospital, discovered approximately 96,000 German marks in a hospital near Alzey, Germany, which was owned by the State of Hessen. The accused, who had known Lieutenant Colonel Pavlatos for some six months and who had accompanied him to the hospital site on the previous day, was informed of the discovery. On the following day accused and Lieutenant Colonel Pavlatos accompanied by two enlisted men from the latter's organization and one from the accused's, removed the money from the hospital and took it to the accused's finance office. There the accused "suggested" a "reward" of approximately 10,000 German marks for Lieutenant Colonel Pavlatos and himself and a "reward" of 2,000 German marks for the three enlisted men who accompanied them. These amounts were distributed to each of these five individuals after some 26,000 German marks had been exchanged for Allied military marks, also at the accused's office. A receipt was executed by the accused in favor of Lieutenant Colonel Pavlatos showing 70,694 German marks recovered from the enemy rather than 96,694. Other letters were written and book entries made, all of which indicated that the lesser amount only had been recovered from the hospital. I recommend that the sentence be confirmed but that the confinement be reduced to one year, that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to correspondence from Honorable Kenneth McKellar, United States Senate, and to a personal interview by Mr. Jack Chambliss, Esq., Attorney from Chatanooga, Tennessee, and Mrs. Mayfield M. Morris, with the Board of Review, all urging clemency on behalf of accused. Honorable Estes Kefauver, Member of Congress, also has called the Board by telephone expressing his interest in the case.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Form of action
3 - 2 ltrs. fr. Sen. McKellar w/incls.

(GCMO 94, 1 May 1946).

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

SPJGK - CM 307029

30 APR 1946

UNITED STATES v. Second Lieutenant MAURICE S. DUITZ (0-1650072), Signal Corps.	XII TACTICAL AIR COMMAND Trial by G.C.M., convened at Headquarters, 64th Fighter Wing, Darmstadt, Germany, 29 and 30 October 1945. Dismissal, total forfeitures and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant Maurice S. Duitz, Headquarters, 64th Fighter Wing, did at Heidelberg, Germany, on or about 14 May 1945, unlawfully enter the store of Hilda Faisst with intent to commit a criminal offense, to wit: larceny therein.

Specification 2: In that Second Lieutenant Maurice S. Duitz, ***, did at Heidelberg, Germany, on or about 14 May 1945 feloniously take, steal and carry away one Flobert rifle, one camera, and one Erika typewriter of a total value of more than $50.00, the property of Hilda Faisst.

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

Specification 1: In that Second Lieutenant Maurice S. Duitz, ***, did at Heidelberg, Germany, on or about 14 May 1945, wrongfully, willfully and unlawfully falsely make in its entirety and pass as true and genuine to Hilda Faisst, a certain written instrument in words and figures as follows:

"This is to certify that the premises at 118 Hauptstrasse contain no contraband and the two guns therein are namely:
1 antique
1 unfinished
by authority of the United States Army.

14 May, 1945

Frago, Rico, Alfredo.
Lt. F.A.

Munitions in the store fit no gun therein and can do no harm."

which said instrument was, as he, the said Second Lieutenant Maurice S. Duitz, then well knew, falsely made and forged.

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

Specification: In that Second Lieutenant Maurice S. Duitz, ***, did at Headquarters, XII Tactical Air Command on or about 19 October 1945, wrongfully and unlawfully, take steal and carry away a typewritten statement dated August 10, 1945, bearing the signature Maurice S. Duitz which statement was attached to and part of an official report of investigation by the 9th Criminal Investigation Division, Headquarters, Ninth Air Force.

A common trial with Private First Class Jasper was ordered by the appointing authority. An objection to this procedure was made by defense counsel but withdrawn before completion of arraignment. Accused pleaded not guilty to and was found guilty of all Charges and Specifications except the words "one Flobert rifle" in Specification 2 of Charge I. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, and forwarded the record of trial for action under Article of War 48 to the Commanding General, United States Forces, European Theater. Before action was taken by that officer his powers, statutory or otherwise, in so far as they pertain to courts-martial were terminated, and, in accordance with instructions from the War Department, the record of trial was forwarded to The Judge Advocate General for action by the confirming authority or other appropriate action.

3. As a result of the common trial with Private First Class Philip Jasper, the greater part of the testimony and most of the offerings pertain to a number of offenses charged solely against him and have no application to those under which accused was tried. Private First Class Jasper was also charged with having committed the same offenses described in Specifications 1 and 2 of Charge I, and Specification 1 of Charge II, but was not charged with having committed the offense described in the Specification of the Additional Charge.

4. <u>For the Prosecution.</u>

a. Charges I and II.

In so far as Charges I and II and the specifications laid thereunder are concerned, the only direct testimony, other than the pre-trial statement made by accused (Pros. Ex. 10), is that of Mrs. Hilda Faisst. The other two witnesses, who the trial judge advocate stated in his opening remarks would be used by him to establish these offenses, namely, the mother and daughter of Mrs. Faisst, were not called.

Mrs. Faisst's testimony may be summarized as follows:

Witness operated a store at 18 Haupstrasse, Heidelberg, in the rear of which was a workshop. She repaired pistols and rifles, sold collars and leashes for dogs and other leather goods, and at one time sold military souvenirs (R. 33,38,41,46). She occupied an apartment at "Unteren, fauler, pels, number 3" (R. 30), which was "about ten minutes walk to go" from her shop (R. 32). She does not speak English at all, and understands only one or two English words (R. 40). On or about 14 May 1945 (which was approximately five months prior to the filing of charges against accused), accused and a soldier went to her store, which was closed. However, she was nearby. The soldier "said" to her in German, "Where are the people," and when she advised him that she was the owner he stated to her, "In five minutes you must get the key, I must go in. *** I give you five minutes time to get the key" (R. 32). Mrs. Faisst then started for her home to get the keys, but, finding them in her bag, opened the door and permitted the accused and the soldier to enter (R. 32, 33). The soldier commented upon the presence of "two rifles and a little rifle," whereupon the witness "showed him the receipt for the two rifles which [she] was allowed to keep from the guardhouse" (R. 33). This receipt was as follows:

"April 4, 1945

"Hilda Feist is authorized to keep one unfinished shot gun and one antique revolver rifle.

By order of Capt Hinkley
Public Safety Officer"

The soldier, who was the only one of the two to whom she spoke, then remarked, "This rifle which you haven't got a receipt for will cost you ten years" (R. 33). They then looked further and found some ammunition (R. 33). The soldier thereupon "said we must look for things" (R. 32) and for "one, two hours they were looking. *** They were always looking for something. One was in the office and the other was outside" (R. 33). While the soldier was in the workshop and the accused was in the front portion of the shop, the soldier "asked me if you have something for my Lieutenant. Perhaps a photo [camera], then the thing is wiped out, it is wiped out of the world" (R. 34). By "the thing" she meant "that with the rifles because he thought I had it without permission" (R. 34). Prior to this conversation and while the accused

and the soldier were in the shop, an American Major had come in (R. 34), but she did not complain to him about "any threats or force being used upon" her (R. 46). In answer to the inquiry about the camera, the witness stated to the soldier that she had one at home, and the three of them then proceeded toward her apartment. She met her mother on the way, and had a conversation with her. This episode is described as follows (R. 35):

> "Q. Was there some conversation with your mother, yes or no?
> "A. Yes or no.
> "P & LM: Just a minute, you will translate for the court what the witness said please. Proceed. Do you know what the witness said?
> "INTERPRETER: She said that, I will get along with those two myself, I don't need any help. At first I asked mother to help me but I didn't need her help.
> "Q. Then you proceeded on to your house alone with the officer and the soldier, yes or no?
> "A. Yes, I went alone."

Upon their arrival at the apartment the soldier and the accused continued to search. "The officer took a machine pistol ***. He loaded the pistol and searched the house" (R. 35). Mrs. Faisst procured the camera and while she was in one room with the soldier and the accused was in a different one, the soldier saw a typewriter and said, "I would like to have it." Witness stated that it belonged to her husband, but the soldier replied that "he isn't here and he also repeated then the affair with the rifle is wiped out" (R. 35,36). Further interrogation developed the following description of what transpired (R. 36):

> "Q. Then what happened?
> "A. Then the officer gave me a hundred marks for the soldier for the camera and for the typewriter. The soldier gave me, laid a hundred marks on the table.
>
> "Q. Did you sell the camera and the gun and the typewriter to the soldier?
> "A. I didn't sell it to him because he was always saying that it would cost me ten years.
>
> "Q. Did you mention the price of a hundred marks or two hundred marks?
> "A. No. The soldier laid down a hundred marks and the officer laid down a hundred marks without my saying anything.
>
> "Q. Which one walked out with the typewriter?
> "A. The soldier took the typewriter.
>
> "Q. What did the officer have?

"A. I don't remember if the soldier took both, I can't remember. Mother, my mother saw it, she was standing by."

While witness was talking with the soldier a boy entered the apartment, and the accused then asked, "is that your child?" This was the only conversation she had with accused, all the remainder of her conversation being in German with the soldier (R. 35,36,40). There then followed a conversation about a receipt, and the soldier typed out one which the accused signed. This receipt which was intended to show "that the business transaction was done," was as follows (R. 36,37; Pros. Ex. 10):

"This is to certify that the premises at 118 Häuptstrasse contain no contraband and the two guns therein are namely:

1 antique
1 unfinished

"By authority of the United States Army.

14 May, 1945

Frago, Rico, Alfredo
Lt. FA

"Munitions in the store fit no gun therein and can do no harm."

Based on what her husband told her, Mrs. Faisst valued the camera, which belonged to her son, at 120 to 140 marks (R. 38, 45). The typewriter, which belonged to her husband, she valued at 250 marks (R. 38,45). When her husband, who was a prisoner at the time of the incidents, found out about the typewriter, he was "cross" at her for selling it (R. 45). The witness identified a "Flobert rifle," which she valued at 15 marks, as the weapon which was "taken from the store" (R. 38). Further details with regards to what took place were developed on cross-examination as follows (R. 43,44):

"Q. Isn't it true that the Lieutenant gave you money for the camera?
"A. Yes, a hundred marks he gave me.

"Q. And didn't you accept the money?
"A. Yes, I took it.

"Q. And wasn't it understood that he bought it and you sold it?
"A. I didn't understand it that way.

"Q. Then why did you take the money?
"A. Yes, it was sold then.

"Q. Isn't it true that the soldier saw a typewriter and said, 'I'd like to buy your typewriter madam.'
"A. Yes, to buy, he said that.

"Q. You are pretty sure about that?
"A. Yes, he said, I want to buy it, but he said it would be wiped out.

"Q. Didn't the soldier give you money for the typewriter?
"A. A hundred marks.

"Q. And didn't you accept that money?
"A. Yes I took the money.

"Q. Didn't the soldier say is that satisfactory to you?
"A. He didn't to me, no.

"Q. Did you tell him that it wasn't satisfactory?
"A. I didn't give an answer, he laid the money down on the table.

"Q. Didn't you understand at that time that he was bargaining with you for the purchase of the typewriter?
"A. No.

"Q. Then when the soldier told you he wanted to buy the typewriter what did you understand by that?
"A. Only because he found the rifle he wanted to buy the typewriter and then he said the whole affair would be ended.

"Q. You didn't at any time offer to return the money did you?
"A. No, I took it.

"Q. Didn't you make a gift of that rifle to that soldier?
"A. No, only because I told him you take the rifle because I don't want to be getting into trouble the next day.

"Q. Didn't you tell the soldier of your own free will, take this rifle, I want to get rid of it?
"A. Yes, I told him to take it I want to get rid of it otherwise somebody else will come and I will have the same trouble again.

"Q. Didn't you give it to them of your own free will?
"A. Only I wanted to get rid of it because otherwise next day they would have come back again.

"Q. So you wanted to get rid of it for your own personal advantage, is that right?
"A. Yes, I told him to take it with him."

The rifle belonged to some one who had left it in the shop to be repaired, and had been there for "a long time" (R. 46). The witness had possession of all three items carried away from her shop by the soldier and

the officer (R. 48).

Both the accused and the soldier "were decent" in their treatment of and attitude toward Mrs. Faisst and did not threaten her, the only threat being that by "the soldier, not the officer *** with the ten years" (R. 42).

Although the trial judge advocate was willing to stipulate that the witness had spoken to the trial judge advocate in connection with the case "in the past two weeks," the witness denied on cross-examination that she had spoken to any American officers about the case during that period (R. 39,40).

On 10 August 1945, approximately three months after the incident which gave rise to the charges, accused voluntarily made the following statement to an investigating officer (R. 57,58,59; Pros. Ex. 15).

> "On May 14 walking down Haupstrasse, Heidelberg, Germany with Philip Jasper I noticed a stack of rifles in the front of a weapons store. I had previously seen same and tried to enter but store was closed. Inquiring in back thru Jasper an interpreter I was shown a woman who was the owner. All references to conversations with these people are to be understood to be the replies as reported by Jasper to me. I asked for the store to be opened and was told that the key was elsewhere. I pointed to my watch and said that I wanted to get in, also pointed to the door. I was not in possession of a pistol at that time nor did I have one in my quarters or on my person. After some time she returned with the key and we entered. I saw that the weapons were harmless, and examined lots of different sizes of ammunition there. The woman was quite worried and asked that the material be removed as she was frequently questioned about it. Jasper asked about a 22 cal rifle which he thought was a dangerous weapon and took it with him. I asked if she had any cameras to sell. She said that she could tell us of a friend who had several for sale, but later said that she had one herself, a leica. She suggested going to her house which we did, and there I paid 100 marks for an Afga roll film camera. This it turned out was broken and I repaired it and later gave it to Jasper. She didn't have a leica and evidently didnt recommend any friend either. Jasper asked to buy a Typewriter, presumably, which he did for 100 marks. It was my understanding that she was willing to sell the camera. I did not threaten her with any jail sentence, but she was apprehensive at having all that ammunition in her possession. I told her that German citizens were not allowed to have firearms in their possession, and that concealing them was serious.
>
> "During the conversation regarding the camera I tried to ask thru Jasper what she wanted for it. She said she didn't know and I handed her 100 marks. I asked if she was satisfied and Jasper said yes. The conversation about the typewriter was not translated to me. I saw Jasper hand her 100 marks also.

"Jasper told me that she wanted some paper saying that the place did not contain any military weapons and he typed out a slip that I signed, FRAGA, RICO, Alfredo.

"/s/ Maurice S. Duitz
2nd Lt. Sig C 10 Aug 45

"Statement typed by and signed
by Maurice S. Dauitz
in the presence of Agent
John P. Boesel, Hq Ninth Air Force,
9th GID, APO 696"

b. Additional Charge.

On 18 October 1945, First Lieutenant Francis J. O'Neill, trial judge advocate herein, served the original charges on the accused and Private First Class Jasper and gave each of them a copy of the papers in the case, including a copy of the Criminal Investigation Division file (R. 86). He retained the original papers in an envelope. The next morning, the accused and Private First Class Jasper with Sergeant Irving Pinsky, their special counsel, came to Lieutenant O'Neill's office. Sergeant Pinsky stated that Private Jasper would like to see the physical objects in the case (R. 87). All went to the office where the physical evidence was kept and after seeing it, Jasper and the defense counsel went into another room. Accused said that he wanted to see the typewritten statement he was supposed to have signed and the alleged forged instrument (Exs. L and U, CID file). He also wanted to see his other typewritten statement, dated 10 August (Ex. V, CID file). Lieutenant O'Neill opened the file and showed them to him. Exhibit V was the last statement on the file (R. 88). Accused wanted to make a picture of Exhibit L and went to get a camera. Lieutenant O'Neill returned to his office, taking the CID file with him. Two enlisted men were working in his office. Accused returned with a camera, took the file to one side of the room and put it on a desk in a position for taking a picture. Lieutenant O'Neill went into another room. Accused came to the door of the other room and asked him if he wanted a picture made of a certain document. Lieutenant O'Neill said, "No." Lieutenant O'Neill was out of his office about three minutes. During the entire period, including the time that Lieutenant O'Neill was absent from the room, there were also present in the room with the accused and Private First Class Jasper two enlisted men of the Judge Advocate Section (R. 93, 102, 103). Both were occupied with other duties and neither noticed the accused remove anything from the original file (R. 102, 103, 104). When Lieutenant O'Neill returned accused gave the file back to him and left about 1130 hours. Lieutenant O'Neill worked on the file a short time, left it in an envelope and went to lunch. He returned from lunch about 1300 hours and started to check the signatures on Exhibits L, U and V (CID file) (R. 90). About ten or fifteen minutes after he returned from lunch he discovered that Exhibit V had been "ripped out of the back end of the file." A little piece of paper was "clinging to

the clip" (R. 90, see back of Ex. 14). He made a thorough search for the missing exhibit but could not find it (R. 92,95). The next day he called accused over the telephone and said to him, "I am accusing you of stealing Exhibit V." He asked accused if he remembered seeing Exhibit V, a typewritten statement dated 10 August, signed by accused. The accused said that he saw a lot of papers and could not be sure what papers he had or had not seen (R. 91). A copy of Exhibit V is attached to the record of trial as Exhibit 15(R. 51, 58, 92).

5. For the Defense.

A motion for a finding of not guilty as to Specifications 1 and 2 of Charge I was denied. The accused's right to testify, to make an unsworn statement or to remain silent was explained to him, and he elected to remain silent (R. 111). The defense then renewed its motion for a finding of not guilty, which was again denied. After certain witnesses had been recalled by the prosecution to testify to matters affecting only the charges against Private First Class Jasper, and both sides had rested, the case was reopened to permit the reception of a stipulation that

> "*** if Hilda Feisst was present *** she would testify that on 14 May 1945 she had in her store at 118 Hauptstrasse the following items: One antique gun, one unfinished gun, and that she had munitions in the store which fitted no gun therein, among other items" (R. 118).

6. Despite the considerable weight which is given to the conclusions of fact reached by a court-martial, it is the function of the Board of Review in cases requiring Presidential confirmation to weigh the evidence (CM 243466, Calder, 27 BR 382, 3 Bull JAG 231, 232) and to uphold a conviction only if an accused "be proved guilty" (CM 248379, 31 BR 237, 3 Bull JAG 151). There is an elementary principle, consistently adhered to in the administration of military justice that "conviction by a court-martial may rest on inference, but must not be based on conjecture" (CM 233766, Nicholl, 20 BR 121, 2 Bull JAG 238; CM 274812, Tracy). In applying this sound and salutary rule of law the Board of Review has frequently quoted with approval the following extract from the decision in Buntain v. State (15 Texas App. 490):

> "We must look alone to the evidence as we find it in the record, and applying it to the measure of the law ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around lives and liberties of the citizens."

The Board is of the opinion that to hold accused guilty of housebreaking and of larceny of property of Mrs. Faisst, charged, respectively,

in Specifications 1 and 2 of Charge I, and of larceny of an official document charged in the specification of the Additional Charge would be to base such findings on unjustified inference and insufficient evidence.

It will be noted that in so far as the charges involving housebreaking and the theft of property belonging to Mrs. Faisst are concerned, reliance is placed solely on her testimony, for accused's pre-trial statement is not an admission of guilt of any offense. Neither of the two additional witnesses whom the trial judge advocate stated he expected to use in establishing these charges was called. Mrs. Faisst, who spoke no English and understood only one or two words of that language, stated that all of her conversations were in German with "the soldier," who, it may be accepted, was Private First Class Jasper, the sole exception being the accused's inquiry as to whether or not a boy who entered the apartment while the alleged search for articles was going on was her child. There is nothing even to indicate that the accused understood German, but even had he been familiar with the language Mrs. Faisst's testimony is not of sufficient potency, in the opinion of the Board, to establish the guilt of the accused.

Members of courts-martial are admonished to utilize their "common sense and *** knowledge of human nature and of the ways of the world in weighing evidence" (MCM, 1928, par. 78a, p. 62). Availing itself of this wise provision the Board recognizes that, although there is no express testimony pertaining to this particular feature, there existed throughout the alleged transactions between accused and Private First Class Jasper on the one hand and Mrs. Faisst on the other a serious language obstacle which may very easily have led to misunderstanding and confusion. Even experienced linguists must search at times for the proper method of expression and find their carefully chosen words misunderstood. A descriptive gesture to supply or supplement a language deficiency, such as is resorted to by almost all sojourners in a foreign land from time to time, may easily be and is frequently interpreted as conveying a thought entirely different from that intended. "Common sense" leads to the reasonable assumption, based on the unusual expressions, probably idiomatic in their nature, used by Mrs. Faisst at times, and the not infrequent difficulties encountered by the court interpreter in translating her testimony precisely, that it is not improbable that she may have misunderstood Jasper or may have given to his actions or those of accused a sinister significance which was not justified. It must be borne in mind that Mrs. Faisst's testimony was given more than five months after the occurrence of the incidents which formed the basis of these charges; that she had made no complaint to the American authorities; and that she had been rebuked for having disposed of the typewriter by her husband, who was a prisoner at the time of the transaction with accused and Jasper.

Summarizing Mrs. Faisst's testimony, it appears that Jasper by words and gestures indicated to her that unless she opened her store in five minutes he and accused would use some form of force, although none

was applied and their conduct was "decent" at all times. The basis of their demands was that they had to "look for" or "search for" something in the store. While they were in the shop an American major came in. Mrs. Faisst made no complaint to him. Neither Jasper nor the accused took anything from the store, although they searched the place "for one, two hours." A rifle and some ammunition in addition to two rifles described on a receipt which she had from another American officer were found during this search and Jasper told her that "it might cost her ten years." Jasper suggested that maybe she had "something for my lieutenant, perhaps a photo [camera], then the thing is wiped out, it is wiped out of the world." To use the exact language given the court by the interpreter, "the thing" to which she was referring meant "that with the rifles because he thought I had it without permission." It was then that she went to her apartment, a ten-minute walk from the shop, with Jasper and accused. On the way she met her mother, but she was not sufficiently worried or disturbed to ask her to go with them. At the apartment she found a camera, which belonged to her son, and Jasper found a portable typewriter, which belonged to her husband. Eventually accused "laid down" 100 marks for the camera and Jasper 100 marks for the typewriter. She took and kept the money because, according to her statement, "he (Jasper) was always saying that it would cost me ten years." She actually gave Jasper the Flobert rifle, because she was afraid that its presence might cause her some future trouble. She testified that when they first got to the apartment, accused loaded a pistol and searched the place, but did not claim that he had ever threatened her or any one else with it. In fact there is not even a suggestion of physical force or compulsion toward or of fear of bodily harm by Mrs. Faisst. Mrs. Faisst's mother and a child came to the apartment while accused and Jasper were there, but there is no indication that Mrs. Faisst made any complaint to them.

It does appear that Jasper and accused used their positions as a non-commissioned and commissioned officer in the American Army, respectively, to induce Mrs. Faisst to sell to them articles of which she may not have desired to dispose. This is emphasized by the fact that Jasper prepared and accused signed the spurious "receipt," which will be considered more in detail hereinafter. Their actions, however, do not constitute larceny of the camera and typewriter thus procured. An essential element of larceny is trespass (MCM, 1928, par. 149g). While certain forms of artifice may be an equivalent of trespass, the Board finds no authority for so classifying the repeated declarations about possible punishment made by Jasper or the offer to "wipe" her alleged unlawful possession of the rifle "out of the world." The actions of Jasper and accused might be termed extortion or solicitation or acceptance of a bribe, but they are not charged with any such offense. The Board, consequently, is of the opinion that the findings of guilty of larceny of the camera and typewriter are not supported by the evidence.

In so far as the housebreaking is concerned, accused is charged specifically with having effected a wrongful entry with intent to commit larceny therein. It is essential that the intent to commit the specific crime or a lesser included one be proved (CM 134246; CM 163107, Dig Op JAG

1912-40, p. 322). In the present case the testimony failed to show any intent to commit larceny or any lesser included offense when accused and Jasper obtained admittance to the shop, and, as a matter of fact, no larceny or lesser included offense was committed there. It is apparent, however, from the actions of accused and Jasper and the logical and reasonable inference to be drawn therefrom that when accused and Jasper approached the shop of Mrs. Faisst they intended falsely to assume an authority they did not possess in order to obtain some advantage to themselves and that they in actuality used this falsely assumed authority to obtain admittance to the store. Entry thus obtained by artifice for an improper purpose was unlawful, and the Board of Review therefore finds the record of trial legally sufficient to support a finding of guilty of unlawful entry in violation of Article of War 96 as a lesser included offense of the crime of housebreaking (CM 202846, Shirley, 6 BR 352).

In so far as the specification of the Additional Charge is concerned, there is no direct proof that accused took the document therein described, nor is there proof of any facts from which it may reasonably be inferred that accused unlawfully or wrongfully took it. While all elements of an offense may be proved by circumstantial evidence, the guilt of an accused must be founded upon evidence, which, under the law, is deemed sufficient to exclude every reasonable hypothesis except that of defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence (16 C.J. 766; CM 233766, Nicholl, 20 BR 123,124; CM 238485, Rideau, 24 BR 272; CM 258020, Palomera, 37 BR 299). The mere fact that the single sheet, containing accused's statement, the loss of which could not injure the prosecution's rights, was missing two hours after accused had used the file, certainly does not support a finding of guilty, particularly in view of the fact that it was the last document in the file. It may safely be said, based on common experience, that it is not unusual for the last sheet of an unprotected file to become detached from the file. In a busy office, such as that described by the trial judge advocate, with its large number of papers, it is not difficult to conceive how readily a single sheet may be misplaced or lost. There were a number of other persons in Lieutenant O'Neill's office, and apparently there was no time during the accused's brief stay in the office that accused was alone. Under all the circumstances and in view of the absence of any real reason for the theft of the statement, the Board is compelled to hold the record of trial legally insufficient to support the finding of guilty of this Specification and Charge.

As to Specification 1 of Charge II, the Board is of the opinion that the record of trial fully supports the finding of guilty. It is not disputed that the "receipt" was typed by Private First Class Jasper and signed with a false name by the accused. Equally it is obvious that deception of Mrs. Faisst was the actuating motive. Accused clearly was not acting "By authority of the United States Army," and admittedly did not sign his name but either forged the name of one "Frago, Rico, Alfredo,"

described by him as "Lt. F.A." or created this alleged American officer to carry out his deception. The fact that some of the statements in the "receipt" are true, does not alter the forgery of the signature and the falsity of the declaration that it was issued by authority of the United States Army. In the opinion of the Board this deliberate resort to trickery and deception on the part of an officer in the Army of the United States in order to obtain an advantage over or concession from a resident of a conquered country is "conduct of a nature to bring discredit upon the military service" and therefore is punishable as an offense under Article of War 96.

7. Consideration has been given to the oral argument presented to the Board at a special hearing held on 21 March 1946, and to the brief submitted by Mr. Arthur L. Fishbein, attorney for the accused, and to the brief and other communications submitted by accused in his own behalf.

8. War Department records show that accused is 29 years and 9 months of age, is married, and has one child. He graduated from high school and attended for three years but did not graduate from College of the City of New York. He likewise had two years of special work in "Aero & Mech. Engineering" at that college and "Brooklyn Polytech." From September 1937 to June 1942 he was employed by photographic establishments. He was "Eng. Draftsman" with "Vought-Sikorsky" from June 1942 to October 1942; "Design Draftsman" with "York Aircraft" from October 1942 to January 1943; and "Head of Materiel, Eng. Dept." with "Jacobson & Co." manufacturers of airplane test equipment, from January 1943 to September 1943. The following appears with regard to his knowledge of foreign languages:

"23. Foreign languages (check proficiency).

Language (specify)	Read			Speak			Auditory comprehension		
	Excellent	Good	Fair	Excellent	Good	Fair	Excellent	Good	Fair
French			v			v			v
SPAN			v			v			v"

He was inducted into the Army on 13 September 1943, and was appointed a second lieutenant on 25 October 1944, upon completion of the prescribed course at the Officer Candidate School, Eastern Signal Corps Training Center, Fort Monmouth, entering upon active duty as such immediately.

9. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as above set forth no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I, and of the

Additional Charge and its Specification; legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding that accused did unlawfully enter the store of Hilda Faisst at Heidelberg, Germany, on or about 14 May 1945, in violation of Article of War 96; legally insufficient to support the finding of guilty of Charge I as a violation of Article of War 93, but legally sufficient to support a finding of guilty of that Charge as a violation of Article of War 96; and legally sufficient to support the findings of guilty of Specification 1 of Charge II and Charge II and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Norman Moyse, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307029 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 14 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Maurice S. Duitz (O-1650072), Signal Corps.

2. Upon trial by general court-martial this officer was found guilty of housebreaking (Specification 1 of Charge I) and of larceny of a typewriter and camera (Specification 2 of Charge I) in violation of Article of War 93; of falsely making and passing as true a false certificate pertaining to contraband possessed by one Hilda Faisst (Specification 1 of Charge II) in violation of Article of War 96; and of wrongfully and unlawfully stealing an official typewritten statement (Specification of the Additional Charge) in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. Before action was taken by that officer his powers, statutory or otherwise, in so far as they pertain to courts-martial, were terminated, and, in accordance with instructions from the War Department, the record of trial was forwarded to me for action by the confirming authority or other appropriate action.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I and of the Additional Charge and its Specification; legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding that accused did unlawfully enter the store of Hilda Faisst at Heidelberg, Germany, on or about 14 May 1945 in violation of Article of War 96, legally insufficient to support the finding of guilty of Charge I as a violation of Article of War 93, but legally sufficient to support a finding of guilty of that Charge as a violation of Article of War 96, and legally sufficient to support the findings of guilty of Specification 1 of Charge II and Charge II and the sentence and to warrant confirmation of the sentence.

The accused, accompanied by one Private First Class Philip Jasper obtained admittance to the shop of one Mrs. Hilda Faisst in Heidelberg by falsely pretending that it was necessary that they make a search. All conversations in the shop were carried on in German between Mrs. Faisst and

Private First Class Jasper. Private First Class Jasper suggested to Mrs. Faisst that possibly she had a camera for the accused, in which event the presence in her shop of a rifle would be "wiped out." Thereafter Mrs. Faisst, accused and Private First Class Jasper proceeded to Mrs. Faisst's apartment where a sale transaction involving the transfer of a camera and typewriter was had. Thereupon accused issued a certificate to Mrs. Faisst covering the rifles and ammunition in her possession, falsely signing it "by authority of the United States Army" and affixed thereto the signature of some third person designated as "Frago, Rico, Alfredo, Lt. FA." During an investigation a written statement previously made by accused disappeared shortly after he had access to it. It was not found in his possession and there was no other proof that he took it.

I recommend that the sentence be approved but that the forfeitures and unexecuted portion of the confinement be remitted. Accused's false actions and false assumption of authority which he did not possess and his misuse of his position as an American officer to obtain an unauthorized advantage in dealing with a resident of a conquered country show that he is not worthy of his commission. However, the offenses of which he stands convicted are not sufficiently serious to justify imposition of a sentence of confinement.

4. Consideration has been given to (1) a letter from Honorable Emanuel Celler, Member of the House of Representatives from New York, (2) brief and communications from the accused, (3) letters from Mr. Andrew Duitz, father of the accused, Mrs. Florence Duitz, wife of the accused, Colonel Merritt E. Olmstead, Wurzburg Military Community, and Dr. Jacob M. Maranz, New York City, all attached to the record of trial, (4) letter from Mr. Andrew Duitz, father of the accused, to The Judge Advocate General, dated March 29, 1946, (5) a letter from Mr. Arthur L. Fishbein, attorney for the accused, to The Judge Advocate General, dated April 3, 1946, (6) letter from Honorable Donald L. O'Toole, Member of Congress, dated April 1, 1946, (7) letter from Mrs. Florence Duitz, wife of accused, to The Judge Advocate General, dated March 29, 1946, and (8) oral argument presented to the Board of Review and brief submitted by Mr. Arthur L. Fishbein.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

8 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mr. Andrew Duitz, to TJAG
4. Ltr fr Mr. Fishbein to TJAG
5. Com and briefs of acc'd
6. Ltr fr Cong O'Toole
7. Ltr fr wife of acc'd
8. Brief submitted by counsel for acc'd

(GCMO 143, 28 May 1946).

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

JAGH - CM 307033

23 JUL 1946

UNITED STATES	)	9TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Wasserberg, Germany, 27 September 1945. Dismissal, total forfeiture and confinement for ten (10) years
Captain HARRY A. KIVIER (0-1297051), Infantry	)	

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, Judge Advocates

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

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

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

Specification 1: In that Captain Harry A. Kivler, Service Company, 60th Infantry, did, at Wolnzach, Germany, on or about 27 July 1945, feloniously take, steal and carry away

one (1) Silver Fox fur coat value about 3000 Reichmarks ($300.00)
one (1) Racoon fur coat value about 2700 Reichmarks ($270.00)
one (1) Tiger Skin coat value about 1200 Reichmarks ($120.00)
one (1) Persian Lamb coat value about 2000 Reichmarks ($200.00)

of the aggregate value of 8900 Reichmarks ($890.00), the property of a Mr. Schweiger, Munich, Germany, then in possession of Frau Victoria Korper.

Specification 2: In that Captain Harry A. Kivler, Service Company, 60th Infantry, did, at Geisenfeld, Germany, on or about 8 August

1945, feloniously embezzle by fraudulently converting to his own use 6000 Reichmarks of the value of $600.00, the property of Frau Wally Domkovich, entrusted to him by the said Wally Domkovich, and to be delivered by him to her husband, Stefan Domkovich.

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

Specification 1: In that Captain Harry A. Kivler, Service Company, 60th Infantry, did, at various times between 1 August 1945 and 14 August 1945, unlawfully, wrongfully and in violation of letter, Headquarters 9th Infantry Division (250.1 - GNMEQ), Subject: "Fraternization", dated 23 March 1945, visit in the home of Frau Wally Domkovich, Geisenfeld, Germany.

Specification 2: In that Captain Harry A. Kivler, Service Company, 60th Infantry, did, at Geisenfeld, Germany, on or about 27 July 1945, without authority, wrongfully take and carry away one radio, value about $30.00, property of Frau Kathe Kaiser of Geisenfeld, Germany.

Specification 3: In that Captain Harry A. Kivler, Service Company, 60th Infantry, did, at Wolnzach, Germany, on or about 11 August 1945, with intent to deceive Lt. Col. Harry R. Phipps, Investigating Officer, 60th Infantry, officially state to the said Lt. Col. Harry R. Phipps that

"We got the 2½ ton truck, which had accompanied us, to pull up in front of the building and had the pants thrown out of the window into the truck. We, also, acquired two sewing machines, complete, and one sewing machine head. I, myself, picked up two small drills and some drill bits to be used in my Maintenance Section. I, also, took about 50 ft. of insulated wire to be used for extensions. Other than the above items, I know of nothing or saw nothing else being removed from the building."

which statement was known by the said Captain Harry A. Kivler to be untrue in that he also removed four fur coats from said building on the same date, to-wit, 27 July 1945.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence is summarized as follows:

Specification 1 of Charge I - Larceny of four fur coats. At about 1000 on 27 July 1945 the accused, a captain assigned to Service Company, 60th Infantry, 9th Infantry Division and another officer, Captain Burger, of the same organization, accompanied by several enlisted men, went to the premises used as a residence and office by Victoria Korper in Wolnzach, Germany (R 10, 11, 12, 16, 17, 19, 39, 48-52). At this time the office was being used as a warehouse for the storage of certain fur coats belonging to clients of Frau Korper. There were also stored in the warehouse some pants and other property belonging to the Wehrmacht (R 12, 14, 17, 20). An "Off-Limits" sign was on the door of the building, written in English and German (R 11, 39). Captain Burger had authority to enter the building to get certain Wehrmacht property and had asked the accused to accompany him (R 39). The accused and Captain Burger were admitted to the building and remained therein about one and one-half to one and three-quarter hours (R 11, 41). In addition to the accused, Captain Burger and Frau Korper, there was present in the building that morning two of the latter's employees, Christina Greunz and Ly Cap, the latter being able to speak English (R 13, 16, 19). While in the building Captain Burger and the accused went to the attic where there were stored some ladies fur coats (R 41). The accused remained in the attic while Captain Burger was in an adjoining room with Frau Korper (R 17, 20, 54). He took a Persian lamb coat and a tiger skin coat from the rack, examined them, and asked for a box, which was secured and Christina Greunz assisted him in placing the Persian lamb coat in the box. She did not see the accused place the tiger skin coat in the box but it was missing after that day (R 17, 18, 20, 22, 52-54). The accused was informed by Ly Cap that the fur coats in storage there belonged to clients of Frau Korper and wished to know by what authority he was taking the coats. He stated that he had authority to take the coats (R 20-23). The accused then put the box under his arm, went to the door and departed (R 55). At the trial these two coats were introduced into evidence and identified by Christina Greunz and Ly Cap as the two coats allegedly taken by the accused from the office of Frau Korper when he left after his first visit there on 27 July (R 18, 21, Pros Exs C & D).

The accused returned to the premises at about 1300 the same day accompanied by First Lieutenant David R. Parker (R 6, 16, 21, 48-50). Ly Cap and Frau Korper were present at the time of this visit and the accused told them that he wanted to see some fur coats for the general's wife (R 6, 21). When he was shown the coats, the accused selected a silver fox cape and a racoon coat, saying: "I will take two of the coats and let the general's wife pick out which one she likes" (R 6, 21). Frau Korper then wrapped the coats and the accused took them and left, accompanied by Lieutenant Parker (R 7, 15, 21; Pros Exs A & B).

Ly Cap was asked on cross-examination if any protests were made to the taking of the coats and she replied: "We could not make any protests

because we had asked them again and again if they had any authorization and they said Yes, and after that we were in no position to make any objections" (R 23). Lieutenant Parker testified that the accused made no threats or promises, that there were no protests made nor any mention of payment but admitted that to the best of his knowledge the woman who spoke English (Ly Cap) did not say: "I am giving this to you without charging you a thing for it" (R 8-10). Lieutenant Parker and the accused discussed whether German soldiers had brought the coats there and "It was more or less our opinion that perhaps they had" (R 9). The accused had no requisition from the Military Government for any of the coats he took (R 10). The four coats, Prosecution's Exhibits A-D, belonged to a client of Frau Korper, Mr. Schweiger, who lived in Munich (R 14) and were identified by Ly Capt as the coats which were removed from Frau Korper's warehouse on 27 July (R 21, 22).

On the evening of that same day the accused and Lieutenant Parker were at the room of a Polish girl by the name of Maria, where Frau Wally Domkovich was also present. There were four coats, including the bear skin (racoon) and the silver fox (cape) in her room at this time, which were brought there by the accused (R 7, 8, 26). The silver fox cape and the Persian lamb coats were given to Wally by the accused (R 25, Pros Exs A & C). Wally also saw the other two coats in Maria's room and was able to identify Prosecution's Exhibits A-D as the four coats accused brought to Maria's room (R 25, 26). Several days after accused had given the coats to Wally he told her that he was leaving for Japan and she should keep the two coats (R 27). During the early part of August, while an investigation was in progress relative to the four fur coats, Maria was directed by the investigating officer to report to the Town Major's Office where she admitted that she had in her possession two fur coats. She turned over to the investigating officer the tiger skin coat and the racoon coat (R 31).

A stipulation, signed by the accused, the defense counsel and the trial judge advocate was introduced in evidence as Prosecution's Exhibit "H" which set forth the values of the four coats as follows: the silver fox, $300 (Pros Ex A); the bear skin (racoon), $270 (Pros Ex B); the Persian lamb, $200 (Pros Ex C); and the tiger skin, $120 (Pros Ex D) (R 36).

Lieutenant Parker testified that some time after 27 July 1945 the accused told him that "if I was asked whether or not I had been down there (the warehouse) with him I should say no" (R 8).

Specification 2 of Charge I - <u>Embezzlement of 6,000 reichmarks</u>. Sometime after receiving the two coats from the accused Frau Wally Domkovich moved into a room which he had secured for her. After moving into this room she was unable to locate a certain amount of German and Polish money which she had had just prior to the move. The accused assisted her in searching for it and the money was finally discovered in

a suitcase which she had forgotten to unpack. Wally then placed 6,000 reichmarks in bills of 50 and 20 mark denominations and about 10,000 Polish Zlodi in a small iron container (about 4"x3"x6") and gave it to the accused, requesting him to "Please be kind enough to bring the money to my husband in the hospital". The accused took the container and said he would take it to the hospital in Ingolstadt. Three days before accused "left" he told Wally that "he brought the money to the hospital and gave it to the man at the gate. The man was wearing a white jacket, and he told the man to bring the money immediately to Mr. Stefan Domkovich" (R 26-28). On or about 27 July 1945 Captain Burger was rooming with the accused. One evening the accused made the remark that his girl friend, known by Captain Burger to be Wally Domkovich, had given him some money. Thereupon accused exhibited some money in a metal box about 6" x 8" x 4" to 5" in size. Captain Burger believed there was also some Polish money in the box (R 32, 33). It was stipulated that if Stefan Domkovich were present he would testify as follows: "My name is Stefan Domkovich, and I am the husband of Walburga Domkovich. I am a Polish National and during the months of July and August 1945 I was a patient in the Polish Hospital at Ingolstadt, Germany. During the time I was there and to this date I did not receive any German or Polish money or currency from any attendant at that hospital or from any American Army Officer." (R 37, 38; Pros Ex K). It was also stipulated that the rate of exchange for valid German marks was ten (10) to the United States dollar (R 37, Pros Ex I).

Specification 1 of Charge II - Fraternization. The accused met Frau Wally Domkovich, a German girl married to a Polish National, in July and for a period of four or five weeks had visited nightly in her room from 10 to 10:30 (R 24, 25, 27, 28). In addition to the two fur coats the accused gave Wally a radio and "small articles it is customary to give a woman" (R 25). A letter 250.1 - GNMEQ, Headquarters Ninth Infantry Division, 23 March 1945, Subject: Fraternization, addressed to All Troops, Ninth Infantry Divisions and Attached Units, contained the following pertinent provisions:

> "2. All troops of this Division and attached units are prohibited from fraternizing with the inhabitants of Germany.
>
> 3. The term 'inhabitants of Germany' as used in this directive includes all German Nationals, as well as all civilians of other nationalities, situated in Germany.
>
> * * * * * * * * * * * * * * * *
>
> 6. The following must be avoided and is strictly prohibited:
>
> a. Visiting in homes in Germany.
>
> * * * * * * * * * * * * * * * *

e. Giving or accepting gifts.

* * * * * * * * * * * * * * * * *

By command of Major General CRAIG:

/s/ J. R. Hutchinson,
/t/ J. R. HUTCHINSON,
Lt. Col., A.G.D.,
Adjutant General."

(R 38, Pros Ex L).

Specification 2 of Charge II - Wrongfully taking a radio. Among certain other gifts, the accused gave Frau Wally Domkovich a radio (R 25). Without objection a copy of a letter, stated by the trial judge advocate to have been signed by the accused, dated 24 July 1945, addressed to Burgermeister, Geisenfeld, Germany, requesting delivery, if possible, of one small compact radio and other articles to the accused's organization, was introduced in evidence (R 36, Pros Ex F). Also introduced was a document dated Geisenfeld, 31 July 1945, purportedly signed by someone as Burgermeister and bearing a seal, stating "Mrs. Kathe Kaiser is requested to turn over her radio for use by the American Government" (R 36, Pros Ex G). It was stipulated "that the radio taken from the home of Frau Kothe Kaiser, Geisenfeld, Germany, on or about 31 July 1945, pursuant to a request of Capt. Harry A. Kivler of the Burgermeister of Geisenfeld, Germany, on 27 July 1945, was a Graetz Model 48W Factory No. 422958, and is the same radio taken from the room occupied by Frau Wally Domkovich by Sgt. Lawrence E. Flood, M.P., on or about 18 August 1945" (R 37, Pros Ex J). Wally Domkovich testified that the accused had given her a radio and that the radio was taken from her "by Sol of the military government". Technician Fifth Grade Saul E. Steelman of the 60th Infantry testified that he and Sergeant Flood recovered the radio (identified by Pros Ex J) from Frau Domkovich's apartment (R 25, 30). It was further stipulated that the radio was of the value of $30.00 (R 36, Pros Ex H).

Specification 3 of Charge II - False Official Statement.' On 9 August 1945 while Lieutenant Colonel Harry R. Phipps was investigating certain alleged wrongful acts of accused and after having warned him of his rights under Article of War 24, asked the accused the following question:

> "Tell me what you know of the circumstances under which you, with another officer, made contact with and appropriated certain items of clothing and equipment at WOLNZACH, Germany, on 27 July 45?"

To this question accused made the following sworn statement:

> "My first knowledge of the items in WOLNZACH was when they were

brought to my attention by Capt. Burger. He suggested that we go down to WOLNZACH and investigate it. After getting permission from the Military Government in Geisenfeld, we proceeded, after dinner, to WOLNZACH. Upon arrival at the 1st Battalion C. P., Capt. Burger contacted the Adjutant of the 1st Battalion and told him exactly what we intended to do. He gave Capt. Burger an 'O.K.' on his intentions and we proceeded to the warehouse. We contacted the woman of the house and she took us upstairs where we saw all these Wehrmacht pants. We got the 2½ ton truck, which had accompanied us, to pull up in front of the building and had the pants thrown out of the window into the truck. We, also, acquired two sewing machines, complete, and one sewing machine head. I, myself, picked up two small drills and some drill bits to be used in my Maintenance Section. I, also, picked up about a dozen electric light bulbs. I, also, took about 50 ft. of insulated wire to be used for extensions. Other than the above items, I know of nothing or saw nothing else being removed from the building. We left there at approximately 1530 hours." (R 34, 35; Pros Ex E).

4. The rights of the accused as a witness were explained to him and he elected to remain silent (R 47, 57). In the accused's behalf Captain Burger testified that he secured authority to enter the warehouse at Wolnzach on 27 July 1945 to remove certain articles, including a sewing machine and some Wehrmacht trousers. The accused accompanied him because he was "more able" to select a good machine than Captain Burger (R 39, 40). They went to the warehouse between 10:00 and 10:15 and remained about an hour and a half to an hour and three quarters (R 41-43). The accused and Captain Burger were together all the time except for one or two instances lasting only two or three minutes each. One of these instances was in the attic where there were 25 or 30 ladies' fur coats. The accused may have seen the coats and might have remained in the vicinity of the coats (R 41-44). The two of them left the warehouse together but Captain Burger did not see the accused carry anything except a riding crop which he habitually carried (R 40, 43, 44). The accused and Captain Burger drove off in a jeep while the material that Captain Burger had secured was hauled away in a truck. Captain Burger did not see any packages of any size in the jeep. He also checked all of the material that was put on the truck before it moved out. He further testified that it could have been possible for a package or two to have been on the truck without his seeing them (R 45, 46).

5. Specification 1 of Charge I. All elements of the offense alleged in this Specification were proved by competent evidence introduced at the trial. The testimony of the German civilian witnesses corroborated by that of Lieutenant Parker clearly establishes the fact that accused removed or was instrumental in having removed from this warehouse by trespass the four fur coats in question; that on the evening of the same day the coats were removed accused took them to a room which was occupied by a

Polish girl by the name of Maria and where his friend, Frau Wally Domkovich was visiting; that he gave two of these coats to Wally and, inferentially, gave the other two to Maria; that several days later he told the former that she should keep the two which he had given her. Further evidence of accused's guilt of a wrongful act was established when he told Lieutenant Parker to deny that he had accompanied the accused to the warehouse (Wharton's Criminal Evidence, Sec 306).

The defense was apparently based on the proposition that the German civilians either did not protest the accused's actions in taking the coats or that they gave the coats to the accused. "In most cases the taking is done secretly or stealthily, but it is not necessary that the act be thus committed to constitute the crime, for if the offender unlawfully takes the property of another without any claim or right to it, with the intent to deprive the owner of it and appropriates it to his own use, larceny has been committed notwithstanding the act may have been done openly, with a reckless disregard of the consequences, and even with knowledge of the owner." (32 Am Jur, Larceny, Sec 13). In view of the circumstances attending the taking as disclosed by the evidence neither contention is tenable. Unquestionably the German civilians did not give the fur coats in question to the accused. It appears equally true that they did not violently protest his actions but the reason for this is aptly summed up in the testimony of Ly Cap, the English speaking employee, when she said: "We could not make any protests because we had asked them again and again if they had any authorization and they said Yes, and after that we were in no position to make any objections." (R 23). The accused cannot avail himself of the presumption in favor of the non-existence of the felonious intent which might arise from his open taking without apparent force when it is considered that the accused was an officer of the occupying forces and those in possession of the goods were civilians and members of a defeated nation. Where consent of the owner, to the taking, is not specific or voluntary, prosecution for larceny is not barred on the ground that there was no trespass (Wharton's Criminal Law, Sec 1155). That the accused possessed the requisite felonious intent permanently to deprive the owner of his property is clear from his disposition of the property.

Specification 2 of Charge I. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (MCM 1928, par 149h). The constitutent elements of this offense are "(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent" (ibid).

The testimony of Wally Domkovich established element (a), above, and her testimony was to some extent corroborated by the testimony of Captain Burger, the accused's roommate, who remembered that the accused made the remark that his "girl friend" had given him some money, that the money was

in an iron box of the description of the box in which the money had been placed when intrusted to him. The accused's conversion of the money and his fraudulent intent in so doing, elements (b) and (c), above, were established by the stipulated testimony of Stefan Domkovich that he did not receive any money while a patient in the hospital at Ingolstadt, Germany, during the months of July and August, by the statement heretofore adverted to that the accused had been given some money by his "girl friend", by the statements made by the accused to Wally that he had given the money to a hospital attendant to give to Stefan Domkovich and that he was leaving for Japan. Thus, the accused's failure to deliver the money intrusted to him coupled with his false statements relative thereto, demonstrates his intent to fraudulently convert the money to his own use.

Specification 1 of Charge II. This offense involved the violation by the accused of a policy adopted by the American Army and put into effect in the particular command to which the accused was assigned by a directive prohibiting social intercourse with all civilian inhabitants of Germany. The accused, by visiting nightly with Frau Wally Domkovich for a period of four or five weeks and by presenting gifts to her, directly violated the provisions of this directive. Whether, as suggested by the defense, Wally Domkovich had, by reason of her marriage to a Polish National, acquired Polish citizenship, was immaterial in view of the inclusive wording of the directive. The proof as to the dates of the fraternization was vague but sufficiently certain, in the absence of objection, to apprise the accused of the alleged offense.

Specification 2 of Charge II. The evidence in support of this Specification shows that the accused on 24 July 1945 addressed a request to the Burgermeister of Geisenfeld, Germany, asking that a radio, among other things, be delivered for authorized use to the Service Company of the Sixtieth Infantry; that pursuant to said request, the Burgermeister on 31 July 1945 issued an official order reading "Mrs. Kathe Kaiser is requested to turn over her radio for use of the American Government"; and that on that date a Graetz Model radio, 48W Factory No. 422958 was taken from the home of said Frau Kaiser and on or about the same date was brought by accused to Wally Domkovich's room. Further it was shown that accused told Frau Domkovich the radio was for her room and that he thereafter told her to give it away. Frau Domkovich testified that the radio accused had given her was taken from her "by Sol of the military government in Geisenfeld". Apparently she referred to Technician Fifth Grade Saul E. Steelman of the Sixtieth Infantry who testified that he and Sergeant Flood recovered the radio from her apartment. From all the evidence it is clear that accused obtained possession of the radio in question by fraud or fraudulent trick or device and turned it over to Frau Domkovich. Such a taking, even assuming the owner parted voluntarily with the radio in accordance with the request of the Burgermeister, was not with the consent of Frau Kaiser. The fraud or trick practiced on the person from whom possession is thus obtained enables the requirement of a trespass to the possession of the owner to be met on the theory that the fraud or trick itself takes the

place of a trespass or is equivalent thereto (32 Am Jur 917). The evidence amply supports the Charge of wrongfully taking and carrying away the radio as alleged.

Specification 3 of Charge II. With reference to this Specification the evidence clearly proved that, as alleged, accused did make a false statement to the investigating officer, that the statement was made with intent to deceive and was known by the accused to be untrue. A false statement made in the course of an investigation is patently made with intent to deceive (CM 240259, Hall, 26 BR 7). While the false statement alleged and proved might logically be regarded as a detailed reiteration of representations involved in the accused's plea of not guilty of Specification 1 of Charge I (larceny of four fur coats), The Judge Advocate General has held in a recent case — analagous except that the offense was charged under Article of War 95 instead of 96 — that false testimony to an investigating officer is a false official statement in violation of Article of War 95 (CM 230829, Mayers, 18 BR 65).

6. Accused is 34 years of age. After he graduated from high school, he took a year of post-graduate work at Wharton Night School, followed by two years of night school at the Spring-Garden Institute in Philadelphia, studying oil refining processes. During this period he was employed at the Susquehana Coal Company as an electrician. Thereafter, until inducted, he was employed by the Atlantic Refining Company in their research laboratories. He has been married for four years and has a daughter two years old. On 16 June 1941 he was inducted and received his basic training at Camp Wheeler, Georgia, in the infantry. After basic training he was assigned to the cadre at the Infantry Replacement Training Center, Fort McClellan, Alabama. On 17 October 1942, he was commissioned a second lieutenant, after having completed Officer Candidate School at Fort Benning, Georgia. He was assigned to the Infantry Replacement Training Center at Fort McClellan, Alabama, where he remained for one and a half years. In April 1944 he was transferred to the Sixty-Fifth Infantry Division at Camp Blanding, Florida, and assigned to the 261st Infantry as Regimental Motor Officer. He was promoted to first lieutenant on 4 August 1943 and to the grade of captain on 1 January 1945. He entered upon foreign service on 10 January 1945 and participated in two campaigns. He has been awarded the Good Conduct Medal and the Combat Infantryman's Badge. Of his twelve efficiency ratings, ten are "excellent" and two are "very satisfactory".

7. Although clemency was not recommended by the court in this case, letters were written to the reviewing authority by accused's regimental commander, his former commanding officer and an officer and seven enlisted men of accused's organization all of which recommended clemency. Numerous communications, including letters from accused's wife and near relatives, letters, together with an analysis of the case, from Mr. Leon Schwartz, district attorney of Luzerne County, Pennsylvania, statements from Captain Burger relative to the case, dated 7 October 1945 and 15 April 1946, a letter from the accused, dated 30 March 1946, letters from the Honorable Daniel

J. Flood, House of Representatives and The Honorable Francis J. Myers, United States Senate, have been appended to the record and given careful consideration.

8. 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. 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 the confirmation of the sentence. Dismissal is authorized upon conviction of a violation of both the 93rd and the 96th Articles of War.

Thomas H. Tapp, Judge Advocate

A. Hortenstein, Judge Advocate

Joseph J. Stern, Judge Advocate

JAGH - CM 307033 1st Ind

WD, JAGO, Washington 25, D. C. Aug 27 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Harry A. Kivler (0-1297051), Infantry.

2. Upon trial by general court-martial this officer was found guilty of the larceny of four fur coats of the total value of about $890 (Chg I, Spec 1), embezzlement of 6,000 reichmarks of the exchange value of $600 (Chg I, Spec 2) in violation of the 93rd Article of War and wrongfully fraternizing with civilians in Germany (Chg II, Spec 1), wrongfully taking a radio (Chg II, Spec 2), making a false official statement (Chg II, Spec 3) in violation of the 96th Article of War. No evidence was introduced of any previous convictions. He was sentenced to dismissal, total forfeiture and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was a member of Service Company, 60th Infantry, which was stationed at Geisenfeld, Germany, at the time he committed the offenses alleged. On 27 July 1945 the accused made two trips to a warehouse in Wolnzach, Germany, where a German woman had certain fur coats stored for a client of hers who lived in Munich. Without her consent accused took four of these coats from the warehouse and later gave two of them to Frau Wally Domkovich, a German girl married to a Polish man, and the other two to a Polish girl by the name of Maria.

Several days after accused had given Frau Domkovich the coats, and while visiting at her room, she intrusted to him 6,000 reichmarks and some Polish money, which accused agreed to take to her husband who was a patient in the Polish hospital at Ingalstadt, Germany. This money was never delivered to Stefan Domkovich, her husband. Substantial evidence was introduced at the trial upon which the court was justified in finding that this money was fraudulently converted by the accused, notwithstanding his statement to Frau Domkovich that he had delivered the money to an attendant at the Ingalstadt Hospital and had told him to take it to her husband.

On 23 March 1945 a directive was published by accused's organization prohibiting "all troops" from fraternizing with the inhabitants of Germany or civilians living in Germany. The directive strictly prohibiting "visiting in homes in Germany" and "giving or accepting gifts". Accused met Frau Domkovich in July 1945 and for a period of four or five weeks visited nightly in her room. In addition to the two fur coats, accused gave her a radio and "small articles it is customary to give a woman".

On 24 July 1945 accused made a request of the Burgermeister, Geisenfeld, Germany, that he furnish the former "one small compact radio". Pursuant to this request the Burgermeister secured a radio, by requisition, dated 31 July 1945, from Frau Kathe Kaiser of Geisenfeld "for use by the American Government". This radio came into possession of the accused and on or about 31 July 1945 he gave it to Frau Domkovich. On or about 18 August 1945 the radio was found in her room by military police.

On 9 August 1945 while accused was being officially investigated relative to the alleged wrongful taking of personal property from the warehouse in Wolnzach, Germany, on 27 July 1945, stated under oath, after enumerating certain items taken by him, which did not include fur coats, that "other than the above items, I know of nothing or saw nothing being removed from the building".

4. Consideration has been given to communications attached to the record of trial and recommending clemency on behalf of the accused from The Honorable Francis J. Myers, United States Senate; The Honorable Daniel J. Flood, House of Representatives; Mr. Leon Schwartz, district attorney of Luzerne County, Pennsylvania; accused's wife and near relatives and several officers and enlisted men, members of accused's organization.

5. Accused is 34 years of age, has been married four years and has one child, a daughter, 2 years old. He was inducted into the service on 16 June 1941, commissioned a second lieutenant on 17 October 1942, promoted to the grade of first lieutenant on 4 August 1943 and to the grade of captain on 1 January 1945. He entered upon foreign service on 10 January 1945 and participated in two campaigns. The Good Conduct Medal and the Combat Infantryman's Badge have been awarded to him.

6. I recommend that the sentence be confirmed but that the period of confinement be reduced to three (3) years and that the sentence as thus modified be carried into execution. I also recommend that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 278, 12 Sept 1946)

CM 307038

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
In the Pacific

11 January 1946

Board of Review
CM P-1119

UNITED STATES v. Private First Class JAMES A. SMITH (37359130), Company H, 160th Infantry.	Trial by G.C.M., convened at Headquarters 40th Infantry Division, APO 40, 17, 19 and 21 November 1945. Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. The Philippine Detention and Rehabilitation Center, APO 75.

OPINION of the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class James A. Smith, Company H, 160th Infantry, did, at Pier Number One, Fusan, Korea, on or about 2140, 21 October 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Mr. Yoshimura, Fusan 2, Korea, the property of two hundred (200) yen, value about thirteen dollars and thirty-three cents ($13.33).

The accused pleaded not guilty to the charge and specification. He was found guilty of the specification, except the words "by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Mr. Yoshimura, Fusan 2, Korea, the property of two hundred (200) yen, value about thirteen dollars and thirty-three cents ($13.33)," substituting therefor the words "with intent to commit a felony; to wit, robbery, committing an assault upon Satayama Masao by wilfully and feloniously seizing and striking the said Satayama Masao and searching his person," of the excepted words not guilty, of the substituted words guilty, and guilty of the charge. The reviewing authority approved the sentence but suspended the dishonorable discharge until the accused's release from confinement and designated the Philippine Detention and Rehabilitation Center, APO 75, as the place of confinement. The findings and sentence were promulgated in General Court-Martial Orders Number 23, Headquarters 40th Infantry Division, 30 November 1945.

3. The evidence reveals that at about 2140, 21 October 1945, Colonel Raymund G. Stanton observed the accused and a Korean civilian on Pier No. 1, Fusan, Korea. The accused was searching the Korean, who was holding his coat open with his hands. It did not appear that the accused was armed. There was no scuffling or physical violence and the civilian did not cry out or try to call attention to what was transpiring (R. 4, 5). The incident occurred at a rather isolated spot, midway between two staircases (R. 13) and half-way between two overhead lights which were about 25 feet apart.

As the colonel approached, the accused backed away and the Korean lowered his coat. At Colonel Stanton's direction, both followed him to the office. Enroute, the accused handed an object to the civilian who put it in his pocket. The colonel reached into the pocket and pulled out a bundle of money in the amount of 200 yen (R. 4, 5).

The Korean was, at that time, identified as "Mr. Yoshimura" by a pass he carried but when he appeared at the trial as a witness it was disclosed that his name was in fact Satayama Masao (R. 8, 12, 13). He formerly was employed on the pier (R. 8) and was not the person known as Mr. Yoshimura (R. 7).

Masao was unable to identify the accused (R. 9). His testimony disclosed that while he was working, an American soldier (apparently the accused) tapped him on the shoulder and beckoned him to follow. When he complied, the soldier searched him, found the money and took it (R. 11). Masao, by sign language, asked several times that the soldier return it but the latter refused until after the other soldier (the colonel) had intervened (R. 9, 10). When asked, "Why did you let the soldier do this to you?" the witness answered, "I can't speak English and he was too big for me" (R. 12). He did not remember whether the soldier was armed. No others were present, as he had been called away from his place of work,

"out of sight" (R. 12). Masao, who received only 60 yen per month as wages, explained that the money represented several months' savings which he brought with him to make some purchases (R. 11).

The accused elected to testify under oath. Assertedly he had the night before received 1000 Japanese yen from a member of his organization, Tennessee Jenkins, to exchange for Korean yen. When the civilian approached him and offered to effect the exchange, he gave him the money. When he saw the Korean the next evening he tried to explain what he wanted, then searched him to reclaim the Japanese money and return it to Jenkins (R. 13, 14, 16).

Testimony for the defense disclosed that there had been a soldier in accused's organization named Tennessee Jenkins, who said he had given accused some money to exchange for him. Jenkins had returned to the United States and did not testify (R. 17-19).

4. The court, by exceptions and substitutions, found the accused guilty of an offense against Satayama Masao, whereas he had been charged with the robbery of a Mr. Yoshimura, who was shown by the record to be another person. The power of a court or reviewing authority to make substitutions in the language of a specification does not include the making of changes which alter the nature or identity of the offense charged and do not involve a lesser offense necessarily included in that which was charged (MCM, 1928, par. 78c). An assault upon the one, with intent to commit robbery, could not have been included within the robbery alleged with respect to the other. The variance is fatal (CM 191809 (1930), 1 B. R. 301; CM 193191 (1930), 2 B. R. 77, Dig. Op. JAG, 1912-40 sec. 451 (45); CM 198857 (1932), 3 B. R. 239).

In the last mentioned case the specification alleged the wrongful taking of a vehicle, the property of Leon Melicio and Gonzales Cendido. By exceptions and substitutions the accused were found guilty of taking the property of Leon Gonzales, Malacio Gonzales and Candido Gonzales. The Board of Review stated:

> "The evidence adduced at the trial established, and the court found, that the accused wrongfully converted a Durant roadster belonging to Leon Gonzales, Malacio Gonzales and Candido Gonzales. There is no evidence in the record that the two men named in the specification do not exist. There is no similarity in the names of the two alleged owners as stated in the specification and the names of the three owners as proved at the trial and found by the court. It is too well settled to require discussion that the wrongful conversion of the property of one man is a separate and distinct offense from the wrongful conversion of the property of another man. Neither offense is included in the other. Where a court by

exceptions and substitutions finds an accused not guilty of the offense charged but guilty of another offense, the legal effect of the action of the court is an acquittal unless all the elements of the offense found were necessarily included in the offense charged. We think the rule applicable to the instant case is adequately stated in the opinion of Mr. Justice Story in the case of United States v. Howard, 26 Fed. Cases 388, as follows:

> 'In regard to cases of misnomer, it will be found, that, in all the cases where the variance has been held fatal, it was a misnomer of a party whose existence was essential to the offence charged in the indictment; as, for example, in cases of theft, where the property is charged as that of A. B., and it turns out, in proof, to be of A. C.; or in cases of robbery, where the person robbed is alleged to be A. B., and it turns out on proof to be C. B. See 2 Russ. Crimes, 707, 714, 715.'"

5. For the reason stated above the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

(Disqualified), Judge Advocate

Allan R. Brown, Judge Advocate

Hart Seyler, Judge Advocate

Clement A. Ling, Judge Advocate

SPJGF - CM 307038

2nd Ind. 18 April 1946

Hq., ASF, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. In the foregoing case of Private First Class James A. Smith, 37359130, Company H, 160th Infantry, attention is invited to the opinion of the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific that the record of trial is legally insufficient to support the findings of guilty and the sentence, and to the concurrance in said opinion of the Acting Assistant Judge Advocate General in charge of said Branch Office. I concur in the opinion of the Board of Review. You have authority to take action upon the case.

2. I recommend that the findings of guilty and the sentence be vacated and that all rights, priviledges, and property og which accused has been deprived by virtue of the findings and sentence so vacated be restored. A form of action designated to carry this recommendation into effect, should it meet with your approval, is inclosed.

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 176, 12 June 1946).

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

SPJGE - CM 307039

UNITED STATES V. Private EARNEST A. SCOTT (42162369). 269th Replacement Company. 12th Replacement Battalion.	29 MAR 1946 United States Army Forces WESTERN PACIFIC Trial by G.C.M., convened at Headquarters, Base X, APO 358, 10 October 1945. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

1. The accused was tried upon the following Charge and Specification.

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Earnest A. Scott, (Casual) 269th Replacement Company, 12th Replacement Battalion, APO 711, (then 557th replacement Company (Provisional), 43rd Replacement Battilion), did, at APO 711, on or about 26 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Vernon L. Stuart, (Casual) 657th Replacement Company (Provisional), 43rd Replacement Battalion, a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the charge and the specification. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the recordof trial to the Commander in Chief U.S. army forces, Pacific, for action under Articel od War 48. The Commander in Chief, U.S. Army Forces, Pacific, confirmed the sentence but withheld the order directingthe execution of the sentence pursuant to Article od War 50½. The record of trial was then forwarded to the Branch Office of The Judge Advocate General with the U.S. Army Forces in the Pacific.

2. The Board fo Review in the Branch Office of The Judge Advocate General of the U. S. Army Forces in the Pacificexamined the record of trial, and in formal holding attached to the record was of the opiniom

that the record of trial is legally sufficient to support the findings and the sentence.

3. The Acting Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with U. S. Army Forces in the Pacific approved the holding of the Board of Review in that office on 27 December 1945 and advised the Commander in Chief, U. S. Army Forces, Pacific, that he then had authority to order the execution of the sentence.

4. On 19 January 1946 the powers conferred by direction of the President upon thr Commander in Chief, U. S. Army Forces, Pacific, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated.

5. The Assistant Judge Advocate General in charge of the above-mentioned branch office thereupon forwarded the record of trial in this case to The Judge Advocate General, Washington, D.C. The Board of Review in the Office of The Judge Advocate General, Washington, D.C., has examined the record of trial, concurs in the opinion of the Board of Review of the Branch Office (a copy of which is hereto attached) ,and is also fo the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Articel of War 92.

Herman Moyse
---------- , Judge Advocate

William B. Kuder
----------, Judge Advocate

~~Earl W. Wingo~~----------, Judge Advocate

SPJGK - 307039 1st IND. 19 April 1946

Hq ASF, JAGO, Washington, D.C.

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial, the holding of the Board of Review in the Branch Office of The Judge Advocate General with the U.S. army Forces in the Pacific, and the opinion og the Board of Review in my office in the cage of Private Earnest A. Scott (42162869), 269th Replacement Company, 12th Replacement Battalion.

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 was found guilty of the murder of another enlisted man in violation of Article of War 92. He was sentenced by the court, all members present concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial to the Commander in Chief, U.S. Army Forces, Pacific, for action under Article of War 48. That officer confirmed the sentence and withheld the order directing the execution of the sentence pursuant to Article of War 50½. The Board of Review in the Branch Office of The Judge Advocate General with the U.S. Army Forces in the Pacific, examined the record of trial and found it legally sufficient to support the findings and the sentence. Its opinion was approved on 27 December 1945 by the Acting Assistant Judge Advocate General with the U.S. Army Forces in the Pacific, who advised the Commander in Chief, U.S. Army Forces, Pacific, that he had authority to order the execution of the sentence. Before execution of the sentence had been ordered the powers conferred upon the Commander in Chief, U.S. Army Forces, Pacific, under the provisions of Articles of War 48, 49, 50 and 50½ were terminated, and in accordance with instructions contained in a cable from the War Department dated 19 January 1946, as clarified by cable from the War Department dated 21 January 1946, the record of trial was forwarded to The Judge Advocate General for action by the President.

3. The evidence shows that the accused had indulged rather freely in intoxicating liquors during the evening of 25 June 1945 and had had an altercation with another enlisred man, during the course of which accused pulled a knife, but was prevented from using it by his companions. Shortly afterwards, in the early hours of 26 June 1945, accused visited two or three tents near his own. In the last tent he visited he demanded that each of the occupants raise his mosquito net. Upon the refusal of Private Vernon L. Stuart to raise his net, accused fired at Private Stuart with a pistol which he carried in his left hand. One of the bullets so fired struck Private Stuartin the stomach and caused his death. Accused was definately identified by eyewitnesses as the soldier who fired the fatal shot.

4. Accused is 24 years of age. He was inducted into the service on 22 December 1944 without any previous service and has seen no combat service. According to information secured by and contained in the review of the Theater Judge Advocate, U.S. Army Forces, Pacific, accused completed 1-½ years of high school at the age of 17, worked with the C.C.C. for 5-1/2 months, thereafter did odd jobs for six months, and later worked on the National Youths Administration program as electrician. In 1942 he was foundguilty of robbery and adjudged a 30-year sentence, 21 months of which he served before beimg paroled. Three months later he was inducted into the Army. He married just befire entering the Army and is reported to be the father of an illegitimate child by another woman.

5. While accused guilt was clearly established, it is my opinion there is lacking that degree of actual malice and deliberste intent to murder which demands imposition of the death penalty. Accused undoubtedly hadindulged freely in intoxicating liquors earlier during the evening, and altho it was not established that he was so drunk as to render him irresponsible for his actions, his condition largely explains his unprovoked killing of deceased with whom he had no previous quarrel. I, therefore, recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor fow a period of fifteen years , and that a United States penitentiary be designated as the place of confinement.

6. Consideration hasbeen given to a letter from Honorable Adam Clayton Powell, Jr., Member of Congress, to The Adjutant General, and also to a letter from Mrs Rosalee Green to the President, requesting clemency in behalf of the accused.

7. 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 herein above made, should such action meet with your approval.

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General.

G.C.M.O. 179, 13 June 1946).

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

SPJGN-CM 307040

UNITED STATES	UNITED STATES ARMY FORCES MIDDLE PACIFIC
v.	Trial by G.C.M., convened at APO 960, 25 October 1945.
Private First Class ALFRED A. PAGAN (30108172), 1492nd Engineer Maintenance Company.	Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Alfred A. Pagan, 1492nd Engineer Maintenance Company, APO 957, on Detached Service with Headquarters Detachment, Station Complement, APO 958, did, at Pepeekeo, Territory of Hawaii, on or about 13 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Carl J. Braun, a human being by stabbing him with a knife.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. 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 Article of War 48. The confirming authority, Commander-in-Chief, United States Army Forces, Pacific, on 10 January 1946, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life; designated the United States Penitentiary,

McNeil Island, Washington, as the place of confinement; and, pursuant to Article of War 50½, withheld the order directing execution of the sentence. The Branch Office, United States Army Forces, Pacific, having been inactivated, the record has been forwarded to this office in accordance with War Department instructions.

3. Evidence for the prosecution: Accused came into a filling station in Pepeekeo, Hawaii, about 8 o'clock in the evening of 13 September 1945 and requested permission to leave a valise. Since the station was about to close his request was refused. Accused exhibited no signs of having been drinking, according to the proprietor of the station (R. 16, 17).

Leaving the station accused walked down the street a short distance to the residence of the Low family (R. 9, 12, 16). Two Navy men, Chief Carpenter Edwin Allison and Motor Machinist Mate, Third Class, Clifton E. Brown, dinner guests of the Lows, were standing outside under a canopy which extended out from the porch over a driveway (R. 6-7, 11-12; Pros. Exs. A-1, A-2, A-3). Accused came up the driveway, stopped about 50 feet from the canopy, and called to Brown, "Come here a minute. I want to talk to you" (R. 7-8, 12). Allison observed that accused had been drinking (R. 11). It was raining and Brown replied that accused would have to come up under the canopy if he wanted to speak with him. Accused approached and asked Brown "to go inside and tell Kelly to come outside, the Puerto Rican want to see her * * *." Brown stated that no Kelly lived there but accused insisted that she did. As they spoke, Carl Braun, a relative of the Lows residing with them, intervened and said, "I am the man of the house. I'll take care of this." Brown walked away to join Allison on the steps of the porch and did not hear any further conversation (R. 8, 12). Braun's wife came out of the house and sought, unsuccessfully, to get him to come back inside the house (R. 14). When Brown reached the porch, he turned around and saw Braun, without much force, push the accused. The latter pulled out a knife with a seven or eight inch blade, raised it high in the air, took a couple of steps forward, and stabbed the unarmed Braun "in the left shoulder" (R. 8, 12). Allison ordered accused to put away the knife but the latter rejoined provocatively, "Maybe you want something of it" (R. 8).

Braun staggered and collapsed on the ground (R. 12). A doctor, who was immediately summoned, pronounced Braun dead at 8:40 p.m. (R. 8). An autopsy disclosed that he had received a wound five inches in depth. The blade penetrated the pectoral muscles, passed between the first and second ribs, continued through the thickness of the apex of the lung into the mediastinum and terminated in the pulmonary artery just as it leaves the heart. Death was due to an acute hemorrhage into the left pleural cavity from the pulmonary vein (R. 6; Pros. Ex. C).

Accused fled after the attack but was taken into custody early on the morning of 14 September. Upon questioning by a military police officer he made a voluntary statement in which he recounted his activities culminating in the killing (R. 12, 18-19, 20-24; Pros. Ex. D). He left Honolulu about 1200 and, upon arriving at Hilo, had lunch and a few drinks. Following a brief visit to the home of a woman friend, Juanita Martinez, he hitch-hiked to Pepeekeo to find a Mrs. Kelly who, accused believed, was responsible for the death of his mother in 1942. His mother had been found dying from a fractured skull after she and Mrs. Kelly had been out drinking together. Accused intended to seek out Mrs. Kelly in Pepeekeo and to kill her with a knife which he had brought with him from Fort Shafter. Approaching the Low home, where he thought Mrs. Kelly lived, he hid his bag by the side of a school so that "in case I had to run I can come back and get the bag and take it with me. * * * If I stabbed somebody they want to chase me and try to catch me." He asserted that he was drunk and staggering at the time. His reason for getting drunk was to kill Mrs. Kelly since "when I am sober I don't got guts to kill nobody." After the deceased appeared accused told him he wanted to see Kelly and was told she did not live there. When accused insisted she did the deceased shoved him three times. Accused warned him twice and the third time stabbed him. After wiping the blood off the knife accused picked up his bag and walked away (Pros. Ex. D).

4. Evidence for the defense: Accused, cognizant of his rights as a witness, testified in his own behalf (R. 32). He stated that after arriving in Hilo and having lunch, he went with a friend to a bar and had "a couple of drinks" (R. 33, 34). From there he went to the Times Square Bar where he remained drinking until it closed. He met Juanita Martinez on the street, accompanied her home to say "Hello" to her folks, and then hitch-hiked to Kawainui, about three miles from his home in Hamakua (R. 34-35). He commenced to walk toward his home, and, passing near the Low residence, where Kelly formerly resided, he decided to go in and find out about his mother's death (R. 35-36). On his belt at the time was a knife, which he had made in his spare time at Honolulu and which he had brought along to show his family. The knife had been in his field jacket but when he left the Martinez residence, he took it out, opened it, and placed it on his belt (R. 38-39, 41). He denied having any intention of using the knife on Mrs. Kelly and he did not remember ever making any statements to the contrary in his confession (R. 41).

Before going up to the Low residence he left his bag by the side of the road since he intended to return that way and did not wish to carry it along. He did not remember making a statement in his confession that the reason for leaving the bag there was to have it handy in event he had to run away (R. 43-44). After reaching the Low residence he talked to a sailor about seeing Mrs. Kelly and suddenly Carl Braun

appeared (R. 38). Accused told him he wanted to see Kelly but Braun was angry and gave accused a push. Accused warned him but Braun repeated this action three times. "I went off my head and I guess I hit him" (R. 38, 45).

Testimony concerning accused's drinking on 13 September was given by the doorman at the Times Square and by Mrs. Juanita Martinez. The former recalled that accused came into the Times Square Bar between two and two-thirty in the afternoon, sat down and "had a drink." Accused went out in half an hour, came back around five o'clock and "ordered his drink." He told the doorman that he was on his way to his home in Hamakua (R. 28-29). Mrs. Martinez testified that accused visited her home about six o'clock. She asserted that "the way he was acting that night he walked like a drunk man." She had known him since his childhood and thought he had always been "a good boy" (R. 30-31).

The stipulated testimony of First Lieutenant Saul Hofstein, AGD, Clinical Psychologist, disclosed that accused functioned "at a mental defective level" and that there were indications that this represented a marked deterioration of a non-organic nature from a higher level of intelligence, probably dull normal. He was deeply disturbed emotionally, impulsive, tended to blow up under pressure and had limited capacity for making judgments. His mental age was 9 years 6 months and his intelligence quotient, 63 (R. 46; Def. Ex. 1).

5. It was shown by stipulation that accused was hospitalized at the 219th General Hospital for observation as to his sanity and, on 9 October, 1945, brought before a Board of Medical Officers. The Board found that accused was capable of distinguishing right from wrong, and of adhering to the right, on 13 September 1945; and that he was presently sane and capable of cooperating in his defense (R. 6; Pros. Ex. B).

6. It is alleged that accused "did, at Pepeekeo, Territory of Hawaii, on or about 13 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Carl J. Braun, a human being by stabbing him with a knife," in violation of Article of War 92.

Murder is "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant without legal justification or excuse. MCM, 1928, par. 148a, p. 162. "Malice aforethought" has been defined as follows:

> "* * * Malice * * * is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will toward 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." Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711.

The Manual for Courts-Martial provides that "malice aforethought" may be found when, preceding or co-existing with the act by which death is caused, there is an "intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not." MCM, 1928, par. 148a, p. 163. Malice may be inferred from the use of a deadly weapon in a manner, likely to, and which does, cause death. Wharton's Criminal Law (12th Ed. 1932), Vol. I, sec. 420, p. 654-655. The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act." Wharton's Criminal Law, Vol. I, sec. 420, p. 631.

The record discloses that when accused went to the Low residence he was "fatally bent on mischief." His removing the knife from his pocket, his opening the blade and sheathing it in his belt where it would be readily available, his secreting his handbag near the house to facilitate a quick get-a-way, eloquently support his admission, conveniently forgotten when he took the witness stand, that he went there with the intention of killing Mrs. Kelly. His vicious and sudden attack with a deadly weapon on Braun, whom accused thought was seeking to frustrate his attempt to see Mrs. Kelly, reveals a "malo animo" and denotes malice.

In accordance with the legal authorities quoted it is clear that accused is guilty of murder unless the evidence is sufficient to show that he acted "in the heat of sudden passion caused by adequate provocation." The Manual for Courts-Martial states:

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide." MCM, 1928, par. 149a, p. 166.

Here we are dealing with an accused possessing a murderous bent of mind which antedated the encounter with Braun. Although the latter may have pushed accused and thus have intensified his emotional reaction, there was no sudden burst of passion such as is contemplated by the law of manslaughter. CM 288446, Arvizu. Furthermore we do not regard Braun's actions as sufficient "to excite uncontrollable

passion in the mind of a reasonable man." Winthrop states, "the quality of the provocation by which the act was induced" is the main test by which we differentiate between murder and manslaughter. "In any case where the provocation, though material, is not excessive, as * * * where the person is assailed but not seriously * * * the law will in general hold the killing to be not manslaughter but murder." Winthrop's Military Law and Precedents (2nd Ed., 1920 Reprint) p. 675. CM 238138, Brewster, 24 BR 173, 176. CM 245726, Vest, 29 BR 265, 275. CM 247055, Mason, 30 BR 249, 253.

The evidence is conflicting as to accused's state of sobriety at the time of the slaying.

> "It is a general rule that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for a crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense." MCM, 1928, par. 126a, p. 136.

> "Before intoxication can be relied upon as reducing the degree of the crime, the intoxication must have been of such a degree as in fact to render the slayer incapable of attaining the purpose, intent, or malice, that the law deems an ingredient of the offense * * *." 26 Am. Jur. sec. 118.

There is nothing in the record to show that accused was so deprived of mental capacity as to be unable to deliberate or premeditate. A reasonable interpretation of the testimony would be that accused had been drinking rather heavily but that his mental faculties were not seriously impaired. The Board of Review concludes that all of the elements of the offense of murder are established beyond any reasonable doubt.

7. The Charge Sheet shows that accused is about 20 years 6 months old and that he was inducted on 26 April 1944.

8. 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 and to warrant confirmation thereof. A sentence either of death or life imprisonment is mandatory upon conviction of murder, in violation of Article of War 92. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of murder,

recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sec. 22-2401 of the District of Columbia Code.

Walmot T. Baughn, Judge Advocate.

Robert J. Clunn, Judge Advocate.

James D. O'Hara, Judge Advocate.

(GCMO 189, 18 June 1946)

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

SPJGN-CM 307041

UNITED STATES v. Private First Class CHARLES R. NICHOLSON (36907853), and Privates GEORGE T. SHEPPARD (35739318), and WILLIAM H. MURPHY (35273297), all of Company D, 188th Parachute Infantry.	)	11TH AIRBORNE DIVISION Trial by G.C.M., convened at APO 468, 5, 6, and 12 November 1945. Sheppard and Murphy: Acquitted. Nicholson: Confinement for four months and forfeiture of $18.66 per month for six months. Regimental Stockade.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

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

CHARGE: Violation of the 93rd Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Private First Class Charles R. Nicholson, Company D, 188th Parachute Infantry, did, at Fujisawa, Honshu, Japan, on or about 3 September 1945, feloniously take, steal and carry away one saber, value about $33.00, the property of Tarokichi Asaba.

Accused, Private First Class Nicholson, pleaded not guilty to the Charge and its Specification and Additional Charge I and its Specification. He was found not guilty of the Charge and its Specification but guilty of Additional Charge I and its Specification except the words "the property

of Tarokichi Asaba," substituting therefor the words "the property of Mr. Saito," of the excepted words not guilty, of the substituted words, guilty. He was sentenced to be confined at hard labor for a period of six months and to forfeit $21.00 of his pay per month for like period. The reviewing authority approved only so much of the findings of guilty of the Specification of Additional Charge I as involves a finding of guilty of larceny of one saber, value about $13.33, the property of Mr. Saito, at Fujisawa, Honshu, Japan, on or about 3 September 1945, in violation of Article of War 93, and only so much of the sentence as provides for confinement at hard labor for four months and the forfeiture of $18.66 per month for six months; and designated the Regimental Stockade as the place of confinement. The findings and sentence were promulgated in General Court-Martial Orders #28, Headquarters 11th Airborne Division, 30 November 1945.

2. The record of trial was examined in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific and there found legally insufficient to support the findings and the sentence.

3. On 3 January 1946 the record of trial was examined by the Board of Review in the same office and found legally insufficient to support the findings and the sentence for the reason that the variance between the allegation in the Specification that the alleged stolen property was the property of "Tarokichi Asaba," and the finding that it was the property of "Mr. Saito," was a fatal error, which opinion was concurred in by the Acting Assistant Judge Advocate General in charge of the Branch Office mentioned, and the record of trial was forwarded to the Commanding General, United States Army Forces, Pacific, for appropriate action.

4. On 22 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, Pacific, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated.

5. The record of trial has been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C. and it concurs in the opinion of the Board of Review of the Branch Office and its reasoning, and holds that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Earle Hepburn, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clarion, Judge Advocate.

SPJGN-CM 307041 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War MAR 27 1946

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Charles R. Nicholson (36907853), Company D, 188th Parachute Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 128, 21 May 1946. As to accused NICHOLSON).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

(117)

SPJGH - CM 307043

27 MAR 1946

UNITED STATES v. Second Lieutenant CLARENCE REED (0-1111855), 573rd Engineer Dump Truck Company.	)	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at Headquarters, Base M, APO 70, 28 September 1945. Dismissal

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant Clarence Reed, Corps of Engineers, 573rd Engineer Dump Truck Company, APO 70, did, at APO 70, while assigned to Company E, 1312th Engineer General Service Regiment, between 8 June 1945 and 1 September 1945, wrongfully fail and neglect to credit and deposit to the soldiers deposit accounts P50.00, currency of the Philippines, the property of Private First Class James L. Edwards; P50.00, currency of the Philippines, the property of Private First Class Oscar L. Thompson; P200.00, currency of the Philippines, the property of Technician Fifth Grade Charles F. Morton; P100.00, currency of the Philippines, the property of Sergeant Ernest Bush, of an aggregate value of P400.00, currency of the Philippines, entrusted to him by the said Private First Class James L. Edwards, Private First Class Oscar L. Thompson, Technician Fifth Grade Charles F. Morton, and Sergeant Ernest Bush, all of the 1312th Engineer General Service Regiment, for deposit in their soldiers deposit accounts.

Specification 2: In that Second Lieutenant Clarence Reed, * * *, did at APO 70, * * *, between 8 June 1945 and 1 September 1945, wrongfully borrow P300.00 from Staff Sergeant Earl W. Mitchell; P474.00 from Technician Fourth Grade Leon Wells; P500.00 from Technician Fifth Grade

Robert L. Sullivan; P320.00 from Private First Class Walter Henderson; P200.00 from Private First Class Nathaniel Bess; all enlisted men of the 1312th Engineer General Service Regiment, and of an aggregate value of P1794.00, currency of the Philippines.

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

Specification: In that Second Lieutenant Clarence Reed, * * *, did, at APO 70, * * *, on or about 31 July 1945, wrongfully state on the July payroll of Company E, 1312th Engineer General Service Regiment that Private First Class Curtis Morgan, 1312th Engineer General Service Regiment, had received his pay in the sum of P61.00, currency of the Philippines, which statement was known by the said Second Lieutenant Clarence Reed to be untrue.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence was introduced of any previous convictions. He was sentenced to be dismissed the service and to pay to the United States a fine of $1500. The reviewing authority disapproved so much of the findings of guilty of Specification 2 of Charge I as involved findings that the accused did, at the time and place alleged, wrongfully borrow 500 pesos from Technician Fifth Grade Robert L. Sullivan and did borrow an aggregate sum in excess of 1294 pesos, currency of the Philippines; approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commander-in-Chief of the United States Army Forces, Pacific, confirmed the sentence as approved by the reviewing authority and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. On 22 December 1945 the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific examined the record of trial and held it legally sufficient to support the findings of guilty of Charge I and of Specification 1, Charge I, except the words "P50.00, currency of the Philippines, the property of Private First Class James L. Edwards," "P100.00, currency of the Philippines, the property of Sergeant Ernest Bush," "Private First Class James.L. Edwards" and "Sergeant Ernest Bush," and except so much of the aggregate value as exceeds P250.00; legally sufficient to support the findings of guilty of Specification 2 of Charge I as confirmed; legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involved findings of guilty of the Specification in violation of Article of War 96; and legally sufficient to support the sentence as confirmed. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. The Acting Assistant Judge Advocate General with the United States Army Forces in the Pacific approved the holding of the Board of Review and on 10 January 1946 forwarded the record of trial to the Commander-in-Chief, United States Army Forces, Pacific, for execution of the sentence after vacation of the indicated illegal findings.

4. On 19 January 1946, the powers conferred by direction of the President upon the Commander-in-Chief, United States Army Forces, Pacific, under the provisions of Articles of War 48,49,50 and 50½ were terminated. Thereafter the record of trial, the opinion of the Board of Review and First Indorsement of the Acting Assistant Judge Advocate General in charge of the above-mentioned Branch were forwarded to The Judge Advocate General, Washington, D. C., for such further action as was deemed appropriate.

5. The Board of Review in the Office of The Judge Advocate General, Washington, D. C., has examined the record of trial, concurs in the opinion of the Board of Review in the Branch Office and for the reasons stated therein is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and of Specification 1, Charge I, except the words "P50.00, currency of the Philippines, the property of Private First Class James L. Edwards," "P100.00, currency of the Philippines, the property of Sergeant Ernest Bush," "Private First Class James L. Edwards," and "Sergeant Ernest Bush," and except so much of the aggregate value as exceeds P250.00; legally sufficient to support the findings of guilty of Specification 2 of Charge I as confirmed; legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings of guilty of the Specification in violation of Article of War 96; and legally sufficient to support the sentence as confirmed and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert E. Trevethan, Judge Advocate.

SPJGH - CM 307043 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 2 1946

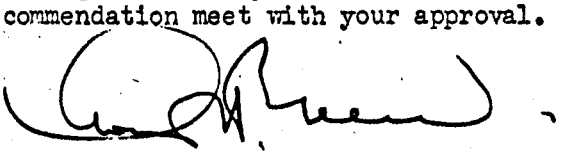
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clarence Reed (0-1111855), 573d Engineer Dump Truck Company.

2. Upon trial by general court-martial this officer was found guilty of wrongfully failing and neglecting to credit and deposit to soldiers' deposit accounts Philippine currency aggregating P400, entrusted to him by four named enlisted men for such credit and deposit (Chg. I, Spec. 1), and guilty of wrongfully borrowing the aggregate sum of P1794, currency of the Philippines, from five enlisted men, (Chg. I, Spec. 2), both offenses in violation of Article of War 96; and guilty of wrongfully stating on a monthly payroll of his organization that a named enlisted man had received his pay in the sum of P61, currency of the Philippines, which statement was known by the accused to be untrue, in violation of Article of War 95. No evidence was introduced of any previous convictions. He was sentenced to be dismissed the service and to pay to the United States a fine of $1500. The reviewing authority disapproved so much of the findings of guilty of Specification 2 of Charge I which pertained to the borrowing of 500 pesos from one of the named enlisted men and which found accused guilty of borrowing an aggregate sum greater than 1294 pesos; approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commander in Chief of the United States Army Forces, Pacific, confirmed the sentence as approved by the reviewing authority and withheld the order directing execution of the sentence pursuant to Article of War 50½. Thereafter the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific examined the record of trial and held it legally sufficient to support the findings of guilty of Charge I, legally sufficient to support the findings of guilty of Specification 1 thereof except the words "P50.00, currency of the Philippines, the property of Private First Class James L. Edwards," "P100.00, currency of the Philippines, the property of Sergeant Ernest Bush," "Private First Class James L. Edwards" and "Sergeant Ernest Bush," and except so much of the aggregate value as exceeds P250.00; legally sufficient to support the findings of guilty of Specification 2 of Charge I as confirmed; legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involved findings of guilty of the Specification in violation of Article of War 96; and legally sufficient to support the sentence as confirmed. The Acting Assistant Judge Advocate General in charge of the Branch office concurred in this holding, but before the execution of the sentence was ordered, the power of the confirming authority so to do was terminated by the President. Accordingly, the record of trial was forwarded to the Office of The Judge Advocate General, Washington, D. C., for examination therein and for subsequent action by you.

3. A summary of the evidence may be found in the accompanying holding of the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific. The Board of Review in The Judge Advocate General's Office, Washington, D. C., concurs in that holding and is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as is indicated in the holding of the Board of Review in the Branch Office and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that holding and recommend that so much of the findings of guilty of Specification 1 of Charge I as finds accused guilty of wrongfully failing and neglecting to deposit P50.00 and P100.00, Philippine currency, to the soldiers' deposit accounts of Private First Class James L. Edwards and Sergeant Ernest Bush, respectively, and so much as finds the aggregate amount of the undeposited funds to be in excess of P250.00 be disapproved; thatonly so much of the findings of guilty of Charge II and its Specification as involves findings of guilty of a violation of Article of War 96 be approved and that the sentence be confirmed and carried into execution.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 119, 10 May 1946)

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

SPJGK - CM 307044

4 APR 1946

UNITED STATES v. First Lieutenant PERVIS R. LANDRY (O-446386), Field Artillery.	)))))))	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at Headquarters, Base X, APO 358, 14 December 1945. Dismissal.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that First Lieutenant Pervis R. Landry, Headquarters, Base X, AFWESPAC, did, at APO 358, on or about 21 October 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Trinidad.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification of the Charge except the words, "forcibly and feloniously, against her will, have carnal knowledge of Maria Trinidad" substituting therefor the words, "with intent to commit rape on Maria Trinidad, commit an assault on the person of the said Maria Trinidad." He was found not guilty of the Charge but guilty of a violation of the 93rd Article of War. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service of the United States and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings "as involve findings that accused, at the time and place alleged, committed an assault and battery, aggravated by indecencies, upon Maria Trinidad, in violation of Article of War 96," and only so much of the sentence as provided for dismissal from the service. The reviewing authority forwarded the record of trial for action under Article of War 48 to the Commander in Chief, U. S. Army Forces, Pacific, who confirmed only so much of the findings of guilty of the Specification of the Charge and the Charge "as involves a finding of guilty of assault, aggravated by indecencies, in violation of Article of War 96," confirmed the sentence as modified by the reviewing authority, but withheld the order directing the execution of the sentence pursuant to Article of War 50½ and forwarded the record of trial to the Branch Office of the Judge Advocate General with the U. S. Army Forces, Pacific. Before action was taken pursuant to said Article by the

Board of Review in that office, the powers of the Commander in Chief, U.S. Army Forces, Pacific, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50½ and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions to the Commander in Chief, U.S. Army Forces, Pacific, contained in a cable from the War Department dated 19 January 1946, as clarified by a cable from the War Department dated 21 January 1946, the Assistant Judge Advocate General, Branch Office of the Judge Advocate General with the U.S. Army Forces, Pacific, forwarded the record of trial to The Judge Advocate General.

3. Summary of the Evidence.

For the Prosecution.

The accused, First Lieutenant Pervis R. Landry, visited several Manila night clubs and then rode about the city on 21 October 1945 in a jeep driven by a Filipino looking for woman. About midnight he stopped in front of the Cine Luzon on Rizal Avenue (R. 23-25) and "picked up" Maria Trinidad, a 13-year old Filipina (R. 6,32) who gave the driver her address and climbed into the back seat (R. 14,25,30), sharing it with accused (R. 8,14,25) without comment (R. 14,30), though she asked the driver in Tagalog if the lieutenant "was good" (R. 26,30). Pursuant to her request (R. 8,15), the driver stopped at her house (R. 25,30) but the accused, who was holding her (R. 26), directed him to proceed to the New Life Bar (R. 8,15,26,30), though against her wishes (R. 15). Without stopping at the bar they drove seven miles to Polo Barrio (R. 8,21,26,30), during which time accused hit her twice on the chin with his fist (R. 14,15,21), remarking that if she would not permit him to kiss her he would kill her (R. 8,19). He then kissed her twice (R. 8,21,30), although the driver, who noticed the kissing, remembered neither the threats nor the striking (R. 30-31). They then drove down an old road and stopped at the request of accused, who told the driver to leave until recalled (R. 9,26,27).

The victim described what then occurred as follows: Accused told her to take off her clothes, and on her refusal (R. 9,16) completely undressed them both, tearing her clothes in the process (R. 9), although she later stated that after he opened her clothes she removed them herself (R. 49). When completely naked (R. 9), they proceeded from the jeep to some bushes where he hit her on the chin and told her to lie down (R. 16). He then got on top of her and pulled or told her to pull her legs apart, which she did (R. 16,17), and he inserted his private parts in hers (R. 10,17,19,20), though she later told others it was his finger and not his penis (R. 19,20, 21). He remained on her for about a half hour when she broke away (R. 17, 18), but he pursued and caught her, again hit her on the chin (R. 18), took her to a nearby bamboo tree, told her to lie down (R. 9,10,18), and again either had intercourse with her (R. 10,18) or held his private parts in

contact with her (R. 18). This act also lasted about thirty minutes (R. 18), but elsewhere she testified that penetration lasted about two hours (R. 17), and later told a witness that although accused had entered two fingers and had an emission, he was unsuccessful at penetration (R. 48,49).

The driver's limited version of the same events was to the effect that after walking about forty meters distant (R. 27,32), he saw the girl, still dressed but crying "ouch" or "mamma," jump off the jeep, pursued and eventually caught by the accused, then clad only in an undershirt (R. 27). Trying to help the girl (R. 31), he told accused that she was too young but was again directed to go away (R. 27,31). They then returned to the jeep, drove about 300 yards farther, and the driver was again dismissed (R. 27,31). Shortly he heard the cry of the girl who, now nude, jumped from the jeep and ran toward him, then turned back again and went beyond a fence (R. 27), followed by accused, completely naked but carrying his trousers (R. 28).

Accused then took the girl to a nearby house (R. 10,18), whose occupants were awakened by her cries (R. 33,35). Still holding or embracing her (R. 11,33,34), he or both of them knocked at the door whereupon (R. 19, 49) a woman opened it and both entered, still naked (R. 10). The accused asked without success for a room or sleeping mat (R. 19,34,49), (or the girl made a similar request) "so that the Lieutenant can sleep - then I can go away" (R. 34,35). Her face and her private parts were bleeding, and her clothes were bloody (R. 11,28,40). The driver delivered her clothes, which she put on, and they thereupon returned to the jeep, accused still wearing only shorts (R. 11,28,47). When the military police arrived, he had his arm around the girl, and when asked if she had been raped or mistreated she gave a negative response (R. 46). The accused, described as "only a little bit drunk" (R. 32), or "under the influence of liquor" (R. 47), left in his jeep with the driver and one military policeman (R. 29), while the girl was taken in another jeep to the Medical Examiner's Office, Bilibid (R. 11,29,36). Her physical examination at 0330 that morning revealed blood clots on the eyebrow, upper chest, and inner sides of the thighs, a cut on the chin, and a contused 1/5 to 1/4 inch laceration of the hymen, previously virginal (R. 36-39,47), though a vaginal smear revealed no spermatozoa (R. 37,42). Six weeks later no evidence of injury to the hymen remained (R. 45).

For the defense.

The accused was duly warned of his rights as a witness (R. 50) and elected to testify under oath substantially as follows:

During the evening he obtained a jeep and driver, picked up two Army friends, and visited two night clubs (R. 51-52). Since it was his birthday, and having just succeeded in commencing an assignment where he could do

some work, he "got drunker than I have been for a long time - and very drunk, at that I didn't know where I was going" (R. 55). He consumed about a quart of whiskey from five o'clock until midnight (R. 56) and, when he gets drunk he loses control of himself and does not know what he is doing, but remembers it all the next day and is sometimes ashamed (R. 55,57). At 2300 his friends were driven home and he proceeded on Rizal Street to the New Life Bar for more drinks and to see a certain girl. When he saw a girl waving, he stopped and "picked her up" (R. 52), still destined for the New Life Bar (R. 52,53,56). He immediately began making love, continuing during the entire ride without objection except for a little push she gave him at the first kiss (R. 53). The car did not stop at her house (R. 55), nor did she attempt to get out, but conversed with the driver in Tagalog on occasion (R. 53), though she spoke no English during the ride, accused thus learning nothing of her capacity for that language (R. 56). He did not hit or cut her during the ride (R. 56). The driver protested the lateness of the hour and was about to turn around when on accused's direction he turned off on a side road, stopped the car, and "took a walk," until again needed (R. 53). The tempo of the love making then increased, both playing with each others' private parts, and finally disrobing completely, she with some assistance by accused (R. 53). Finding the jeep uncomfortable, and desiring a room, they started walking hand in hand through the brush, the girl leading, when suddenly both stumbled and fell, he to his knees and she on her face (R. 53,54,55). He picked her up, and they then walked on. After they had proceeded "a little further," at his request she "laid down on her back" and he "laid against her but *** never did get on top of her" (R. 54). He "played with her," but, being unsuccessful in getting an erection, placed her hand on his penis (R. 54). He never asked her to have intercourse, and at no time did she cry out or attempt to hit, bite or scratch him (R. 54). In about ten minutes, still nude, they approached the back door of a house, both knocked, were admitted, and amidst much confusion with men and women talking, he asked the lady for a room. Deciding it was useless, they departed, someone having secured their clothes for them, and returning to the jeep, he told the driver to drive off (R. 54). The girl was in his arms making no outcry when the military policemen came and he requested permission to take the girl home and for them to follow (R. 54).

A three months' associate testified that accused was from "a good family," and has an excellent character (R. 44).

4. Accused requested the appointment of Captain William C. Fitzhugh or Lieutenant Anthony Yturri as individual counsel. This request was denied by the appointing authority. Before arraignment this fact was presented to the court. Thereupon the president directed that the trial judge advocate secure a statement from the appointing authority or his representative as to the availability of the requested counsel, and ordered a recess of the court. When the court reconvened the following transpired (R. 3):

"TJA: Telephone communication has been had by the trial judge advocate and the defense counsel with Colonel Haynes, Staff Judge

Advocate, AFWESPAC, who has stated that Captain Fitzhugh and Captain Yturri, both of his office, are unavailable as defense counsels in the present case because of the pressure of other duties.

"PRES: Does the defense desire a continuance, or does the accused desire to proceed?

"DEF: In view of the statement of the refusal, the defense does not desire a continuance.

"PRES: Very well, we will proceed."

Without objection by the defense the court then proceeded with the trial. Subsequently, after the prosecution had presented its case and rested, Captain Fitzhugh testified in behalf of the defense as a character witness for the accused, but before doing so he was interrogated with respect to his availability and that of Lieutenant Yturri as individual defense counsel, and testified that he was a Section Head in the Office of the Staff Judge Advocate, AFWESPAC, in the City of Manila, where apparently the trial was held, and that Lieutenant Yturri worked in his section. His duties were not connected with "reviewing." Accused had expressed a desire to have him act as "defense counsel." What happened thereafter is described by the witness as follows:

"*** After talking to Lieutenant Landry, I went to Colonel Haynes, who is Staff Judge Advocate - I told him that I had been requested as counsel and that I was willing to function as such. And he said he would rather I would not - because of my duties as Section Head, he couldn't spare me from the office as long as it would take to work up the case. We figured it would take a week or ten days. He also thought that as the office was the reviewing authority of general court-martial cases that it was not proper for personnel from that office to be taken for defense counsel, if others were available elsewhere" (R. 43).

An accused is entitled to military counsel of his own selection, "if reasonably available" (AW 17, MCM, 1928, par. 45a). However, "questions of availability of counsel are primarily for determination by the convening authority, and his decision will not be reviewed except upon a showing of abuse of discretion" (CM 202846, Shirley, 6 BR 358; see also CM 207588, Lizotte, 8 BR 358). In view of the statements made by Captain Fitzhugh it does not appear that there has been any such abuse. Further, accused did not ask for a continuance or object to trial without being represented by counsel whom he had requested, and may be deemed to have waived any rights that he might otherwise have had on this score. Finally, the record conclusively shows that he was ably represented by the assistant defense counsel. In view of all these circumstances it is the opinion of the Board that even assuming that the convening authority should have granted accused's request, the record establishes that his substantial rights were not injuriously affected by the refusal.

5. The evidence establishes beyond a reasonable doubt an assault on Maria Trinidad by accused, aggravated by indecencies. Almost from the moment the 13-year old Filipina entered the car until the

military police arrived several hours later accused repeatedly committed acts which constituted the offense - he threatened to strike and did strike her; he fondled her in a most licentious manner; and he applied force to her person in revolting ways that can only be described as reprehensible in view of the immaturity of his victim, who clearly was not qualified by experience to resist too strenuously the improper advances of an American officer, and the handicap from which she suffered by reason of her obviously limited knowledge of the English language. While her own testimony contains several instances of self-contradiction, and was impeached in part by other witnesses, her extensive injuries and blood-stained clothing, her screams, cries and protests, denied only by the accused, and her attempts to escape from him, as corroborated by the driver, overwhelmingly destroy any possible defense based on consent. The depraved and contemptible nature of the acts committed upon this young girl may properly be considered as an aggravating circumstance in reaching the conclusion that the finding of guilty, as modified first by the approving and then by the confirming authority, is fully supported by the record of trial. The offense of which accused was found guilty, as finally confirmed, is a lesser included offense of the crime of assault with intent to commit rape (CM 199369, Davis, 4 BR 37,43, CM 218643, Bright, 12 BR 103), and with equal reason of the crime of rape. That accused's conduct was a violation of Article of War 96 is thoroughly established (MCM 1928, p. 189).

While the record indicates that accused had indulged in intoxicating liquor during the course of the evening, not only is there an absolute lack of proof that he was drunk to such an extent as to make him irresponsible for his actions, but the record is convincing that he was not in fact drunk.

6. War Department records show that accused is 25 years and 4 months of age and is single. He graduated from high school and for four years attended but did not graduate from Louisiana State University. Upon completion of the four year R.O.T.C. course at the latter institution he was commissioned a second lieutenant, Field Artillery, Reserve Corps, 18 May 1942, and was called into active service 10 June 1942. He was promoted to First Lieutenant 12 February 1943. He had no civilian occupation.

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

Norman Moyer, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307044 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 17 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Pervis R. Landry (O-446383), Field Artillery.

2. This officer was tried by general court-martial on a charge of rape of one Maria Trinidad in violation of Article of War 92. He was found guilty of the Specification of the Charge except the words, "forcibly and feloniously, against her will, have carnal knowledge of Maria Trinidad," substituting therefor the words, "with intent to commit rape on Maria Trinidad, commit an assault on the person of the said Maria Trinidad." He was found not guilty of the Charge but guilty of a violation of the 93rd Article of War. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service of the United States and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings "as involve findings that accused, at the time and place alleged, committed an assault and battery, aggravated by indecencies, upon Maria Trinidad, in violation of Article of War 96," and only so much of the sentence as provided for dismissal from the service. The reviewing authority forwarded the record of trial for action under Article of War 48 to the Commander in Chief, U.S. Army Forces, Pacific, who confirmed only so much of the findings of guilty of the Specification of the Charge and the Charge "as involves a finding of guilty of assault, aggravated by indecencies, in violation of Article of War 96," and confirmed the sentence as modified by the reviewing authority, but withheld the order directing the execution of the sentence pursuant to Article of War 50½ and forwarded the record of trial to the Branch Office of the Judge Advocate General with the U. S. Army Forces, Pacific. Prior to action by the Board of Review in that office, in accordance with instructions from the War Department to the Commander in Chief, U. S. Army Forces, Pacific, the Assistant Judge Advocate General, Branch Office of the Judge Advocate General with the U.S. Army Forces, Pacific, forwarded the record of trial to The Judge Advocate General.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence as confirmed by the Commander in Chief, U. S. Army Forces, Pacific, and to warrant confirmation of the sentence.

On 21 October, near midnight, while riding in a "jeep" in Manila,

accused "picked up" a 13-year old Filipina, Maria Trinidad, in front of the Cine Luzon. He immediately began to commit improper acts and continued to do so until the arrival of the military police several hours later. He threatened to strike and did strike her; he fondled her in a most licentious manner, and he attempted to have intercourse with her, or applied force to her person in a revolting fashion. Accused's reprehensible conduct may not be condoned. He has clearly demonstrated that he is unfit to continue as a commissioned officer in the Army of the United States. I recommend that the sentence as previously confirmed be confirmed and ordered executed.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 89, 1 May 1946).

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

SPJGN-CM 307045

UNITED STATES	)	7TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Kyongsong, Korea, 8, 10 and 13 November 1945. To be hanged by the neck until dead.
	)	
Private First Class PETE M. RODRIGUEZ (39423658), Company K, 184th Infantry.	)	

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the soldier named above 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 86th Article of War.

Specification: In that Private First Class Pete M. Rodriguez, Company K, 184th Infantry, being on guard and posted as a sentinel at Communication Center, Kyongsong, Korea, on or about 6 October 1945, did leave his post before he was properly relieved.

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

Specification: In that Private First Class Pete M. Rodriguez, Company K, 184th Infantry, did, at Kyongsong, Korea, on or about 6 October 1945, forcibly and feloniously against her will, have carnal knowledge of Mrs. Yang, Pok Ja.

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

Specification: In that Private First Class Pete M. Rodriguez, Company K, 184th Infantry, did, at Kyongsong, Korea, on or about 6 October 1945 unlawfully enter the dwelling of Mr. and Mrs. Yang, Pok Ja, with intent to commit a criminal offense to-wit: Rape therein.

He pleaded guilty to Charge I and its Specification, not guilty to the remaining Charges and Specifications, and, all of the members present at the time the vote was taken concurring, was found guilty of all the Charges and Specifications. Evidence was introduced of a previous conviction by a Summary Courts-Martial of an absence without leave for three days. All of the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and in his action provided: "Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld." The record has been treated as though forwarded for action under Article of War 48.

3. The competent evidence for the prosecution may be summarized as follows: On the night of 6 October 1945, accused, a member of Company "K", 184th Infantry (R. 6, 7, 10) was performing guard duty in Kyongsong, Korea, on a two-man post. His guard duty was to extend from 8 p.m. until midnight and the post was the Communication Center in a school house (R. 7). About 8:30 p.m. the accused left his post armed with a .45 caliber pistol and remained away for about one hour to an hour and a half (R. 8-9).

About 9:30 p.m. on 6 October 1945 Mr. Yun, Kuan Sen and his wife Yang, Pok Ja, of 2512 Sam Chung Jung, Kyongsong, Korea, were sleeping in their dwelling when they heard someone, who proved to be the accused, scale the wall outside, walk about, knock on the door and window and say "MP, MP." Mr. Yun thinking it was the police arose and opened the door. The accused pointed a pistol at him, entered and made a brief search of the house, notwithstanding their protests that they were Korean and not Japanese, as claimed by the accused. While pointing the pistol at them, he ordered them to remove their clothing. After they had removed their clothing he discharged the pistol into the floor, and told Mrs. Yun to lie down. She called the accused's attention to the fact that she was menstruating but he pushed her down, took off his pants, "went on top of" her and engaged her in sexual intercourse while the husband sat on the floor a few feet away (R. 13-15, 18-20). During the act accused held the pistol in his right hand resting on the woman's breast (R. 16). After he had completed coition accused arose and forced the woman to wipe his penis off with her underwear (R. 15).

The husband was too frightened to oppose the accused (R. 15). Because of her fear of the pistol the wife removed her clothing (R. 18) and did not resist or offer any opposition to the intercourse (R. 19). Mrs. Yun had never seen the accused before that night (R. 18). Penetration was effected (R. 12, 19).

An examination of accused's clothing several days later disclosed blood on his shirt, trousers and shorts (R. 11; Pros. Exs. F, G, H). When questioned accused at first denied all knowledge of the occurrence. Upon further questioning he admitted being in the house and making advances to the woman but he asserted that he left when her husband arrived. Finally he admitted having intercourse with the woman and discharging the pistol (R. 12).

4. The accused, after being duly warned of his rights, elected to testify under oath (R. 20-21). On the morning of 6 October 1945 he was on guard when a woman came to him and asked him to give her a blanket. He told her he would if she would have intercourse whereupon she pointed to a house. He did not, however, give the woman a blanket at the time or later. He was not certain that she was Yang, Pok Ja. At 2000 o'clock he reported to his post for guard but left a short while later and went to the house and knocked on the door. He was met by the woman dressed only in shorts and shirt. She smiled and he entered and found her to be alone. The accused started "playing" with her and she removed her shirt and pants, at his request. Although he discovered that she was menstruating, he "felt like having intercourse with her" and lay down with her and was about to effect a penetration when her husband entered. The accused got excited, drew his pistol and fired, and then made his escape (R. 21, 24). He returned to his post and upon being relieved went to his barracks (R. 22). He was arrested the next day and questioned. At first he would not answer. He was taken to the stockade several times where he was questioned for long periods of time without being given any food. When he gave his version of the occurrence he was accused of lying and threatened with a beating. He finally signed a statement without his rights having been explained nor knowing its full meaning (R. 22).

5. The accused has been convicted of (1) leaving his post before being property relieved while on guard and posted as a sentinel, in violation of Article of War 86; (2) rape, in violation of Article of War 92; and (3) housebreaking, in violation of Article of War 93.

With reference to Charge I, it was clearly established by the evidence for the prosecution and admitted by the accused in his testimony and by his plea of guilty that he did, as charged, leave his post before he was regularly relieved, after having been posted as a sentry, at the time and place alleged in the Specification. All of the essential elements of the offense having been proved and admitted the accused was properly and legally found guilty of a violation of Article of War 86 (MCM, 1928, par. 146c, p. 161).

With reference to Charge II, rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b, p. 165). It is not necessary to prove resistance in order to

establish the commission of the crime of rape if the failure to resist is induced by fear of death or of great bodily harm (CM ETO 10742, Boyd; CM ETO 13897, Coffee; CM ETO 18528, Shakespere).

> "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 * * * the consummated act is rape" (1 Wharton's Criminal Law, 12th Ed. Sec. 701, pp 942-943).

It was clearly established that the accused did at the time and place alleged in the Specification have carnal knowledge of the woman named therein. She and her husband contended that she submitted to the intercourse unwillingly and that her failure to resist was due to her fear of death or great bodily harm at the hands of the accused who threatened her and her husband with a loaded firearm. They contended that after forcing her to disrobe at pistol point he deliberately fired the weapon in order to dispell any thought of resistance and to demonstrate his ability to kill. He did this immediately before pushing her down on the mattress and giving vent to his sexual desires. Such circumstances, if believed, are legally sufficient to support a finding of guilty of the crime charged. The accused denied the use of force or threats and contended that he called at the house by pre-arrangement with the woman and when about to engage in intercourse with her the husband unexpectedly entered. During the excitement of making his escape from the house he accidentally discharged his weapon. There was thus presented a clear issue of fact for the determination of the court. That tribunal has resolved the issue against the accused. Such was within its province. It had the opportunity of seeing, hearing, and observing the witnesses. The court has imposed the death penalty and therefore the Board of Review may weigh the evidence and judge the credibility of the witnesses. A careful examination of the record, mindful of this duty, fails to disclose any good reason for disturbing the findings of the court.

The victim and her husband told a straightforward story of how the accused without invitation entered their abode pretending to be an "MP" and at pistol point compelled her to undress and then, notwithstanding her menstruating condition, compelled her to have intercourse with him in the presence of her husband. She undoubedtly submitted through fear of his loaded firearm. On the other hand, the credibility of the accused was seriously impeached by his conflicting pre-trial versions of his conduct that night and by his contention that he did not engage in sexual intercourse when the contrary appeared from the condition of his clothing. All of the elements of the crime are sustained by competent substantial evidence and the findings should not be disturbed.

With reference to Charge III, housebreaking is defined as unlawfully entering another's building with intent to commit a criminal

offense therein (MCM, 1928, sec. 149e, p. 169). The evidence for the prosecution clearly established that the accused gained entrance to the home of Yang, Pok Ja and her husband by threat of force and violence and by pretending to be a member of the military police. The entry was therefore unlawful, and the intent to commit rape, as alleged, was properly and legally inferred by the court from the fact that he did commit rape almost immediately after his entry. He admitted in his own testimony that his purpose of entering the house was to have sexual relations with the woman whom he claimed had invited him there for that purpose. His contention that he had been invited was rejected by the court in favor of the story told by Mr. Yun and his wife that he tricked them into opening the door by his false pretense of being a military policeman and then entered with levelled gun. By virtue of the same reasoning as expressed with reference to the preceding Charge the findings of guilty of this Charge and its Specification should be sustained. An intent to commit a specific crime at the time of entry may be inferred from the circumstances, particularly his conduct upon entering (CM ETO 13255, Gonzales; CM ETO 16340, Damaso; CM ETO 15090, Duval et al).

6. The Charge Sheet shows that accused is twenty-one years and one month of age. Without prior service he was inducted at Salinas, California, on 24 August 1944.

7. The court was legally constituted and had jurisdiction over the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).

Earle Hepburn, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert Johnson, Judge Advocate.

SPJGN-CM 307045 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War APR 2 1946

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 First Class Pete M. Rodriguez (39423658), Company K, 184th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years, that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement, and that the sentence as thus modified be 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Gcmo 137, 24 May 1946).

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington 25, D.C.

JAGQ - CM 307046

JUL 15 1946

UNITED STATES	)	FIFTH AIR FORCE
v.	)	Trial by G.C.M., convened at Headquarters, Fifth Air Force, APO 710, 4-5 September 1945. Dismissal.
Major JOHN F. McBRIDE (0-916313), AC, Headquarters, V Bomber Command, APO 710.	)	

OPINION of the BOARD OF REVIEW
WURFEL, OLIVER and DAVIS, 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 96th Article of War.

Specification 1: In that, Major (then Captain) John F. McBride, Headquarters, V Bomber Command, while Special Service Officer and Post Exchange Officer of V Bomber Command, on or about 17 September 1944, did, at APO 713, wrongfully sell for a profit to the Main Exchange, Base E, 3670 .50 caliber shell type cigarette lighters at a unit price of $2.40 or total price of $8,808.00, which said cigarette lighters were purchased by the said Major John F. McBride at a unit price of $1.36 or total purchase price of $4,991.20, being a profit to the said Major John F. McBride in the amount of $3,816.80.

Specification 2: In that Major (then Captain) John F. McBride, Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did, at APO 920, on or about 4 October 1944, wrongfully sell for a profit to the 90th Bombardment Group Exchange 777 .50 caliber shell type cigarette lighters for a unit cost of

$2.44 or total cost of $1,895.88, which said lighters were purchased by the said Major John F. McBride at a unit price of $1.36 or total purchase price of $1,056.72, being a profit to the said Major John F. McBride in the amount of $839.16.

Specification 3: In that Major John F. McBride, Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did, at APO 72, during the month of January 1945, wrongfully sell for a profit 1471 .50 caliber shell type cigarette lighters to Base K Exchange at a sale price of $1.70 per unit or total sale price of $2,500.70 which said lighters had been purchased by the said Major John F. McBride at a unit price of $1.36 or total price of $2,000.56, being a profit to the said Major John F. McBride in the amount of $500.14.

Specification 4: In that Major (then Captain) John F. McBride, Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did, at APO 713, on or about 8 December 1944, wrongfully sell for a profit to Main Exchange, Base E, 200 sets of salt and pepper shakers at a unit price of $7.20 or total sale price of $1,444.00, which said salt and pepper shaker sets had been purchased by the said Major John F. McBride at a unit cost of $4.00 or total cost of $800.00, being a profit to the said Major John F. McBride in the amount of $644.00.

Specification 5: In that Major (then Captain) John F. McBride, Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did, at APO 713, on or about 21 December 1944, wrongfully sell for a profit to the Main Exchange, Base E, 50 beer mugs at a unit sale price of $11.29, or a total sale price of $564.50, which said beer mugs had been purchased by the said Major John F. McBride at a unit cost of $7.20 or total cost of $360.00, being a profit to the said Major John F. McBride in the amount of $204.50.

Specification 6: In that Major John F. McBride, Headquarters V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did at APO 710, during the month of February 1945; through personnel of the 91st Photo Wing Exchange wrongfully sell for a profit 42 sets of salt and pepper shakers at a unit price of $6.00 or a total selling price of $252.00, which said salt and pepper shaker

sets had been purchased by the said Major John F. McBride at a unit cost of $4.00 or a total cost of $168.00, being a profit to the said Major John F. McBride in the amount of $84.00.

Specification 7: In that Major John F. McBride, Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did at APO 710, during the month of February 1945, through personnel of the 91st Photo Wing Exchange wrongfully sell for a profit 36 beer mugs at a unit price of $8.00 or a total selling price of $288.00, which said beer mugs had been purchased by the said Major John F. McBride at a unit cost of $7.20 or a total cost of $259.20, being a profit to the said Major John F. McBride in the amount of $28.80.

Specification 8: In that Major John F. McBride (then Captain), Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did, at APO 929, on or about 28 February 1944, wrongfully sell for a profit to Fifth Air Force Officer's Mess, one pool table with accessories for £ 88 Australian currency, value about $284.24, which said pool table with accessories had been purchased by the said Major John F. McBride for £ 73.15.0 Australian currency, value of about $238.22, being a profit to the said Major John F. McBride of about $46.02.

Specification 9: (Disapproved by the reviewing authority).

Specification 10: In that Major John F. McBride (then Captain), Headquarters, V Bomber Command, while Special Service and Post Exchange Officer of V Bomber Command, did, at APO 713, Unit 1, on or about 12 May 1944, wrongfully sell for a profit to the 345th Bombardment Group Officer's Club, one pool table with accessories for £ 88, Australian currency, value about $284.24, which said pool table with accessories had been purchased by the said Major John F. McBride for £ 73.15.0, Australian currency, value about $238.22, being a profit to the said Major John F. McBride of about $46.02.

Specification 11: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Major John F. McBride (then Captain), Headquarters, V Bomber Command, having been attached to Headquarters Squadron, V Bomber Command for rations from 30 January 1943 to 1 November 1944 and having utilized messing facilities provided by Headquarters, V Bomber Command during said period, did, at APO 927, during said time, wrongfully submit pay vouchers covering said period to W. G. Bro, Finance Officer, Base Section 7, failing to deduct on said vouchers for meals furnished to him by the United States Government.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1 to 10, inclusive, of Charge I; not guilty of Specification 11; and guilty of Charge I. He was found not guilty of Specification 1 of Charge II, guilty of Specification 2, and not guilty of Charge II, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 9 of Charge I, and approved the sentence. The confirming authority confirmed the sentence and forwarded the record of trial pursuant to Article of War 50½, but before final action had been taken pursuant to Article of War 50½, the jurisdiction of the confirming authority to order execution of the sentence was revoked and the record of trial was forwarded to this office.

3. Accused was Special Service Officer of the V Bomber Command from January 1943 to 20 April 1945 (R 20). From March or April of 1944 to the latter date he was also Post Exchange Officer and was detailed as "coordinator for the entire Command to see that they got their share of supplies" (R 58). Besides organizing the flow of exchange supplies from Australia, he bought in his own name and on his own credit or with his own cash 8300 cigarette lighters at $1.36, 1716 souvenir beer mugs at $7.20 and 600 sets of salt and pepper shakers at $4.00 (R 13; Ex. 1, R 15; Ex. 3, R 22, 25). He resold them in part as follows:

On 17 September 1944, to Main Exchange, Base E, 3670 lighters @ $2.40 (R 14; Ex. 2-C, R 25).

On 4 October 1944, to 90th Bombardment Group Exchange, 777 lighters @ $2.44 (R 14; Ex. 2-H, R 26).

On 4 January 1945, to Base K Exchange, 1471 lighters @ $1.70 (R 14; Ex. 2-D, 2-E, 2-G, R 27, 28, 29).

On 8 December 1944, to Main Exchange, Base E, 200 sets of salt and pepper shakers @ $7.20 (R 14; Ex. 2-B, R 30).

On 21 December 1944, to Main Exchange, Base E, 50 beer mugs @ $11.29 (R 14; Ex. 2-A, R 31).

During February 1945, to 91st Photo Wing Exchange, 42 sets of salt and pepper shakers @ $6.00 (R 17; Ex. 6, R 32).

During February 1945, to 91st Photo Wing Exchange, 36 beer mugs @ $8.00 (Ex. 6, R 32, 33).

Of the items purchased, 1,482 beer mugs are still stored, 148 are not accounted for; 137 salt and pepper shakers are stored and 221 not accounted for; 2,182 lighters are not accounted for (R 45). Accused also purchased two billiard tables for $238.22 each and sold them, one on 28 February 1944 to the Fifth Air Force Officers' Mess for $284.24, and one on 12 May 1944 to the 345th Bombardment Group Officers' Club for $284.24 (R 14-17; 35, 36; Ex. 2-I, 4-A, 4-B, 5, 7). Many of these items were transported on Government planes from Australia to bases in forward areas (R 22). The total gross profit on the above transactions amounts to more than $6,000.00.

Although accused ate at Army messes during most of the time alleged, thereby becoming obligated to reimburse the Government, he submitted pay vouchers throughout the period without making any deduction therefor (R. 14, 21; Ex. 2-M).

4. After his rights had been explained accused elected to be sworn and testified at length in his own behalf (R 54). He claims to have won about $30,000 in gambling and that he financed the purchases out of his winnings (R 58, 66). The actual transactions described in the specifications of Charge I were substantially undisputed, but accused asserted that he made no overall profit on the sales because much merchandise was lost in shipment or in the course of military operations. It was his position that the gross profit of $5676.10 on the lighters alone actually disappeared if these losses were charged against it (R 75-84). No records of his transactions were available because they were lost on Leyte Island during military operations and because of the loss he was forced to testify from memory (R 59, 72). He stated that it was not possible to prove that a net profit was or was not made on the sale of the lighters because certain facts essential to a computation were not in evidence (R 102, 103). The salt and pepper shakers and the mugs unsold have not been paid for and accused will not sell them until he gets a better price from the vendor (R 87).

The difficulties encountered by accused in obtaining merchandise for the exchanges served by his organization, at a time when it was very difficult to get anything to sell, were commented upon by a fellow officer who had known accused all during the period in question and who testified in his behalf as follows:

> "Q. Would you say that Major McBride was a good special service, or let's say supply, special service, or P.X. officer?
>
> "A. I would say that he was one of the best this theater could have possibly had during the war. Over here, at the time, the conditions that existed made it extremely difficult to get supplies any time. Having been in the supply game ever since I came over here over two years ago, I know for a fact, and from bitter experience, it has been extremely difficult to get supplies of any nature, whether authorized or unauthorized. I would say personally, to the best of my knowledge and belief, that Major McBride exercised more initiative and worked harder and did more to get supplies and equipment for the troops than any man who has ever come over here. In my opinion, he has done a bang-up job." (R 109)

As to his failure to deduct for meals furnished by the Government, accused said it was an "oversight and forgetfulness" on his part; he had offered "months ago...to square it up with Fifth Air Force finance" (R 65, 66, 86).

In rebuttal to accused's testimony that he had made no money on his sales, the prosecution introduced evidence that, even considering all of the lighters as lost which were unaccounted for by the evidence, accused still made a profit of $1,788.00 on the sale of lighters (R 119).

5. It is wrongful and a violation of the Articles of War for military personnel to engage in private business when such activity in any way tends to interfere with a military assignment.

> "There are limitations upon the activities of officers and other personnel subject to military law. The general principle underlying such limitations is that every member of the Military Establishment, when subject to military law, is bound to refrain from all business and professional activities and interests not directly connected with his military duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would

have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War" (par. 2a(2), AR 600-10, 8 July 1944).

If there is any doubt in an officer's mind whether a projected enterprise will contravene the foregoing principle, he may report the facts and request instructions from the War Department in advance (par. 2a (2)(b), AR 600-10, supra).

Where officers bought and resold at a profit 362 bottles of champagne to French hotel operators, it was held that the transactions were wrongful and a violation of Article of War 96.

"'The activities alleged are not only incompatible with the status of accused...as officers of the Army, but are of such nature as to tend to interfere with and hamper the full and proper discharge of their duties in this active theater of operations and certainly to give rise to the reasonable inference that they would have that effect.' They constitute violations of AR 600-10..." (CM 293926, Haug, et al).

There is substantial evidence of record from which the court could find that accused, while serving as Special Service and Post Exchange Officer of an overseas command, sold merchandise which he had purchased privately, at a considerable mark-up, to post exchanges and officers' messes which were located in the same theater of operations. The evidence is not clear whether the purchasers alleged in the specifications of Charge I were actually under his personal supervision or control or whether he had the duty as an agent of the Government to make purchases for them of the merchandise in question. But it does appear that he played an active part in expediting the general flow of special service and post exchange goods from Australia to the forward bases and was in constant touch with exchange officers.

That post exchange merchandise and special service equipment may have been difficult to obtain at that time in forward areas does not excuse these outside activities of accused. The items which he bought and sold, particularly the salt and pepper shakers and the souvenir beer mugs, were hardly essential to the well-being of the troops and there is no evidence that they could not have been bought directly by the purchasers rather than through accused as an intermediary. The transactions were of such size and the profit so substantial that they cannot be said to have been merely nominal. It is questionable whether one who himself is dealing in post exchange merchandise is a proper person to serve as a staff post

exchange officer, and it seems plain that such private business interests would "normally give rise to a reasonable suspicion" that they would "interfere with or hamper" in some degree the proper discharge of his official duties. The Board of Review is therefore of the opinion that there is substantial evidence of record from which the court could properly find that accused violated the provisions of AR 600-10 which are quoted above.

Specification 2 of Charge II alleges that accused over a period of nearly two years wrongfully submitted pay vouchers on which he did not deduct for meals which had been furnished him by the Government. In proof of this allegation, the prosecution introduced the War Department Finance Department Form 3, "Pay Card--Commissioned Officers" (Ex 2-M), which appears to contain a summary of accused's pay data for the period from February 1943 to October 1944. This form does not show any deductions for meals due the Government from accused.

Although the pay card was but a compilation of data from accused's pay vouchers, the failure to object to its introduction amounted to a waiver (MCM, 1928, sec. 117a, p. 121). Accused's admission at the trial that he had not deducted on his pay vouchers for meals eaten at Government expense and the data shown on the pay card, constituted sufficient proof of his guilt of this offense.

6. War Department records show that accused was commissioned a captain in the Army of the United States, 27 August 1942 and entered upon active duty 3 September 1942. He had no prior service. His principal civilian occupation was organizing and coaching professional football teams. Accused's efficiency ratings were uniformly "excellent". It further appears that after the trial of this case accused was hospitalized in the Pacific Theater and in the United States for gastric disturbances. After maximum hospital benefits had been reached he was transferred to the Separation Center, Fort Dix, New Jersey, and separated from the service, the effective date of separation being 5 September 1946.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved, legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Seymour W. Wurfel, Judge Advocate

W. Wayne Oliver, Judge Advocate

Walter W. Davis, Judge Advocate

JAGQ - CM 307046 1st Ind

WD, JAGO, Washington 25, D. C. JUL 26 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major John F. McBride (0-916313), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of ten Specifications alleging that while he was Special Service Officer and Post Exchange Officer of V Bomber Command, he wrongfully sold at a profit to post exchanges various articles including cigarette lighters, beer mugs and salt and pepper shakers, and wrongfully sold at a profit pool tables to an officers' mess, to officers of the 90th Bombardment Squadron and to an officers' club, in violation of Article of War 96. He was also found guilty of failing to deduct on his pay vouchers for a period of about two years the cost of meals furnished to him by the United States, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of one Specification, alleging wrongful sale at a profit of a pool table to the officers of the 90th Bombardment Squadron, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commander in Chief, United States Army Forces, Pacific, confirmed the sentence and forwarded the record of trial to the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific, for action pursuant to Article of War 50½, but before final action had been completed pursuant to Article of War 50½, the record of trial was forwarded to this office.

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

4. The evidence shows that while accused was Special Service Officer and Post Exchange Officer of V Bomber Command in the Pacific area he purchased a quantity of cigarette lighters, beer mugs and salt and pepper shakers through a dealer in Australia and sold some of them, at a substantial mark-up, to post exchanges at advance bases. He also purchased and sold two pool tables to officer groups, also at a profit. The difference between the purchase and sale prices approximated $6,000. The accused did not deny the sales, his only defense being an attempt to show that as a

whole he did not actually profit on the transactions inasmuch as a number of the articles purchased were lost and a number were still in storage unsold. As to his failure to deduct on his vouchers for meals furnished by the Government, accused testified that it was an oversight and that he had offered to settle.

5. Accused's efficiency ratings during his service from 1942 were uniformly "excellent." Another officer testified that he did excellent work in procuring and shipping special service equipment to bases where it was in great demand.

6. It should be noted that accused is at present on terminal leave. The effective date of his separation is 5 September 1946. A memorandum has been written by this office to The Adjutant General recommending that final separation of accused be deferred pending disposition of the case.

7. Accused not only engaged in business which tended to interfere with the discharge of his duties but he took advantage of his official position to realize personal gain. He demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 247, 2 Aug 1946).

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

JAGH - CM 307047 [illegible] SEP 1946

UNITED STATES	)	FIFTH AIR FORCE
v.	)	Trial by G.C.M., convened at APO 710, 16 and 19 November 1945. Dismissal, total forfeitures and confinement for nine (9) months.
Second Lieutenant DANTE E. AMBROSINI (0-736059), Air Corps	)	

OPINION of the BOARD OF REVIEW

HOTTENSTEIN, SOLF and SCHWAGER, 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: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant DANTE E. AMBROSINI, 531st Bombardment Squadron, 380th Bombardment Group, did, while en route from APO 920 to APO 921, on or about 4 November 1944 absent himself without proper leave from the service of the United States and did remain absent without proper leave until about 25 January 1945.

Specification 2: (Nolle prosequi.)

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

Specification 1: (Nolle prosequi.)

Specification 2: (Nolle prosequi.)

Specification 3: In that Second Lieutenant Dante E. Ambrosini, 531st Bombardment Squadron, 380th Bombardment Group (H) AAF, APO 321, did, on or about 4 November 1944 to 25 January 1945 wrongfully obtain from the United States pay and allowances for above mentioned period, to which he was not entitled.

He pleaded not guilty to, and was found guilty of, both Charges and Specifications thereunder. 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 five hundred dollars, to be confined at hard labor, at such place as the reviewing authority might direct, for nine months, and to be confined at hard labor until said fine is so paid, but for not more than three months in addition to the nine months thereintofore adjudged. The reviewing authority approved the sentence, remitted the fine and the additional confinement until the fine was paid, and forwarded the record for action under Article of War 48. The confirming authority, the Commander-in-Chief, United States Army Forces, Pacific, confirmed the sentence, as modified, and forwarded the record of trial for action under Article of War 50½. The power conferred by direction of the President upon the Commander-in-Chief, United States Army Forces, Pacific, under the provisions of Article of War 48, having been suspended on 19 January 1946, the record of trial was forwarded to The Judge Advocate General for action pursuant to Article of War 50½.

3. Evidence for the prosecution: The accused, Second Lieutenant Dante E. Ambrosini, Air Corps, was, prior to 22 October 1944, a member of the 90th Bombardment Group, stationed at Owi Island near Biak, APO 920. On that date, he was relieved from that assignment, transferred to the 380th Bombardment Group located at Darwin, Australia, APO 921, and ordered to proceed to his new station (R 10, 11, 24; Pros Ex 1, 1A, 2). Accused accordingly left Biak on 3 November by air (R 67). There was a direct air courier mail route from Biak to Darwin (R 25, 27), although the normal course was by way of Nadzab, thence to Townsville, at which latter point it was necessary to change planes for Darwin (R 26) but unnecessary to go by Brisbane in order to reach Darwin from Biak (R 26). Brisbane was 400 miles south of Townsville (R 75; Pros Ex 5), the usual transfer point (R 25), where the changes of getting a plane were always very good (R 28, 29). Nevertheless, and although his plane stopped at Townsville (R 68), accused proceeded to Brisbane, arriving thereat on 4 November (R 14, 68, 69). During the next 45 days he lived at the same address as Mavis Inglis, an Australian girl whom he had known for eighteen months, and on 20 December moved into an apartment (R 13, 14-16, 52; Pros Ex 4). During the 45-day period he was with the girl almost "24 hours a day" and thereafter was with her every night (R 14, 16, 21, 22; Pros Ex 4). He often obtained government vehicles while in her company (R 21, 22, 63, 72, 84, 89; Pros Ex 4, Def Ex C-1) and used them "for riding around" (R89; Pros Ex 4).

Between 4 November 1944 and 26 January 1945, twelve planes carrying passengers left Eagle Farm Airdrome, Brisbane, for Darwin and anyone traveling on official orders who made an application during that time could have secured transportation within a reasonable time (R 31, 32; Pros Ex 6, 6A). Priority was determined according to the order in which applications were recorded on daily priority lists (R 35). Although Miss Inglis was with him on nearly every trip to Eagle Farm Airdrome, she never heard him request transportation (R 16, 18; Pros Ex 4).

The 265th Replacement Company (AAF) was the only organization at Brisbane officially handling transportation for Air Force personnel en route to forward areas, and during the period 4 November 1944 to 25 January 1945 all such personnel reporting were required to remain with that organization while awaiting transportation (R 40, 41). Notwithstanding this fact, the records disclosed that during that period accused did not report either in person or by telephone, nor did he make any requests for transportation to the officer designated to receive such requests (R 38, 41, 42; Pros Ex 7). At no time did it require more than two weeks to secure transportation from Brisbane to Darwin (R 42; Pros Ex 7). The troop movement sergeant who knew accused did not see him nor did he receive any transportation request from him during the period 4 November to 25 January 1945, although all such requests cleared through him (R 43, 45; Pros Ex 8). However, personnel traveling North during that period frequently arranged their own transportation through organizations such as the Troop Carrier Wing and the Air Transport Command (R 46; Pros Ex 8).

Accused finally left Brisbane by plane on 26 January 1945 and joined his organization at Darwin 12 hours later the same day (R 14, 21, 74, 75; Pros Ex 3, 4). He duly signed and presented vouchers and received full pay and allowances for November and December 1944 and January 1945, the period of his absence (R 47; Pros Ex 9).

4. Evidence for the defense: Accused was advised of his rights as a witness (R 65) and elected to testify in substance that he left Biak 3 November 1944 by air pursuant to orders transferring him to the 380th Bombardment Group (R 66, 67). The plane stopped at Merauke, New Guinea, Cairns, Australia and Townsville and at each stop he unsuccessfully requested transportation to Darwin, there being no plane available at the time (R 68, 69). Failing to secure transportation at Townsville, he proceeded to Brisbane because he knew there was a direct air transport command route from Brisbane to Darwin, that transient aircraft coming from the South stopped at Eagle Farm and Archer Field and there was also a good chance of getting one of the planes of the 380th flying to Darwin (R 68). Arriving at Brisbane, he was assigned quarters at the billeting office (R 69). He tried to secure transportation at Eagle Farm Airdrome nearly every day, specifically attempting to get on the planes leaving 5 and 8 November, 3, 4, 7 and 31 December, and also made fruitless efforts at Archer Field. On two occasions he would have secured a ride had it not

been for his 300 pounds of baggage (R 70-73, 80, 86). Drawing motor transportation at the Eagle Farm motor pool nearly every day he used it principally to go to the airport (R 72, Def Ex C, C-1). Early in January he went to the Primary Building and obtained a promise of transportation at the 322nd Troop Carrier Wing and thereafter made no further efforts elsewhere (R 73, 74). On 26 January he finally obtained passage on a plane of the Troop Carrier Wing and arrived at Darwin after a 12-hour trip (R 74, 75). He admitted that he saw the Australian girl nearly every day he was in Brisbane during November, December and January, and took her riding in government vehicles (R 83, 84), but refused to answer a question as to whether he lived at her home, as being incriminating (R 83). Since he was not certain as to the exact location of his organization, he failed to notify his new commanding officer of the reason for his delay (R 85).

The Eagle Farm Airdrome motor pool officer, a defense witness, stated that from 3 November to 25 January he frequently saw accused, who told him he was trying to locate his organization before attempting to secure transportation. On most of his visits Miss Inglis was not with him. The record of trip tickets showed that accused used cars from the pool on twenty-eight occasions during the three-months' period (R 61, Def Ex C, C-1) generally at night (R 64, Def Ex D).

5. The evidence conclusively establishes that accused was absent without leave during the greater portion of his stay in Brisbane during the months of November, December 1944 and January 1945. Although the morning report of his organization fails to reflect such wrongful absence, it is an established principle that the introduction of such record is not the exclusive method of proving absence without leave. "Direct proof, though desirable is not in all cases requisite. Like any other fact absence without leave may be inferred from other circumstances" (Sec 419 (2), Dig Op JAG, 1912-40; III Bull JAG 9; CM 273696, Lewis, 47 BR 23).

In making its findings of guilty, the court properly considered that accused took 82 days to accomplish a journey which ordinarily required only a short time. Instead of stopping at Townsville, the usual transfer point where transportation was available, he proceeded by a circuitous route to Brisbane. Instead of occupying government billets, he lived at the same address as a girl acquaintance, and for nearly six weeks was in her company almost 24 hours a day, using government transportation to ride around with her. Since 12 planes made the trip from Eagle Farm Airdrome during the period, it is reasonable to infer that he could have secured transportation had he made a conscientious effort to do so. He also made no effort to secure transportation from the 265th Replacement Company, the only organization officially handling transportation for northbound Air Corps personnel, notwithstanding the fact that on a previous trip to

Brisbane he had obtained it there. He made no attempt to communicate with his new commanding officer. In the face of all these facts, accused's protestations that he made "every effort" to secure transportation were incredible and the court was fully warranted in disbelieving them and finding him guilty.

Ordinarily an officer is entitled to draw his pay pending trial and the outcome thereof (Dig Op JAG, 1912-40, Sec 1443 (3)). However, the offense of wrongfully obtaining pay and allowances for the period of his absence without leave is also satisfactorily proved. That accused did draw such pay and allowances was established by stipulation (Pros Ex 9) and that this act was wrongful is demonstrated by proof that he was absent without leave during the periods involved. Neither pay nor allowances accrued to accused while he was absent without leave (par 3, AR 35-1420, 15 December 1939) and he was charged with knowledge both of his wrongful absence and of the regulation (III Bull JAG 14; CM 246591, Graham, 30 BR 95).

6. Accused, a 23-year-old, married, Air Corps pilot, enlisted voluntarily at the age of 18 and after he was graduated from Cadet School was commissioned a second lieutenant, Air Corps Reserve, Army of the United States, 4 January 1943. He was promoted to first lieutenant, Air Corps Reserve, 4 January 1946. He entered upon overseas service in June 1943, has flown 42 combat missions, has 220 flying combat hours and has been awarded the Air Medal with one oak leaf cluster. In May 1944 he was punished by reprimand and forfeiture of one-half of one month's pay for reckless operation of an airplane. On 27 July, 22 August and 7 September 1944 he was hospitalized for venereal disease.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review, the record of trial is legally sufficient to support the sentence, as approved by the reviewing authority. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Articles of War.

Rottenstein, Judge Advocate

Weldon A. Soff, Judge Advocate

Henry A. Thomas, Judge Advocate

JAGH - CM 307047 1st Ind

WD, JAGO, Washington 25, D. C. OCT 16 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dante E. Ambrosini (0-736059), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave, in violation of Article of War 61, and of wrongfully obtaining pay and allowances to which he was not entitled, in violation of Article of War 96. He was sentenced to dismissal, total forfeitures, to pay a fine of five hundred dollars ($500), to be confined at hard labor at such place as the reviewing authority may direct for nine months, and in addition to be confined at hard labor not exceeding three months until payment of the fine. The reviewing authority approved the sentence, remitted the fine and the additional confinement pending payment of the same, and forwarded the record of trial for action under Article of War 48. On 18 January 1946 the Commander-in-Chief, United States Army Forces, Pacific, confirmed the sentence as approved by the reviewing authority, but pursuant to Article of War 50½, withheld the order directing its execution. The power conferred by direction of the President upon the Commander-in-Chief, United States Army Forces, Pacific, under the provisions of Article of War 48, was suspended on 19 January 1946 and the record of trial was forwarded to my office for action pursuant to Article of War 50½.

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

On 22 October 1944 accused was transferred from Biak to Darwin, and ordered to proceed to the latter station. He left Biak by Government airplane, on 3 November 1944, and arrived in Brisbane, Australia, the following day. He remained in Brisbane until 26 January 1945 when he obtained air transportation and proceeded to Darwin. In the interim he made no adequate effort to obtain transportation to his new station and made no attempt to notify his new commanding officer. He spent most of his time in Brisbane visiting an Australian girl whom he had met on a previous trip. He testified that he tried to obtain transportation to his new station, but the evidence for the prosecution convincingly shows that he did not make any serious attempt to do so. Upon reporting to his new organization, he was immediately restricted to its area and thereafter he submitted pay vouchers and was paid in full, for the period during which he had been absent.

4. The accused is 23 years of age, married, and a high school graduate. He enlisted as an aviation cadet on 29 April 1942 and was appointed a second lieutenant, Air Corps Reserve and entered active duty on 4 January 1943. His record shows disciplinary action under the 104th Article of War, for improper piloting of an airplane, for which $75.00 of his pay was forfeited; also that he was in a non-pay status under AR 35-1440, from 22 August to 28 August 1944. He was awarded the Air Medal on 17 May 1944 and an Oak Leaf Cluster thereto on 17 January 1945.

I recommend that the sentence as modified by the reviewing authority be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 328. 30 October 1946).

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

JAGK - CM 307048

10 JUN 1946

UNITED STATES v. First Lieutenant PETER V. IACOVAZZI (O-698121), Air Corps, and First Lieutenant CHARLES H. BROGAN (O-701881), Air Corps.	FIFTH AIR FORCE Trial by G.C.M., convened at Headquarters Fifth Air Force, APO 710, 13 December 1945. EACH: Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

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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 Iacovazzi was tried upon the following Charge and Specification:

CHARGE: Violation of the 79th Article of War.

Specification: In that First Lieutenant Peter V. Iacovazzi, 318th Troop Carrier Squadron, did, at Shibetsu Naval Base, Hokkaido, Japan, on or about 21 October 1945, wrongfully appropriate to his own use the following public property of the United States taken from the enemy, viz, one hundred thousand (¥ 100,000) yen in Japanese currency, value in currency of the United States six thousand six hundred sixty-six and 67/100 ($6,666.67) dollars.

The accused Brogan was tried upon the following Charge and Specification:

CHARGE: Violation of the 79th Article of War.

Specification: In that First Lieutenant Charles H. Brogan, 318th Troop Carrier Squadron, did, at Shibetsu Naval Base, Hokkaido, Japan, on or about 21 October 1945, wrongfully appropriate to his own use the following public property of the United States taken from the enemy, viz, forty thousand (¥ 40,000) yen in Japanese currency, value in currency of the United States two thousand six hundred sixty-six and 67/100 ($2,666.67) dollars.

Accused Iacovazzi pleaded guilty to the Charge and to the Specification "'Guilty' except the words 'one hundred thousand (¥ 100,000) yen in Japanese currency, value in currency of the United States six thousand six hundred sixty-six and 67/100 ($6,666.67) dollars', substituting therefor, 'eighty thousand (¥ 80,000) yen in Japanese currency, value in currency of the United States Five thousand three hundred thirty-three and 33/100 ($5,333.33) dollars'". He was found guilty of the Charge and of the Specification with the exceptions and substitutions noted above. Accused Brogan pleaded guilty to and was found guilty of the Charge and its Specification. No evidence of any previous conviction of either accused was introduced. Each accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to pay to the United States a fine of $1500.00 and to be confined at hard labor "at such place as the reviewing authority may direct until said fine is so paid, but not for more than twelve months." Four of the nine members of the court thereafter recommended "that so much of the sentence as provides for dismissal from the service not be approved." The reviewing authority approved the sentence as to each accused but remitted "so much thereof as provides for payment of a fine and for confinement until said fine is paid," and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On 21 October 1945 the accused, First Lieutenants Iacovazzi and Brogan, arrived at the Japanese Shibetsu Naval Base to act as a disposition team in the destruction of Japanese naval and military equipment and "to procure all inventories" (Pros. Exs. 3A, 4A). Their orders provided for the confiscation of Japanese property but made no specific mention of Japanese currency (R. 27,28). At some time prior to 21 October 1945 Lieutenant Haruo Matsuda, a Japanese naval officer and paymaster of the Shibetsu Naval Base, had drawn ¥ 1,500,000 from the Bank of Japan. The money was all new, of 200, 100 and 10 yen denominations and wrapped in 1000 yen packages (R. 6,7). This money belonged to the Japanese government (R. 8) and was intended to be used for paying the men at the Base (R. 9). It was kept in a safe in Lieutenant Matsuda's private room (R. 7) which was about ten meters from his office (R. 16). Upon arriving at the Shibetsu Base on 21 October 1945, the accused, Lieutenants Iacovazzi and Brogan, showed Lieutenant Matsuda their orders and explained their mission. He showed them the tunnel where the bombs were kept and gave them other information concerning equipment on the Base. The next day they came back to his office and ordered him to open the safe (R. 7,8; Pros. Exs. 3A, 4A). This he did, and the remaining money therein having been taken out, the three of them counted it and found it amounted to ¥ 341,970. Both the accused then wrapped the money into several packages and put it into Lieutenant Brogan's bag (R. 8). The bag was then intrusted to Lieutenant Matsuda for safekeeping pending receipt of instructions for the disposition of the money and, not being able to get it into the safe because of its bulk, he left it in his room under guard (R. 9).

The next morning, 23 October 1945, Lieutenant Matsuda went to the nearby hotel where accused were staying and told them that he wanted to use the money to meet the pay roll. At that time Lieutenant Iacovazzi refused on the ground that he had no authority to free the money, but some time in the afternoon of that day Lieutenant Iacovazzi came to the Base and told Lieutenant Matsuda he could use it for the pay roll. Thereafter, they went to the latter's room and Lieutenant Iacovazzi opened the bag and purported to give Lieutenant Matsuda the money therein (R. 9). Lieutenant Matsuda gave Lieutenant Iacovazzi a receipt for the money and put it back in the safe. He did not count it at the time (R. 10). While handing the money over to Lieutenant Matsuda, Lieutenant Iacovazzi, according to his confession, "pulled a few ¥ 200 bills from the last bundle" and "could tell that some bundles were remaining" in the bag (Pros. Ex. 3A). Lieutenant Brogan was not present during this transaction but was elsewhere at the Base at that time (Pros. Ex. 4A). Lieutenant Iacovazzi took the bag with him when he left the Base and went to a hotel some twenty miles away, where he shared a room with Lieutenant Brogan. Lieutenant Brogan accompanied Lieutenant Iacovazzi on the trip from the Base to the hotel and on the way the latter had opened the bag and pulled out a bundle explaining that it contained some of the money from the paymaster's office at Shibetsu (Pros. Exs. 3A, 4A). That evening, when they were alone, they opened the bag to take a look at the money and found that there were four bundles of 200 yen notes in it amounting to ¥ 80,000. Lieutenant Iacovazzi gave Lieutenant Brogan two of the bundles amounting to ¥ 40,000.

The following day, the two accused returned to the Base. On the way, Lieutenant Iacovazzi paid the hotel bill with one of the 200 yen notes and gave two other officers money to pay for their geisha girls (Pros. Ex. 3A). Meanwhile, on the night of 23 October 1945, Lieutenant Matsuda had counted the money in the safe and had discovered that ¥ 100,000 were missing. The missing currency consisted of five hundred 200 yen notes, the serial numbers of which were known to him. This loss was reported to his Base commander. When both accused arrived at the Base on October 24th, Lieutenant Matsuda questioned them about the money and asked if there was any money left in the bag. They answered in the negative and Lieutenant Brogan showed him the empty bag. Lieutenant Iacovazzi then informed Lieutenant Matsuda that the loss was due to Lieutenant Matsuda's carelessness (R. 11,12,13).

Later the same day, 24 October 1945, both accused left Shibetsu Naval Base to return to their station at Chitose Army Air Base. A few days thereafter they went to Manila, returning to Chitose Army Air Base on or about 7 November 1945 (Pros. Exs. 3A, 4A, R. 20). Between these two dates Lieutenant Iacovazzi had loaned 3200 yen to his squadron beer fund, which sum included several of the 200 yen notes; sent a $300 money order to his mother using the 200 yen notes in payment therefor; cashed $200 worth of the 200 yen notes for Philippine money; dispatched $200 in money orders on one occasion and a "PT&T" for $160 on another; bought money orders for $285 which were not dispatched but turned over to his commanding officer on his return; spent "a fair sum at the Post Exchange and for liquor; and "lost some gambling"

(Pros. Ex. 3A). Between these two dates, Lieutenant Brogan dispatched a "PT&T" for $140; bought a money order for $100 which was not dispatched but turned over to his commanding officer on his return; cashed a $100 money order for another officer, but turned the money order over to his commanding officer on his return; spent some money in Manila and had either $200 or $300 worth of yen converted into Philippine currency; and lost some money gambling (Pros. Ex. 4A).

In the meantime the loss of ¥ 100,000 yen from the Shibetsu Naval Base had been brought to the attention of Colonel Herbert L. Grills, the commanding officer of the accused, and he had also been supplied with the serial numbers of the missing currency. Upon their return to Chitose Army Air Base on or about 7 November 1945, both accused were met at the flight line and ordered to report to Colonel Grills. Prior to reporting, Lieutenant Iacovazzi had left his B-4 bag in the airplane in which he had been traveling and Lieutenant Brogan had left his jacket in the squadron operations office (Pros. Exs. 3A, 4A). Colonel Grills first questioned Lieutenant Brogan and asked him if he knew anything about the missing money from the Shibetsu Naval Base. He said he did not (R. 24). He next interrogated Lieutenant Iacovazzi who also protested that he had no knowledge of the missing funds (R. 25). Before questioning Lieutenant Iacovazzi, however, Colonel Grills' Assistant A-4, Major Shuford W. McDonald, had examined Lieutenant Iacovazzi's B-4 bag and had found some of the missing currency therein (R. 20,21). Upon being confronted with this fact by Colonel Grills and being properly warned of his rights under Article of War 24, Lieutenant Iacovazzi made a signed confession in his own handwriting (R. 25) to the effect that he had "confiscated" ¥ 80,000 from the Shibetsu Naval Base; of which he had turned over ¥ 40,000 to Lieutenant Brogan, had disposed of approximately ¥ 15,000 and had the rest in his possession (Pros. Ex. 1). Thereupon Colonel Grills again questioned Lieutenant Brogan, and after being told that Lieutenant Iacovazzi had confessed Lieutenant Brogan told Colonel Grills that the Japanese currency taken from the Shibetsu Naval Base remaining in his possession was in his clothing down on the flying line (R. 26). As a result of this information, Major McDonald found some of the missing currency in Lieutenant Brogan's jacket in the operations office (R. 21). Lieutenant Brogan then made a confession in his own handwriting (R. 26) to the effect that he had taken ¥ 40,000 of the Shibetsu Naval Base money and that the amount thereof not returned on 7 November 1945 had been sent to his home address (Pros. Ex. 2). Lieutenant Brogan had been properly warned of his rights under Article of War 24 before he confessed (R. 24). Both accused, being again properly warned of their rights under Article of War 24, made more detailed confessions to the investigating officer (Pros. Exs. 3, 3A, 4, 4A).

The balance of the missing ¥ 100,000 over the ¥ 80,000 admittedly taken by the accused was never accounted for.

4. <u>Evidence for the Defense.</u>

The prosecution and the defense stipulated that one Captain Arvesen would testify that both accused had given him a total of ¥ 28,351 to be delivered to the proper official at Shibetsu Naval Base in restitution of a portion of the total of ¥ 80,000 admittedly taken by the accused. This sum represented the difference between the total taken and the sum of ¥ 51,649 held as evidence in the courts-martial proceedings (R. 29, Def. Ex. A). Prosecution and defense also stipulated that Lieutenant Matsuda would testify that this sum had been received by him for the Shibetsu Naval Base (R. 30, Def. Ex. B).

Major Charles G. Carter, Jr., 309th Bomb Wing, testified that he had been the immediate commanding officer of Lieutenant Brogan since December 1943 and of Lieutenant Iacovazzi since January 1944. Major Carter had been the commander of the 318th Troop Carrier Squadron (C-47s) and Lieutenant Brogan was a pilot in that organization and Lieutenant Iacovazzi a navigator. Lieutenant Brogan had been interested in working with the enlisted men of the command and had been Public Relations Officer both in the United States and overseas. He kept the morale of the unit at a very high peak and organized and ran the unit's recreation center for enlisted men and its officers' club. He was interested in the Army as a career and was one of the few rated officers who was interested in the administrative details of the Air Corps. He was appointed Assistant Adjutant of the Squadron and performed these duties in an excellent manner. Lieutenant Brogan was an excellent pilot and flew the lead ship in the C-47 formations. He proved his ability by making air drops to the 6th Army in Luzon. Lieutenant Iacovazzi was the best navigator in the squadron. He took part in organizing the squadron's enlisted men's recreation center in Northern Luzon. In overseas flying he was the first officer in the squadron to reach the maximum flying hours required for rotation, but refused rotation so that he could stay and help the unit finish moving the squadron from Atsugi to Hokkaido. The character of both accused had been excellent and witness would ask for either of them as members of his squadron had he the opportunity to do so (R. 30,31,32).

Major Shuford W. McDonald, 309th Bomb Wing, Chitose Air Base, testified that he had known both accused for approximately fourteen months and that he had occasion several times to ride with Lieutenant Brogan as pilot and Lieutenant Iacovazzi as navigator. In all instances they carried out their duties in an excellent manner. Prior to the occurrence for which they were now on trial they had not been in trouble of any kind (R. 33,34).

Captain Frederick M. Ellis, Chitose Air Base, testified that as Combat Intelligence Officer the accused would report to him every time they completed a flying mission. Lieutenant Iacovazzi was the best navigator in the squadron and during the first nine months overseas flew a total of 900 hours. He was scheduled for rotation in July 1945, but passed it up so that a brother officer, another navigator, might go home to see his new-born son. Lieutenant Brogan worked with the witness both in the United States and overseas as Public Relations Officer. He spent a lot of his time arranging better

things for the enlisted men. During his first nine months overseas he flew at least 800 hours (R. 34,35).

Lieutenant Robert P. Goyette, 318th Troop Carrier Squadron, 3rd Air Commando, testified that he now commanded the 318th Troop Carrier Squadron and that he has known both accused, members of his organization, for about ten months. He likes both accused and has had many opportunities to fly with both of them. He felt their ability and judgment were superior under conditions which were often hazardous. Witness vouched for accused's character and generosity. While in Laog the squadron had a club of its own and Lieutenant Brogan was club treasurer. It meant a lot of work for him and he did a good job. At the same time they also had a "feast house" in Manila which Lieutenant Iacovazzi volunteered. This meant a sacrifice of flying time for him and he did all the work "with no reward except maybe a thank you." Witness did not think either accused would ever knowingly do anything wrong (R. 35,36).

Lieutenant Iacovazzi took the witness stand in his own behalf and testified under oath. He is 24 years of age and unmarried, but his mother and brother are dependent upon him for support. He entered the military service in August 1942 as an Air Corps cadet. He came overseas on 15 October 1944. He has flown approximately 1900 hours, 245 of which were combat hours consisting of 74 combat missions. The majority of these missions took place in the mountains of Luzon. He participated in the New Guinea, Southern Philippines, Luzon and Western Pacific campaigns and has four battle stars pending. He has received the Air Medal with one Oak Leaf Cluster. He and Lieutenant Brogan turned in the sum of ¥ 28,351 to Captain Arvesen to make up the difference between the sum held as evidence in the trial and the ¥ 80,000 taken from the Shibetsu Naval Base. Of this sum he contributed about $400 he had collected in back pay and about $250 which he had borrowed from a fellow officer (R. 38,39).

Lieutenant Brogan took the witness stand in his own behalf and testified under oath. He is married and has no children. He entered the military service in August 1942 as an Air Corps cadet. Prior to his entry into the military service he had attended a military academy and had an appointment to West Point, which he could not accept, for he had dislocated an elbow in football and could not get a waiver for this defect. He came overseas on 15 October 1944. He has approximately 2,000 flying hours to his credit, 185 hours of which were combat hours consisting of 51 combat missions. He participated in the New Guinea, Southern Philippines, Northern Philippines and Ryukus campaigns. He received the Air Medal and understands that an award to him of the Distinguished Flying Cross is pending. He and Lieutenant Iacovazzi delivered to Captain Arvesen some ¥ 28,000, his share of which had been made up from two months back pay he had collected and amounts he had borrowed from brother officers. His pay amounts to $405 a month and he has a Class E deduction of $200 (R. 40,41,42).

Four members of the court recommended clemency for both accused on the ground that both have excellent combat and service records and on the further ground that, from the clear cut appearance of both accused, it was believed that their dereliction was the result of youth and inexperience, being suddenly faced with an unusual temptation connected with their duties of discovering and destroying enemy property. The four members felt that the demeanor and attitude of both accused indicates that they have learned a hard lesson.

5. By his plea of guilty, the accused, Lieutenant Iacovazzi, admitted having appropriated to his own use at the time and place alleged the sum of ¥ 80,000 in Japanese currency, which sum was public property of the United States taken from the enemy, of the value in currency of the United States of $5,333.33. By his plea of guilty, the accused, Lieutenant Brogan, admitted having appropriated to his own use at the time and place alleged the sum of ¥ 40,000 in Japanese currency, which sum was public property of the United States taken from the enemy, of the value in currency of the United States of $2,666.67.

The evidence adduced at the trial, apart from the pleas and confessions of the accused, established beyond all reasonable doubt that on 23 October 1945 certain Japanese currency of 200 yen denomination, the serial numbers of which were known, was missing from the pay account of the Shibetsu Naval Base. This money had been in the possession of the Japanese paymaster of the Base and had belonged to the enemy government. On or about 7 November 1945, after both accused had denied all knowledge of the missing currency, substantial amounts of it were found in their possession. Prior to the trial accused gave one Captain Arvesen the sum of ¥ 28,351, about $1890.08 in United States currency, for delivery to the Japanese paymaster at Shibetsu Naval Base in restitution of that portion of the ¥ 80,000 admittedly taken by accused representing the difference between this total and the sum of ¥ 51,649 found in the possession of the accused. According to their confessions Lieutenant Iacovazzi gave Lieutenant Brogan ¥ 40,000 on 23 October 1945, and Lieutenant Brogan accepted this amount well knowing that this was part of the ¥ 80,000 taken by the latter from the pay accounts of the Shibetsu Naval Base on that day. Also, between 24 October 1945 and 7 November 1945 both accused had treated this money as their own and spent it freely.

It is axiomatic in the law of war that property belonging to an enemy government becomes, upon capture, the property not of the individual captor but of the nation in whose army he serves (AW 79; FM 27-10, par. 327, Hague Regulations, Art. 53, TM 27-251, p. 33; Dig Op JAG 1912, p. 1061; Winthrop, Mil. Law and Precedents, 2d Ed., pp. 557, 781; SPJGD/D-75534, SPJGW 1945/6216, 4 Bull. JAG 389; CM ETO 9573, Konick, 4 Bull. JAG 338; CM ETO 17667, Truex (CM 308337)). Pillage for private gain is prohibited by the modern law of war (AW 79; FM 27-10, par. 329; Hague Regulations, Art. 47, TM 27-251, p. 31). Article of War 79 provides that any person subject to military law who wrongfully appropriates such property shall be punished as

a court-martial may direct. The evidence clearly establishes that Lieutenant Iacovazzi exercised such control for his personal benefit over the ¥ 80,000 taken from the Shibetsu Naval Base as to constitute a violation of the mentioned Article of War. Lieutenant Iacovazzi gained no title to this money and thus could pass no title to the ¥ 40,000 he gave Lieutenant Brogan. When, therefore, Lieutenant Brogan, fully cognizant of the source of this money, treated it as his own he also violated the provisions of the 79th Article of War.

6. War Department records show that the accused, Lieutenant Iacovazzi, is 25 years of age and is unmarried. He is a high school graduate and prior to his entry into the service was employed as a machinist with the Bell Aircraft Corporation. He had one month of infantry training with the C.M.T.C. in each of the years 1937 and 1938 and was a member of the Enlisted Reserve Corps from July 1942 to February 1943. On 28 February 1943 he entered the service as an Air Corps Cadet and upon successful completion of a course of training in navigation he was appointed and commissioned a temporary second lieutenant in the Army of the United States on 13 November 1943. He was promoted to the grade of first lieutenant on 13 October 1944. Thereafter, he went overseas and on 31 May 1945 he was awarded the Air Medal for meritorious achievement while participating in sustained operational flight missions in the Southwest Pacific Area, during which hostile contact was probable and expected. These flight missions were made in unarmed transport aircraft over hazardous land and sea routes and consisted of evacuating casualties from forward positions to hospitals in the rear areas and dropping supplies by parachute to guerrilla forces behind enemy lines. On 5 October 1945 he was awarded the Oak Leaf Cluster to the Air Medal for similar services performed at a later period.

7. War Department records show that the accused, Lieutenant Brogan, is 23-1/2 years of age and is married. He is a high school graduate and attended Kemper Military School, Boonville, Missouri, for one year. He had no civilian employment prior to entering the military service. On 21 February 1943 he entered the service as an Air Corps cadet and upon successful completion of a course of training as a two-engine pilot he was appointed and commissioned a temporary second lieutenant in the Army of the United States on 5 December 1943. He thereafter went overseas and was promoted to the grade of first lieutenant on 21 April 1945. On 5 June 1945 he was awarded the Air Medal for meritorious achievement while participating in sustained operational flight missions in the Southwest Pacific Area, during which hostile contact was probable and expected. These flight missions were made in unarmed transport aircraft over hazardous land and sea routes and consisted of evacuating casualties from forward positions to hospitals in the rear areas and dropping supplies by parachute to guerrilla forces behind enemy lines.

8. Lieutenant Brogan appeared before the Board of Review in his own behalf at a hearing held on 27 May 1946.

9. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and each sentence and to warrant confirmation of each sentence. Dismissal is authorized upon conviction of a violation of Article of War 79.

William P. Kuder, Judge Advocate

Gilbert McAbrook, Judge Advocate

Earl W. Wingo, Judge Advocate

JAGK - CM 307048 1st Ind

WD, JAGO, Washington 25, D. C. JUN 28 1946

TO: Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Peter V. Iacovazzi (0-698121), Air Corps, and First Lieutenant Charles H. Brogan (0-701881), Air Corps.

2. Upon a common trial by general court-martial the accused Iacovazzi pleaded guilty to and was found guilty of wrongfully appropriating to his own use property of the United States taken from the enemy, viz, 80,000 yen, and the accused Brogan pleaded guilty to and was found guilty of wrongfully appropriating to his own use property of the United States taken from the enemy, viz, 40,000 yen, in violation of Article of War 79. Each was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to pay to the United States a fine of $1500 and to be confined at hard labor "until said fine is paid but not for more than twelve months." The reviewing authority approved the sentence as to each accused but remitted "so much thereof as provides for payment of a fine and for confinement until said fine is paid" and forwarded the record of trial for action under Article of War 48.

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

On 22 October 1945, the accused, Lieutenants Iacovazzi and Brogan, acting as a disposition team with orders requiring them to destroy Japanese naval and military equipment and to procure all inventories at the Japanese Shibetsu Naval Base but making no specific mention of Japanese currency, took possession of ¥ 341,970 belonging to the Japanese government and located in a safe at that Base. This sum had been in the custody of the Japanese paymaster thereof and was part of the pay accounts of the Base. The next day Lieutenant Iacovazzi purported to return this sum to the Japanese paymaster so that the latter could pay his men, but knowingly retained ¥ 80,000 thereof. Later that day Lieutenant Brogan received ¥ 40,000 from Lieutenant Iacovazzi, knowing that this sum was part of the ¥ 80,000 taken from the Japanese Base by the latter. On 24 October 1945, the Japanese paymaster, having noticed a shortage in his accounts, asked accused if they had retained any of the currency and received a denial from both accused. There-

after, on the same day, both accused left the Base and returned to their station at Chitose Army Air Base and then went on a trip to Manila. Upon their return to their station they were questioned about the missing currency by their commanding officer and denied all knowledge of it. However, when part of the missing currency was found in the possession of Lieutenant Iacovazzi, they confessed that they had taken the money and that each had disposed of a considerable amount thereof. Restitution of the amount disposed of was made before the trial by the accused.

Lieutenant Iacovazzi is 25 years of age and is unmarried, but, according to his sworn testimony, his mother and brother are dependent upon him for support. He went overseas on 15 October 1944 and has flown approximately 1900 hours, 245 of which were combat hours consisting of 74 combat (air transport) missions. He participated in the New Guinea, Southern Philippines, Luzon and Western Pacific campaigns and has four battle stars pending. He has received the Air Medal with one Oak Leaf Cluster. Lieutenant Brogan is 23-1/2 years of age and is married. He went overseas on 15 October 1944 and has flown approximately 2000 hours, 185 of which were combat hours consisting of 51 combat (air transport) missions. He participated in the New Guinea, Southern Philippines, Northern Philippines and Ryukus campaigns. He received the Air Medal and, according to his sworn testimony, was recommended for the Distinguished Flying Cross. On the ground of the youth and inexperience of both accused and because of their excellent combat and service records, four of the members of the court recommended clemency and that so much of the sentence as provides for dismissal from the service be not approved. Due consideration has been given to this recommendation.

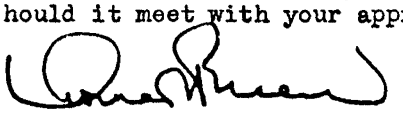
Lieutenant Brogan requested and was granted a hearing before the Board of Review in my office on 27 May 1946, and also appeared before me on 29 May 1946 and said that due to the confused state of affairs at the time he committed the offense he had not fully realized that he was acting wrongly, had not regarded the Japanese currency in the same light as he would United States currency and admitted that he had converted the former to his own use. He now appreciates that he was wrong and stated that he had never committed any offense before or since the events for which he was tried. He asked for clemency for both himself and Lieutenant Iacovazzi. Due consideration has been given to this plea for clemency.

Since there is nothing in the record to justify the acts of the accused, which acts clearly demonstrate that each is unworthy of his commission, I recommend that the sentence as to each accused, as approved by the reviewing authority, be confirmed but that the forfeitures as to each be remitted, and that the sentences as thus modified be carried into execution.

4. Consideration has been given to a copy of a letter from Honorable Edwin A. Hall, Member of Congress, addressed to the Secretary of War and

a copy of a letter inclosed therewith from Lieutenant Iacovazzi to Congressman Hall, which accompany the record of trial.

5. Inclosed are forms of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Cpy ltr fr Congressman Hall w/incl

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

JAGJ CM 307048

MEMORANDUM FOR THE UNDER SECRETARY OF WAR

SUBJECT: Withdrawal of action confirming sentences to dismissal in the case of First Lieutenant Peter V. Iacovazzi, 0698121, Air Corps, and First Lieutenant Charles H. Brogan, 0701881, Air Corps

1. The above named officers were tried in common by a general court-martial convened at Headquarters Fifth Air Force, APO 710, on 13 December 1945. They were charged with wrongfully appropriating to their own use certain Japanese currency, public property of the United States, taken from the enemy, in violation of Article of War 79. The amounts alleged in the specifications were 100,000 yen in the case of Lieutenant Iacovazzi and 40,000 yen in the case of Lieutenant Brogan. Lieutenant Brogan pleaded guilty to the charge and specification and Lieutenant Iacovazzi pleaded guilty to the charge and guilty with exceptions to the specification (he pleaded guilty as to 80,000 yen only). Each was found guilty in accordance with his pleas and sentenced to dismissal, total forfeitures, a fine of $1500, and confinement at hard labor until the fine is paid but not for more than twelve months. The reviewing authority approved only so much of the sentence as involved dismissal and total forfeitures and forwarded the record of trial for action under the 48th Article of War.

2. The record of trial was examined by the Board of Review and found to be legally sufficient to support the findings of guilty and the sentences, and to warrant confirmation of each sentence. On 28 June 1946, I forwarded the record of trial and the Opinion of the Board of Review to you, together with my concurrence and recommendation that the sentences as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentences as thus modified be carried into execution. You acted in accordance with this recommendation on 28 September 1946 (Brogan) and 14 October 1946 (Iacovazzi).

3. In April 1946, after approval of his sentence by the reviewing authority, Lieutenant Brogan returned to the United States on emergency leave and, on 19 June 1946, was honorably separated from the service. On 1 July 1946 he reverted to inactive status.

4. The evidence shows that on 22 October 1945 Lieutenants Iacovazzi and Brogan, acting as a disposition team with orders requiring them to destroy Japanese naval and military equipment and to procure all inventories at the Japanese Shibetsu Naval Base, took possession of 341970 yen belonging to the Japanese Government and located in a safe at that base. This sum had been in the custody of the Japanese paymaster and was part of the pay accounts of the base. The next day Lieutenant Iacovazzi purported to return this sum to the Japanese paymaster but knowingly retaining 80,000 yen thereof. Later that day Lieutenant Brogan received 40,000 yen from Lieutenant Iacovazzi knowing this sum was part of the 80,000 yen taken from the Japanese base by the latter. Both accused denied they had retained any of the currency when questioned by the Japanese paymaster on 24 October 1945 and subsequently by their commanding officer. When part of the missing currency was found in the possession of Lieutenant Iacovazzi they later confessed that they had taken the money and that each had disposed of a considerable amount thereof. Restitution of the amount disposed of was made by accused before the trial.

5. The administrative separation from the service of Lieutenant Brogan, under honorable conditions and prior to final action on the sentence, amounted to an implied remission of his sentence and the proceedings, which have not as yet been promulgated by a general court-martial order, should be treated as abated in the Brogan case. Accordingly, it is recommended that you execute a new order in the Brogan case, withdrawing your former action and providing that no further action will be taken through the exercise of the confirming power or promulgation of the proceedings.

6. Although Lieutenant Iacovazzi was the one who physically withheld the sum of money when turning over the pay roll funds to the Japanese paymaster, the degree of culpability involved in his offense does not vary substantially from that involved in Lieutenant Brogan's offense of receiving and appropriating half of the proceeds with full knowledge of the source of the money. The sentence as to each accused was the same and the action taken by the reviewing authority and by you as confirming authority, did not differ with regard to modification of the sentences. The net result of a dismissal in the case of Lieutenant Iacovazzi would permit a marked disparity in the treatment accorded to each officer. The proceedings in Iacovazzi's case also have not yet been promulgated. I recommend that you execute a new order in the case of Lieutenant Iacovazzi, withdrawing your former action, confirming the sentence as approved by the reviewing authority, remitting the forfeitures imposed and suspending execution of the sentence as thus modified during the officer's good behavior.

JAGJ CM 307048

7. Inclosed herewith are two orders designed to carry the foregoing recommendations into effect should they meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. R/T (CM 307048) and allied papers
2. Form of order (Brogan)
3. Form of order (Iacovazzi)

(G.C.M.O. 320, 23 October 1946).

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

SPJGN-CM 307049

U N I T E D S T A T E S v. First Lieutenant PHILLIP H. JACOBS, also known as PHILIP FRANCIS JACOBS (0-925206), Transportation Corps.	)))))))	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at Headquarters Base K, Army Forces Western Pacific, APO 72, 6 November 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Phillip H. Jacobs, TC, Base Port Command, APO 72, did, in conjunction with Private First Class William J. Kimberly, 275th Port Company, and Private First Class Jack Rosenbaum, 275th Port Company, at APO 72, on or about 20 July 1945, feloniously take, steal, and carry away 210 cases of beer, of the value of about $420.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification excepting the figures $420.00," substituting therefor "$378.00"; of the excepted figures not guilty, of the substituted figures guilty. He was sentenced to be dismissed the service, to forfeit all

pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was on duty on the early morning of 20 July 1945 as Dock Officer at Dock No. 3 at Tacloban, supervising the unloading of a cargo of trucks and beer from the S.S. Kincaid (R. 7, 26). The beer was government property (R. 9, 29). Instructions had been given to remove the trucks during the night and the beer the following morning (R. 26, 30-31). Privates Kimberly and Rosenbaum, members of the 275th Port Company which was detailed to unload the ship, went off duty at midnight but returned about 0030, along with Sergeant Herbert W. Johnson, for the purpose of procuring some of the beer for themselves (R. 18, 22-23, 26-27, 40). Rosenbaum went down into the No. 2 hatch and tied a rope around 18 cases of beer which Kimberly hauled up and placed near a gun turret. The Third Mate discovered the beer, however, and the beer was returned to the hatch (R. 7, 15, 21, 27).

Accused came aboard ship about 0130 and, observing what had happened, "kidded" Kimberly and his companions about "being caught" (R. 17). Remarking that he was going to get some beer, accused asked Sergeant Johnson to have the boys in the hold throw three or four cases of beer on one of the trucks being hoisted but the sergeant in charge, to whom the request was transmitted, refused (R. 21-22, 27). Accused continued to talk about getting some of the beer and stated that he could procure an LCM if they made it worth while (R. 18-19). He said an LCM would hold a net load of beer, or about 200 cases, but Sergeant Johnson said this was "too much beer to get" and walked away (R. 8, 14). Kimberly, however, favored the idea and it was agreed that accused would take 50 cases as his share (R. 10, 19). Accused left the ship to seek an LCM and, when he returned stating he had been successful, Kimberly threw an empty net in the hold and, with the assistance of another soldier and some Filipino laborers, loaded it with about 200 cases of beer. After Kimberly had reported that the load was ready accused went off to get the LCM but returned saying the LCM driver had changed his mind (R. 9-10).

Accused drove Kimberly in his jeep over to the small ships dock where Kimberly talked to the LCM driver but Kimberly's efforts were equally fruitless (R. 10). Kimberly suggested the possibility of getting a truck at the Base Port Command motor pool and accused said he had a friend there. They drove there and Kimberly induced the dispatcher to let them have a truck and to issue a trip ticket. Kimberly drove the truck back to the ship, accused following in his jeep (R. 11-12). Rosenbaum was waiting for them at the rail and on their arrival he went

down into the hold. The net load of beer was hoisted up by the "jumbo boom," dropped in the truck, and covered with a tarpaulin (R. 12, 29). The cases bore the green band indicating government property and also quartermaster markings (R. 9). Accused stood on the dock and watched the transfer of the beer from the ship to the truck. It was then about 0430 (R. 16). Kimberly and Rosenbaum drove the truck to their company area, passing the dispatcher's shack on the way. Rosenbaum held up the trip ticket, shouted "Monument Beach," falsely indicating that their destination was the Quartermaster ration dump, and no attempt was made to stop them (R. 12).

Trucks carrying beer were required to carry a guard and, when a report was received by the Sergeant of the Dock Security Guard that a truckload of beer had left the dock without a guard, an investigation followed (R. 12, 39-40). The truck, with the beer still in the net, was found in the 275th Port Company area. A single case of beer from the same load was found in the rear of a nearby tent (R. 40). A total of two hundred and ten cases, valued at $1.80 each, were turned over to the Quartermaster (R. 42; Pros. Ex. 2).

4. Evidence for the defense: Accused took the witness stand in his own behalf (R. 42). He asserted that he had been in the Army since 31 July 1943, and had been overseas since 1 September 1943, serving in Australia, New Guinea, and the Philippines. Since 27 October 1944 he had been stationed in Tacloban working in various capacities with the Port Command (R. 43). On the morning of 20 July 1945 he was serving as Dock Supervisor. In the performance of that duty he was required to see that no cargo was improperly taken off the ship (R. 44). He denied that he had ever taken any beer (R. 47). Kimberly had spoken to him about getting some beer but accused assumed they would take only a few cases for their own use. He did not expect to receive any for himself or to obtain any personal gain (R. 43-44). Since he had left the dock at 0400 to take the "expected cargo" reports to his office, the first information he had about a truck load of beer was a report turned in about 0530 that the military police had found a truck load of beer in the 275th Port Company area. He admitted making an inconsistent prior statement to the effect that his first knowledge of the truck load of beer came around noon on 20 July 1945 when a Private Thompson reported that he had dispatched a truck to a soldier for the reputed purpose of hauling dunnage but that the soldier had used the truck to haul beer (R. 47).

Testimony that accused was in the Port Command office continuously between 0400 and 0515 was given by another officer on duty there (R. 47-48). Other officers testified concerning accused's ability and character. He was "a very capable officer," cooperative and always "on the ball," "well liked and respected by his friends," and his character had "always been of the best" (R. 50-53). His

"66-4" form showed thirteen ratings of excellent (R. 54; Def. Ex. A).

5. The Specification of the Charge, as amended by the court's findings, alleges that on 20 July 1945, at APO 72, accused, in conjunction with Privates First Class William J. Kimberly and Jack Rosenbaum, stole 210 cases of beer, valued at $378, the property of the United States furnished and intended for the military service. The Specification is laid under the 94th Article of War.

It is undisputed that on the early morning of 20 July 1945, Privates Kimberly and Rosenbaum stole 210 cases of beer, property of the United States of the value stated, from the S.S. Kincaid while it was being unloaded at a dock in Tacloban. The only conflict in the evidence arises over the question of accused's complicity in the theft. Accused, who was on duty as Dock Supervisor at the time and charged with the duty of preventing any irregular removals of cargo from the ship, admitted that he knew Kimberly and Rosenbaum intended to remove beer from the ship but he contended that he thought they would only take a few cases for their own personal use and that he was not there when the sizeable quantity was removed from the ship. According to Kimberly, however, accused knew that they intended to carry away around 200 cases, agreed to a division of this amount, helped to procure the truck in which the beer was transported, and stood on the dock as the cases were hoisted in a net over the side of the ship. Corroboration of some of the details related by Kimberly in his account of the transaction was supplied by other witnesses.

Accused's testimony is not convincing and the court-martial was justified in rejecting his version of the theft and accepting that related by Kimberly. Although accused did not join physically in the asportation of the stolen property, his active participation in planning the theft, his assistance in procuring a truck by which the goods were transported, and his standing by while the beer was carried off the ship, constitute him a principal in the commission of the offense under the provisions of section 332 of the United States Criminal Code, act of March 4, 1909 (35 Stat. 1152; 18 U.S.C. 550) which reads as follows:

> "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."

Accused testified that his part in the theft was not motivated by the thought of personal gain. This statement is not contradicted by any other testimony in the case. Whatever its bearing on the question of clemency this is obviously no legal defense to the charge of larceny. In the opinion of the Board of Review the offense charged against accused is proved beyond any reasonable doubt.

6. War Department records disclose that accused is about 31 years of age having been born 22 November 1914. He is a high school graduate and in civilian life has been employed as a maintenance man on locomotives, "choker man" (hooking up logs); "side runner" (seeing that ship cargo is properly stowed away); assistant engineer repairing turbines and boilers; and foreman in charge of heavy machinery on dock and ship. He was appointed a temporary second lieutenant in the Army of the United States effective 30 July 1943 entering upon active duty on that date. On 5 August 1944 he was promoted to grade of first lieutenant. His marital status is given as "divorced".

Accused was arraigned as Phillip H. Jacobs and is so styled in the reviewing authority's action. A WD AGO Form 66-4, introduced in evidence by the defense, and other papers attached to the record indicate that the correct name of accused is Philip Francis Jacobs. War Department records show that Serial Number 0-925206 which follows accused's name in the reviewing authority's action, and on the charge sheet, is assigned to Philip Francis Jacobs.

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. Dismissal is authorized upon conviction of a violation of Article of War 94.

Carle Stephens, Judge Advocate.

Walnot T. Baughn, Judge Advocate.

Robert J. Warner, Judge Advocate.

SPJGN-CM 307049 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War APR 1 1 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Phillip H. Jacobs, also known as Philip Francis Jacobs (0-925206), Transportation Corps.

2. Upon trial by general court-martial this officer was convicted of stealing, in conjunction with two enlisted men, 210 cases of beer valued at $378, property of the United States, furnished and intended for the military service, in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence but remitted the confinement imposed and forwarded the record of trial for action under Article of War 48.

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

Accused, while on duty as a Dock Officer in Tacloban on 20 July 1945, assisted two enlisted men in the theft of 210 cases of beer from the hold of a ship being unloaded. Six of the seven members of the court-martial recommended clemency on the ground that there was no evidence of any intent to procure the beer for financial gain but only for consumption by members of his organization, and on the further ground that his previous record and performance had been good. The Staff Judge Advocate of the Eighth Army Area Command, the appointing authority, which was deactivated prior to taking action upon the sentence, states that it was intended to return the record to the court for reconsideration and reduction of the sentence to a $1000 fine and a reprimand. The Theater Judge Advocate, United States Army Forces, Pacific, recommends reduction of the sentence to a forfeiture of $100 per month for ten months. The enlisted men received sentences providing for dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for one year.

I am of the opinion that a sentence to dismissal is appropriate for the offense committed. Accused betrayed the trust reposed in him and participated in the larceny of a sizeable amount of government property. The enlisted men, who had come to the ship to steal a few

cases of beer for their own use, were persuaded to engage in larceny on a much larger scale. Accused's responsibility for the offense is obviously much greater than that of the enlisted men. The reviewing authority followed the court's recommendation for clemency by remitting the confinement imposed. I believe no further reduction (except the remission of the forfeitures) is warranted. I accordingly recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 90, 1 May 1946).

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

JAGH CM 307050 | 7 JUN 1946

U N I T E D S T A T E S	)	TWENTIETH AIR FORCE
v.	)	Trial by G. C. M., convened at Headquarters, 313th Bombardment Wing, APO 336, c/o PM, San Francisco, California, 15 January 1946. Dismissal.
Second Lieutenant DONALD J. PASQUARIELLO (0-932010), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Donald J. Pasquariello, 421st Bombardment Squadron, 504th Bombardment Group, did, at APO 336, c/o Postmaster, San Francisco, California, on or about 1 December 1945, wrongfully sell one fifth-gallon bottle of whiskey to Private First Class Wade D. Killian, Headquarters and Base Service Squadron, 359th Air Service Group.

He pleaded guilty to the Specification and not guilt to the Charge but guilty of a violation of the 96th Article of War. He was found guilty of the Charge and Specification. No evidence of previous conviction was introduced. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On the night of 1 December 1945 Privates First Class Wade D. Killian and George Koly, both members of the 359th Air Service Group, stationed at Tinian

Marianas Islands, attended a U.S.O. show conducted at the Station General Hospital. They left the hospital about 9:30 P.M. and drove to the Officers' Area of the 504th Bombardment Group, which was accused's organization. There they observed a light burning in one of the huts which was occupied by accused. They entered and inquiried if accused knew where they might purchase a bottle of whiskey. Accused replied that he had a bottle they might have. Accused produced a one fifth gallon bottle of scotch and Private First Class Killian gave him a twenty dollar bill. Accused then gave Killian three dollars change, stating that twenty dollars was too much to pay for the whiskey and admonished Killian, "Do not get caught with this stuff". Neither of these soldiers knew or had ever seen accused prior to the night of this occurrence.

A General Order had been promulgated on 16 February 1945 in accused's command, which among other things, provided in paragraph 4 that, "No alcoholic beverage, distilled spirits or other intoxicating liquor will be offered for sale, as a gift or barter to any enlisted man within this command". This General Order (Pros. Ex 1) was introduced in evidence without objection and it was stipulated that the order was in full force and effect on 1 December 1945.

4. After being advised on his rights as a witness in his own behalf accused elected to remain silent.

Major John L. Fisher, Headquarters 504 Bombardment Group, testified that on 15 November 1945 he was called upon to furnish a detail consisting of one officer and 30 enlisted men to supervise the bomb dump. Accused was chosen for this assignment and performed the duties thereof in very satisfactory manner. The Wing Ordnance Officer gave accused a commendation for his work in this instance. Thereafter Major Fisher appointed accused Mess Officer and in this capacity he likewise discharged his duties satisfactorily. Throughout his acquaintance with him accused had always conducted himself in a manner becoming an officer and a gentleman.

Captain Leslie McLaurin, accused's commanding officer, served with accused for a considerable period of time and knew him well. Throughout this acquaintance accused had demeaned himself as an officer and gentleman. Captain McLaurin signed the formal recommendation (Def. Ex. B) that accused be tried by general courts-martial for the offense charged as a violation of Article of War 95, but had no alternative in view of the existing policy theretofore announced by higher authority. He thought accused might well have been charged under Article of War 96, and his recommendation that accused be eliminated from the service was because of the mandatory provisions of Article of War 95 in this regard and the policy that he be charged under this article.

Captain Robert L. Sherman, Sixth Bombardment Group, investigated the charge against accused and submitted a formal report (Def. Ex. C) in which he recommended that accused be tried by general courts-martial under Article of War 96, stating that the offense charged did not constitute conduct unbecoming an officer, and that accused in his opinion should not be eliminated from the service.

5. The prosecution's evidence together with accused's plea of guilty demonstrates that at the time and place alleged accused sold a one fifth gallon bottle of scotch whiskey to an enlisted man of his command for the sum of $17, in violation of a standing order (Pros. Ex #1) then in effect prohibiting such sale. It is also clear from the evidence that the whiskey was sold and delivered upon premises used for military purposes by the United States.

> "The sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or any Army transport, or upon any premises used for military purposes by the United States, is hereby prohibited." (Sec. 38, Act of Feb. 2, 1901 (31 Stat. 748); 10 U.S.C. 1350; Sec. 310 M.L. 1939)

By selling the bottle of scotch whiskey under the circumstances revealed by the record of trial, accused also violated the quoted statute, and in turn, violated the 96th Article of War (CM 264728, Price; 42 BR 254). In the case of CM 235382, Singletary, 21 BR 389, wherein the Board of Review passed upon the legality of the sale of liquor by an officer to enlisted men engaged on maneuvers, the Board said:

> "Apart from the statute, supplying the men of his command with intoxicating liquor is certainly prejudicial to good order and military discipline, whether it is viewed from the standpoint of currying favor with the troops or from the standpoint of the possible result of the effect on the men the intoxicating liquor might have during field exercises. It is therefore a direct violation of the 96th Article of War which expressly prohibits all disorders or neglects to the prejudice of good order and military discipline."

The court here, however, found accused guilt of violating the 95th Article of War. To so find the court of necessity considered the acts of accused to be conduct unbecoming an officer and a gentleman. As was said in CM 235382, Singletary, supra, in order that such acts constitute a violation of the 95th Article of War, they must dishonor or disgrace the individual personally as a gentleman, seriously compromise his position as an officer and exhibit him as morally unworthly to remain an officer. This accused was acting in an unofficial or private capacity. The act of an officer in selling a bottle of liquor to an enlisted man is not per se conduct violative of article of War 95. The objection to such conduct is that it is prejudicial to good order and military discipline. As such it properly falls within the ambit of Article of War 96. Only an aggravated case should be held to constitute a violation of Article of War 95. It is therefore concluded that accused's conduct constituted a violation of Article of War 96 rather than Article of War 95.

6. Accused is 22 years of age and single. He is a high school graduate and attended Newark College of Engineering for seven months. He was inducted 5 March 1943, appointed a flight officer 25 November 1945 and appointed a second

lieutenant, Army of the United States, 2 May 1945 and entered upon active duty the same date. He is a rated bombardier; has been awarded the Purple Heart and the Air Medal for his participation in various combat missions, against Japan. All of his efficiency ratings have been excellent.

Attached to the record of trial is a letter signed by accused's commanding officer recommending clemency because of accused's youth and excellent military record.

7. The court was legally constituted and had jurisdiction of accused 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 only so much of the findings of guilty of the charge and its Specification as finds the accused guilty of the Specification in violation of the 96th Article of War, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

On Leave, Judge Advocate.

A. Hottenstein, Judge Advocate.

Joseph J. Stern, Judge Advocate.

JAGH - CM 307050 1st Ind

WD, JAGO, Washington 25, D. C. JUN 25 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Donald J. Pasquariello (0-932010), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully selling a fifth-gallon bottle of whiskey to an enlisted man, in violation of Article of War 95. No evidence was introduced of any previous convictions. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 1 December 1945, two enlisted men went to accused's organization which was located at Tinian, Marianas Islands, and asked accused, who prior to that time was unknown to them, if he knew where they might purchase a bottle of whiskey. Accused replied that he had some and produced a fifth-gallon bottle of scotch. One of the enlisted men handed accused a twenty dollar bill as payment and was given three dollars change, the accused stating that twenty dollars was too much to pay for the whiskey. At the same time he admonished the purchaser not to get caught "with this stuff". Accused elected to remain silent.

Subsequent to trial, the accused's commanding officer, commanding the 504th Bombardment Group, addressed a letter dated 28 January 1946 to the reviewing authority requesting clemency on behalf of accused. He stated therein that the accused had participated in five combat missions and had been awarded the Air Medal as well as the Purple Heart, the latter for injuries sustained in the ditching of a B-29 aircraft. As further grounds for clemency it was set forth that accused's performance of duty had been excellent, that he is only 21 years of age and that his record other than this one instance was unsullied. Inasmuch as the reviewing authority had taken action on 25 January 1946, a date prior to receipt of this letter, it was forwarded for inclusion in the record of trial. Hence, this is the first time it has received consideration. I recommend that only so much

of the findings of guilty of the Charge and Specification be approved as finds the accused guilty of the Specification in violation of Article of War 96. In view of the youth of the accused, his prior good record including combat service, and the recommendation for clemency submitted by his commanding officer, I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of $50.00 of his pay and that the sentence, as thus commuted, be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 218, 9 July 1946).

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

SPJGK - CM 307051

30 APR 1946

UNITED STATES	)	TWENTIETH AIR FORCE
v.	)	Trial by G.C.M., convened at Headquarters 313th Bomb.Wing, APO 336, c/o Postmaster, San Francisco, 16 January 1946. Dismissal.
Second Lieutenant DONALD E. GLASS (O-2082426), Air Corps.	)	

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Donald E. Glass, 421st Bombardment Squadron, 504th Bombardment Group, did, at APO 336, c/o Postmaster, San Francisco, California, on or about 3 December 1945, wrongfully sell one-fifth gallon bottle of whiskey to Technical Sergeant John L. Rose, 240th Ordnance Ammunition Company.

Before pleading to the Charge and Specification accused through defense counsel made a motion to strike out the specification, which was denied. Accused then pleaded guilty to the Specification of the Charge and not guilty to the Charge, but guilty to the Charge as a violation of Article of War 96. After an explanation of the meaning of his plea of guilty by the law member, accused withdrew his plea of guilty to a violation of Article of War 96 but again pleaded guilty to the specification. Because of the inconsistency of the plea the law member ruled that the court should treat the pleas throughout as not guilty. When the prosecution rested accused with the permission of the court withdrew his plea of guilty to the specification and pleaded "not guilty." Thereupon he renewed his motion to strike out the specification, which was again denied. He was found guilty of the Charge and the Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution.

Private First Class Charles Pearson and Technical Sergeant John L. Rose, both members of the 240th Ordnance Ammunition Company, on the evening of 3 December 1945 went into the area occupied by the 504th Bombardment Group, to which accused was assigned, in search of whiskey. They found none at the first hut which they visited and then proceeded to the hut occupied by the accused, which Pearson entered, Rose remaining on the outside. Pearson asked accused whether he had any whiskey and upon receiving an affirmative reply asked, "How much?" Thereupon accused replied, "twenty dollars." Rose then went into the tent, gave accused $20, and received a bottle of whiskey. The two enlisted men, neither of whom had seen accused previously, then left (R. 9-14). The following pre-trial statement made by accused was admitted in evidence (Pros. Ex. 1):

> "At about 2215, 3 December 1945, I was lying on my bed in hut #19, 421st Bomb Squadron area, when two colored soldiers came in and asked me if I had any liquor. I said 'No' at first and then recalled having a bottle of Dunbar's Scotch that I didn't care for and reached for it. The one colored soldier offered me twenty dollars for it. I took the two five dollar bills and a one ten dollar bill in exchange for the bottle of Scotch. The colored soldier asked if I had anymore and though I had more, I said 'NO' since I was getting rid of the bottle I didn't want. I have never sold any liquor previously.
>
> "I wish to further state that the foregoing statement is true and correct to the best of my knowledge and belief and was promised no consideration whatsoever and am making this statement of my own free will."

Under a stipulation as to its genuineness prosecution offered in evidence as Exhibit 3, Island Command General Order No. 12-45 dated 16 February 1945 entitled "DISPENSATION OF LIQUOR, REGULATIONS PERTAINING TO." The order, among other things contains the following provision:

> "4. No alcoholic beverage, distilled spirits or other intoxicating liquor will be offered for sale, as a gift or barter to any enlisted man within this command."

4. For the Defense.

Captain Leslie McLaurin, former commander of the 421st Bombardment Squadron, 504th Bombardment Group, under whom accused served from 10 October (1945) to 10 January (1946) testified as to the excellent character and conduct of the accused. He was of the opinion that accused should not "be discharged from the service" and had signed a recommendation to that effect in transmitting the charges, solely because he considered it his duty to follow "the policy of the Wing in which they requested that these cases of selling whiskey be charged with the 95th Article of War which brings about a mandatory dismissal" (R. 28,29,30; Def. Ex. B).

First Lieutenant Lee D. Glass, also of the 504th Bombardment

Group, had known accused for one year and had flown with him. In so far as conduct was concerned he considered accused one of the best members of the crew. Accused "didn't get out and get drunk and didn't play a lot of poker and lose a lot of money. I understand he is saving money to go back to school. He always conducted himself as a gentleman should" (R. 31).

After an explanation of his right to testify, to make an unsworn statement, or to remain silent, accused elected to remain silent.

Accused's "AAF Officer's Qualification Card" was received in evidence as Defense Exhibit C. It shows that accused then a second lieutenant entered on active duty as an officer 27 January 1945 in the capacity of "Navigator" after enlisted service of approximately one and one-half years. His only efficiency ratings were as follows:

"4 April 1945 to 30 June 1945 - 3.7
"8 August 1945 to 9 October 1945 - 4.5
"10 October 1945 to 31 December 1945 - 3.9"

He is authorized to wear the Victory ribbon, the American Theater ribbon, and the Asiatic-Pacific ribbon with two battle stars.

5. While it is not controverted that accused sold the bottle of whiskey for $20 to an enlisted man not of his command, and while it is apparent that such conduct is a disorder to the prejudice of good order and military discipline (CM 235382, Singletary, 21 BR 389; and CM 264728, Price, 42 BR 255), the Board of Review is of the opinion that there is no justification for finding that this isolated sale is of such serious character as to bring dishonor and disrepute upon the profession which accused represents or to show that accused is "one with whom his brother officers cannot associate without loss of self-respect," or otherwise to constitute conduct unbecoming an officer and gentleman within the contemplation of Article of War 95. The Board of Review, therefore, holds that the record of trial is legally sufficient to support only a finding of guilty of the Specification in violation of Article of War 96.

In reaching this conclusion the Board has taken cognizance of the holding in CM ETO 6881, 4 Bull JAG 234. In that case, however, the situation presented was entirely different from that in the present case. The accused therein were two officers who, after having acquired some whiskey as a ration for an imaginary battalion, openly and publicly peddled this whiskey (quoted at the ration station at 76-1/2 Francs per bottle) to enlisted men at 1,000 Francs per bottle. In short, the activities of accused in that case were comparable to those of professional "bootleggers" and properly established their lack of possession of the qualities demanded of an officer and a gentleman.

6. War Department records show that accused is 22 years of age and unmarried. He graduated from high school and without having engaged in any civilian occupation was inducted into the Army at the age of approximately 19 years on 6 July 1943. Upon completion of the prescribed course of training at Officer Candidate School, Ellington Field, Texas, he was commissioned a second lieutenant, Air Corps, Army of the United States, 27 January 1945, and immediately entered upon active duty as such.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Specification of the Charge and legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of Article of War 96. Dismissal is authorized upon conviction of a violation of Article of War 96.

Herman Moyer, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307051 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 8 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Donald E. Glass (O-2082426), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of selling a bottle of whiskey to an enlisted man in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the finding of guilty of the Specification of the Charge and legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of Article of War 96.

On the evening of 3 December 1945 accused, an officer in the 421st Squadron, 504th Bombardment Group, sold a bottle of whiskey to an enlisted man, not a member of his organization. An order of the Island Command expressly "provides that no intoxicating liquors should be offered for sale as a gift or barter to any enlisted men within this command."

While accused's conduct is a disorder to the prejudice of good order and military discipline, this isolated sale of a single bottle of whiskey does not justify dismissal. In view of accused's youth, his previous good record, and all the circumstances, it is recommended that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for two months.

4. Consideration has been given to the attached request for clemency from the Commanding Officer of the 504th Bombardment Group, forwarded through channels by the Commanding Officer of the 313th Bombardment Wing with a recommendation "for favorable consideration."

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 132, 22 May 1946)

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr CO, 504th Bomb. Group

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

JAGH - CM 307087 22 JUL 1946

UNITED STATES	)	ARMY AIRWAYS COMMUNICATION SYSTEM
	)	
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 21 January 1946. Dismissal and total forfeitures
	)	
First Lieutenant PORFIRIO A. BONET (0-581421), Air Corps	)	

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, Judge Advocates

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

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

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

Specification: In that, 1st Lt. Porfirio A. Bonet, Air Corps, Squadron B, 3539th Army Air Forces Base Unit, was, at Mulberry Island Recheck Gunnery School, Fort Eustis, Virginia, on or about 5 September 1945, guilty of conduct unbecoming an officer and a gentleman, in that he kissed Ruth A. Estell, put his hand on her knee and attempted to get on top of her while in the presence of Corporal Vernell H. Jones and LaVerne Buschow.

CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

CHARGE III: (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification: In that First Lieutenant Porfirio A. Bonet, A.C., Squadron A, 76th AAF Base Unit, then being in command of Mulberry Island Recheck Gunnery School, Fort Eustis, Virginia, was, during the period from about 4 September 1945 to about 10 September 1945, derelict in his duty as commanding officer of said detachment, in that he wrongfully failed to eject from said detachment LaVerne Buschow and Ruth A. Estelle, female civilian persons who, during said period, were quartered with said detachment and lived in association with members thereof, all to the prejudice of good military discipline and morality.

He pleaded not guilty to all Charges and Specifications and was found guilty of Charge I, the Additional Charge and the Specification of each, but was found not guilty of all other Charges and Specifications. No evidence was introduced of any previous convictions. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be fined $300. The reviewing authority approved the sentence but remitted the fine and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused was the detachment commander of a group consisting of himself and thirteen or fourteen enlisted men stationed at Mulberry Island, Fort Eustis, Virginia (R 25, 37). On 2 September 1945 two hitch hikers, Miss LaVerne Buschow and Miss Ruth Estell were picked up by two enlisted men and brought to the detachment where they remained until about 10 September 1945. Miss Buschow slept in the accused's room, which was adjacent to the orderly room but in the same building and Miss Estell slept in one of the barracks (R 9, 10, 11). During her stay at the detachment, Miss Buschow had sexual intercourse with two of the enlisted men and a "score sheet" was kept in the barracks, showing the names of those with whom the girls had indulged (R 19, 20). LaVerne testified that she did not see the accused until September 3, the day after her arrival, which was Labor Day. On that day she met him in the day room (R 11, 21). Thereafter, she again saw him in the same place on Thursday (R 11). Their next encounter, according to LaVerne, was about 4:30 a.m. on "Thursday or Friday" (September 6 or 7), when accused entered his room in which she was sleeping, undressed and got in bed with her. She refused to have intercourse with him and left the bed, though she remained in the room for some time. Later in the day she saw the accused in the mess hall and at his request accompanied by Ruth, returned to his room. There they discussed the matter of their remaining on the island, LaVerne stating to accused that the first sergeant had ordered them to leave. Accused then informed the girls that he was in charge and would tell them when they had to leave. At his request Ruth left the room and LaVerne then engaged in sexual intercourse with accused upon his assurance that they would be permitted to remain (R 12, 13). The girls remained at the island until the following Monday (September 10) (R 13).

During the period of their sojourn at the detachment Ruth, LaVerne and Corporal Vernell H. Jones, a member of the detachment, went to the gunnery observation tower, which was located on Mulberry Island. LaVerne was unable to give the date but Corporal Jones testified it was either on Tuesday or Wednesday (September 4 or 5). It was the date on which "a colonel was supposed to come out and inspect the island". (R 13, 25, 32). While there the three were joined by accused (R 26) after which Jones and Ruth left. Accused kissed LaVerne and asked her to engage in sexual intercourse with him but she refused. Later the two couples rejoined at the tower and all sat on a blanket (R 13, 14). All the parties then lay down, the accused concentrating his attention upon Ruth, while Jones devoted himself to LaVerne. According to Jones both couples were trying to "smooch a little" (R 17, 26). Accused was seen to fondle Ruth, kissing her, feeling her leg and lying on top of her. She did not protest and appeared to be enjoying the experience (R 14, 26, 27, 30). He asked her what he had to do to make her "hot" and she told him to blow in her ear. He asked her to go up into the tower with him but she refused (R 26).

4. On behalf of accused the defense introduced evidence to show that Lieutenant Colonel Robert L. Kelly, the Commandant of students at Langley Field, made an informal inspection of Mulberry Island on or about 5 September 1945 and that accused, as commanding officer of the detachment inspected, was present (R 37). The accused's wife testified that they resided in Williamsburg, Virginia and that although accused had a room at Mulberry Island, he did not stay there overnight nor did he leave his home in Williamsburg to go to work earlier than 7:15 a.m. throughout the month of September. She further stated that on September 3 which was Labor Day, the accused was not on duty and remained at home (R 39-41).

After his rights as a witness were explained the accused elected to be sworn and testified that on 6 September 1945 he did not leave his home for Mulberry Island until after 7:00 a.m. and that on that day as well as on any other he did not have sexual intercourse with LaVerne Buschow (R 42). On cross-examination he admitted that he was acquainted with LaVerne from seeing her "in the orderly room and around". Prior to his marriage in June he had occupied quarters in a building containing the orderly room, but since his marriage he had never remained overnight at Mulberry Island (R 43).

5. The evidence clearly shows that Miss LaVerne Buschow and Miss Ruth Estell were brought to the detachment area of which accused was the commanding officer and were permitted to remain there as guests from 2 September 1945 to 10 September 1945. Apparently the accused had no knowledge of their presence until 4 September 1945 for he was absent from Mulberry Island, the detachment's location on Sunday, September 2 and Monday, September 3 which was Labor Day. He testified that he was acquainted with LaVerne Buschow from seeing her "in the orderly room and around". There was also uncontradicted evidence to the effect that LaVerne had indulged in sexual intercourse with some of the enlisted men of accused's detachment during her stay and that a "score card" had been posted in one of the barracks indicating

the names of the soldiers who had thus been favored. Further it was shown that accused knew of the continued presence of these girls on about September 5, for on that date, he and an enlisted man of his organization, in the company of both girls were at the gunnery observation tower at which place he engaged in amorous relations with both girls. From the foregoing it seems clear that the continued presence of these girls at the detachment was agreeable to accused and that he was well aware of their relations with the enlisted men. His failure to take prompt and positive action to cause their removal immediately upon their presence becoming known to him on 4 September 1945 was indeed in dereliction of his duty as commanding officer of that detachment and constituted conduct prejudicial to good order and military discipline in violation of Article of War 96. The evidence is legally sufficient to sustain the findings of guilty of the Additional Charge and its Specification.

With respect to the offense alleged in Charge I as a violation of the 95th Article of War, the evidence is uncontradicted that on the date in question the accused did fondle, kiss and try to get on top of Ruth Estell while they were lying on the ground. This demeanor, including the conversation accompanying it, could leave no doubt as to accused's designs. Receptive as Miss Estell was to accused's blandishments, the fact that accused, a married man, engaged in this lewdness in broad daylight in the presence of an enlisted man of his detachment and Miss Buschow constituted an offense in military law. It is also our opinion that this offense was properly alleged as a violation of Article of War 95. Offenses against good morals in violation of public decency and propriety constitute violation of this Article of War (Winthrop's, Military Law and Precedents, Second Edition, page 718), and the instant offense, falling as it does within that category, is a violation thereof.

The Board of Review desires to comment upon another question presented in the record of trial. Upon cross-examination of Miss Buschow and Corporal Jones, the defense counsel sought to attack the creditability of the witnesses by showing that Miss Buschow had made a pre-trial statement containing a word the meaning of which she did not know and that Corporal Jones had made prior inconsistent statements. In the case of Miss Buschow, defense counsel failed to lay a proper predicate for his questions designed to impeach her testimony and we are therefore of the opinion that the court properly sustained the prosecution's objection to this line of questioning. In the matter of the cross-examination of the witness Jones, however, the following occurred:

"Q. You had made one or more sworn statements regarding this case is that true?

A. Yes, sir.

At this point, the Defense Counsel attempted to question the witness on discrepancies in previously sworn statements made out of Court but was overruled by the Law Member.

Defense: The Defense, at this time, would like to ask for a directed verdict of not guilty of all charges and specifications due to inability of the Defense to properly cross-examine the Prosecution's witness.

Prosecution: The Prosecution is, of course, strenuously opposed to any such a motion. I here submit that the Prosecution has been extremely tolerant of the Defense Counsel's examinations up to this point. He has been given every latitude.

Defense: If it please the Court, there is no major argument, as far as we are concerned, we merely want it on the record.

Law Member: Subject to objection by any member of the Court, the motion is denied." (R 30).

Thereafter, under further cross-examination, Jones testified as follows:

"Q. When was the last time you reviewed this testimony that you are giving?

A. My own statement?

Q. That's right.

A. I read it this morning.

Q. Did you make this statement of your own free will?

A. Yes, sir.

Q. What was your idea of making a change in your statements?

A. The first time I came in to make my statement I was taking up for Lt. Bonet, but then I found out that I was under oath to tell the truth, I changed it and told the truth about just what happened." (R 32).

While the exact question asked by defense counsel and "overruled" by the law member is not set forth in the record, it referred to "discrepancies in previous sworn statements made out of court". The failure of the reporter to record the question which was objected to and the remarks of the counsel and the law member precisely as they occurred, in relation thereto, was improper. We interpret the statement that the law member "overruled" the attempted questioning to mean that he sustained an objection to the question

propounded. No other construction can be given such a summarization. Since the record fails to set forth verbatim what question or questions were asked, in justice to the accused it must be assumed that they were proper. Obviously, defense counsel was endeavoring to lay a foundation for the impeachment of the witness. Indeed, the record at this point suggests that very fact. By his action the law member foreclosed the defense from its elementary and vital right of cross-examination. Were it not for the fact that Jones' testimony was merely corroborative of that given by Miss Buschow and that under continued cross-examination Jones subsequently admitted he had made prior inconsistent statements, the findings of guilty of this charge could not stand. Under the circumstances we do not consider the error of sufficient gravity to require reversal.

6. The accused is 35 years of age and married. He graduated from high school and attended Ottawa and Havana Universities for one year at each, majoring in courses designed to fit him for the diplomatic service. His father was at one time in the diplomatic service of the Cuban Government. Accused entered military service in 1942 after civilian employment from 1939 to 1942 in the export business. He successfully completed a course of instruction as an officer candidate and was appointed a second lieutenant, Air Corps, Army of the United States on 21 August 1943. Subsequently he served overseas in the European Theater of Operations and on 15 July 1944 was promoted to the grade of first lieutenant. The review of the staff judge advocate sets forth that while serving as a Squadron Gunnery officer accused completed five combat missions and forty combat hours at his own request while not on flying status. He had overseas duty totalling about eight months.

7. The court was properly constituted and had jurisdiction of the accused 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 sustain findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas N. Jaffy, Judge Advocate

M. L. Martin, Judge Advocate

Joseph J. Stern, Judge Advocate

JAGH - CM 307087 1st Ind

WD, JAGO, Washington 25, D. C. AUG 1 3 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Porfirio A. Bonet (0-581421), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of fondling, kissing and attempting "to get on top" of a young woman in the presence of other persons in violation of Article of War 95 and of dereliction of duty as commanding officer in wrongfully failing to eject from his detachment two young women who were residing with enlisted men of said detachment, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be fined $300. The reviewing authority approved the sentence, remitted the fine and forwarded the record of trial for action under Article of War 48.

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

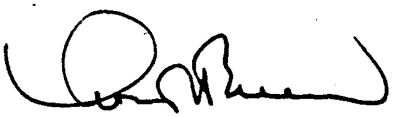
On 4 September 1945, the accused who was commanding officer of a small detachment of enlisted men stationed at Mulberry Island, Fort Eustis, Virginia, became aware of the presence in this detachment of two young women hitch-hikers, who had been picked up by two enlisted men on 2 September 1945 and brought there. They were quartered in the area as guests.

On 5 September 1945 the accused was with these two women and an enlisted man of his detachment near a gunnery observation tower on the island at a point somewhat removed from the detachment area. There he made amorous advances toward one of the women, lying on her, kissing her and placing his hand on her leg. She did not object to this treatment, but the act was committed in the presence of the other woman and enlisted man. The girls remained at the camp until 10 September 1945, when they were removed by Military Policemen. At the time of this occurrence the accused was a married man.

Under the circumstances, accused's conduct on 5 September 1945 was scandalous and unbefitting an officer and a gentleman. His failure to adopt prompt measures for the ejectment of these interlopers demonstrates that he is not qualified to assume the duties and responsibilities of an

officer and is unworthly of his commission. In addition to the instant case, charges are pending against this officer for (a) being drunk and disorderly on the public streets of Hampton, Virginia, while in uniform on 10 March 1946 and (b) being drunk and disorderly in station at Langley Field, Virginia, on 11 March 1946. This office has also been advised that accused has outstanding a total of nine insufficient funds checks totalling $210.00. I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 261, 21 Aug 1946).

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

JAGH - CM 307097

1 NOV 1945

UNITED STATES v. First Lieutenant ROBERT H. MELLINGER (0-2044919), Air Corps	)	SEINE SECTION Trial by G.C.M., convened at Paris, France and London, England, 25-29 September and 1, 2, 4-6, 8, 16 and 17 October 1945. Dismissal, total forfeitures, confinement for three (3) years, fine of $7,500 and further confinement until fine is paid, but not to exceed six (6) months.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, at or near Paris, France, between about 10 April 1945 and about 30 June 1945, wrongfully and unlawfully conspire with David Szul Poliszuk, Selma Kirschbaum, and Feuwell Goldberg, civilians, to engage in business in the European Theater of Operations, United States Army, by transporting British paper currency, gold bullion, gold coins, and diamonds between England and France, for personal gain.

Specification 2: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, at or near Paris, France, between about 10 April 1945 and about 30 June 1945, wrongfully and unlawfully engage in business in

the European Theater of Operations, United States Army, by acting as agent, intermediary, and conduit, in transporting British paper currency, gold bullion, gold coins, and diamonds between England and France, for personal gain.

Specification 3: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, at or near Paris, France, on or about 25 June 1945 wrongfully and unlawfully conspire with Alec Moutafolo, a civilian, and Captain David B. Vail, to engage in business in the European Theater of Operations, United States Army, to wit, to purchase, transport and sell about one thousand four hundred ninety (1490) bottles of cognac, for personal gain.

Specification 4: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did at or near Paris, France, on or about 25 June 1945, wrongfully and unlawfully engage in business in the European Theater of Operations, United States Army, by lending three hundred thousand (300,000) French francs to one Alec Moutafolo, a civilian, for the purchase of about one thousand four hundred ninety (1490) bottles of cognac and arranging for the transportation of said cognac to Brussels, Belgium, for personal gain.

Specification 5: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, at or near Orly, France, on or about 25 April 1945, wrongfully, unlawfully, and without proper authority hold in his possession about one thousand (£1000) pounds British paper currency in the liberated territory of France.

Specification 6: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, at or near Orly, France, on or about 15 May 1945, wrongfully, unlawfully, and without proper authority hold in his possession about two thousand (£2000) pounds British paper currency in the liberated territory of France.

Specification 7: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, at or near Orly, France, on or about 15 June 1945, wrongfully, unlawfully, and without proper authority hold in his possession about two thousand (£2000) pounds British paper currency in the liberated territory of France.

Specification 8: (Finding of not guilty on motion of defense).

Specification 9: (Finding of guilty disapproved by reviewing authority).

Specification 10: (Finding of not guilty).

Specification 11: (Finding of not guilty).

Specification 12: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Robert H. Mellinger, Headquarters, United States Air Forces in Europe, did, in conjunction with Captain David B. Vail, Headquarters, Theater Service Forces, European Theater, at or near Paris, France, on or about 28 June 1945, knowingly and willfully misappropriate one (1) 2½ ton 6x6 truck, of the value of more than Fifty Dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Specification 2: (Defense motion to strike sustained by court).

The accused pleaded not guilty to both Charges and all Specifications thereunder, and was found guilty of Specifications 1 (with minor exception), 2, 3, 4, 5, 6, 7 and 9 of Charge I, Charge I, Specification 1 of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of $7,500, to be confined at hard labor for three (3) years and to be further confined at hard labor until said fine is so paid, but for not more than six (6) months in addition to the three (3) years so adjudged. The reviewing authority disapproved the finding of guilty of Specification 9 of Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertinent to the approved findings of guilty may be summarized as follows.

On motion of the prosecution, the court took judicial notice of the following (R 82):

Letter, Headquarters, European Theater of Operations, dated 23 September 1944, file AG 121 OpGA, Subject: "Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels", which provides in pertinent part:

"2. Except as authorized, all personnel subject to the jurisdiction of this headquarters, (including officers and men of United States controlled merchant vessels and civilians accompanying or serving with the United States Army) are prohibited from:

errand, or a total of 20,000 francs (R 126, 147). The letters to London were addressed to a man named Goldberg (R 154).

Mrs. Kirschbaum testified that in June 1945 she counted out 1,700 pounds sterling and 940 pounds sterling which she said "was certainly destined for London, as we always put the money destined for London into envelopes" (R 147). Corporal Clarence Earley, who worked for accused at Orly Field, was instructed by him on several occasions to make "cross-channel" calls and arrange accommodations for accused at the Park Lane Hotel (R 161, 163) and to notify a Miss O'Connor and a Mr. Goldberg of the approximate time of arrival of accused (R 161, 162).

Mrs. Melitta Moutafolo testified that on several occasions during the months of April, May and June, the accused told her he had just returned from England (R 334). On a few such occasions she accompanied him to Rue Bourg Tibourg where she would wait on the street while accused entered a house at 3 Rue Bourg Tibourg. On these occasions accused carried considerable sums of English money in cigar boxes wrapped in cloth, or in rolls, into the building (R 335-343; Pros Ex 6, 7, 8). On one occasion the accused came out of the house with money but usually the cigar boxes would be empty when he left the house (R 341). On another occasion he put English money into her pocketbook at her country house in Croissy (R 341). On one occasion accused came into her bedroom and put gold sovereigns, half sovereigns and a small bar of white gold on her bed (R 342-343). Accused tried to impress Mrs. Moutafolo with his wealth and told her that he had made $250,000. Later he told her he now had $350,000 (R 352). On 20 May 1945 he told her that he "would make up to a million and then go home" (R 354). Once, after accused had returned from London, he asked Mrs. Moutafolo to translate a letter written in Jewish German which was signed "Goldberg". The letter stated that the writer had no diamonds of "the right size they wanted to have and they must wait shortly". In June accused again showed her a letter signed by Goldberg and asked her to read and translate it, but to tell him about it later because he did not want Corporal Earley, who was present, to know about it. The second letter also referred to diamonds. The writer appeared hurt because the person to whom the letter was addressed did not trust him. Goldberg wrote that he had to be careful about buying diamonds, that he wanted to get diamonds with eight edges ("acht kant"), which were unobtainable. It would be necessary to wait until somebody brought them from Prague (R 343-344).

Captain Francis L. Cate, who was stationed at Orly Field, testified that sometime during May 1945, the accused showed him a package and said it contained uncut diamonds. Accused exhibited the contents of the package to the witness who described the contents as looking like "a lot of little gravel pebbles" (R 242) with sharp edges (R 246) and wrapped in "white light paper similar to tissue paper" (R 248).

Captain Cate, Corporal Earley and Private First Class Thomas E. Grisham testified that sometime in the latter part of May 1945, accused

was seen talking to General Reckord, Provost Marshal of the Paris Area, holding a package which he later stated contained a gold bar and which weighed over a pound (R 173, 184, 197, 210, 247, 249). The witnesses did not see the contents of the package which was wrapped in brown wrapping paper. However, Captain Cate stated that the package was "heavier than it actually looked it should have been" (R 247).

On another occasion Corporal Earley saw twelve English sovereigns on accused's desk in Orly Field (R 172, 183, 187-188). Sometime between 10 April and 15 April 1945, Grisham saw accused with a large number of gold coins stacked on his desk. Grisham described the coins as being about the size of an American nickel and stated that they appeared to be English sovereigns. These coins were arranged in 15 to 17 stacks each about one inch high. The witness estimated that there were about 400 such coins on the desk (R 194-195, 199, 202-204). Gold sovereigns were worth twenty shillings before 1939 (R 261).

On various other occasions accused had large amounts of British paper money in his possession. Corporal Earley testified that in the latter part of April he saw ten piles of English one pound notes on accused's desk at Orly Field, which accused was sorting. The witness estimated that each pile consisted of 100 pounds (R 166-167). On or about 20 April 1945 accused came to the office of Captain David B. Vail in the Signal Section of Communication Zone Headquarters. Accused unbuttomed his shirt and put approximately ten rolls of one pound notes on the witness' desk, commenting, "That wasn't a bad week's work". The witness testified that each roll was about two and a half inches in diameter and he estimated that there were approximately 100 pounds in each roll (R 292-293).

Early in May accused showed Captain Cate and Corporal Earley a package which contained English currency. The witnesses testified that they saw some 5 pound and 100 pound notes. Accused asked them to estimate the number of pounds in the package and stated that it contained about 4,000 pounds (R 167, 180, 240-241). In the latter part of May accused was seen by Corporal Earley and Private Grisham sorting a pile of pound notes on his desk. He asked the witnesses to guess the amount and stated that there were over 2,000 pounds (R 170-171, 195, 204, 208-209).

Early in June Corporal Earley saw the accused sorting pound notes on his desk. Accused told the witness that there were 2,000 pounds in the pile (R 190-191).

Captain Vail testified that on 19 June, accused was at a dinner, removed his blouse and that three rolls of pound notes dropped on the floor (R 293). On 23 June accused showed Captain Vail and two WACs in his apartment in Paris a carton containing approximately thirty rolls of pound notes (R 295-296).

Alec Moutafolo, a French civilian manager of a French film agency, became acquainted with accused in November 1944. Accused was a frequent guest at his town house and his country house, and maintained a residence in Mrs. Moutafolo's apartment (R 213-214). In the latter part of June Moutafolo discussed a cognac transaction with accused and asked him if he could secure 600,000 francs with which to buy the cognac which was to be sold in Brussels at a profit (R 214-215, 345, 347). Accused attempted to borrow that sum from Poliszuk but was only able to secure 300,000 francs (R 122-123). Moutafolo offered accused fifty per cent of the profit to be made on the transaction, but when accused delivered the 300,000 francs to Moutafolo he stated that he did not want any part of the proceeds, but that the people who had advanced the 300,000 francs wanted 10,000 francs for the use of the money (R 218, 223).

A day or two after the loan was made (R 225), accused was asked if he could obtain a truck to transport the cognac to Brussels and a few days later stated that he could (R 216, 225, 347). An Army truck (R 218) made available to accused by Captain Vail (R 288-290) was loaded with 1490 bottles of cognac and driven to Brussels (R 217, 297; Pros Ex 5). The agreement provided that the accused be paid fifty francs per bottle for the transportation of the cognac (R 226). Although accused did not participate in the profits of the sale of cognac, he carried out his part of the deal "because of friendship" (R 227).

The truck was to report to Captain Vail at his partment at 53 Avenue Foch, Paris, on 27 June, but did not arrive until the following day. Accused was not present on the day the truck left but was present on 27 June when it failed to appear. A 2½ ton 6 x 6 United States Army cargo truck was dispatched on 28 June 1945 by the MTS Motor Pool (R 273, 297; Pros Ex 5), driven to Captain Vail's apartment and loaded with cognac (R 277). It was stipulated that a 6 x 6 2½ ton truck such as was described in Specification 1 of Charge II has a value in excess of $50 (R 332).

On or about 2 July Moutafolo repaid accused the 300,000 francs plus 10,000 interest (R 217). He also paid him 100,000 francs for the use of the truck, although the agreed price was 75,000 francs because the truck was one day late in returning from Brussels and accused was angry (R 229, 232, 234).

Captain Vail testified that accused had agreed to pay him twenty-five francs per bottle for the delivery of the cognac to Brussels (R 286), and discussed the possibility of transporting 5,000 bottles (R 287). On the morning of 4 July 1945 accused paid Vail 60,000 francs (R 291). On cross-examination Vail admitted that he was instrumental in securing a truck to be dispatched to Brussels on an official trip in order to obtain champagne for an officers' mess. Accused learned of the contemplated trip to Brussels, because the witness had asked him if he was interested in getting a few bottles of champagne. A few days later accused asked Vail if he could arrange for transportation to Brussels for the delivery of cognac. With the

champagne trip in mind Vail agreed to arrange for the transportation. Champagne was secured in Brussels and delivered to the Biltmore Hotel Officers' Mess (R 313-319).

Prior to Captain Vail's testimony, the trial judge advocate announced that the witness had been given an opportunity to resign for the good of the service but had refused to do so. He further stated that no offer of immunity had been made to Vail, but that he had been promised that if he testified voluntarily against the accused in the instant case and waived his rights to refuse to answer self incriminating questions, a recommendation for clemency and leniency would be made to the court which will try him and to the reviewing authority (R 282).

By stipulation the prosecution introduced as Prosecution Exhibit 17, a Report of a Board of Officers which convened at 191st General Hospital, APO 887, on 30 August 1945, under the provisions of paragraph 35c, Manual for Courts-Martial, 1928, and Army Regulation 420-5. The findings of the board were that accused "is sane and responsible for his actions now, and is so far free from all mental defects, disease, or derangement as to be able to distinguish between right and wrong, and to adhere to the right, and to be able to cooperate with his defense" and that accused "was sane and responsible for his actions during the period when he is alleged to have committed certain acts for which disciplinary action is now pending." Pertinent extracts of the clinical abstract which was attached as an exhibit to the report show the following:

"PAST HISTORY:

Patient is an only child. States he never got along well with mother, who had wanted a girl and 'she was very nervous.' As a result, he was sent to boarding school by mother at age of 9, until age of 18 - at end of 1st year of college. Usual rigid life of Catholic school. Says he always had quite a temper. At the age of 18 he states he spent 3 weeks in Colorado General Hosp, 'under observation.' Does not know what for. 'My father sent me.' Enjoyed competitive sports. Adds, 'I never made close friends though. Never had a close buddy, prefer to be on my own.' Worked in steel mill 5 years, and worked himself up to assistant roller, earning up to $300.00 monthly; left it following a knee injury while at work. Then farmed, worked in shipping depot of Sears Roebuck. Unmarried, has a steady girl. No VD. Has a dilute sexual interest; usually has premature ejaculation. Denies excess drinking in civil life. No civil arrests.

"MILITARY HISTORY:

Joined RCAF in 1940, but in 1941 'came down with colds and nervousness; couldn't sleep; no appetite; headaches; irritable,' and was placed in training command. Joined US Air Forces in 1942 as a Sgt. 10 days later was made flight officer, doing flying control. Commissioned in Dec 1943. Because I was ready to 'blow my top,' was transferred from exacting work of flying control to running a Repl Pool. Has never done combat flying. No courts martials. No excessive drinking.

* * *

"MENTAL STATUS:

On admission he was very tense, restless, and sweated excessively; expressed himself with difficulty, and in general showed the behavior of a man in a severe, acute anxiety state. It is our opinion that this condition is a panic reaction resulting from his present unhappy situation. After a few days he calmed down considerably and was able to give a coherent story. He gave all personal history data relantly, and in well organized fashion. When discussing his present difficulty he became evasive, vague, rationalizes, and maintains he was only indirectly involved in the transactions - that he didn't know what most of the packages contained, and did it essentially as a favor for friends of his who had been helpful to him in getting settled at Orly. His affect is intact; there are no disturbances of speech production; there is no evidence of any psychotic (insane) thought content. Intelligence is normal; is oriented in all fields. Rorshach test shows a normal personality.

From objective sources, it is reported that he was a very dynamic individual, with many plans which he put into effect expeditiously, and would go to great length to get small things done. There is also evidence that he was rather ostentatious. This may bring up the question of possible 'manic' behavior. In our opinion, from the evaluation of the patient objectively, the laboratory tests, and the Rorshach test, that these features represent personality factors of an eccentric type, but entirely within normal limits. His sudden change in behavior following his being charged with the offenses in question are also indicative of the fact that he understood fully the significance of the charges and possible consequences.

"FORMULATION:

This man is sane and responsible at the present time and was sane and responsible at the time of the alleged offense. He has a neurosis, anxiety type, of several years duration - manifested by headaches, insomnia, impatience, irritability, and restlessness. From his own statement regarding his behavior during the investigation of his case, at which time he did things that he did not recall, when they were mentioned to him, it is reasonable to assume he was in a panic, resulting from his predicament. This condition does not affect his legal responsibility" (R 582; Pros Ex 17).

Accused became ill during the course of the trial and was taken to a dispensary and thence to a mental hospital for observation (R 686-687). The defense thereupon raised the question of the accused's mental ability to cooperate in his own defense and asked that the record be forwarded to the reviewing authority under the provisions of paragraph 63, Manual for Courts-Martial (R 689, 693).

Major Ian P. Rak, a physician from the 179th General Hospital and a specialist in psychiatry (R 703), had the accused under observation for a number of days to determine his sanity and degree of potential cooperation (R 704; Pros Ex 18). He found accused sane (R 704) and believes him capable of cooperating sufficiently "to carry through with the proceedings" (R 705).

On cross-examination he stated that the accused could well refuse to cooperate with his counsel and that that condition is frequently met, such persons being known medically as "psychopathic persons" (R 706). After explaining the physical and emotional reactions of normal persons (R 709, 711; Pros Ex 19) and his opinions about them, he reiterated his opinion that accused was sane (R 713). However, on redirect examination, the witness stated that it was his opinion that the accused wanted to cooperate with his defense counsel, but was incapable of doing so (R 715).

The defense renewed its motion that the court declare the accused incapable of cooperating in his defense in accordance with paragraph 63, Manual for Courts-Martial, 1928 (R 716-720), which motion was denied (R 721).

4. The evidence for the defense was substantially as follows:

On motion of the defense, the court took judicial notice of Letter, Headquarters United States Strategic Air Force in Europe, Subject: "Transaction in Currency and Foreign Exchange Assets," dated 14 December 1944 (R 428), which provides in pertinent part:

"1. Except as authorized, personnel in occupied German territory or liberated territory are prohibited from:

a. Importing, holding, transferring, exporting or in any way dealing in United States or British paper currency. Personnel arriving with such currency in their possession will exchange or otherwise dispose of it through Finance Officers/Paymasters within 24 hours of arrival" (R 430).

Lieutenant Colonel Leonhardt W. Scheffler, the accused's commanding officer, testified that, during all of the time that he had accused under his supervision, the accused was the "one person" who did his work well and that he had been rated "superior" for the entire period covered by the charges. All of accused's flights to England were on official business and authorized by the witness (R 485-486). Toward the end of June accused mentioned that he had advanced money to purchase some cognac. The witness thereupon admonished accused that engaging in business was not authorized and showed him a circular prohibiting such business activity in the file. He told accused that he better get his money back (R 489-490). His business activities in no way interfered with the performance of his duties or with his efficiency (R 487).

Letters and commendations from various commanding officers attesting to the accused's excellent work were received in evidence (R 779-780; Def Ex E, F, G. H and I).

Mr. Feiwel Goldberg was called as a witness and stated that on advice of counsel he refused to testify (R 584). His solicitor was present and when the law member asked if he refused to answer on the ground that it would incriminate him, the witness asked that he be permitted to speak to his lawyer and then answered "Yes" (R 588-589).

The defense contended that it had a right to show why Goldberg refused to testify (R 591-605) and though the law member first ruled that it was inadmissible (R 600) this ruling was reversed and permission given to proceed (R 605). Goldberg then testified that he had intended to testify, but shortly after he had agreed to do so four men came to his apartment, two in American uniform (R 607) and they told him not to testify (R 612). On cross-examination he stated that his wife had become frightened resulting in a miscarriage (R 614) and she told him not to testify; he had fully intended coming to court to give evidence but after the treatment his wife had gotten from the investigators he changed his mind (R 617); the investigators did not abuse either of them but his wife had spent considerable time in a concentration camp and was deathly afraid of the military (R 623). On redirect examination he admitted that "80%" of his reason for not testifying was because his wife would be nervous (R 626), but refused to answer how many diamonds he had sold to the accused (R 626).

Sergeant Leslie James of the British Police (R 660) testified as a witness for the prosecution in rebuttal that he had gone to the Goldberg apartment with two American Military Police Officers, was admitted by Mrs. Goldberg who voluntarily permitted them to make a search (R 660); when Mr. Goldberg appeared he did not raise any question about the search (R 661). On cross-examination he stated that the American officers merely accompanied the British police (R 673). They were searching for currency and gold (R 667), but did not tear the apartment to pieces (R 669). They knew about the proceedings against the accused (R 670). They did not get a search warrant because the original intention in going there was to question Goldberg and when Mrs. Goldberg permitted the search they made it (R 674). He did not ask her to open the safe. One of the American officers spoke to Mrs. Goldberg in a foreign language but, since the witness did not understand any foreign language, he did not know what was said (R 672).

Mrs. Goldberg, called as a sur-rebuttal for the defense (R 681), testified that she saw the four men at her apartment. One of the officers spoke German, said they would make a search and ordered her to open the safe. They searched the entire apartment and it so frightened her that she had a miscarriage (R 682).

The defense introduced the deposition of Captain Arthur Nugent, Medical Corps, a flight surgeon who made a medical examination of accused on 20 June 1945. He testified therein that on that date accused showed signs of severe mental distress and emotional depression. He found that accused was "suffering from severe chronic nervous exhaustion, often termed 'operational exhaustion' or sometimes 'flying fatigue'" (R 678). On cross-examination he stated that accused was not insane but that he was in a psychoneurotic state (R 679).

Doctor Robert Gillespie, an expert psychiatrist, examined the accused on 11 September 1945 (R 648); he considers him immature and emotionally unstable in an almost "panicky state" (R 649); although able to distinguish right from wrong he is not as responsible as the ordinary person and is very easily influenced (R 650). On cross and redirect examination he stated that in his opinion the accused could cooperate in his defense (R 651), since he cooperated fully in the conduct of the examination which was made (R 653).

As stated above, when the trial was resumed in Paris (R 685), the accused was taken ill. The defense raised the question of accused's mental ability to cooperate in his own defense and asked the court to forward the record to the reviewing authority in accordance with Manual for Courts-Martial, 1928, paragraph 63 (R 689, 693).

Major Raymond D. Flynn, an officer who had known accused a few months,

testified that he saw him at the St. Augustine Mess on 7 October 1945. The accused complained of being ill and asked to be taken to a hospital. He was taken to the American hospital where it was found that he was a "psychiatric case" and he was transferred to the 179th General Hospital (R 698).

Major Thomas L. Foley, special defense counsel, requested that he be sworn (R 700) and testified that he questioned the accused's mental condition; that the accused had been uncooperative, does not seem to realize the seriousness of the charges, and has consistently been reluctant to give information or relate details about events when questioned (R 701-702).

After being properly warned as to his rights as a witness, the accused elected to remain silent (R 780-781).

5. The defense elected to challenge each member for cause (R 2-3, 12, 15, 18, 20, 22, 25, 27, 30), but after a cursory examination withdrew the challenges without requiring the court to take any action by vote (R 12, 15, 18, 20, 22, 25, 27, 30). Colonel Johnson, the president, was challenged peremptorily, by the defense, and withdrew (R 32). During the course of the trial, the defense challenged the law member a second time for cause on the ground that he was biased and prejudiced, with the admonition that the record of trial was "going into the Federal Court" and "there is going to be a lot of people embarrassed by these rulings, and I am telling the court that in advance." Thereupon Lieutenant Colonel Shanner, the law member, was sworn as a witness and questioned as to his competency. He gave a brief outline of his educational background as well as his experience in the practice of law. He stated that the rules of evidence which he was applying in the instant case were the same as those he would apply in civil practice in Illinois and in the District of Columbia (R 451). The court, following the procedure prescribed by Manual for Courts-Martial, 1928, paragraph 58f, page 46, denied the challenge.

It is the function of the court to determine the existence or nonexistence of the alleged grounds of challenge and the burden of maintaining a challenge rests on the challenging party. The record shows that the law member made consistently proper rulings with only one serious exception (R 662), but this was subsequently corrected (R 663) and no injury to the accused resulted; and, except for charges and counter-charges by the Defense, many of them made for the express purpose of creating a record for future action in the Federal Court (R 47, 118, 141, 164, 191, 256, 258, 306, 314-315, 548, 639), no specific showing was made that the law member had ruled improperly, or that he was biased or prejudiced against the accused. It was for the court to determine whether the challenged member was actually biased against the accused and its decision should not be interfered with unless clearly erroneous, or unless disqualification appears as a matter of law.

6. Defense counsel moved to strike all of the Specifications under the 96th Article of War on the grounds that:

> "1. It is the right of every person, guaranteed by the 6th Amendment, to be informed of the nature and the cause of an accusation against him;
>
> "2. The application of the 96th Article of War to the ultimate facts alleged in each of the specifications under Charge I is so vague, indefinite and uncertain as to be violative of the 5th Amendment to the Federal Constitution, in that it is a lack of due process" (R 37).

In support of such contentions the defense claimed that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"; that the language of Article of War 96 is so vague as to make it impossible to judge what acts do or do not come within its provisions and "one man's opinion as to what act comes within the scope of the language used is just as logical as the opinion of any other man."

This question has not been passed upon directly since the article was broadened in the revision of the Articles of War in 1920. However, in passing upon the validity of the general article for the government of the Navy, the United States Supreme Court, in Dynes vs. Hoover, 20 Howard 65 (at page 82) held:

> "Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known to practical men in the navy and army, and by those who have studied the law of courts martial, and the offenses of which the different courts martial have cognizance."

In the opinion of the Board of Review, there has been no change in the 96th Article of War which would alter that rule. Not only do "practical men in the army" know what offenses are punishable under the 96th Article of War, but those offenses are described in the Manual for Courts-Martial and maximum punishments therefor are set forth in paragraph 104c of the Manual. The principle of condemning, in general language, acts which would prejudice or discredit the military service was approved by the United States Supreme Court in Carter vs. McClaughry, 183 U.S. 365, 397-400, Swaim vs. U.S., 165 U.S. 553; U.S. vs. Fletcher, 148 U.S. 584; Smith vs. Whitney, 116 U.S. 167. In Smith vs. Whiteny, supra, the court stated:

stated:

> "Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a special relation, or in private business."

The defense further moved to strike all Specifications of Charge I (violation of Article of War 96) on the ground that the specifications allege no offenses (R 48-55, 57). In support of the motion, defense counsel argued that engaging in business and having possession of British currency are not per se wrongful acts; but, instead, are acts which can only be made wrongful by legislation; and that the specifications do not allege what statute or order has been violated. The trial judge advocate thereupon announced that the prosecution relied upon letter, Headquarters, European Theater of Operations, dated 23 September 1944, Subject: "Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels," and upon letter, Headquarters, European Theater of Operations, dated 4 April 1945, Subject: "Prohibition Against Engaging in Business" (R 54).

Whereas it would have been better practice to allege the orders which made the conduct of the accused wrongful, failure to include a reference to such orders did not prejudice the substantial rights of the accused, since the specification fairly apprised the accused of the offenses charged. The presence of the word "wrongful" in each specification was sufficient to put him on notice that his acts were alleged to have been effected under such improper circumstances as to be prejudicial to good order and military discipline or to constitute conduct of a nature to bring discredit upon the military service (Cf: CM 226512, Lubon; CM 303049, Penick, CM ETO 8458; CM 305617, Blacker, CM ETO 10418). The word "wrongfully" may reasonably be construed to mean under improper circumstances in the light of the general situation with regard to the existing military situation, European economic and currency conditions, accused's position as an officer, and the place where the transactions were made. The specifications thus state offenses in violation of Article of War 96. It was not essential to allege that accused violated any official directives (CM 291176, Besdine, CM ETO 7553; Williams vs. U.S. (1897), 168 U.S. 382, 389; CM 305617, Blacker).

"The importing, holding, transferring, exporting, or in any way dealing in United States or British paper currency, gold coins or gold bullion, the buying, selling or dealing in securities * * * postage stamps, real estate, or any kind of property * * * and acting as agent, intermediary or conduit in any business transaction for gain * * * for any person, firm or corporation wherever located * * *" was expressly prohibited in liberated or co-

cupied territory within the European Theater of Operations. The specifications as a whole set forth a series of acts and alleged transactions which fall within the prohibitions set forth by the Theater Commander. There is no ambiguity about the prohibitions and there is certainly no doubt that the court was charged with the duty and responsibility of determining whether the conduct of the accused was such as to constitute "conduct of a nature to bring discredit upon the military service." Not only has the accused been sufficiently apprised of the "nature and the cause of an accusation against him," but there is no possibility of any dispute arising as to the meaning of the language in the 96th Article of War. Nor is it so vague as to make it impossible to judge what acts do or do not come within its provisions. Congress specifically provided that though not mentioned in the articles, "all conduct of a nature to bring discredit upon the military service" should be punishable by courts-martial under Article of War 96 according to the nature and degree of the offense, and punished at the discretion of the court. "It is peculiarly for the court-martial to determine whether the evidence establishes the offense; in other words, whether the conduct charged and the evidence in support thereof show a breach of that part of Article of War 96 which denounces * * * 'all conduct of a nature to bring discredit upon the military service'" (CM 199391, Klima, 4 BR 45). The motions to strike the specifications and to dismiss the action on those grounds were properly overruled.

The defense then moved to strike Specifications 1, 2, 3 and 4 of Charge I on the grounds that accused could not be found guilty of "engaging in business," since a single act or a series of unconnected acts do not come within such term, and, assuming that the acts complained of did constitute engaging in business, the accused could not be held accountable because there is no showing that he had any notice or knowledge or the directives prohibiting military personnel from engaging in business, and that it did not interfere with his military duties (R 60-64).

There is no doubt that the term "engaging in business," in its broad and usually accepted sense, has come to mean the establishment of some form of enterprise from which a person hopes to earn a livelihood. To insist that a person could not be guilty of engaging in business in violation of an express prohibition against such a practice merely because there was only a single transaction, or a series of seemingly disconnected ones, would be to distort the purpose of the directive and the reasons for its promulgation. The evidence is clear that the accused violated the specific terms of the prohibition in the directives, of which the court took judicial notice, by participating in transactions involving British pounds, diamonds, gold and gold bullion, through other than authorized agencies. The question is whether such directives had the effect of legal, operative standing orders, binding upon the accused at the time of his alleged offenses. In CM 291176, Besdine, the Board of Review, in a case involving the wrongful exchange of currency, said:

"As to the authenticity * * * there can be little question. The action of the President * * * in concurring, on behalf of the U.S., in the appointment of General Eisenhower as Supreme Commander of the British and United States Expeditionary Forces (The Stars and Stripes, 28 December 1943), later designated as Supreme Headquarters, Allied Expeditionary Force, was indisputably in the exercise of his constitutional powers in time of war as Commander in Chief of the Army. It was therefore binding upon all within the sphere of the President's legal and constitutional authority * * * and could not be set aside by the civilian courts as it was not in conflict with the Constitution or laws of Congress * * *. The Board of Review will likewise not question the authority of General Eisenhower as Supreme Commander of the Allied Expeditionary Force to issue legal directives binding upon U.S. Army personnel of his command. In promulgating orders in their general military capacity, superior military commanders directly represent, and exercise the authority of the Commander in Chief * * *. Thus the Board likewise will not question the legality of an order promulgated by the Supreme Commander regulating matters of currency amoung U.S. Army personnel of his command in the absence of indication that it is in conflict with mandate of higher authority. * * * The memorandum * * * was a valid and legal directive. (3) The prohibition * * * is a matter of importance directive in nature and evidently of permanent duration. * * * It became effective as part of the written military law * * * on the date of its promulgation, i.e., the date of its release and distribution by deposit in the mails (AR 310-50, WD, 8 Aug 1942, par 2). In the absence of evidence to the contrary, it may be presumed that the directive was released and distributed on or about the date it bears in the regular course of performance of their duties by the officers concerned * * *. Accused was thus chargeable with notice of the prohibition."

Wrongfully engaging in commercial activities for personal gain has been held to be an offense in violation of Article of War 96 in CM 293926, Haug, et al, CM ETO 9345, and in CM 297908, Kenney, CM ETO 8555. In the Haug case, supra, the accused were found guilty of wrongfully engaging in commercial transactions for personal gain, to wit, purchasing and re-selling at a profit approximately 362 bottles of champagne to private French hotel operators. The Board of Review held:

"The activities alleged are not only incompatible with the status of accused * * * as officers of the Army, but are of such a nature as to tend to interfere with and hamper the full and proper discharge of their duties in this active theater of operations and give rise to the reasonable inference that they would have that effect * * * (They constitute violations of par 2e, AR 600-10, 8 July 1944). Failure to comply with Army Regulations has long been

recognized as an offense in violation of Article of War 96 (CM ETO 1872, Sadlon and authorities cited therein)."

It may be noted that the offenses in the Haug case occurred prior to the promulgation of the 4 April 1945 directive.

It seems unnecessary to discuss the right of the Supreme Commander to issue directives seeking to control the activities of military personnel under his jurisdiction. No one can deny that army regulations, as such, do not prohibit members of the military from engaging in business provided it does not interfere with the performance of their military duties. The courts have consistently held that such activities were not to be curtailed. The decisions cited by the defense deal with military personnel during peacetime or violations, as such, in the Zone of Interior. No one can disagree that modern warfare is more than combat, ammunition and equipment. The internal economy of the nations with whom we are allied is as much the concern of the Supreme Commander as the fitness and number of men required to carry on successful warfare. To permit a member of the military, as in the instant case, to use aircraft for purely personal gain - or more - to circumvent the customs laws of our allies by transporting valuable items to be disposed of outside legitimate channels is detrimental to the successful conduct of military operations. It is impossible to evaluate the importance of a sound economy within the borders of a nation with whom we are allied in waging war. To say that a member of the military has been deprived of his rights as a citizen because he is denied the "opportunity" of carrying on some form of business which does not interfere with his military duties is so tenuous an argument as to require little answer. If such conduct were condoned or encouraged, it is difficult to imagine what extremes might be reached. If no control were exercised, the entire military operation would be jeopardized by men using their military status and army transportation to carry on every conceivable form of transaction. It is obvious that it was to prevent just such transactions that the Supreme Commander issued the directives which were violated by the accused. France had been stripped of most of her goods and possessions before our forces liberated her territory, and, the remaining items commanded fabulous prices. The accused, by surreptitiously bringing various articles from England to France and using his military status and equipment to effectuate it, was indulging in a course of conduct directly contrary to that which the Supreme Commander required, not only of the accused, but of all military personnel in the Theater of Operations. To argue that accused did not know of the directives which set forth such prohibitions is of no avail. Not only is the court permitted to take judicial notice of such directives, but the accused, as well as all other military personnel, is charged with notice of them (CM 283453, Mitchell, CM ETO 3649; CM 291176, Besdine).

In CM 265108, Radloff, CM ETO 567, the Board of Review said:

> "The question of the validity of regulations, War Department Orders or orders of the Commanding General of United States Army Forces on duty in a foreign country in time of war because they infringe upon or restrict rights guaranteed by the Federal Constitution, may not be entertained. When accused took the oath as a soldier in the Army of the United States, he by that act, of necessity, surrendered some of the privileges and immunities belonging to him as a citizen * * *."

The motions to strike the specifications on the grounds that the accused did not "engage in business"; and that, if he had, he was not subject to punishment because there was no showing that he had received notice of the directives, and that the Supreme Commander had no authority to issue them, were properly denied.

7. As noted above, accused became ill near the conclusion of the trial. He was taken to a dispensary and thence to a mental hospital for observation (R 686-687). The defense thereupon raised the question of accused's mental ability to cooperate in his own defense and asked that the record be forwarded to the reviewing authority under the provisions of paragraph 63, Manual for Courts-Martial (R 689, 693). Major Thomas L. Foley, special defense counsel, requested that he be sworn (R 700) and testified that he questioned the accused's mental condition, because the accused had been uncooperative, did not seem to realize the seriousness of the charges, and had been consistently reluctant to give information or relate details about events when questioned (R 701-702). The testimony of Major Ian P. Rak, the psychiatrist who examined the accused, was not free from ambiguity. He testified that the accused was capable of cooperating sufficiently "to carry through with the proceedings" (R 705) and that his lack of cooperation may be occasioned by incompatibility with the personality of his defense counsels (R 706). However on redirect examination he stated that the accused wanted to cooperate with his defense counsel, but was incapable of doing so (R 715).

The conflict in the evidence left the court free to draw its own conclusions from all the facts and the manner in which the defense had been conducted. (CM 271889, Barbara, 1st Ind, 46 BR 212-218).

If accused was so uncooperative with his defense counsel as to interfere with the defense, such lack of cooperation is not reflected in the record nor was it apparent in the conduct of the defense. The expert and able cross-examination of prosecution witnesses clearly shows that defense counsel was thoroughly familiar with the facts of the case and that the accused sufficiently cooperated with his counsel, although it may be true that his cooperation was difficult to obtain.

There was no serious effort made to establish a defense of insanity on the grounds that accused was not responsible for his action or unable to adhere to the right.

In view of all the facts, the court properly denied the defense's motion that the record be forwarded to the reviewing authority under the provisions of paragraph 63, Manual for Courts-Martial.

8. Specification 1 of Charge I alleges a conspiracy to engage in business by transporting British paper currency, gold bullion, gold coins, and diamonds between England and France for personal gain, and Specification 2 of Charge I alleges the substantive offense of engaging in business by acting as an agent, intermediary and conduit in transporting such currency and precious metal and stones between England and France. We will consider the proof in support of the findings of guilty of these specifications in inverse order.

a. The evidence is conclusive that during the period between 10 April 1945 and 30 June 1945 there were numerous transactions on the part of the accused, dealing not only in British currency, but also in gold coins, gold bullion and diamonds. It is uncontradicted that on several occasions the accused received letters from Poliszuk and delivered them to Goldberg in London and that he also delivered letters and packages from Goldberg to Poliszuk at the home of Mrs. Kirschbaum. For each of these errands he received either 30,000 or 40,000 francs. Poliszuk testified that accused was paid a total of 150,000 francs for these services. Disinterested witnesses have established that during this period the accused had in his possession large amounts of British paper currency, gold coins, some gold bullion and uncut diamonds. Possession of these items is established not only by the testimony of witnesses who saw these items in his possession, but by numerous admissions made by the accused to disinterested witnesses. The testimony of Mrs. Moutafolo, who was not a party to either conspiracy, not only shows that the accused had possession of British currency, gold coins, and gold bullion, but also deliveryof the items to the home of Mrs. Kirschbaum.

In considering accused's voluntary admissions made at various times to his military associates, Captain Cate, Captain Vail, Corporal Earley and Private Grisham, that he had large sums of British currency, gold, etc., and that 1,000 pounds "wasn't a bad week's work" as well as his admission to Mr. Moutafolo, that he had made $250,000 and later $350,000, the Board has given due consideration to his mental condition as a psychoneurotic and constitutional psychopathic inferior. Many of his statements may well have been exaggerations, calculated to impress the witnesses with his importance and affluence. It is apparent that he sought to create the impression that the money and gold he carried belonged to him. Nevertheless, such exaggerations affect only the amount of accused's personal gain and do not minimize the proof of his participation in the unlawful transactions alleged.

The entire course of conduct clearly falls within the prohibition contained in the Theater directive of 4 April 1945 of which the court took judicial notice. In pertinent part the directive provides:

"3. The term 'engaging in business' is defined to include:

a. Buying, selling or dealing in securities, except savings bonds, regularly purchased from the issuing government; postage stamps; real estate; or any kind of property in this theater for present or future personal profit or investment. (As to dealing in currency, reference is made to letter, this headquarters, AG 121 OpGA, subject: 'Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Area and Certain Transactions Involving French Currency Except through Official Channels', dated 23 September 1944).

b. Acting as agent, intermediary or conduit in any business transaction for gain in this theater for any person, firm or corporation, wherever located or planned to be located."

The evidence shows that accused acted as an agent or a conduit for Poliszuk, a French civilian, in transporting (importing) currency, gold and diamonds into France and transporting (exporting) currency to England. Such activity is expressly forbidden by paragraph 3b of the above directive. It is also a violation of paragraph 3a which, by reference, incorporates the 23 September 1944 directive.

The latter directive provides in pertinent part:

"2. Except as authorized, all personnel subject to the jurisdiction of this headquarters, (including officers and men of United States controlled merchant vessels and civilians accompanying or serving with the United States Army) are prohibited from:

a. Importing, holding, transferring, exporting, or in any way dealing in United States or British paper currency in liberated or occupied territory within the European Theater of Operations.

* * * *

c. Dealing in gold coins or gold bullion.

* * * *

e. Importing into and exporting from continental France, funds, securities, or money from the account of persons residing in continental France who are not subject to the jurisdiction of this headquarters as defined above.

3. Violation of any prohibition hereof will subject the offender to trial by court-martial or other appropriate disciplinary action."

The evidence shows that accused imported, held, transferred and exported British paper currency in liberated territory within the European Theater; that he dealt in gold coins and gold bullion; and that he imported into and exported from Continental France, funds and money for the account of Poliszuk, a person residing in Continental France who was not subject to the jurisdiction of the European Theater of Operations, United States Army.

We regard the evidence which supports the finding of guilty of Specification 2 of Charge I to be such as to practically compel a conviction.

b. Specification 1 of Charge II avers a conspiracy by accused, David Poliszuk, Selma Kirschbaum, and Feiwell Goldberg to engage in business by transporting British paper currency, gold bullion, gold coins and diamonds between England and France for personal gain. That which we have said, in respect to the proof of guilt of the substantive offense, applies with equal force to the same evidence as proof of the conspiracy and accused's participation therein.

A criminal conspiracy is a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or effect a lawful object by unlawful means or in an unlawful manner (Pinkerton v. U.S.; 145 Fed (2d) 252, 254; CM 255975, Ranzinger et al; CM CBI 114; CM 273791, Gould, 47 BR 29, 65). This definition of a common-law conspiracy was first enunciated in 1821 by the Court of Appeals of Maryland in State v. Buchanan, 5 Harr and J. 317, 9 Am. Dec. 534, and has been almost universally followed in the Federal courts as well as in most state courts ever since. The Federal Criminal Code has not changed the nature of the offense of conspiracy but has added merely the requirement that an overt act to effect the object of the conspiracy be charged and proved. It is necessary to prove under the Federal Criminal Code not only the existence of an unlawful combination but also that one or more of the confederates did an overt act to effect the common object (McGinniss v. U.S., 256 Feld 621), proof of such overt act being as much a condition to conviction as the proof of the unlawful confederacy itself (U.S. v. Wexley, 79 Fed (2d), 526; Eldredge v. U.S., 62 Fed (2d) 449).

The only direct evidence that accused agreed to do what was done is contained in the testimony of his co-conspirators, Poliszuk and Mrs. Kirschbaum. Their testimony establishes that accused, at least impliedly, agreed to use his official status as a pilot attached to Communication Zone Headquarters, which involved frequent trips between England and France, as a means for transporting letters and packages between England and France. If at first he did not know the nature of this acitivity as well as the contents of the letters and packages, his ignorance was soon dispelled. There is some evidence in Poliszuk's testimony that accused was under the impression that

the first letter he delivered to Goldberg was merely personal. However, when Poliszuk offered him 30,000 francs for each subsequent errand, and gave him three gold watches in additon to the sum agreed upon for each errand, his ignorance began to vanish. It disappeared entirely when he became aware of the contents of the packages and persisted to engage in the same course of conduct. It is not necessary to show complicity of the accused in the preliminary stages of the conspiracy. All who join a conspiracy at any time after its formation become conspirators (People v. Mother (1830), 4 Wend (NY) 229; State v. Frealer (1840) 4 N.C. 90, 6 Am. Dec. 558); U.S. v. Nunnemacher (1576) Fed. Cas. No. 15, 902).

The language of the Board of Review in CM 262217, Williams, CM CBI 159, seems applicable.

> "It is not necessary to constitute a conspiracy that two or more persons meet together and enter into an explicit and formal agreement, or that they should directly by words state what the unlawful scheme was to be and the details and plans or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end, work together in any way in furtherence of the unlawful scheme, every one of such persons becomes a member of a conspiracy."

In the Gould case (op cit, pp 66-67), the Board of Review cites the following authorities:

> "It is enough to prove circumstances which indicate an intelligent and deliberate meeting of minds of co-conspirators, with intent to commit an offense (Hoffman v. U.S. 68 Fed (2d) 101). No formal agreement between the parties is essential to the formation of a conspiracy for the agreement may be shown if there be evidence of concert of action tending to show that all the parties working together understandingly with a single design for accomplishment of a common purpose (Marino v. U. S., 91 Fed (2d) 691). Overt acts performed by the parties to effect an unlawful object may be considered in determining whether a conspiracy exists (Pastrano v. U.S., 127 Fed (2d) 43, 45). * * Previous discussion by the conspirators is unnecessary, and is not regarded as essential that each conspirator take part in every act or that he know the exact part to be performed by his confederates (Spies v. People, 122 Ill. 1). It is enough if the minds of the parties meet and join in an understanding way to accomplish an unlawful common purpose. A conspiracy is rarely susceptible of

direct proof as conspirators seldom reduce their agreement to writing or make public their unlawful plans (Reavis v. U.S., 106 Fed (2d) 982.) * * * The standard by which the sufficiency of proof of a conspiracy is to be tested has been thus stated:

> 'It is not necessary that the participation of the accused be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of criminal conspiracy is not available and it will be disclosed only by a development and a collocation of circumstances (U.S. v. Manton, 107 F. (2d) 834).'"

The evidence is conclusive that during the period alleged there were numerous transactions on the part of the accused, dealing not only in British currency, but also in gold coins, gold and diamonds. The acts of the accused and those of his accomplices completed the pattern which involved a violation of the directives. Although the transactions were separate and distinct they show a chain of events which justified the court's conclusion that they were part of a pre-conceived plan to engage in activities in violation of express prohibitions. While the proof of the existence of the conspiracy in the instant case must depend in great part on the testimony of co-conspirators, the actions of the accused in the presence of, and his statements to persons in no way involved, justify the court's inference that there was a closeness of personal association and a concurrence of sentiment on the part of the accused and others as part of a pre-conceived plan.

The defense contended that the specification should be dismissed because the offenses charged are not violative of any statute nor are they offenses under the common law; that there can be no conspiracy if some of the parties are not under the jurisdiction of the court and not subject to United States laws; that the specification does not allege acts which are susceptible of conspiracy, and a person cannot be convicted on the evidence of a co-conspirator.

As to the argument that the offenses charged are not violative of any statute nor are they offenses at common law, reference is made to the authority of the Supreme Commander (supra) to provide proper regulations and orders necessary to the carrying out of military operations. There is no showing that the powers vested in him have been abused, nor has there been any evidence that the accused was being discriminated against. The directives apply to all military personnel and were designed to prevent the disruption of the internal economic structure of the nations who were joined with us in a common cause. Black market activities are a vicious and dangerous form of operation and if permitted to flourish would seriously endanger our program seeking to stabilize and hasten the economic recovery of our allies. Legitimate channels were provided for dealing in currency and commodities and any

attempt to deviate from such avenues endangered the well regulated plans which were a vital and necessary part of our military operations.

Defense counsel contended that conspiracy is a common law offense and since the United States has no Common Law Jurisdiction it must be shown that the particular conspiracy alleged is denounced by a Federal Statute. This argument fails to take into consideration the provisions of 18 USC 88, Federal Criminal Code, which provides that where there is a conspiracy "to commit any offense against the United States * * *, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined," etc.

Under the provisions of this statute, a conspiracy against the United States is established where the object of an unlawful agreement was the commission of some offense against the United States, or the doing of some act made an offense by the laws of the United States (U.S. v. Lyman, 190 Fed 414). Since the failure to obey a lawful standing order constitutes an offense against the United States within the scope of Article of War 96, it follows that a conspiracy to violate such an order falls within the scope of the Federal Criminal Code provisions denouncing conspiracies to commit an offense against the United States.

There is no foundation for the argument that the accused could not be found guilty of a conspiracy because some of the parties were not subject to the jurisdiction of the courts of the United States.

> "The general rule is well settled that, where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. It is immaterial, as affecting the question of co-equal responsibility, that one or more were not actually present at the consummation of preconcerted design, or that the conspirator who committed the act cannot be identified, or that the act charged may not have been arranged for. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan" (12 C. J., p 577, and cases therein cited).

It has been held that where a conspiracy is once established, although it was formulated out of the jurisdiction of the court, an overt act committed by one of the conspirators within the jurisdiction of the court, in the pursuit of the common object of the conspiracy, is the act of each conspirator (U.S. v. Goldberg (1876), Fed. Cas. No. 15, 223; U.S. v. Lancaster (1891), 44 Fed 896) and each conspirator is liable in the place of an overt

act (Johns v. State (1862), 19 Ind. 421; Bloomer v. State (1878), 48 Maryland 521; Commonwealth v. White (1877), 123 Mass. 430; Commonwealth v. Corlies (1869), 3 Brewster (Pa) 575).

Since there is no question about the right of the Supreme Commander to promulgate regulations seeking to properly control the actions and activities of military personnel, it follows that persons who join with others to circumvent such regulations are guilty of conspiring to do so.

> "Conspiracy is a 'combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means. The offense thus defined excludes only confederations to accomplish lawful objects by lawful means; the offense includes all possble unlawful confederations'" (12 C. J., p 541).

The fact that some of the parties either could not be prosecuted, or were not, is of no avail to the accused.

> "The fact that one of the persons conspiring is himself incapable of committing the offense which is the object of the conspiracy neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." (12 C.J., p 576; U.S. v. Bayer (1876), Fed. Cas. No. 14, 547; U.S. v. Stevens (1890), 44 Fed 132).

> "Failure to prosecute all conspirators does not prevent the prosecution of a part of them. The usual and convenient course is to include all the conspirators in a joint indictment. Nevertheless, an indictment or information will ordinarily be sustained against one of the alleged parties to the conspiracy, unless there is some reason peculiar to such an indictment plainly making a several proceeding improper." (12 C.J., p 613; Heine v. Commonwealth, 91 Pa. 145).

In the Gould case, supra, an officer was convicted by general court-martial of conspiring with a civilian and a New York Corporation to defraud the United States and to commit an offense against the United States. Similarly, in the instant case, the co-conspirators were not subject to military law and consequently it was impossible to try them with the accused in a joint trial.

The courts have gone to an even more extreme degree in sustaining convictions in conspiracy proceedings. In People v. Olcott (2 Johns. Cas. (NY) (1801)) the court held that where one of three persons engaged in conspiracy dies before trial and another is acquitted the survivor may be tried and convicted.

An indictment charging the defendant with conspiracy with a person or persons unknown has been held good (People v. Mather (1830), 4 Wend. (NY) 229, 21 Am. Dec. 122).

The defense contended that it was improper for the testimony of alleged co-conspirators to be received prior to the establishment of the conspiracy by other evidence. There is no doubt that such a rule would apply to an extra-judicial confession. However, it does not apply to the testimony of a co-conspirator.

Paragraph 114c of the Manual for Courts-Martial provides in pertinent part:

> "In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them. It is immaterial whether such acts or statements were done or made in the presence or hearing of the other parties. The acts and statements of a conspirator, however, done or made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape. Of course, this rule is not to be construed as affecting the competency of one accomplice to testify against the others." (Underscoring supplied).

It is obvious that a co-conspirator is an accomplice. "In a prosecution for conspiracy, all the conspirators are accomplices * * *" (Underhill's Criminal Evidence, 4th Edition, Sec 770). "* * * the mere fact that a person was an accomplice of the accused does not so identify him with the latter as to render him incompetent to testify for or against him." (Winthrop's Military Law and Precedents, 2nd Edition, p 336). On the contrary, " the general common law is that accomplices are competent witnesses against their criminal associates" (Underhill's Criminal Evidence, 4th Edition, Sec 153). The objection (R 283) was, therefore, properly overruled.

Although the testimony of a co-conspirator should be carefully weighed there is no prohibition against his testifying.

> "A co-conspirator is an accomplice and although uncorroborated is always a competent witness. The fact that he is an accomplice operates, not against the admissibility of his testimony, but only against its credibility" (12 C.J., p 636).

The court was justified, too, in permitting great latitude in the presentation of every fact and circumstance which might have some bearing upon the question.

"The fact of a conspiracy may be proved by any competent evidence. * * * Circumstantial evidence is competent to prove conspiracy. * * * Circumstantial evidence if sufficiently strong may outweigh the positive statement of a party or witness. In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue and which will enable them to come to a satisfactory conclusion. The government has the right to show the whole history of the conspiracy from its commencement to its conclusion. And it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred sometime before the alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate fact at issue * * *" (12 C.J. p 633-634).

In view of the foregoing authorities, the Board of Review is of the opinion that the evidence amply sustains the finding of guilty of Specification 1, Charge I.

9. Specification 3 of Charge I avers a conspiracy of accused, Alec Moutafolo, and Captain David Vail, to engage in business in the European Theater of Operations, to wit, to purchase, transport, and sell about 1490 bottles of cognac. Specification 4 of Charge I alleges the substantive offense, namely that accused wrongfully engaged in business by lending Moutafolo 300,000 francs for the purchase of cognac and arranging for the transportation of such cognac to Brussels, Belgium. We will again consider the proof in support of the findings of guilty of these specifications in inverse order.

a. With respect to Specification 4, Charge I, the evidence shows that Alec Moutafolo asked the accused to lend him 600,000 francs for the purchase of cognac in Paris for resale in Brussels at a profit. He offered accused fifty per cent of the profit. Accused borrowed 300,000 francs from Poliszuk and loaned that sum to Moutafolo. At the time he delivered the money to Moutafolo he stated that he wanted no part of the profit, but he (or Poliszuk) wanted 10,000 francs interest. Moutafolo then asked if accused could arrange for the necessary transportation.

Accused had in the meanwhile learned that Vail was arranging to dispatch a truck to Brussels to pick up champagne for an officers' mess. He arranged with Vail that the truck be made available to Moutafolo for the transportation of cognac to Brussels. Moutafolo agreed to pay the accused 50 francs per bottle of cognac for the use of the truck. Accused in turn agreed to pay Vail 25 francs per bottle. On 28 June 1945, after some delay, the truck was made available to Moutafolo. The cognac was delivered to Brussels, and

Moutafolo repaid the loan of 30,000 francs plus 10,000 francs interest. He also paid accused 100,000 francs for the use of the truck. On 4 July 1946, accused gave Vail 60,000 francs. It is clear that he retained 40,000 francs as his share of the proceeds for the use of the truck. The record does not show whether he intended to deliver the 10,000 francs interest to Poliszuk or retain it himself. Whatever his intentions may have been, he was apprehended and the money confiscated before he had an opportunity to repay Poliszuk (R 803).

The defense contended that the evidence is insufficient to establish beyond a reasonable doubt that the accused engaged in business in this transaction. It was argued that lending money was not one of the activities denounced by the Theater Directive of 4 April 1945, and that accused expressly refused to engage in business by declining a share in the profit.

We do not agree with this contention. All the circumstances of the transaction show conclusively that the accused acted as an intermediary to effect a business transaction. He arranged for the necessary loan to effect the purchase of cognac, and arranged for necessary transportation.

Such activity is expressly forbidden by the 4 April 1945 directive which provides in part:

> "2. * * *, all personnel subject to military law are prohibited from engaging in business in this theater.
>
> "3. The term 'engaging in business' is defined to include:
>
> * * *
>
> b. Acting as agent, intermediary or conduit in any business transaction for gain in this theater for any person, firm or corporation wherever located or planned to be located."

He derived a profit and expected a profit from the transaction taken as a whole, if not directly from the sale of the cognac. Such activity in Europe was held to be a violation of Article of War 96, and a violation of Army Regulations 600-10, 8 July 1944, prior to the effective date of the 4 April 1945 Theater Directive: "Prohibition Against Engaging in Business" (CM 293926, Haug et al, supra).

The Board of Review is of the opinion that the record is amply sufficient to sustain the finding of guilty of Specification 4, Charge I.

b. Specification 3, Charge I avers the conspiracy to engage in business by purchasing, transporting, and selling cognac for personal gain. The discussion of the proof of the substantive offense is applicable to evidence as proof of the existence of the conspiracy and accused's participation therein.

The circumstantial evidence clearly establishes a combination between the three alleged conspirators to do an unlawful act (engaging in business by military personnel) by unlawful means (misappropriation of government transportation).

> "The actual fact of conspiracy may be inferred * * * from circumstances, and the concurring conduct of the defendants need not be directly proved. Any joint collocation of independent but co-operative acts, by persons closely associated with each other, is * * * sufficient to enable the jury to infer concurrence of sentiment; and one competent witness will suffice to prove the cooperation of any individual conspirators. If, therefore, it appears that two or more persons, acting in concert, are apparently pursuing the same object, often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy" (Wharton's Criminal Law, 12th Ed, Sec 1667).

The argument of the defense that the accused could not be guilty of a conspiracy concerning the sale of cognac because he withdrew from any participation in the profits, even if true, was justifiably disregarded by the court.

> "The fact that a person, after entering into an agreement with another to commit a crime, withdraws from the agreement does not for obvious reasons prevent his conviction for the conspiracy" (12 C.J. p 579).

In view of the foregoing and the authorities cited in paragraph 8b above, the Board of Review is of the opinion that the record of trial is likewise amply sufficient to support the finding of guilty of Specification 3, Charge I.

10. Specifications 5, 6 and 7 of Charge I allege respectively that the accused wrongfully, unlawfully and without authority, held in his possession 1,000 pounds of British currency on or about 25 April 1945, 2,000 pounds of British paper currency on or about 15 May 1945, and 2,000 pounds of British paper currency on or about 15 June 1945.

The court took judicial notice of the following directives, pertinent portions of which are cited below:

Letter, Headquarters Theater of Operations, dated 23 September 1944, file AG 121 OpGA, Subject, "Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels," which provides in pertinent part:

"2. Except as authorized, all personnel subject to the jurisdiction of this headquarters, (including officers and men of United States controlled merchant vessels and civilians accompanying or serving with the United States Army) are prohibited from:

a. Importing, holding, transferring, exporting, or in any way dealing in United States or British paper currency in liberated or occupied territory within the European Theater of Operations."

Letter, Headquarters United States Strategic Air Force in Europe, subject, "Transaction in Currency and Foreign Exchange Assets," dated 14 December 1944, which provides in pertinent part:

"1. Except as authorized, personnel in occupied German territory or liberated territory are prohibited from:

a. Importing, holding, transferring, exporting, or in any way dealing in United States or British paper currency. Personnel arriving with such currency in their possession will exchange or otherwise dispose of it through Finance Officers/ Paymasters within 24 hours of arrival."

The Board of Review takes judicial notice of Administrative Memorandum Number 35, Supreme Headquarters, Allied Expeditionary Forces, dated 25 October 1944, revised 7 December 1944) subject: "Transactions in Currency and Foreign Exchange Assets," paragraph 2 of which contains language identical to that of the United States Strategic Air Force letter dated 14 December 1944 cited above. The administrative memorandum carries a notation, "Distribution D".

It was held in CM 291176, Besdine, supra, that a similar administrative memorandum, issued by Supreme Headquarters, Allied Expeditionary Forces, became "effective as part of the written military law * * * on the date of its promulgation, i.e., the date of its release and distribution by deposit in the mails".

Accordingly, it is our opinion that the SHAEF Administrative Memorandum and the United States Strategic Air Force letter are applicable to the instant case. In our opinion the elements of proof of the offense alleged in these specifications are:

That the accused, at the time and place alleged:

a. Held British paper currency in his possession.

b. The amount of such paper currency held.

c. That the holding of such paper currency was in the liberated territory of France.

d. That the holding of such paper currency was not authorized, i.e., that he held such currency beyond 24 hours after his arrival in France.

The twenty-four hour period of grace was a reasonable provision for the benefit of casual travelers who were required to leave England from airports where no exchange facilities were provided.

With respect to these specifications, the record shows the following:

Specification 5, Charge I (Holding 1000 Pounds British Paper Currency on or about 25 April 1945). Corporal Earley testified that in the latter part of April he saw accused sorting ten piles of British one-pound notes at his desk at Orly Field, France. The witness estimated that each pile consisted of 100 one-pound notes. Captain Vail testified that on or about 20 April 1945, accused came into his office at Communication Zone Headquarters. Accused unbottoned his shirt and put approximately ten rolls of one-pound notes on witness' desk commenting, "That wasn't a bad week's work". Each roll was about 2½ inches in diameter, and he estimated that each roll contained approximately 100 pounds.

Specification 6, Charge I (Holding 2000 pounds British paper currency on or about 15 May 1945). In the latter part of May accused was seen by Corporal Earley and Private Grisham sorting a pile of pound notes at his desk at Orly Field. He asked the witnesses to guess the amount and stated that there were over 2000 pounds.

Specification 7, Charge I (Holding 2000 pounds of British paper currency on or about 15 June 1946). Early in June Corporal Earley saw accused sorting pound notes on his desk. Accused told the witness that there were 2000 pounds in the pile.

During the period covered by the specifications accused made about six trips to England. The prosecution showed that he received flight clearances from Orly Field, France, for Biggen Hill, England, on 25 May 1945, 2 June 1945, 15 June 1945, and 3 July 1945. Records for the period prior to May 1945 were not available at Orly Field. The prosecution did not show the dates accused departed from England, or the dates when he returned to Orly Field, although it would be reasonable to assume that the records of flight clearances at Biggen Hill, England, could have been made available. In view of the indefinite nature of the evidence as to the dates when accused was seen in possession of the British paper currency as alleged in these specifications, and the lack of evidence as to the date of accused's return to France, the Board of Review is of the opinion that the prosecution did not establish a prima facie case

as to Specifications 5, 6 and 7, Charge I, in that the evidence does not show that accused held the British paper currency for more than twenty-four hours after his arrival in France. Accordingly, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of these specifications.

11. Specification 1, Charge II, alleges that on or about 28 June 1946 the accused in conjunction with Captain Vail misappropriated a 2½-ton 6x6 truck, property of the United States.

Misappropriation means devoting to an unauthorized purpose. The misappropriation of the property or money need not be for the benefit of the accused (MCM, 1928, par 150i, pp 184-185).

The elements of proof as stated in the Manual for Courts-Martial are:

"* * * (a) That the accused misappropriated * * * certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the acts of the accused was wrongfully or knowingly done, as alleged; and (d) the value of the property, as specified" (MCM, 1928, par 150i, p 185).

With respect to the specification the evidence shows that Alec Moutafolo asked accused if he could obtain a truck to transport cognac to Brussels. It was agreed that accused was to receive 50 francs per bottle in consideration for the transportation. Accused learned that Captain Vail was making arrangements through a mess officer to dispatch a truck to Brussels for the purpose of picking up champagne for the Biltmore Hotel Officers' Mess. Accused asked Captain Vail if he could arrange to transport cognac to Brussels and promised him 25 francs per bottle. Captain Vail completed his arrangements for the truck through the mess officer of the Biltmore Hotel Officers' Mess. The truck was to report to Captain Vail at his apartment, 53 Avenue Foch, Paris, on the morning of 27 June 1945. Accused was present with Moutafolo waiting for the truck on 27 June 1945. However, the truck did not appear on that date. On 28 June 1945, a 2½-ton 6x6 United States Army truck was dispatched by the MTS Motor Pool and reported to Captain Vail. Accused was not present at the time. The truck was loaded with 1490 bottles of cognac and driven to Brussels where the cognac was unloaded. Champagne was obtained in Brussels and delivered to the Biltmore Hotel Officers' Mess in Paris.

Moutafolo paid accused 100,000 francs for the use of the truck on 2 July 1945. Accused gave Vail 60,000 francs and apparently retained 40,000 francs for himself.

It was stipulated that a 6x6 2½-ton truck such as was described in the specification has a value in excess of $50.00.

It was contended by the defense that the accused could not be guilty of misappropriating a government truck because it had originally been dispatched for a legitimate purpose, and the accused was not profiting from the transaction in which the truck was used.

Although the evidence shows that accused retained 40,000 francs of the 100,000 francs paid by Moutafolo for the use of the truck, and that his original agreement with Captain Vail was that Vail was to receive 25 francs per bottle whereas Moutafolo had agreed to pay accused 50 francs per bottle, it is immaterial whether accused profited from the transaction.

Misappropriation means devoting to an unauthorized purpose. The misappropriation need not be for the benefit of the accused (MCM, 1928, par 150i). The appropriation may be resorted to for a friend or for the accommodation of a person interested with the officers in some business (Winthrop's Military Law and Precedents, 2nd Ed, 1920 Reprint, p 708).

There remains for consideration whether the legitimate mission of the truck affects the finding of guilty of this specification.

The ninth sub-paragraph of Article of War 94 states in pertinent part:

> "Who steals, * * *, knowingly and wilfully misappropriates * * * any ordnance, arms, equipment, ammunition, clothing, subsistance, stores, money, or other property of the United States furnished or intended for the military service thereof; * * *."

In CM 199841, Miotka (1932) (Dig Op JAG 1912-40, Sec. 452 (18); and in CM 221537, Hamilton (1942), the Board of Review held that there can be no misappropriation of property over which accused had no control or supervision. These cases were expressly overruled in CM 243287, Poole, 1943, wherein the Board of Review stated that the legislative purpose of the pertinent provision of Article of War 94 was to provide offenses not limited by the technicial descriptions of the ordinary crime of larceny and embezzlement to cover those cases where a person subject to military law makes wrongful and unauthorized use of Government property devoted to military service, without regard to whether such person obtained control of the property rightfully or wrongfully (III Bull, JAG (1944), p 236-237). We agree with the doctrine of the Poole case.

Accordingly, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1 of Charge II.

12. Numerous objections and motions were made by the defense during the course of the trial, many of which pertained to matters so well settled in law as to require no discussion in this opinion. All of the questions raised by the defense have been considered by the Board of Review, however only those requiring comment have been discussed above.

13. The accused is 36 years of age, unmarried and a high school graduate with two years of college. He enlisted in the Royal Canadian Air Force 29 January 1940 and was a flight sergeant when he was discharged to enter the Army of the United States. War Department records show that he served as an enlisted man from 11 December 1942 to 4 December 1943; was appointed a flight officer 21 December 1942; accepted a commission as second lieutenant, Army of the United States and entered active duty on 5 December 1943; was promoted to first lieutenant on 1 December 1944.

14. The Board of Review has given consideration to a letter addressed to The Judge Advocate General from Senator Edwin C. Johnson, dated 1 January 1946, and two inclosures thereto from Mr. Roy Lanyon, Longmont, Colorado; and a letter addressed to the Under Secretary of War from Senator Johnson, dated 10 June 1946, inclosing two letters, one from accused dated 31 May 1946, and the other from First Lieutenant Ernest H. Fidellow, dated 16 May 1946.

15. 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. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 2, 3 and 4 of Charge I, and Charge I, and Specification 1 of Charge II, and Charge II, but legally insufficient to support the findings of guilty of Specifications 5, 6 and 7 of Charge I, and is legally sufficient to support the sentence and to warrant confirmation thereof. A sentence to dismissal, total forfeitures, to pay a fine of $7,500, and to confinement at hard labor for three (3) years is authorized upon a conviction of violations of Articles of War 94 and 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 307097 1st Ind NOV 1 4 1946

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert H. Mellinger (0-2044919), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of conspiracy to engage in business in the European Theater of Operations (Chg I, Specs 1, 3), wrongfully engaging in business (Chg I, Specs 2, 4) and of wrongfully holding British currency in the liberated territory of France (Chg I, Specs 5, 6, 7, 9), all in violation of Article of War 96, and of misappropriation of a United States Army truck in violation of Article of War 94 (Chg II, Spec 1). No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, to pay a fine of seven thousand five hundred dollars, to be confined at hard labor for three (3) years and to be further confined at hard labor until payment of the fine but not more than six (6) months in addition to the three (3) years so adjudged. The reviewing authority disapproved the findings of guilty of one of the four specifications involving holding of British currency, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 2, 3 and 4 of Charge I and Charge I and Specification 1 of Charge II and Charge II, but legally insufficient to support the findings of guilty of Specifications 5, 6 and 7 of Charge I and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

The accused was a pilot and operations officer attached to Headquarters Communication Zone, European Theater of Operations, United States Army and was stationed at Orly Field, France. His duties involved frequent flights between France and England. Engaging in business and importing, holding, transferring, exporting or dealing in British currency in the liberated territory of France were forbidden by directives published by Headquarters, European Theater of Operations. Accused entered into an agreement with two French and one British civilians, pursuant to which, on several occassions, he imported British paper and gold currency, gold bullion and diamonds into France from England, and was paid 30,000 to 40,000 francs per trip or a total of about 150,000 francs. In addition, he received three gold watches for these services. He also entered into an agreement whereby he loaned 300,000

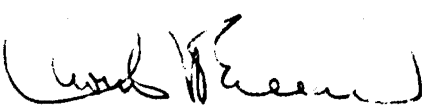
francs to a French civilian for the purpose of buying cognac in Paris, France, for resale in Brussels, Belgium. In addition to advancing the funds for the purchase of cognac, he arranged with a Captain Vail that a truck, which was to be dispatched to Brussels on a legitimate mission, be made available to the French civilian for the purpose of transporting cognac to Brussels. The civilian offered to pay accused 50 francs per bottle for transporting the cognac and accused in turn agreed to pay Captain Vail 25 francs per bottle. Pursuant to these agreements 1490 bottles of cognac were purchased in Paris, loaded on a United States Army 6x6 2½ ton cargo truck and driven to Brussels. Accused declined to accept any part of the profit accruing from the sale of cognac, but he received 10,000 francs interest for the loan of the money and 100,000 francs for the use of the truck. He paid Captain Vail 60,000 francs for the use of the truck and retained 40,000 francs for himself.

4. Consideration has been given to a letter received from Senator Edwin C. Johnson, dated 1 January 1946, with two inclosures thereto from Mr. Roy Lanyon, Longmont, Colorado, and a letter addressed to the Under Secretary of War from Senator Johnson, dated 10 June 1946, inclosing a letter from accused dated 31 May 1946, and a letter from First Lieutenant Ernest H. Fidellow, dated 16 May 1946, written on behalf of the accused.

The record of trial shows that Captain Vail, who was involved with accused in the cognac transaction and the misappropriation of the truck was promised that clemency would be recommended in his behalf, if he were tried, in consideration for his testifying against accused in the instant case. The records of my office do not indicate that Captain Vail has ever been tried for his participation in the offenses alleged herein.

5. I recommend that the findings of guilty of Specifications 5, 6 and 7 of Charge I be disapproved and that the sentence be confirmed, but that the confinement be reduced to eighteen (18) months and that the fine and the additional confinement contingent upon the nonpayment of the fine be remitted, that a United States Disciplinary Barracks be designated as the place of confinement and that the sentence as thus modified be carried into execution.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 357, 21 November 1946).

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

SPJGK - CM 307101

19 APR 1946

UNITED STATES v. First Lieutenant ROSS D. ALLEN (0-1580567), Quartermaster Corps.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, 19 December 1945. Dismissal, and confinement for two (2) years.

HOLDING by the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Ross D. Allen, Quartermaster Corps, 1850th Service Command Unit, Camp Chaffee, Arkansas, did, at Camp Chaffee, Arkansas, on or about 19 March 1944, feloniously embezzle by fraudulently converting to his own use a 1935 ton and a half Chevrolet cargo truck, value in excess of $50.00, the property of the United States, entrusted to him by the United States.

Specification 2: In that First Lieutenant Ross D. Allen, ***, did, at Camp Chaffee, Arkansas, on or about 19 March 1944, feloniously embezzle by fraudulently converting to his own use a 1942 one half ton Chevrolet pick-up truck, value in excess of $50.00, the property of the United States, entrusted to him by the United States.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For reasons hereinafter stated, the Board of Review holds that the court was without jurisdiction to adjudicate the issues presented and that therefore the proceedings were void. In view of this holding, consideration of the evidence will be omitted.

4. The record of trial reveals that accused was commissioned a second lieutenant in the Army of the United States on 15 November 1942 and entered on active duty the same date (R. 73). He was relieved from active duty and reverted to inactive status on 15 November 1944, at which time he received a Certificate of Service (R. 73,74, Def. Exs. 1,2,3). Thereafter he remained on inactive status, dressed as a civilian, and performed no military duties until September 1945 (R. 75,76). By paragraph 20, Special Orders 218, War Department, 12 September 1945, he was ordered to active duty effective 17 September 1945 (R. 75, Def. Ex. 4). On 2 October 1945 a Charge and two Specifications were drawn and sworn to alleging the commission by him of two offenses of embezzlement on 19 March 1944 in violation of Article of War 93. The Charge and Specifications were subsequently investigated under the provisions of Article of War 70, referred for trial by general court-martial 5 November 1945, and trial had thereon 19 December 1945.

The procedure outlined in the preceding paragraph presents the question whether an officer of the Army of the United States on inactive status may be recalled to active duty and thereafter be tried for an alleged violation of Article of War 93 committed prior to his relief from active duty, where the offense alleged is not one in which jurisdiction is retained by the express provisions of Article of War 94.

The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a re-entry into the military service (par. 10, MCM, 1928). To the general rule there are, however, some exceptions, among them the following: (1) persons under sentence adjudged by courts-martial; (2) a soldier who obtained his discharge by fraud; (3) a person whose discharge or other separation did not interrupt his status as a person subject to military law, such as discharge for the purpose of accepting a commission; and (4) "certain cases of fraud and embezzlement" under the provisions of the 94th Article of War (MCM, 1928, par. 10; AW 94). Under the provisions of Article of War 94 if any person subject to military law -

> "*** steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistense stores, money, or other property of the United States furnished or intended for the military service thereof; *** and *** receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." (underscoring supplied)

The same Article of War also provides -

"And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls."

It is thus clear that under the express provisions of Article of War 94 it is contemplated that under certain circumstances an individual, although discharged from the service, continues to remain liable to be arrested and held for trial and sentence by a court-martial. Nothing therein requires that the accused be on active duty at the time of trial, jurisdiction being retained by reason of the nature of the offense committed. Such circumstances however are not present in this case. There is no allegation that the property alleged to have been embezzled was property of the United States furnished or intended for the military service nor that the property alleged to have been embezzled was ration savings, post exchange, company or other like funds nor was it property intrusted to an officer by an enlisted man or men.

In CM 283459, Reid (4 Bull JAG 339), the accused officer was charged under Article of War 93 with having embezzled cigarettes, the property of the non-commissioned officers' club. Accused was an officer of the Army of the United States on active duty at the time of the alleged offense but had been relieved from active duty prior to the time charges were preferred and was in an inactive duty status at the time of trial. The Board of Review held therein that the offense charged was not one falling within the provisions of Article of War 94 and therefore the relief of accused from active duty deprived the court of jurisdiction. The holding in effect established that the relief from active duty of an officer of the Army of the United States is tantamount to "discharge or other separation" from the service within the contemplation of paragraph 10, Manual for Courts-Martial, 1928, and is in accordance with express opinions of this office (SPJGJ 1946/1791, 14 Feb 46; SPJGJ 1945/841, 16 Mar 45; SPJGJ 1944/8535, 6 Dec 44, 5 Bull JAG 35).

The fact that the accused in the case under discussion was recalled to active duty and was on such duty at the time of trial does not remove it from the principles enunciated in the cited case. It is well settled that jurisdiction as to an offense committed during a period of service terminates by discharge or other separation from the service and is not revived by a re-entry into the military service (par. 10, MCM, 1928; CM 217842, Sierer, 11 BR 327; CM 204194, Preston, 7 BR 321).

5. For the reasons stated, the Board of Review holds that the court was without jurisdiction and therefore the record of trial is legally insufficient to support the findings of guilty and the sentence.

Herman Mayo, Judge Advocate

William B. Huder, Judge Advocate

Earl W. Wrigo, Judge Advocate

SPJGK - CM 307101 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: Commanding General, Eighth Service Command, Army Service Forces, Dallas 2, Texas.

1. In the case of First Lieutenant Ross D. Allen (O-1580567), Quartermaster Corps, I concur in the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence, and for the reasons stated recommend that the findings and sentence be disapproved.

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

(CM 307101).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

SPJGN-CM 307104

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Butner, North Carolina, 12 February 1946. Dismissal.
	)	
Second Lieutenant THOMAS W. MACEJAK (O-1688355), Infantry.	)	

OPINION of the BOARD OF REVIEW
HEPBURN, O'CONNOR and MORGAN, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Thomas W. Macejak, Company F, 12th Infantry, did, without proper leave, absent himself from his organization at Camp Butner, North Carolina from about 8 January 1946, to about 1 February 1946.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence but remitted the forfeitures and confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution: There was introduced in

evidence without objection an extract copy of a Special Order of the 35th Headquarters and Headquarters Detachment, Special Troops, First Army, Camp Rucker, Alabama, dated 19 December 1945, which relieved the accused from that organization, transferred him to the 4th Infantry Division, Camp Butner, North Carolina, ordered him to proceed on or about 22 December 1945, and granted him fifteen days delay en route (R. 7; Pros. Ex. 1). An extract copy of the morning report of the same organization, admitted in evidence without objection, indicated that the accused departed from Camp Rucker on 24 December 1945 (R. 7; Pros. Ex. 2). An extract copy of the morning report of Company "F", 12th Infantry Regiment, admitted in evidence without objection, showed that accused joined that organization on 2 February 1946 from "35th Hq & Hq Det Sp Trs First Army Cp Rucker Ala" (R. 7; Pros. Ex. 3).

4. The accused, having been advised concerning his rights as a witness, elected to testify in his own behalf (R. 8). He was commissioned in Italy in July 1945 and returned to the United States on 26 August. While on his "leave" at his home in Chicago, Illinois, his wife was "expecting a baby" and was ill. About two days before his leave terminated, he sent a telegram to Camp Rucker, Alabama, requesting an extension. He never received any reply, so he stayed at his home to try to help his wife. He had not received any leave previously and had no occasion to seek an extension of a leave. One officer, called as a witness, testified that accused was in the military service of the United States, that he was formerly a platoon sergeant, and that his character and the nature of the performance of his duties were superior (R. 8).

5. The accused has been found guilty of absenting himself from his organization without proper leave from about 8 January to 1 February 1946. The evidence adduced by the prosecution and not denied or contradicted by the accused clearly established that the accused was transferred from Camp Rucker, Alabama, to Camp Butner, North Carolina, on 19 December 1945, ordered to proceed on or about 24 December 1945, and given fifteen days delay en route in the nature of leave. He departed in accordance with this order but failed to arrive at Camp Butner until 2 February 1946. The accused frankly admitted that he overstayed his leave because of the illness of his wife, and in mitigation related that he requested an extension of his leave but received no answer to his request. The court was therefore justified in finding that the accused was absent without leave from Camp Butner - the place where accused was required to be - from and after 8 January 1946 until his arrival on or about 2 February 1946. The findings of guilty are therefore supported by the evidence.

6. War Department records show that accused was born 2 May 1924. His permanent address is Chicago, Illinois. He graduated from high

school and for one year was employed as a machinist. He is an accomplished accordian player. On 13 March 1943 he was inducted into the service and served as an enlisted man in the Infantry, reaching the grade of sergeant, until 14 July 1945 when he was commissioned second lieutenant AUS. According to accused's testimony he was recently married.

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. Dismissal is authorized upon conviction of a violation of Article of War 61.

Earle Hepburn, Judge Advocate.

Robert J. Glamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 307104 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War 21 March 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas W. Macejak (0-1688355), Infantry.

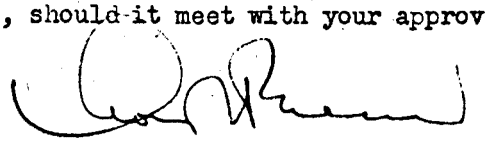
2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of 23 days from his station, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence but remitted the forfeitures and confinement, and forwarded the record of trial for action under Article of War 48.

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

The accused, who had recently returned from overseas duty, was transferred from Camp Rucker, Alabama, to Camp Butner, North Carolina, and granted fifteen days leave en route. He went to his home in Chicago, Illinois, and failed to report at his new post until 23 days after his leave had expired. He had recently married and claimed that his wife was pregnant and ill and failing to receive any reply to his telegram requesting an extension of leave overstayed his leave. While his conduct is inexcusable nevertheless in view of his previous good military record and inexperience as an officer I recommend that the sentence of dismissal be confirmed but commuted to a reprimand and a forfeiture of $50 of his pay per month for three months, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from Honorable C. Wayland Brooks, United States Senate, in behalf of accused.

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



3 Incls
1 - Record of trial
2 - Form of action
3 - Ltr. fr. Hon. Brooks

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 108, 7 May 1946).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH - CM 307107

24 APR 1946

U N I T E D S T A T E S	)	SOUTH PACIFIC BASE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Noumea, New Caledonia, 19-20
Captain HARRY J. HART	)	November 1945. Dismissal and
(0-2042771), Infantry.	)	total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification 1: In that Captain Harry J. Hart, attached unassigned Personnel Center, South Pacific Base Command, APO 502, up to 14 April 1945, First Lieutenant, Headquarters, New Caledonia Island Command, did, at APO 502, wrongfully seek, solicit, plan, arrange for and pursue the company and association of Technician Fifth Grade Eston L. Buster, an enlisted man, from about 1 August 1944 to about 4 August 1945 and from time to time during said period, and did wrongfully on or about 27 November 1944, at APO 502, spend the night in the same room at a hotel in La Foa with said Technician Fifth Grade Eston L. Buster and during said night did, indecently, lewdly, and unbecomingly place his hand upon, stimulate, and cause an ejaculation from the penis of Technician Fifth Grade Eston L. Buster.

Specification 2: In that Captain Harry J. Hart, attached unassigned Personnel Center, South Pacific Base Command, APO 502, then, First Lieutenant, Headquarters, New Caledonia Island Command, did, at APO 502, on or about 27 November 1944, conduct himself in a manner unbecoming an officer and gentleman in that he made improper advances toward Technician Fifth Grade Eston L. Buster, an enlisted man, by placing his hand upon the penis of said Technician Fifth Grade Eston L. Buster.

Specification 3: (Findings of not guilty).

Specification 4: (Findings of not guilty).

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

Specification 1: In that * * *, did, at APO 502, on or about 27 November 1944, wrongfully drink intoxicating liquor in the presence and company of Technician Fifth Grade Eston L. Buster, an enlisted man.

Specification 2: (Findings of not guilty).

Specification 3: In that * * *, did, at APO 502, from about 1 August 1944 to about 4 August 1945, wrongfully seek, solicit, plan, arrange for, and attempt to be in the company and association of Technician Fifth Grade Eston L. Buster, an enlisted man, thereby causing said Technician Fifth Grade Eston L. Buster great mental stress, embarrassment, and anxiety, such conduct on the part of Captain Harry J. Hart being to the prejudice of good order and military discipline.

Accused pleaded not guilty to all Charges and Specifications, was found not guilty of Specifications 3 and 4 of Charge I and of Specification 2 of Charge II, and was found guilty of all other Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. Thereafter the sentence was confirmed by the Commanding General, United States Army Forces, Pacific, but the forfeitures were remitted and pursuant to Article of War 50½ the order directing the execution of the sentence was withheld. The record of trial was thereafter forwarded for statutory review to the Branch Office of The Judge Advocate General, United States Army Forces, Pacific. Before review by that office was accomplished, the powers conferred by direction of the President upon the Commanding General, United States Forces, Pacific, under the provisions of Articles of War 48, 49, 50 and 50½ were terminated. Accordingly, the record of trial was then forwarded for statutory review to the Office of The Judge Advocate General, Washington, D. C.

3. The prosecution introduced evidence to show that in July or August 1944, while stationed in New Caledonia, Technician Fifth Grade Eston L. Buster, 20 years of age, was introduced to accused by a Sergeant Ryan following church services one day. Accused was serving as aide-de-camp to a General Rose at the time. That evening at accused's invitation, Buster and Ryan had dinner with him in a French restaurant in Noumea. Following dinner Buster visited briefly with accused in the latter's apartment and then

accused drove him home (R.14). Sometime during this first meeting accused recited a particular poem which, to Buster, indicated that accused was not as good a Christian Scientist as he professed to be (R.29). About two weeks after this incident Buster was invited by accused to dine at the home of a French family in Dumbea. Buster accepted the invitation and accompanied accused on this social visit (R.15). Later, in September 1944, accused encountered Buster at the post exchange and asked Buster to accompany him on a visit to the home of a lady friend with whom he was having some difficulty. Buster understood he was to serve as a chaperon of some description and he accompanied accused on this visit (R.15,63). Sometime in October 1944, at accused's invitation Buster flew with him to visit Oua Tom, apparently a place located on New Caledonia (R.15,16).

The following month, November 1944, accused telephoned First Lieutenant Roger D. Kauffman, an officer in Buster's organization, and asked that Buster be relieved from duty for a short time so that he might drive accused on an overnight trip. Buster was given a two-day pass and on or about 27 November 1944 Buster drove accused's jeep to Division Headquarters near La Foa where he picked up accused (R.16,77). They then drove to the Hotel Banu in La Foa, arriving there about 7:30 p.m. After accused conversed in French for awhile with Mr. Banuelos, the operator of the hotel, Buster and accused were shown two guest rooms in a building located in the rear of the hotel and thereafter accused and Buster had dinner together in the hotel. Mr. Banuelos visited with them during dinner, he and accused drinking wine and talking. Buster testified that he drank no wine although he did taste a spoonful of egg brandy. Mr. Banuelos, however, testified that Buster drank two small glasses of wine during dinner and that it made him slightly intoxicated (R.17,18,46-49,51).

As to events thereafter transpiring, Buster testified as follows. Sometime after dinner he and accused went to one of the rooms that Mr. Banuelos had shown them. There were three rooms on this floor and the room accused and Buster entered was the right hand room. Accused removed his clothing, entered the double bed and told Buster he had better "come on and get into bed." Although accused had consumed several glasses of wine the previous evening he did not appear drunk. Concluding that but one room had been assigned them, Buster undressed except for his shorts and entered the double bed. Although he did not customarily wear shorts, he wore them on this trip because of the probability that he would share a double bed with accused. They chatted for awhile and then accused arose and exhibited to Buster some indecent pictures. Thereafter the lights were extinguished and as Buster commenced to fall asleep, accused "started to crowd" him, threw one arm across Buster's body and said, "Let's be democratic and share your shorts." Buster made no comment and accused soon withdrew his arm. Buster then rolled onto his back whereupon accused threw his arm over Buster's stomach. By then Buster was "sexually aroused and rather embarrassed" and he placed his hand over his shorts to cover his privates. Accused withdrew his arm whereupon Buster removed his hand covering his privates. Soon accused put his

hand on Buster's penis and threw his leg across Buster's body (R.18,19,32,34). Buster then testified that (R.19):

> "He took his hand and put it on my hand and placed my hand on his penis which was erect and I removed my hand. He repeated this several times and then he took the heads of the two penises and rubbed them together and I had an ejaculation on his body."

Thereafter accused rolled onto his back and indulged in an up and down motion which made the bed squeak. Following that he reached out of bed for a handkerchief and then grasped hold of Buster's penis and "pulled it toward him several times" whereupon Buster arose from the bed. He thereafter lay for awhile upon a cot in the room but since it had no mosquito bar he finally returned to the bed about 3:30 or 4:00 a.m. where he remained for about an hour and a half until morning (R.20,21).

Mr. Banuelos testified that after dinner that evening he conducted accused and Buster to the two rooms he had previously shown them but he did not remember whether they entered the same or different rooms. These two rooms were identified as the left and the center rooms. The room to the right Mr. Banuelos claimed as his own room. It had a small cot and a "double chair wicker" in it but the other two rooms had only double beds (R.49,53,55,56).

A night or two after Buster's return from La Foa he told his tentmate, Sergeant James F. Brandau, about his experience with accused and was advised to stay away from accused and forget the incident because there was too much rank involved (R.22,23,63-65). For two or three months following the La Foa incident, Buster remained away from church although he was a very religious person, so as to avoid accused (R.25,38,66). During that period, in January or February 1945, accused telephoned Buster about a new regulation relative to direct commissions and appointments as warrant officers and asked Buster to have dinner with him and Lieutenant Ryan, formerly Sergeant Ryan, but Buster refused (R.23,38). Accused also called an officer in Buster's organization and urged that Buster be recommended for a direct commission (R.78).

In June 1945, while Buster and a Corporal Guffey were removing telephone equipment from a discontinued telephone exchange, accused invited him to look over a prepared account of accused's trip to Tahiti which Buster did in the presence of another officer and an enlisted man (R.25,26,73). One day after church in July 1945, Buster, who was driving a vehicle, was asked by accused to drive him and a naval officer to accused's apartment. When they arrived at accused's quarters Buster accepted his invitation to have a sandwich and some orangeade (R.25). Another day, late in July 1945, accused walked with Buster from church to the post exchange where they encountered Lieutenant Kauffman, an officer in Buster's organization, and accused embarrassed Buster by asking Lieutenant Kauffman when Buster was to receive another stripe (R.26,79). About 2 August 1945 Buster was detailed to remove accused's

telephone to his new quarters. When Buster met accused at his office the latter placed a five gallon can of paint in the truck. Buster remarked that he desired some paint for his tent whereupon accused replied that he could obtain it for him from the Seabees. Later accused called Buster and told him the paint was available. Buster regretted having made any mention of his desire for paint (R.26,74,75). For the seven months prior to institution of Charges against accused, Buster attended church on the average of two or three times a month and saw accused there frequently. Almost every time accused would invite Buster to have dinner with him but Buster would always refuse (R.27,39).

After the La Foa incident, Sergeant Brandau observed that Buster seemed to have changed; he noticed that he appeared worried. Buster testified that during the summer of 1945 he became nervous, irritable and argumentative and that in July or August 1945 he received his first reprimand in the Army from Sergeant Plant, his superior (R.27,66). Finally on 5 or 6 August 1945, Buster felt about "at the end of (his) rope" and because the situation was affecting his work he decided to follow the advice of Technician Fourth Grade Clifton H. Guffey and tell Lieutenant Kauffman of the La Foa incident (R.27,41,74). He visited the lieutenant that evening in the orderly room and, upset and nervous, he related the La Foa incident. Buster had been a good soldier and a good worker. He had never been known to drink or smoke even at company parties (R.63,79,80). Other than the incident at La Foa no sexual improprieties occurred between accused and Buster (R.45). Buster testified he had never indulged in sexual intercourse or had any experience similar to the La Foa incident before (R.21).

During the investigation of the instant offenses accused was asked if he failed to have any recollection of the La Foa incident because of intoxication and he replied:

> "Except that we did sleep in the same room, but I have known myself all my life, I have known what company I have kept; and particularly in New Caledonia, where I had the advantage over almost everybody down there because of speaking French, and was able to get a date with darn near any girl I wanted . . .".

Later in the investigation accused stated:

> "I think the good which I have done for the Government over such a long period of time would entitle me to an honorable discharge even admitting that I were drunk and consequently committing an indiscretion being drunk at La Foa" (Pros. Ex. 3).

4. The defense offered evidence to show that on the morning after the La Foa incident, according to the testimony of Joseph Banuelos, Buster informed Banuelos that he was sorry that he had vomited in the hotel bed (R.57).

Madame Thiole Bounard, sister-in-law of Banuelos, testified that she tended the three rooms in the hotel annex on the morning after the alleged affair; that she found vomit in the bed located in the left room; that Banuelos had slept in his own room, the right room, the previous night; and that the bed in the third room had also been occupied. She changed the sheets in the left and center room and found no evidence of "dreams." There was no cot in the room where the vomit was found, the only cot being in Banuelos' room (R.58-61). She further testified that when military investigators came to the hotel about two weeks prior to the date of this trial they did not ask her anything but spoke mostly to Banuelos (R.60).

After accused had been advised of his rights he elected to give sworn testimony in his own behalf and he testified as follows. He arrived in New Caledonia in March 1942 as an enlisted man and about one year later was commissioned a second lieutenant. He was eventually appointed aide-de-camp to Brigadier General Owens and also served in the same capacity with General Rose, the successor to General Owens (R.98-100). In August or September 1944 accused first met Buster at church and they, together with Sergeant Ryan, had dinner (R.98-100). Accused took Buster and two other individuals on a plane ride to Oua Tom (R.101).

Accused invited Buster to drive his vehicle on the La Foa trip because Buster had once mentioned in church that if accused was ever going to take a trip up the island he would like to accompany him. Accused took Buster to the Hotel Banu because accused had known Mr. Banuelos for some time and had a standing invitation to use the hotel's facilities. Mr. Banuelos showed accused and Buster the two rooms they were to occupy and then he had dinner served to them in the hotel dining room where other people were present (R. 102,106,109). Buster tasted a spoonful of some sort of liquor before dinner and during dinner they were served a bottle of French wine of which Buster partook a couple of glasses. The drinks appeared to affect Buster. Accused had consumed some bourbon and water and a glass of beer during the middle of the afternoon, an apertif before dinner and two glasses of wine during dinner. When he retired he felt the effects of alcohol and was drowsy (R.103,104,118).

Mr. Banuelos had placed the left and center rooms at the disposal of accused and Buster. Before retiring they chatted for awhile with Mr. Banuelos in his room, the right room. Thereafter accused went to the left room, undressed and retired, feeling drowsy from the drinks he had consumed. Buster followed him to that room and he undressed and entered the bed accused was occupying (R.103,104). Accused did not "remember too well" what transpired thereafter but as he recollected he fell asleep promptly and was later awakened when Buster vomited in the bed. Accused then arose and moved to the center room. So far as accused recollected there was no cot in either the left or center room (R.105).

Following the La Foa trip Buster had lunch in accused's quarters on two occasions. The only time subsequent to that trip that accused sought to

contact Buster was with respect to the new regulations on direct commissions and all other meetings were by chance (R.106,107). Accused had himself received a direct commission, his friend Sergeant Ryan was about to receive one and accused made it a point to help enlisted men in that regard (R.113).

Accused took Buster to meet his French girl friend because accused was intending to sever his relations with her and he thought Buster would be interested in meeting her since he had no female friend on the island (R.107, 108).

With respect to the indecent pictures that Buster asserted accused showed him in the hotel room, the following cross-examination of accused was conducted, viz (R.112):

"Q. Did you show any lewd pictures to Buster on that evening?

A. I don't have any recollection of what went on after I went to bed.

Q. You just don't remember whether you did or did not?

A. I didn't have any with me.

Q. You don't carry lewd pictures with you. Is that correct?

A. I won't say I have never in my life.

Q. But you didn't that night?

A. Not as far as I remember."

Accused asserted that after the La Foa incident he was transferred to Hawaii and was given the opportunity to return to the United States to be separated from the service but instead he chose to stand trial for the alleged offenses (R.120,121).

Colonel Raymond F. Field, Lieutenant Colonel Jack H. Weske, Lieutenant Colonel Fred L. Smith, Technical Sergeant Jerry C. Martin, Technician Fourth Grade James R. Carnes, and Technician Fifth Grade Etienne Strein all testified with respect to accused's good character stating variously that his reputation for character and morals was excellent (R.123-129). According to accused's WD AGO Form No. 66-1, he had one Superior rating and eight Excellent ratings (R.130;Def. Ex.E). For performance of his duties as aide-de-camp and as a Civil Affairs officer he had received letters of commendation

from Brigadier General Ray L. Owens, Brigadier General William I. Rose, Vice Admiral W. L. Calhoun, United States Navy, and Rear Admiral Paul Hendren, United States Navy (R.131, Def. Exs.F,G,H and I).

5. In rebuttal Master Sergeant Warren L. Jordan testified for the prosecution that on 8 November 1945 when he visited the Hotel Banu while investigating the Charges against accused, he interviewed Mrs. Thiole Bonnard, the sister-in-law of Mr. Banuelos, for about twenty-five minutes but she was very vague. She did not recall what room or rooms accused occupied on his visit to the hotel, did not remember whether or not she found the beds disarranged the next morning and she continuously referred Jordan to Mr. Banuelos for information (R.132-134).

6. a. Charge I, Specification 1

Under this Specification accused is charged (a) with wrongfully soliciting the company of Buster over the period from 1 August 1944 to about 4 August 1945, and (b) with indecent sexual intimacy with Buster on 27 November 1944. It is clear that this Specification purports to allege two separate and distinct offenses. Assuming for the moment that each offense is sufficiently alleged, the misjoinder of two offenses in a single Specification is not fatal error although it is not approved practice (CM 247496, Egalnick, 30 BR 361). Substantially the same offense as was alleged in the first part of this Specification is alleged as a violation of Article of War 96 in Specification 3 of Charge II. We will consider those two offenses hereafter, confining ourselves for the moment to a consideration of the second offense alleged in this Specification 1 of Charge I. The prosecution's testimony as well as that of accused himself reveals that opportunity existed for commission of this offense. As to actual commission thereof the evidence is conflicting. Buster, the prosecuting witness, testified fully as to events which established the offense and in such a case as this, accused's conviction may be sustained upon the uncorroborated testimony of that witness (CM, 228524, Moser, 16 BR 219; CM 241161, Moore, 26 BR 207). Accused denied commission of the offense and certain parts of his testimony relative to pertinent events occurring that night were substantiated by the testimony of the hotel owner and his sister-in-law. These last two individuals, however, were obviously friendly to accused and it lay within the province of the court to determine what credence was to be accorded their testimony. The fact that Buster delayed some ten months before officially reporting the incident was a circumstance to be considered by the court in determining the weight to be attached to his testimony. Conversely, the evidence as to complaints made by Buster to other enlisted men, one of which at least was made promptly after his return from the La Foa trip, was relevant matter tending to corroborate his testimony (Wharton's Criminal Law, 12th ed., Vol. 1, sec. 727). Upon all of the evidence it cannot be said that the court was unwarranted in finding accused guilty of at least so much of Specification 1 of Charge I as involved indecent sexual intimacy with Buster. Such conduct clearly was violative of Article of War 95 (CM 244212, MacFarlane, 28 BR 217).

b. Charge I, Specification 2

The offense alleged in this Specification refers to the conduct of accused following the initial act of improper familiarity with Buster. Although it occurred but a short time after the original act, it was a separate and distinct act. It was not a part of a continuous course of improper relations since the initial intimacy had been concluded before accused committed the offense here alleged. The comments we have made above with respect to the evidence introduced to establish the offense alleged in Specification 1 are likewise applicable here and repetition thereof is unnecessary. In our opinion the evidence warranted the court's findings of guilty of this Specification 2 of Charge I.

Contrary to the contentions of defense counsel, War Department Circular No. 3, 3 January 1944 did not preclude accused's trial for these two incidents of indecent conduct. By its very terms that circular is declarative of policy only and does not constitute a jurisdictional limitation upon the power of general court-martial authority.

c. Charge II, Specification 1

Accused is here charged with wrongfully drinking intoxicating liquor in the presence of an enlisted man. Concededly, under certain circumstances, it is violative of Article of War 96 for an officer so to indulge himself. It is improper for an officer to drink liquor in the presence of enlisted men when the organization is in actual contact with the enemy (CM ETO 15858, Ingham; CM ETO 7246, Walker), or while the officer is performing duty (CM ETO 8731, Sirois). However, it is not per se a military offense for an officer to drink intoxicating liquor in the presence of enlisted men. Were it so, every officer would be guilty of such offense every time he entered a public bar, night club, or cocktail lounge, and had a drink at a table adjoining that of an enlisted man or at an adjacent stool at the bar. Indeed, as the very record of trial shows, there were certain social gatherings of enlisted men and officers within accused's command sponsored and approved by superior authority, where both enlisted men and officers imbibed intoxicating liquor in each other's presence. If such conduct were per se a military offense, it would be none the less so even though superior authority countenanced it. For an officer to drink in the presence of an enlisted man does constitute an offense only, however, if it is done under such circumstances as in fact do violate the proscription of Article of War 96.

Turning to the evidence here before us it appears that while dining in the evening with his driver, an enlisted man, in a public hotel and while in the company of the hotel proprietor, accused had an apertif and two glasses of wine. It does not appear that he was performing duty at the time, that he created even the slightest disturbance or that there was any undue conviviality. So far as the record reveals he consumed a moderate amount of wine in a gentlemanly manner and conducted himself with propriety. Certainly if

accused had dined alone in this hotel with enlisted men at adjoining tables and consumed the same amount of liquor in a similar manner, his conduct would have been subject to no objection. We cannot say on the evidence before us that the presence of an enlisted man at the table was of itself a sufficient fact to brand accused's conduct as violative of Article of War 96. In our opinion the evidence does not sustain the findings of guilty of this Specification.

d. Charge II, Specification 3 and balance of Charge I, Specification 1

Under the first part of Charge I, Specification 1, accused was charged with wrongfully seeking, planning and pursuing the company of the enlisted man, Buster, from 1 August 1944 to 4 August 1945, in violation of Article of War 95; and under Charge II, Specification 3, he was charged with similarly seeking the company of the same enlisted man over the same period thereby causing the enlisted man great mental stress, embarrassment and anxiety, all to the prejudice of good order and military discipline, in violation of Article of War 96. The proof shows that in July or August 1944 Buster had dinner one Sunday evening with accused and a sergeant. About two weeks thereafter Buster accompanied accused to the home of a French family for dinner. In September 1944 Buster accompanied accused on a visit to the home of a girl friend of accused. In October 1944 Buster flew with accused to a place called Oua Tom. So far the evidence does not indicate any such continuous pursuit of the company of Buster as would brand accused's conduct as improper. The only reasonable conclusion to be drawn from this evidence is that Buster willingly accepted these invitations and accompanied accused on the various visits and trips. It does not appear that there was any constraint upon Buster or that he was harrassed with unwelcomed advances at least up to November 1944. Accordingly, the evidence of their association up to November 1944 does not establish, or even tend to establish, either of these alleged offenses.

The first time accused contacted Buster after the La Foa incident on 27 November 1944 was in January or February 1945 when accused telephoned Buster relative to a new directive concerning direct commissions and invited him to dine with accused and another officer. Buster testified that he met accused on four other specific occasions in June, July and August 1945. These meetings occurred either at church or when Buster's duty took him into the accused's presence. Certainly there is no evidence that accused planned or arranged to be in the same place where Buster was performing duty. Equally obvious is it that accused was entitled to attend church if he wished. He attended church before the La Foa incident and his mere attendance thereafter, standing alone, cannot reasonably be construed as a part of a scheme on his part to enjoy the company of Buster. All of these four meetings were purely chance meetings so far as the evidence in this record reveals.

The final evidence as to these two offenses is Buster's general testimony that for the seven months prior to institution of these Charges he attended church on the average of two or three times a month, saw accused

there frequently and almost every time accused invited him to dinner which Buster refused. The evidence does not show whether the invitations were extended casually and the conversation concluded after rejection thereof or whether accused repeatedly and insistently urged acceptance of his invitations after Buster's refusal. As we have said, accused had a right to attend church and certainly no inference of improper conduct can be drawn from that fact alone. All that could have been improper on his part under these circumstances would have been continuously to have pestered Buster with insistent and unwelcomed invitations as a part of a scheme to insinuate himself into Buster's company. Without having some evidence as to the number of invitations issued Buster and as to accused's manner in extending them the court had inadequate evidence from which to conclude that accused was pursuing a plan of seeking the company of Buster. Buster's very general testimony was utterly insufficient to warrant an inference that over that period of seven months accused did "wrongfully seek, solicit, plan, arrange for, and attempt to be in the company and association" of Buster.

True, Buster testified that accused's conduct caused him worry and embarrassment. Possibly, one encounter with accused after the La Foa incident would have caused a similar reaction. In any event, the essence of these two offenses is not the causing of worry and embarrassment to Buster; the essence is that accused sought, solicited, planned, arranged for, and attempted to be in Buster's presence thereby producing such an effect. Accused's conviction of these two offenses can only be sustained, no matter what the effect may have been on Buster, if the evidence established beyond a reasonable doubt that accused did seek, solicit, plan and arrange to be in Buster's presence. Clearly, the evidence that accused met Buster when their paths of duty crossed, that he met him at regular church services and that he extended an unknown number of dinner invitations in an undescribed manner is utterly insufficient to establish such a design. In our opinion the evidence does not establish commission of the matters alleged in either the first portion of Specification 1 of Charge I or in Specification 3, Charge II.

7. Accused is 27 years of age and unmarried. He graduated from Northwestern University in 1939 and from 1939 to 1941 he was assistant branch manager of an automobile finance company. He entered military service in March 1941 and reached the grade of staff sergeant. On 25 February 1943 he received a direct commission as second lieutenant while serving in the South Pacific on New Caledonia. On 9 May 1944 he was promoted to first lieutenant and on 14 April 1945 he was promoted to captain. On 2 October 1945 he submitted his resignation for the good of the service, promptly thereafter forwarded a withdrawal thereof and on 26 October 1945 his resignation was not favorably considered by The Adjutant General.

8. On 15 April 1946, Attorneys Seymour S. Guthman of Washington, D. C., and Maurice Parker of Pittsburgh, Pennsylvania, appeared before the Board of Review on behalf of the accused and were accorded a full hearing. Matters

covered by them both in their brief and in their oral argument have received the full consideration of the Board.

9. The court was legally constituted and had jurisdiction of the accused and the offenses. Except as noted above, 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 insufficient to support the findings of guilty of Specifications 1 and 3 of Charge II and Charge II and of so much of Specification 1 of Charge I as involves the alleged seeking, soliciting, planning, arranging for and pursuing the company of the named enlisted man for the period alleged, and legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tuttle, Judge Advocate

Joseph J. Stern, Judge Advocate

Robert C. Newthan, Judge Advocate

Hq ASF, JAGO, Washington 25, D. C.

MAY 4 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Harry J. Hart (0-2042771), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of an indecent offense committed upon an enlisted man and of wrongfully seeking and soliciting the company of the same enlisted man (Chg. I, Spec.1), and guilty of a second indecent act upon the same soldier (Chg. I, Spec.2), both in violation of Article of War 95, and guilty of wrongfully drinking liquor in the presence of an enlisted man (Chg. II, Spec.1), and of wrongfully seeking and soliciting the company of the enlisted man (Chg. II, Spec.3), both in violation of Article of War 96. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commander-in-Chief, United States Army Forces, Pacific, confirmed the sentence but remitted the forfeitures and forwarded the record of trial for action under Article of War 50½.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 3 of Charge II and of Charge II (wrongfully drinking in presence of enlisted man and seeking company of enlisted man) and of so much of Specification 1 of Charge I as involves the alleged seeking, soliciting, planning, arranging for and pursuing the company of the named enlisted man for the period alleged and legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence.

4. On 27 November 1944 an enlisted man, Technician Fifth Grade Eston L. Buster, drove accused's jeep on a trip to a military headquarters in New Caledonia and that evening the two stayed at the Hotel Banu in La Foa where they occupied a double bed. Accused had been drinking to some extent. After retiring accused twice fondled Corporal Buster's privates, producing an ejaculation during the first incident.

These two offenses committed by accused thoroughly demonstrate his unfitness to remain an officer. I recommend that the sentence as modified be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 114, 10 May 1946).

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

SPJGK - CM 307109

13 MAY 1946

UNITED STATES	PHILIPPINE BASE SECTION
v.	Trial by G.C.M., convened at Headquarters Base "M", APO 70, 21 June 1945. To be hanged by the neck until dead.
Private First Class CRAIG DAVIS (34483410), 742nd Medical Sanitary Company.	

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Craig Davis, 742nd Medical Sanitary Company, did, at APO 70, on or about 18 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Juana Pulido, a Filipino civilian, of Pagudpod, San Fernando, La Union, P. I.

He pleaded not guilty to the Specification and to the Charge. He was found guilty of the Specification and of the Charge. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial to the Commander-in-Chief, U. S. Army Forces, Pacific, for action under Article of War 48. That officer confirmed the sentence but withheld the order directing execution thereof pursuant to Article of War 50½.

3. The Board of Review in the Branch Office of the Judge Advocate General with the United States Army Forces in the Pacific examined the record of trial and held it legally sufficient to support the findings and the sentence. The holding was approved by the Assistant Judge Advocate General with the United States Army Forces in the Pacific, who advised the Commander-in-Chief, United States Army Forces, Pacific, that he had authority to order execution of the sentence. The result of trial and order of execution were published in General Court-Martial Orders No. 23, General Headquarters, United States Army Forces, Pacific, 20 September 1945. Pursuant to instructions, the execution of the sentence was stayed and the record of trial was forwarded to The Judge Advocate General for action by the President.

4. The Board of Review in the Office of The Judge Advocate General has examined the record of trial, concurs in the opinion of the Board of Review in the Branch Office (a copy of which is hereto attached), and is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92.

William B. Kuder, Judge Advocate

Gilbert E. Stickroyd, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307109 1st Ind

Hq ASF, JAGO, Washington, D. C. MAY 21 1946

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 First Class Craig Davis (34483410), 742nd Medical Sanitary Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of the accused.

3. Consideration has been given to the attached letter from the wife of the accused to the President asking clemency.

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.

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Rec trial w/Bd Rev Op and Op Br Of B/R
2. Drft ltr sig S/W
3. Form of Ex action
4. Ltr fr wife of acc'd to Pres.

(GCMO 211, 3 July 1946).

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

JAGN-CM 307119

U N I T E D S T A T E S	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Mitchel Field, New York, 19 November and 6, 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21 December 1945. Dismissal, total forfeitures, and confinement for three (3) years.
Major ALPHONSE J. FABBRICATORE (0-1534478), Medical Administrative Corps.	)	

OPINION of the BOARD OF REVIEW
WHITE, McMILLAN and JOHNSON, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Major Alphonse J. Fabbricatore, Medical Administrative Corps, 110th Army Air Forces Base Unit (Staging), did, at Mitchel Field, New York, on or about 22 March 1945, with intent to deceive the Commanding Officer, Company C, 68th Infantry Training Battalion, 17th Infantry Training Regiment, Camp Howze, Texas, cause an official report to be made to the said Commanding Officer, Company C, 68th Infantry Training Battalion, that Private First Class Austin R. Asta, of said organization, had been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on 21 March 1945, suffering from acute catarrahal bronchitis, which report was known by the said Major Alphonse J. Fabbricatore to be untrue, in that the said Private First Class Austin R.

Asta had not been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on or about 21 March 1945 and was not, on or about said date, suffering from acute catarrahal bronchitis.

Specification 2: In that * * *, did, at Mitchel Field, New York, on or about 27 March 1945, with intent to deceive the Commanding Officer, 439th Bombardment Squadron (L), 319th Bombardment Group, Columbia Army Air Base, Columbia, South Carolina, cause an official report to be made to the said Commanding Officer, 439th Bombardment Squadron (L), 319th Bombardment Group, that Corporal Marvin B. Frankel, of said organization, had been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on 25 March 1945, suffering from acute bronchitis, which report was known by the said Major Alphonse J. Fabbricatore to be untrue, in that the said Corporal Marvin B. Frankel had not been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on or about 25 March 1945.

Specification 3: In that * * *, did, at Mitchel Field, New York, on or about 4 April 1945, wrongfully and without authority, cause a convalescent furlough from the Detachment of Patients, Army Air Forces Regional Station Hospital, Mitchel Field, New York, to be given to Corporal Marvin B. Frankel, 439th Bombardment Squadron (L), 319th Bombardment Group, Columbia Army Air Base, Columbia, South Carolina, when, in fact, the said Corporal Marvin B. Frankel had not been a patient in the Army Air Forces Regional Station Hospital, Mitchel Field, New York, had not been treated as an out-patient by any medical officer at Mitchel Field, New York, was not entitled to such convalescent furlough, and would otherwise have been absent without leave from his proper organization and station.

Specification 4: In that * * *, did, at Mitchel Field, New York, on or about 31 March 1945, with intent to deceive the Commanding Officer, 12th Detachment, Special Troops, Second Army, Fort Jackson, South Carolina, cause an official report to be made to the said Commanding Officer, 12th Detachment, Special Troops, Second Army, Fort Jackson, South Carolina, that Private First Class Salvatore Arlotta, of said organization, had been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on 31 March 1945, which report

was known by the said Major Alphonse J. Fabbricatore to be untrue, in that the said Private First Class Salvatore Arlotta had not been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on or about 31 March 1945.

Specification 5: In that * * *, did, at Mitchel Field, New York, on or about 9 January 1945, with intent to deceive the Commanding Officer, Second Air Force Replacement Pool, Lincoln Army Air Base, Lincoln, Nebraska, cause an official report to be made to the said Commanding Officer, Second Air Force Replacement Pool, Lincoln Army Air Base, Lincoln, Nebraska, that Private First Class Matthew V. Marino, of said organization, had been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on 7 January 1945, suffering from pneumonia, which report was known by the said Major Alphonse J. Fabbricatore to be untrue, in that the said Private First Class Matthew V. Marino had not been admitted to the Army Air Forces Regional Station Hospital, Mitchel Field, New York, on or about 7 January 1945, and was not suffering from pneumonia on or about said date.

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

Specification 1: In that Major Alphonse J. Fabbricatore, then Captain, Medical Administrative Corps, did, at Mitchel Field, New York, on or about 29 November 1943, wrongfully and without authority cause Private Joseph Tafuri, 32894460, formerly assigned to 763rd Anti-Aircraft Artillery Battalion, Camp Stoneman, California, and then attached, unassigned, to the Detachment, Medical Department, Army Air Base, Mitchel Field, New York, to be relieved from attached, unassigned, to the Detachment, Medical Department, Mitchel Field, New York, and assigned thereto, for the purpose of enabling the said Private Joseph Tafuri to evade overseas duty with the 763rd Antiaircraft Artillery Battalion, his proper organization.

Specification 2: In that * * *, did, at Mitchel Field, New York, on or about 28 February 1944, wrongfully and without authority cause Private John J. Santa Maria, 42040711, Company A, 34th Infantry Replacement Training Battalion, Infantry Replacement Training Center, Camp Croft, South Carolina, to be relieved from assignment thereto and transferred to Detachment Medical Department, Mitchel Field, New York, for the purpose of enabling the said Private John J. Santa Maria to evade further duty with Company A,

34th Infantry Replacement Training Battalion, Infantry Replacement Training Center, Camp Croft, South Carolina, his proper organization.

Specification 3: In that * * *, did, at or near Hempstead, New York, on or about 25 June 1944, agree and conspire with one Vincent Eugene Santaniello, alias James Santaniello, to defraud the United States by causing Private Carl J. Sposato, 31458709, Company B, 222nd Infantry Training Battalion, 68th Infantry Training Regiment, Infantry Replacement Training Center, Camp Blanding, Florida, to be wrongfully transferred to a Medical Department Unit at Mitchel Field, New York.

Specification 4: In that * * *, did, at Mitchel Field, New York, on or about 5 September 1944, wrongfully and without authority cause Private Carl J. Sposato, 31458709, formerly assigned to Company B, 222nd Infantry Training Battalion, 68th Infantry Training Regiment, Infantry Replacement Training Center, Camp Blanding, Florida, to be relieved from attached, unassigned, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York, and transferred to Section B, 110th Army Air Forces Base Unit, Mitchel Field, New York, for the purpose of enabling the said Private Carl J. Sposato to evade further duty with Company B, 222nd Infantry Training Battalion, 68th Infantry Training Regiment, Infantry Replacement Training Center, Camp Blanding, Florida, his proper organization.

Specification 5: In that * * *, did, at or near Hempstead, New York, on or about 11 August 1944, agree and conspire with one Vincent Eugene Santaniello, alias James Santaniello, to defraud the United States by wrongfully and in consideration of the payment of the sum of $1,250.00 paid by Private Frank J. Giangrasso, 42078374, 3rd Training Regiment, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, causing the said Private Frank J. Giangrasso to be transferred to a Medical Department Unit at Mitchel Field, New York.

Specification 6: In that * * *, did, at Mitchel Field, New York, on or about 30 December 1944, wrongfully and without authority cause Private Frank J. Giangrasso, 42078374, to be transferred from the 3rd Training Regiment, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, to attached, unassigned, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional

Station Hospital, Mitchel Field, New York, for the purpose of enabling the said Private Frank J. Giangrasso to evade further duty with the 3rd Training Regiment, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, his proper organization.

Specification 7: In that * * *, did, at or near Hempstead, New York, on or about 27 August 1944, agree and conspire with one Vincent Eugene Santaniello, alias James Santaniello, to defraud the United States by wrongfully and in consideration of the payment of the sum of $2,000.00, paid by Technician Fifth Grade Lawrence Vigorito, 42068667, Casual Detachment, Boston Port of Embarkation, Camp Miles Standish, Massachusetts, causing the said Technician Fifth Grade Lawrence Vigorito to be transferred to a Medical Department Unit at Mitchel Field, New York.

Specification 8: In that * * *, did, at Mitchel Field, New York, on or about 27 October 1944, wrongfully and without authority cause Technician Fifth Grade Lawrence Vigorito, 42068667, to be transferred from the Casual Detachment, Boston Port of Embarkation, Camp Miles Standish, Massachusetts, to attached, unassigned, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York, for the purposes of enabling the said Technician Fifth Grade Lawrence Vigorito to evade further duty with the Casual Detachment, Boston Port of Embarkation, Camp Miles Standish, Massachusetts, his proper organization.

Specification 9: (Finding of Not Guilty).

Specification 10: (Finding of Not Guilty).

Specification 11: In that * * *, did, at Mitchel Field, New York, on or about 6 November 1944, wrongfully and without authority cause Private Arthur B. Greenberg, 32962104, Section B, 110th Army Air Forces Base Unit, to be transferred to the War Department Separation Center, Fort Dix, New Jersey, for the purpose of being discharged from the military service under the provisions of Section X, Army Regulations Number 615-360, and Section II, War Department Circular Number 370, 12 September 1944, for the convenience of the government on the ground that he was below minimum physical induction standards, the said Captain Alphonse J. Fabbricatore then well knowing that the said Private Arthur B. Greenberg had not been found by competent authority to be below minimum physical induction standards.

Specification 12: In that * * *, did, at or near Hempstead, New York, on or about 11 December 1944, agree and conspire with a person or persons unknown, to defraud the United States by wrongfully and in consideration of the payment of the sum of $5,000.00, paid by Private Moe Senate, 42121214, Postal Detachment No. 7, Provisional Postal Battalion, New York Port of Embarkation, causing the said Private Moe Senate to be wrongfully discharged from the military service.

Specification 13: In that * * *, did, at Mitchel Field, New York, on or about 16 January 1945, wrongfully and without authority cause Private Moe Senate, 42121214, formerly assigned to Postal Detachment No. 7, Provisional Postal Battalion, New York Port of Embarkation, and then attached, unassigned, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York, to be transferred to the War Department Separation Center, Fort Dix, New Jersey, for the purpose of being discharged from the military service under the provisions of Army Regulations Number 615-365, and Section II, War Department Circular Number 370, 12 September 1944, for the convenience of the government on the ground that he was below minimum physical induction standards, the said Major Alphonse J. Fabbricatore then well knowing that the said Private Moe Senate had not been found by competent authority to be below minimum physical induction standards.

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

Specification: In that Major Alphonse J. Fabbricatore, then Captain, Medical Administrative Corps, did, at or near Mitchel Field, New York, on or about 29 October 1944, wrongfully and unlawfully accept and receive from Private Daniel J. Patrissy, 12191189, attached, unassigned, to the New York Port of Embarkation Casual Detachment, Camp Kilmer, New Jersey, the sum of $500.00, for the purpose of effecting the transfer of the said Private Daniel J. Patrissy from the New York Port of Embarkation Casual Detachment, Camp Kilmer, New Jersey, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York, and thus enabling him to evade overseas duty as a replacement.

The accused, prior to pleading generally and by way of a plea to the jurisdiction of the court, moved to strike Specification 5 of the Charge, the Additional and the Second Additional Charge and all Specifications thereunder (R. 20, 32), which will be discussed in another part of the opinion. He pleaded not guilty to all Charges and Specifications thereunder. He was found not guilty of Specifications 9 and 10 of the Additional Charge, guilty of Specification 7 of the Additional Charge, excepting the words "and in consideration of the payment of the sum of $2000.00 paid by Technician Fifth Grade Lawrence Vigorito, 42068677, Casual Detachment, Boston Port of Embarkation, Camp Miles Standish, Massachusetts, causing the said Technician Fifth Grade Lawrence Vigorito to be transferred to a Medical Department Unit at Mitchel Field, New York," substituting therefor, the words "causing Technician Fifth Grade Lawrence Vigorito, 42068667, Casual Detachment, Boston Port of Embarkation, Camp Miles Standish, Massachusetts, to be transferred to a Medical Department Unit at Mitchel Field, New York," of the excepted words not guilty, of the substituted words guilty, and guilty of all other Specifications and Charges. There was no evidence of previous convictions. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence, designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution: The evidence shows that there was in effect at the Army Air Forces Regional Station Hospital, Mitchel Field, New York, a standard operating procedure, pursuant to Army Regulations, War Department directives and hospital regulations, concerning the admission, treatment, hospitalization, passes, convalescent furloughs, transfers and discharges under Section II, AR 615-360, and Section X, AR 615-365, of command and casual patients. Therefore in determining whether the accused was the motivating agency that brought about the violations alleged in the Specifications as laid under the Charge, Additional and Second Additional Charges, this standard operating procedure will be discussed briefly herein below.

The procedure for handling a casual patient at the Regional Station Hospital, where the accused was on duty first as Sergeant Major, later as Adjutant when commissioned from Officer Candidate School, and then as Executive Officer, is as follows: The sick call medical officer will examine the casual and if he believes that the casual should be admitted to the hospital, the officer will initiate a Form 55-A (clinical record), which is transmitted to the ward to which the patient is assigned and a duplicate copy sent to the Registrar's Office. The ward officer completes the diagnosis, supervises the clinical record, (Form 55-A) and twenty-four hours before the casual patient's discharge

from the hospital, the Form 55-A is sent to the Registrar's Office where it is checked and filed. At the time of the casual's admission to the hospital a teletype or TWX is sent to the casual's organization containing the information that the casual is a patient in the Regional Station Hospital, Mitchel Field, New York, the diagnosis if possible, and a request for his service record and allied papers. Causal patients on admission to the hospital are carried by the Detachment of Patients as "attached unassigned" to that organization until such time as they are dropped from the rolls of their own organization by reason of requests for such action pursuant to Circular 280, WD 1944, and AR 40-590. Such request is made in the event a casual patient is to be hospitalized for such a length of time that it will be necessary to pay him or issue clothing to him, if he is to be transferred to another hospital, or if he is to be processed for a Certificate of Disability Discharge. However it is seldom known, upon the day of admission of a casual patient, that he will likely receive a Certificate of Disability Discharge (R. 234-242).

A patient treated as an out-patient is picked up as a regular admission to the hospital only if he is to be in quarters for more than twenty-four hours. For a single treatment as an out-patient no record appears in the Registrar's Office although there would be a treatment record at the hospital (R. 341-345).

Squadron "B", 110th Army Air Forces Base Unit and its predecessor organization, as distinguished from the Detachment of Patients, is the organization which services the hospital and to which only permanent party personnel on duty at the hospital are assigned (R. 239). Air Corps casuals can be assigned to Squadron "B" through the Air Force liaison officer, but not Ground or Service Force casuals unless they have made application through channels for such transfer with the approval of the Commanding Officer of the Regional Station Hospital. Permanent assignment of casuals to Mitchel Field from the Ground or Service Forces without specific instructions from The Adjutant General would be contrary to par. 6, Circular 280, WD 1944, and contrary to the policy of the Commanding Officer of the hospital (R. 435-436).

Convalescent furloughs are requested by the Ward Officer, approved by the Chief of Service, and forwarded for final approval by the Surgeon's office. The Commanding Officer never delegates authority to anyone for final approval of convalescent furloughs (R. 439).

When a patient is ready for discharge a report is made to the hospital liaison officer who determines the particular orders required and notifies the ward the date orders will be ready. The ward officer completes the chart (Form 8-33) and sends the complete record to the Registrar by 2:00 p.m. on the day prior to discharge. The Registrar checks where the former casual patient is going, issues a physical status report and the casual's organization is notified of the discharge (R. 340-341).

The provisions of par. 3a(5) of WD Cir. 280, 1944, have no bearing upon the disposition of Service or Ground Force casual patients or his discharge to duty and such casual patients, in the absence of contrary instructions from the Ground or Service Forces, will be sent to the Service Forces Redistribution Station at Fort Dix, New Jersey (R. 414). Recommendations for separation under Section X originate with the ward officer, through the Surgeon who either approves or disapproves it and is then forwarded to the Commanding Officer of the organization to which the patient is regularly assigned (R. 797).

Teletype or TWX messages initiated by the hospital usually, although not necessarily, contain the initials or signature of the dictating officer (R. 360-361, 986-989).

The three way initial system is one in which there appears on the face of the message the initials of the dictating authority, the signing authority and the typing authority separated by diagonals. The four way initial system is one in which on the message appears the initials of the Surgeon, the dictating authority, the signing authority and the typing authority (R. 278-279).

Teletype or TWX messages are dispatched to the Message Center from where they are transmitted to the Base Signal Center where a number and identifying marks "M.T.L." for Mitchel Field and "M" for medical are placed thereon (R. 245) and the original is taken to the First Air Force Signal Center for transmission. One copy is returned to Base Headquarters for filing, one copy retained by the Base Signal Center and any additional copies returned to the section which originated the TWX (R. 290-291). The number on the message and the stamp by the Base Message Center showing the date received is the method by which it is determined that the message has been transmitted. The return copy to the hospital is filed in a master TWX file of which the Adjutant is custodian (R. 247-248).

With the foregoing in mind each Specification will be discussed herein below in chronological order for the purpose of testing the legal sufficiency of the evidence to sustain the findings of guilty.

Specification 1 of the Charge: In August 1944, Private Austin R. Asta, who lived in Brooklyn, New York, met the accused through a friend, Jimmy Santaniello (Vincent Eugene Santaniello, named as co-conspirator in Additional Charge, Specifications 3, 5, and 7), at the recreation hall, Mitchel Field. Asta and the accused went to the Old Cantonment Hospital where Asta was given a bed, although nothing was wrong with him. He stayed there about a week and never received any medical treatment. He then went to work at the Medical Motor Pool until February 1945 and then returned to his organization at Camp Howze, Texas (R. 374-375). In March 1945 Asta came home on an emergency furlough

(R. 376-379; Pros. Ex. 6) because his father was ill. While there he contacted his friend Jimmy Santaniello for an extension of his furlough. They went to Mitchel Field, saw the accused, Jimmy Santaniello's friend, and the accused said "he would try to get an extension to Asta's furlough for a few days," which he did (R. 377-384). Asta spent six days at Mitchel Field, was not admitted to the hospital, but helped out at the Motor Pool (R. 500), and went home at night (R. 384-385). Asta then obtained a furlough signed by the accused (R. 509-510) and delivered to him by the accused (R. 377-379, 380; Pros. Ex. 7). He borrowed $10.00 from the accused (R. 377-385) at which time the accused told him that he "wanted no part of Jimmy Santaniello" (R. 378). On 21 March 1945 at the New Cantonment Hospital, Mitchel Field, Asta appeared at sick call where he was examined by a medical officer on his complaint of headaches since an automobile accident in 1942. Examination showed that he was normal and was told to go back to duty (R. 390-392; Pros. Ex. 8). The accused told Asta to work in the Motor Pool with Squadron "B" which he did for several weeks (R. 500-503). Asta then returned to Camp Howze, Texas, from where he wrote two letters to accused expressing his thanks and returning the $10.00 that he borrowed (R. 387; Def. Exs. P, Q). On 23 March 1945 a teletype was dispatched to Asta's Commanding Officer at Camp Howze, Texas, stating that Private First Class Austin R. Asta, 42060543, was admitted to the Mitchel Field Hospital, diagnosis: Bronchitis acute, catarrhal (R. 248-249, 291, 294, 373; Pros. Ex. 1). The sending of the message was directed by the accused (R. 349-350). There is no record that Private Asta was admitted to the hospital on 23 March 1945 and no record that he was ever admitted except on 22 August 1944 (R. 328).

Specifications 2 and 3 of the Charge: On 27 March 1945, a TWX message was dispatched to the Commanding Officer, 439th Bomb Squadron (L) 319 Bomb Group, Columbia Army Air Base, Columbia, South Carolina, stating that Corporal Marvin Frankel, 12046481, had been admitted to the hospital 25 March 1945, diagnosis: Bronchitis, acute (R. 249-250, 294-295; Pros. Ex. 2). There is no record that Corporal Frankel had ever been admitted to the hospital except on 9 November 1944 (R. 328-329). The sending of the TWX was directed by the accused (R. 350-351). On 4 April 1945 the accused directed First Lieutenant Stephen Liaskos, M.A.C. to issue a five-day convalescent furlough to Corporal Frankel which was done (R. 351-353, 373; Pros. Exs. 3, 4). On 5 April 1945, a message was received from the Columbia Army Air Base requesting information as to when Corporal Frankel would be returned to full duty status and stating that it was imperative that he return at the earliest possible date (R. 1015; Def. Ex. FF), to which reply was made that Corporal Frankel would be released 9 April 1945 (R. 1016; Def. Ex. GG). It is stipulated that Corporal Marvin B. Frankel was, on or about 27 March 1945 and on 4 April 1945, assigned to the 439th Bombardment Squadron (L), 319 Bomb Group, Columbia Army Air Base, Columbia, South Carolina (R. 396; Pros. Ex. 9).

Specification 4 of the Charge: Private First Class Salvatore Arlotta who lived in Manhattan, New York City, was assigned with the 12th Detachment Special Troops, Second Army, Fort Jackson, South Carolina. He came home on furlough, met a friend Sonny Rosen, and as a result of their conversation went to the hospital admitting office at Santini, Mitchel Field (R. 397), and on three successive trips, secured three successive three-day furloughs from a person he did not know, who was not the accused (R. 353-354). At the admitting office at Santini, Arlotta told some one in uniform that he had a cold and was told to go home and take care of it (R. 398).

On 31 March 1945 a TWX was sent to the Commanding Officer, 12th Detachment Special Troops, Fort Jackson, South Carolina, stating that Private First Class Salvatore Arlotta, 42032707, had been admitted to the hospital on that date (R. 251-252, 295-296, 373; Pros. Ex. 5). This message was prepared and sent by direction of the accused (R. 353-354). There is no record that Arlotta was ever admitted to the hospital at Mitchel Field (R. 329).

Specification 5 of the Charge: Private Matthew V. Marino, who lived at Jersey City, New Jersey, came home about the first part of January 1945 on a seven-day en route transfer from Sioux Falls Army Air Base, Sioux Falls, South Dakota, to join the Lincoln Army Air Base, Lincoln, Nebraska. He thought that he was ill and reported to Mitchel Field, New York, for a physical checkup. He was physically examined, but was not admitted to the hospital. He was not suffering from pneumonia. He went on duty in the Motor Pool for three weeks. He does not recall who he first met at Mitchel Field, but does know that a doctor examined him. The doctor did not inform him as to the results of the examination. He does not know the accused, and the accused did not send him to the Motor Pool. He never joined the Lincoln Army Air Base (R. 404-407).

On 9 January 1945 a TWX was sent to the Commanding Officer, Lincoln Army Air Base (Replacement Pool), Lincoln, Nebraska, stating that Private Matthew V. Marino, 42105768, was admitted to the hospital, Mitchel Field, 7 January 1945, diagnosis: Pneumonia, and requesting the soldier's service record and allied papers. This message was signed by the accused (R. 252-254, 296, 297, 403; Pros. Ex. 10). There is no record that Private Matthew V. Marino was ever admitted to the hospital (R. 329).

Specification 1 of the Additional Charge: Private First Class Joseph Tafuri's first assignment was as a truck driver, Quartermaster Corps, Camp Lee, Virginia, and later with an antiaircraft unit at Camp Stoneman, California. He came to Brooklyn, New York, His home, on an emergency furlough in September 1943 as his father was sick. While at home he decided to have medical treatment for hemorroids and went to the hospital at Mitchel Field, where he was admitted and operated upon. This happened during his furlough about the latter part of October 1943. He was

hospitalized for about twelve days and was given a convalescent furlough. At the expiration of the convalescent furlough he reported back to Mitchel Field, to a sergeant in the Registrar's Office. The sergeant gave him a bunk and told him that he (Tafuri) would probably be stationed at Mitchel Field. He never received any orders returning him to Camp Stoneman, California, a staging area, although he did expect to return. He guessed that he was physically fit for overseas duty (R. 513-523). He has known Jimmy Santaniello, his family undertaker, for five years (R. 515-516), and he also knows the accused (R. 513). The deposition of Sergeant John D. Miller (R. 529; Pros. Ex. 13) states that Sergeant Miller knew Private Joseph Tafuri and that the accused called him on the telephone and told him to put Tafuri to work. He assigned Tafuri as an orderly in the Officers' quarters (R. 524). On 21 October 1943 a TWX was sent to the Commanding Officer, Camp Stoneman, California, requesting that Private Joseph Tafuri, "now a patient" in the hospital be granted a ten-day convalescent furlough. This message was signed by the accused (R. 300, 529; Pros. Ex. 14). The accused told Master Sergeant Robert Y. Salomons, first sergeant of Squadron "B", to put Tafuri to work as a striker in the Officers' quarters, as he was a good man (R. 473).

Specification 2 of the Additional Charge: Private First Class John J. Santa Maria met the accused at the home of Jimmy Santaniello in Brooklyn about three years ago. At that time the accused was a first lieutenant and he was a civilian. On 9 October 1943, he was inducted and later was stationed at Camp Croft, South Carolina. In January 1944 he was home in Brooklyn, New York, on a furlough. He went to the hospital at Mitchel Field, saw the accused, told him that he was sick, and the accused took him to sick call and he was admitted to the hospital, as he was suffering from sinusitis and a very bad cold. Nothing was said by the accused during their conversation about his duty status. He asked if he could transfer to the Air Corps. On his way to the Registrar's Office he met the accused who told him that he was in the Air Corps and he reported to the Motor Pool where he worked for five or six weeks. He was sent to Pawling, New York, and remained there until May 1945 (R. 534-538). Form 55-A (clinical record) shows that "no operation" was written on the face of the form and the diagnosis was "sinusitis moderate cause undetermined." Disposition, "to duty" (R. 325, 557; Pros. Ex. 21). The accused told the first sergeant of Squadron "B" that he was sending Private Santa Maria over to him, as Private Santa Maria was going to be assigned to Squadron "B" and would not return to his organization. The accused also spoke with the Commanding Officer of Squadron "B" relative to soldiers who belonged to the Detachment of Patients, one of whom was Private Santa Maria, who were going to be assigned to Squadron "B" and who would not return to the organization from whence they came (R. 472-473). Subsequently Santa Maria was assigned to Squadron "B" (R. 475). Two morning reports show that Private John J. Santa Maria was assigned to the Detachment of Patients as of 9 March 1944 and erroneously dropped from Detachment of Patients, picked up by Squadron "B", Army Air Forces Base Unit to duty (R. 562; Pros. Exs. 25, 26).

Specifications 3 and 4 of the Additional Charge: Private Carl J. Sposato was inducted on 28 March 1944 at Fort Devens, Massachusetts, and was sent to Camp Blanding, Florida, with the Infantry. He remained there twelve weeks and came to New York on a ten-day emergency furlough, 16 June to 25 June 1944 (Pros. Ex. 29), because his sister's intended mother-in-law was sick (the mother-in-law is Jimmy Santaniello's mother). His sister did marry Jimmy Santaniello in June 1944. He told his sister "that he did not feel so good" and she told him "that Jimmy knew some one at Mitchel Field who would see what was the matter with him and take him into the hospital" (R. 566-568). Later he had a conversation with Jimmy Santaniello who told him that he knew a Captain at Mitchel Field who would see that he was treated and taken care of (R. 743). Jimmy took him to Mitchel Field where they met the accused at the gate who asked him how he felt. Jimmy told Sposato that "they would take care of him." The accused then drove him to sick call at the Old Cantonment Hospital, where he was examined by a doctor and admitted to a ward. He remained in the hospital as a patient for two weeks (R. 569). On his discharge on 5 July 1944 he telephoned the accused "that he was leaving" and the accused told him to see Lieutenant Clark, who would put him to work. He reported to Lieutenant Clark and was assigned as an ambulance driver (R. 570). He was not told to go to the Registrar's office, nor did he ever receive any orders or know anything about his transfer to Squadron "B" (R. 576-577). He remained at Mitchel Field until sometime in December 1944 and then went to Camp Gordon, Georgia. He was transferred to Fort Meade, Maryland, and on a delay en route the latter part of January 1945, he took ill in New York. He never got to Fort Meade, as he was taken in a Mitchel Field ambulance to Mitchel Field. The accused had nothing to do with his second trip to Mitchel Field (R. 570-573). Form 55-A (clinical record) shows that a tonsillectomy was performed on Sposato and he was ordered to duty on 5 July 1944 (R. 580; Pros. Ex. 30). The morning report of Detachment of Patients shows that Sposato on 8 July 1944 was attached and joined from Camp Blanding, Florida, 25 June 1944 (R. 581; Pros. Ex. 31). The accused ordered the first sergeant of Squadron "B" to take Sposato off of the Infantry list, but the sergeant refused because he had no authority to do this, as that was up to Captain Stilphen, the Commanding Officer. Sposato was subsequently taken off the list in September 1944 (R. 473-475). Squadron "B" was run by the accused and not by the Commanding Officer (R. 505-508). The company clerk of Squadron "B" who kept a private memorandum of the names of soldiers who were sent to his organization, not assigned to it, received correspondence from Sposato's organization requesting status classification and Sposato's return. He telephoned the accused and asked what he should do about this correspondence? The accused told him to send it to him and he would take care of it and the company clerk never saw the correspondence again (R. 612-613).

Specifications 5 and 6 of the Additional Charge: Private Frank J. Giangrasso entered the military service in February 1944, was assigned

to Camp Upton, New York, then to the Field Artillery Replacement Center, Fort Sill, Oklahoma, remained for sixteen weeks, was ordered transferred to Fort Francis E. Warren, Wyoming, and given a delay en route. While on delay en route he returned to his home, Richmond Hill, New York, and saw Jimmy Santaniello, whom he had known for six or seven years (R. 616-619). He made an agreement with Santaniello by which he was to pay $1250.00 and for which he would be transferred and stationed at Mitchel Field, as long as a "captain" known to Santaniello, who would effect the transfer, would be stationed at Mitchel Field (R. 745-747).

About the 9th or 10th of August 1944, Giangrasso was taken by Jimmy Santaniello and Giangrasso's brother-in-law, Louis DeSena, to Mitchel Field, stopped at the Recreation Center across the street from the main gate outside the Field where Santaniello made a telephone call to the accused, and reported that the accused was busy, so they returned home. The following day the same procedure was followed and after the telephone call, the accused appeared in a vehicle operated by Sergeant Fritt and took Giangrasso to the Detachment of Patients. The accused went in and Giangrasso remained outside. The accused came out and sent Giangrasso to the orderly room of Squadron "B", 110th Army Air Forces Base Unit, where he was assigned to duty as a litter bearer at the Medical Motor Pool, later as an ambulance driver, and remained until May 1945 (R. 616, 653, 745, 766; Pros. Ex. 37). He was paid by the Detachment of Patients and was never hospitalized (R. 624). Giangrasso paid $1000.00 to Santaniello and $250.00 to DeSena for Santaniello (R. 748-765).

On 11 August 1944 a TWX was sent to Giangrasso's organization requesting his service record and allied papers be forwarded to Mitchel Field (R. 258, 302, 654; Pros. Ex. 38). On 2 September another TWX was sent stating "Reutel. Frank J. Giangrasso now patient at this hospital pd date of disposition unknown" (R. 258, 303, 654; Pros. Ex. 39). On 29 December 1944 another TWX was sent requesting "SR and AP * * * EM hospitalized this station since 13 Aug 44" (R. 259, 303, 654; Pros. Ex. 40). Frank J. Giangrasso was never admitted as a patient to the hospital at Mitchel Field (R. 656-659).

Specifications 7 and 8 of the Additional Charge: Technician Fifth Grade Lawrence Vigorito who lived in Brooklyn, New York, and has known Jimmy Santaniello for five or six years, entered the military service 21 January 1944. During August 1944 he was stationed at Camp Miles Standish, Massachusetts, a staging area, where he received instructions on how to abandon ship and had received his "shots" (R. 600-661, 767). He left Camp Miles Standish 26 August 1944 on a pass and on the same evening met the accused in a bar in Hempstead, New York. The accused took him to the hospital at Mitchel Field, where he was admitted for nasopharyngitis, acute, catarrhal, remained about two weeks, was given a ten-day convalescent furlough and was placed on duty with the Medical Motor Pool. On 27 August 1944 a TWX signed by the accused was sent to

Vigorito's organization requesting his service record and allied papers (R. 676; Pros. Ex. 42). On 23 October 1944 a TWX was sent requesting orders transferring Vigorito to the Detachment of Patients for the purpose of discharge under AR 615-360 and orders were issued (R. 261, 263, 304, 307, 327, 640, 678, 766, 767; Pros. Exs. 41-46). Vigorito never did return to Camp Miles Standish (R. 665).

Specifications 9 and 10 of the Additional Charge: Findings of not guilty.

Specification 11 of the Additional Charge: Private Arthur B. Greenberg, Squadron "B", 110th Army Air Forces Base Unit, stationed at Pawling Convalescent Center, New York, a sub-base of Mitchel Field, entered the service in June 1943 (R. 813) and was classified "limited service " because of hay fever. From the middle of August to the end of September 1944, he was treated at Pawling for an attack of hay fever (R. 813). In October 1944, finishing the hay fever treatment, he was sent to Mitchel Field for allergy tests. After these tests, Greenberg went to see the accused and showed him the results, whereupon the accused said "that he thought Greenberg was eligible for discharge under a new War Department Circular." Two or three days later Greenberg showed the accused a letter from his immediate Commanding Officer recommending consideration for discharge and the accused told him to return the following day. He returned and was told to report to the Detachment of Patients in two days. This he did and was given orders to go to Fort Dix, New Jersey, where he was discharged under Section X, AR 615-360 (R. 332, 594, 806, 822, 840, 853; Pros. Exs. 57-60; Def. Exs. N, V, Y). The accused signed the letter dated 4 November 1944 requesting that Greenberg be assigned to the Detachment of Patients (R. 840; Pros. Ex. 59). Prior to the day Greenberg reported to Mitchel Field which was sometime in October 1944, the accused telephoned the first sergeant, Squadron "B", and told him "to have Greenberg come and see him when Greenberg reported in from Pawling" (R. 855). The accused also called the morning report clerk of Squadron "B" twice by telephone about 31 October or 1 November 1944, telling the clerk that "he had Private Greenberg coming down from Pawling and that he send Greenberg directly to the accused." On the second telephone call the accused told the clerk "not to give Greenberg any assignment because Greenberg was going to the Detachment of Patients for discharge" (R. 867-873). It was either during the last of October or the first part of November 1944 that the accused telephoned the first sergeant of Pawling Convalescent Center and told him "to send Greenberg's 201 file to the accused's office by the bus driver" (R. 835-840).

The Commanding Officer of Pawling Convalescent Center who had previously disapproved the request for discharge of Greenberg sometime in October 1944, called the accused by telephone and asked "why Greenberg was discharged" and the accused told him "that it wasn't any of his

business and that he should remember that Mitchel Field was running Pawling" (R. 845). The reason the Commanding Officer of Pawling Convalescent Center disapproved the request for the discharge of Greenberg was that the basis of the request was Greenberg's complaint of his back and hay fever. Greenberg had been transferred to a desk job and there was no justification for that work to cause complaint of his back condition and, since hay fever season had been over for some time, there was also no reason that Greenberg's hay fever could be bothering him (R. 843). No action for Greenberg's discharge under Section II or Section X of AR 615-360 was initiated by the Commanding Officer of Pawling Convalescent Center, nor did he approve such action (R. 850-851). The order transferring Greenberg to the Detachment of Patients (R. 840; Pros. Exs. 57-59) was "for discharge purposes UP. Par. 9g, sec. II, AR 615-360." Greenberg never appeared before any Board of Officers for a Certificate of Disability Discharge under Section II (R. 811). This was contrary to current directives and to the policy and operation of the hospital (R. 794-797).

Specifications 12 and 13 of the Additional Charge: Private Moe Senate, formerly assigned to Postal Detachment No. 7, Provisional Battalion, New York Port of Embarkation, met a friend named "Al", whose last name is unknown, in Brooklyn and paid him $2000.00 on 11 December 1944 under an agreement that for $5000.00 this "Al" would introduce him to a friend (the accused) and if he (Senate) was below the minimum standards he would be discharged (R. 874, 930-931). On the same date they drove to a restaurant in Hempstead and later the accused arrived. "Al" motioned to him and he came over to their table. "Al" introduced the accused to Senate and said this was the fellow he mentioned that was sick. Senate then told the accused that he was on limited service and had pains in his left arm and chest. The accused said he would take him to the hospital (R. 874-875). Senate got into the accused's car and Al and the accused talked for about five minutes out of the hearing of Senate (R. 875-876). "Al" then left and they drove to Mitchel Field. On arriving there, they got into another automobile, a staff car, and continued on to Santini. The accused took Senate into the hospital, told a sergeant that Senate was sick and he was put on sick call. After waiting half an hour a Captain O'Connor called him in and asked Senate what was wrong with him, gave him a piece of paper and told him to go to Ward 16 (R. 876-878). Senate remained in the hospital until the 15th or 16th of January 1945, then reported to the Detachment of Patients, where he received orders to go to Fort Dix, where he was discharged and thereafter on 19 January 1945 paid "Al" an additional $3000.00 (R. 878-879, 932). Senate does not know "Al's" last name (R. 932), but Special Agent James J. McDonough, FBI, said the person that Senate was with in the restaurant in Hempstead was a party named Charles, whom the accused, in a confession to Special Agent McDonough, said was a close friend of Santaniello (R. 921-922).

The ward in the hospital to which Senate was admitted was in charge of Captain O'Connor who observed Senate during his hospitalization and found him fit for full duty (R. 903-918; Pros. Ex. 76). On his discharge from the hospital orders were issued for Senate's return to his organization (Pros. Ex. 71) but these orders were revoked (Pros. Ex. 72) and he was ordered to Fort Dix for discharge from the military service under AR 615-365 and WD Circular 370 and "TWX Hq Div. Postal Bn, NYPE Army Postal Terminal New York dd 14 Jan. 1945." (Pros. Ex. 73). When the accused was shown a photograph of Senate by Federal Bureau of Investigation agents, he stated that he would refuse to make any written statement regarding Private Moe Senate, because "that's the case that would hang him" (R. 920).

Second Additional Charge and Specification: Private Daniel J. Patrissy was in New York on a furlough from Camp Crowder, Missouri, in September 1944. At the Cafe Zanzibar the accused who was seated at a table with some officers and a civilian made the remark when Patrissy was dancing with his wife (Mrs. Patrissy) "You are doing all right." Later the accused sent a drink over to their table, which Patrissy acknowledged with a thank you and nodding and then went over to accused, introduced himself, and they started talking about the Army. During the conversation Patrissy mentioned that the lady he was with was his wife, that she was going to have a baby, and that he would like to be near home. The accused said that he was stationed at Mitchel Field and, if he could help, that Patrissy should give him a ring, and gave Patrissy his telephone number in Hempstead (R. 941-943).

In the latter part of October 1944, Patrissy was stationed at Camp Kilmer, New Jersey, being processed for overseas shipment. He came home on a twenty-four hour pass, phoned the accused, and an appointment was made to meet that night at the Cafe Zanzibar. They met in the bar and discussed the transfer of Patrissy to Mitchel Field and the fact that Patrissy was "hot" where he was stationed and that Patrissy could only raise $500.00. The accused told Patrissy to meet him at Mitchel Field the following day. Patrissy returned to Camp Kilmer, got another pass, came home, got the money ($500.00) which he borrowed, and came to Mitchel Field where he met the accused at the main gate. He got in the accused's car and told the accused that "he was leery about this," but the accused made no reply. They drove to Santini and stopped at a building on the way, where the accused got out and suggested that Patrissy go into the cafeteria and eat something. Patrissy said he was not hungry and stayed in the car. The accused returned and they proceeded to Santini where the accused took him to a barracks building. During the ride to Santini, Patrissy took the $500.00 out of his pocket and placed it on the seat of the car. The accused saw him do this. Patrissy worked as a clerk in the Detachment of Patients for four or five weeks, after which time he was sent to Fort Dix, New Jersey, and discharged from the Army (R. 944-953).

On 30 October 1944 a TWX was sent from the hospital at Mitchel Field, New York, signed by the accused, to Patrissy's Commanding Officer, Camp Kilmer, New Jersey, requesting service record and allied papers and stating that Patrissy was admitted to the hospital 29 October 1944 (R. 270, 309, 939; Pros. Ex. 77). Patrissy had never been admitted to the hospital (R. 939-940).

It is further shown by prosecution's evidence: The accused never had authority to grant furloughs to personnel who were not patients in the hospital (R. 438). The accused was over all superior officer in the Administrative Section and it was his job to keep close watch on the Detachment of Patients and see that orders were properly written and published (R. 419-420).

The evidence shows that a written confession of the accused was taken on 26 June 1945 by special agents of the Federal Bureau of Investigation, wherein the accused admitted that he and Jimmy Santaniello conspired in the transfer of Privates Sposato, Giangrasso, Vigorito, Tafuri, and Santa Maria (R. 697-702; Pros. Ex. 55), as follows:

"June 24th, 1945

I, Alphonse J. Fabbricatore, Major in the Army of the United States A.S. No 01534478 make the following voluntary statement to J. J. McDonough and G. J. Flynn who have identified themselves to me and whom I know to be Special Agents of the Federal Bureau of Investigation. No threats or promises of any kind have been offered to me to induce me to make this statement and I have been told that anything I do say may be used against me in a court of Law.

I first met Jimmy Santanielo in the summer of 1943 when he was a private. He was stationed at some camp in the west and was home on furlough. A very close friend of mine brought Jimmy to Mitchel Field and introduced him to me. I do not care to identify this friend of mine because I consider him a relative, having been god father to one of his children. He asked me if I could do anything for Jimmy. I took Jimmy to see Col. Hubbard and a Capt. Adelmann. They examined him and found that he had a temperature and he was ordered hospitalized. He was in the hospital for a few months and subsequently received a medical discharge and a certificate of disability.

Following his confinement in the hospital, on at least one occasion I took Jimmy to the Belmont Race Track. I recall that on one occasion I ran short of funds and that Jimmy loaned me a hundred dollars. I tried to repay the loan but he refused to accept. I later considered this

debt canceled when I cashed a check for Jimmy and it bounced.

About the time of the birthday of Col. Oliver Neiss I had planned to give a party in his house. I was temporarily short of cash at the time and Jimmy threw the party. It was held at the Cafe Zanzibar in New York City. It was attended by Col. Neiss, Major Ernest Weymuller, Jimmy Santaniello, Chips (full name not known) Jimmy's brother Jerry, and a few others whose name I do not recall.

I recall that Major Weymuller attended a wedding with Col. Neiss and myself and that Col. Neiss and I attended the wedding of Jimmy.

I remember that at the celebration of Jimmy's wedding, Jimmy introduced Col. Neiss to a sergeant, a boxer and asked the Col. if he could help him. Col. Neiss was very angry and said that he did not discuss these matters outside his office.

Shortly thereafter I met Jimmy and his father and a soldier by the name of Tafuri and the latter's father at the Terrace Room on Franklin St., Hempstead, N.Y. Jimmy told me that the Tafuri family had had a lot of hard luck and illness and that the soldier was needed near home by the family. He asked me to have him transferred to Mitchel Field and I agreed to do so. Jimmy mentioned no money to me that night.

About a week later Jimmy brought this soldier Tafuri to Mitchel Field. I took him to the Detachment of Patients. I believe he was subsequently admitted to the hospital and later transferred to the medical detachment. I don't recall what Tafuri's ailment was.

At a subsequent date, while attending the wedding of Jimmy's sister I was introduced to a Mrs. Santa Maria by Jimmy. She spoke to me in Italian and told me that she had a son in the army and would like to have him transferred to a spot near home. I agreed to see what I could do for her son. I believe that this was the older brother. To the best of my recollection Jimmy later brought the Santa Maria boy to the hospital and I had him admitted to the hospital. He was supposed to be suffering from a kidney ailment. After sometime in the hospital. Santa Maria was assigned to the Motor Pool and drove a staff car. I recall that there was another Santa Maria boy by the name of Johnny whom Jimmy brought to the Field and for whom I obtained a transfer.

I arranged the transfers of Anthony DiAngelo, Lawrence

Vigorito, Carl Sposato, a soldier by the name of Giangrasso and numerous other men.

I objected strenuously with Jimmy but he threatened to 'frame' Col. Neiss and Major Weymuller and say that they had helped arrange the transfers of these men. He told me that he had received money from these men for arranging their transfers and that he had already spent it. He threatened to show pictures of Col. Neiss, Major Weymuller and myself taken at the Cafe Zanzibar. On at least four different occasions Jimmy offered me several hundred dollars but I refused it.

I recall that in the case of DiAngelo the CO (Registrar) at the hospital reported the matter to Col. Neiss who questioned me as to DiAngelo's status. I told Col. Neiss that I was just doing a favor for a friend. He ordered me to have DiAngelo returned to his station at once. I telephoned DiAngelo and told him he would have to return. That night before the orders were issued Jimmy came to see me. He said that DiAngelo would stay or that he would say Col. Neiss had aided the transfer and involve him. I had DiAngelo transferred to the Detachment of Patients. I told him to keep away from Major Baker, a psychiatrist, who had told me that DiAngelo was faking and that he, Baker, could find nothing wrong with him.

In the case of Carl Sposato, I recall telling Jimmy that he was crazy to bring Sposato back to the hospital a second time because all the officers and men knew him and knew that I knew him. Jimmy told me not to worry. I understand that Sposato was in a hospital in New York and upon Jimmy's advice told them (the doctors) that he was stationed at Mitchel Field which was not true at that time. The hospital called Mitchel Field and an army ambulance was sent to pick him up.

I read and fully understand the statements I made above, consisting of eight pages and swear that they are true. The order and time of transfer of all men mentioned above will have to be verified as I cannot remember the exact dates.

/s/ Alphonse J. Fabbricatore.

Witnessed:
J. J. McDonough, Special Agent, F.B.I., New York, N. Y.
G. J. Flynn, Sp. Agt., F.B.I., New York, N.Y."

In an oral statement to the same special agents, the accused denied generally that he had received any monies in connection with the transfers and discharges, but did admit that he found an envelope on his desk

containing $1100.00 and that Private Sposato told the accused that before he was transferred to Mitchel Field, he paid $1000.00 to Jimmy Santaniello. The accused further told the special agents that he would refuse to make any statement regarding Private Moe Senate because "that's the case which would hang me" (R. 920). The accused's letter to Mr. McGoey, head of the Federal Bureau of Investigation of New York, dated 27 June 1945 (Pros. Ex. 54), admitting the giving of his confession to special agents of the FBI, is hereinafter set forth.

"27 June 1945

Dear Mr. McGoey -

I am sure that you will forgive me for taking up a few minutes of your time to read this letter because it concerns two of your men and is written in the utmost sincerity.

The supplementary true statement I made in the "Sam Boyer Case," was the result of the combined efforts on the part of Mr. Wallace, a fine gentleman, and the dogged determination of Agent G. F. Flynn.

In my present difficulty, Agent Flynn has again succeeded in making me, voluntarily, speak the truth in the interests of justice. This time, unfortunately, the truth will cause my being convicted and, justly so. Mr. Flynn should be commended for his aggressiveness and his fine understanding, in my opinion, of human faults - - - even commended after I've been sentenced.

Please don't consider me too much of a rat, Mr, McGoey, for what I did I done because - first - I thought I was helping out some old folks and - secondly - because of a situation a couple of crooks engineered me into. I know those aren't very good excuses but I speak the truth.

Trusting you will preserve a kind remembrance of Mr. Wallace, and Agent Flynn, I remain,

Respectfully yours,

/s/ Alphonse J. Fabbricatore
Major A. U. S."

The evidence concerning the pay of the accused shows that during 1944 and up to May 1945, he drew monthly from the Finance Officer in amounts from $66.74 to $192.11. In 1943 to July 1944 his monthly deposits in his bank accounts were in small amounts to $250.00. Beginning

August 1944 his monthly deposits were as follows: August $850, September $1700, October $1000, November $120, December none, January 1945 $1206.04, February $600, March $1800, April $1100, May none, June none, July none, August $500. In addition, there was deposited to the account of the accused as trustee for his infant son, between 15 June 1943 to 22 May 1945, the sum of $1805 (R. 684-697; Pros. Exs. 47-53). In November 1944 the accused loaned to one Dave Rosenberg the sum of $3000.00 of which $2000.00 was repaid (R. 736, 737).

4. Evidence for the defense: The evidence shows that the accused was a very efficient officer, ambitious, energetic, a hard worker and seemed always to have the interests of the hospital and that of the Commanding Officer at heart. He was over-generous, easily imposed upon by officers and the staff and at times by enlisted men. He was inclined to take short cuts in doing his work. This was approved by his Commanding Officer as long as it helped the efficiency of the hospital and was not contrary to Army Regulations or instructions (R. 420). The physical equipment for a shop system for the convalescent, to rehabilitate vocationally and physically ambulatory patients was personally obtained by the accused. He also secured a more lenient pass system for such patients and otherwise got things done (R. 1036-1041). The accused assisted in revising the Manning Tables and obtained a large number of additional personnel to handle the patients evacuated from the European Theater. He helped people financially in loaning $200.00, $180.00 and $300.00 to individuals during the period following February 1944, and he donated $500.00 to the Convalescent Fund (R. 1042-1047). It seemed that nothing could go wrong with the hospital, while he was helping to steer things. He was loyal to the Army, and worked extra hours in furtherance of the welfare of the hospital (R. 1053-1055). His records as a noncommissioned officer and those as secretary-treasurer of the Non-Com Club were superior. As Adjutant, hospital inspections were nearly always rated superior, and as an officer his efficiency ratings were superior. He was exceptionally efficient and generally well liked (R. 1056-1058).

In the office of the Commanding Officer, Executive Officer, Adjutant and Sergeant Major, it was not always the practice for the one dictating a paper to sign it and should he be out, others would do it (R. 986-989). The request for orders, Locator Card and orders prepared for Private Marino (Spec. 5, Original Charge), were prepared on verbal order of Lieutenant Russo (R. 989-994; Def. Exs. DD, T). The request for orders for Private Senate (Spec. 12, 13, Add. Charge) was a form letter and was drawn up indiscriminately by enlisted personnel and the initials and names of officers were likewise used (R. 995, 996).

The accused never gave orders to the clerk-typist in the Request and Orders Section from 10 May 1943 to 30 November 1945 (R. 994).

The first request for orders concerning Private Moe Senate (Spec. 12, 13, Add. Charge) for return to his organization was revoked by some person and orders were issued transferring Senate to Fort Dix (Pros. Ex. 73). The accused did not tell the clerk-typist to revoke the request for orders sending Private Senate back to his organization (R. 994-1002; Def. Ex. BB).

Private Greenberg (Spec. 11, Add. Charge) could not have been in the allergy clinic at Mitchel Field, unless he had been referred by another clinic. For an allergy Rhinitis, reference would most likely be from the Ear, Nose and Throat Clinic, although it was unknown where Greenberg came from (R. 1008-1015). In Pawling where Greenberg lived from May to October 1944, he was sometimes almost blind from hay fever and sinus, at which times he looked quite bad and his eyes were swollen (R. 1015).

The accused was held incommunicado prior to trial in a small room in a wooden building under guard (R. 1017; Def. Exs. HH-1, HH-2, HH-3).

The accused personally questioned Private Patrissy (Spec. of Second Add. Chg) who, in answer to the question "Can you look me straight in the eye before this court and say that I am positively the officer that you met at the Cafe Zanzibar on or about 20 September 1944," replied "It is a mental thing with me. I can't see myself taking so much responsibility. That's what I am afraid of. See, I don't know - maybe I am wrong, that's why" (R. 1062-1063).

Defense Exhibit KK received in evidence, which was a Form 55-A concerning the diagnosis of Private Carl J. Sposato (Spec. 3, 4, Add. Charge), contains the following notations: "Constitutional psychoneurosis, hysteria, moderate" and on completion of the case "1 and 2 unimproved." Disposition - "Duty" (R. 1069).

The bank deposits of Vincent E. (Jimmy) Santaniello show that during 1944 and up through May 1945, such deposits were not less than $400.00 and up to $5550.00. From October 1944 to April 1945 Santaniello's deposits were not less than $2139.00 and up to $5550.00 for each month. During 1944 to May 1945, he had total deposits of about $33,000.00 and withdrawals of about $25,000.00 (R. 1058-1059; Def. Ex. J).

The accused elected to remain silent in his defense in chief.

5. Pleas and Motions.

Prior to arraignment of the accused the court granted the prosecution's motion, over the objection of the defense, to amend Specification 2 of the Additional Charge, changing the date from 9 April 1944

to 28 February 1944 and changing the designation of the organization to which the soldier named in the Specification had formerly belonged (R. 4-5). The court properly permitted the amendment, as the gist of the offense was the wrongful transfer and the nature of the offense was not changed.

The accused moved for the reservation of his right to challenge for cause at a later date, which was overruled. The court properly ruled that challenge for cause known to the accused must be made before arraignment, but if grounds for cause were later discovered such challenge could be made as provided in paragraph 58c, page 45, MCM, 1928 (R. 3-4).

The accused, after arraignment, pleaded to the general issue and was granted a continuance for the presentation of special pleas and motions (R. 5-12). On the convening of the court on 6 December 1945, the defense requested permission to examine the whole court by general questions directed to all members of the court, as a basis for a possible challenge for cause. The court properly denied the motion, members of a court-martial are challenged separately, and not en masse, as provided by paragraph 58, page 44, MCM, 1928 (R. 13-15).

In the Board's deliberations upon the record careful consideration has been given to the brief filed by Jacob Steinfeld, attorney for the accused, as well as his assistant defense counsel at the time of trial, and his oral argument heard by the Board of Review on 8 October 1946. Seven points in assignments of error have been made and argued at great length. These we shall discuss in the order in which they have been presented.

The first point argued is that the accused's motion to strike the Additional Charge and the Specifications thereunder and the Second Additional Charge and the Specification thereunder should have been sustained and opportunity permitted the defense to introduce evidence in behalf of its plea, because the Additional Charge and all Specifications thereunder were illegally preferred as they were not prepared after the court had been ordered on the original Charge, thus prejudicing the rights of the accused and the right to a fair and impartial trial (R. 29), citing the Radovich case, CM 283142 (1945), 4 Bull JAG 335, sec. 395(50), August 1945, and paragraph 26, page 17, MCM, 1928. That prior to preferring, referring and service of all charges the status of the accused was in administrative restriction from 27 April 1945 to 11 May 1945, in confinement from 12 May 1945 to 18 October 1945 and in arrest in quarters until the date of trial. That the accuser held up the preferring of the Original Charge because he was in the process of investigating other offenses which might result in charges and thought he could hook them onto the Original Charge, although he knew that the accused was in confinement. That the defense offered testimony in support of its motion, which was denied by the Law Member, as it was an interlocutory question.

The second point assigned as error is termed "a special plea to the jurisdiction that a fair and impartial investigation was not had under AW 70." The defense contended that there had not been substantial compliance with the provisions of Articles of War 70 and 71, and to support his plea the accused was permitted to offer testimony that he was placed in arrest in quarters 27 April 1945, in confinement 12 May 1945 and in arrest in quarters 18 October 1945. While in confinement he was not allowed telephone calls or communication except when he was escorted to other places or guards were present with visitors. Certain regulations of the First Air Force were violated in that the guardhouse report did not show the specific Article of War under which the accused was in confinement (Def. Exs. A-D). That the original Charges were preferred and sworn to 26 May 1945, forwarded to the Base Commander 3 July 1945, referred to the investigating officer 5 July 1945, and returned by the investigating officer 27 July 1945, on which last date they were forwarded to the Commanding General, First Air Force. That the Additional Charges were preferred, sworn to and forwarded to the Base Commander 15 September 1945 and forwarded to the Commanding General, First Air Force, 19 September 1945. That the Second Additional Charge was preferred, sworn to 25 August 1945 and on the same date forwarded to the Base Commander and investigating officer, who returned it with the Additional Charges. That the advice of the Staff Judge Advocate was submitted 24 September and the case referred for trial 27 September 1945 on which date the Charges were served on the accused by the Trial Judge Advocate. That the court made a blanket ruling sustaining objections by the prosecution relative to the defense questions to the investigating officer concerning the preliminary investigations made by the Inspector General Section.

Points one and two can be discussed together, inasmuch as they raise the same issue. The defense cannot sustain its position that the Additional Charge and the Second Additional Charge and all Specifications thereunder were illegally preferred, that there was a multiplicity and accumulation of charges while the accused was in confinement, and that the refusal of the court to permit testimony on point one was error. Even though the court properly denied the motion of the defense to offer proof in support of point one, it did later grant such motion and permitted the accused to introduce evidence at length, which evidence was to the effect that the accuser, an Assistant Inspector General, was to aid in the conduct of an investigation involving fraudulent discharges, which began 27 April 1945 and ended sometime in September or October 1945; and that he had some information leading to all Charges and Specifications and some evidence that the accused was involved in some of these fraudulent discharges, when the original Charges were preferred.

The evidence shows successive delays in the preferment of the Additional and Second Additional Charges. Due to the length and scope of the investigation from which developed evidence of serious offenses as contained in this record of trial, such delays were justified. The question of whether the rights of the accused were prejudiced is not

considered controversial, since the accused was aware of the investigation and told the investigating officer (Major Fingold) throughout and at its termination, that he was entirely satisfied with the investigation and that Major Fingold has been fair and impartial and had complied with every request that he (the accused) made of him (R. 204). The most that can be said on this point is that it is not a question of jurisdiction, but rather a procedural one, answered in cases that will be discussed after point two has been analyzed. As to point two "a special plea to the jurisdiction of the court," that there had not been substantial compliance with the provisions of Articles of War 70 and 71, in that the investigation made had not been fair and impartial, that the accused was not furnished a copy of the charges within eight days after his arrest, that he had been subjected to a lengthy incarceration contrary to Article of War 70, and that a prolonged arrest goes to the substantial rights of the accused to a fair and impartial trial, the following is stated by way of analysis. It would seem that the provisions of Article of War 70 were substantially complied with, as the accused stated that he was entirely satisfied with the investigation and that all of his requests had been granted by the investigating officer. The evidence adduced in the record indicates that a long period of time would be required to complete an investigation of the offenses alleged in the Specifications and Charges in this case. The incarceration of the accused, the failure to specify the Article of War at the time of his arrest, and the failure to furnish the accused with a copy of the charges within eight days after his arrest are not jurisdictional matters (CM 229477, Floyd, 17 BR 149, 154-156; CM 237032, Nelson, 23 BR 231, 248; CM CBI 194 Ransom; CM 273791, Gould, 47 BR 57-58). In the above cited cases the provisions of Article of War 70 are considered procedural in character, as it does not deal with acquisition, since jurisdiction of the person and subject matter is conferred by statute. Errors or irregularities in procedure are not regarded as fatal to the validity of the proceedings unless a substantial right of the accused is thereby prejudiced.

The failure to serve the accused with a copy of the Charges within eight days after his arrest and the period of his incarceration are also procedural matters and do not go to the jurisdiction, on the same reasoning as set forth in the above cited cases. Therefore the court properly denied the motion to strike the Additional and Second Additional Charges and the Specifications thereunder, as well as the special plea to the jurisdiction of the court.

The third and fourth points assigned as errors are so closely related that they can be discussed together, as they pertain to the accused's confession and are termed "incriminating statements of 26 and 27 June 1945," respectively (Pros. Exs. 54, 55). The accused objected to the introduction in evidence of the so-called incriminating statement of 1945 which is a letter written by accused to Mr. McGoey, head of the New York Office of The Federal Bureau of Investigation, urging as grounds, the accused's restraint, his ignorance of the Charges until 5 July 1945,

the refusal of permission to visit his wife on the day their child was born causing him great anxiety and mental distress, and the taking of nembuthal and phenobarbital tablets on the evening prior to and on the early morning of his meeting with Special Agents McDonough and Flynn, which he told them about before giving his signed confession - "incriminating statement of 26 June 1945." That Special Agents McDonough and Flynn of the Federal Bureau of Investigation said that they wanted information concerning civilians to whom money was paid and faithfully promised the accused that "they could understand these transfers" and they were sure that he would not be tried by a military or civilian court as all that they needed was one statement like that and they would talk with Colonel Wold, the Air Inspector, to permit the accused to see his wife occasionally at home. That the accused would never have signed the statement of 26 June 1945 had the Special Agents not promised to keep certain names contained in said statement a secret; this the accused claims was an inducement for him to sign. That the drugs he had taken left him drowsy and nauseated, and that the lengthy interrogation as well as the transcribing of the interrogation of the accused's confession (the incriminating statement of 26 June 1945) not being verbatim, also were factors to be considered. The same argument was made in support of the accused's objection to the incriminating statement of 26 June 1945 (the accused's confession, Pros. Ex. 55). As to the merit of the accused's objection to the introduction of the incriminating statement of 27 June 1945 (Pros. Ex. 54) the Board is of the opinion that it is without any foundation, because this statement in the form of a letter to Mr. McGoey clearly and unequivocally admits the accused's guilt and establishes the confession of the accused (Pros. Ex. 55) as freely and voluntarily given. It refutes the testimony of the accused, who took the stand as a witness for the special purpose of contesting the admissibility of his confession, and corroborates the evidence given by Special Agent McDonough that the accused signed his confession voluntarily without any promise or inducement. Special Agent McDonough further gave evidence that the accused had helped in investigations with the Federal Bureau of Investigation and knew their methods. Inasmuch as the defense's argument in objecting to the admissibility of both incriminating statements (Pros. Exs. 54, 55) is based on the same grounds, any repetition would be surplusage. The Board is of the opinion that the incriminating statements (Pros. Exs. 54, 55) were properly admitted into evidence and a review of these exhibits will show that any citations on "the law of confession" to support its opinion is unnecessary, as there is no error involved.

As to point five, next assigned as error, that the TWX's (teletype messages) were introduced in evidence over the defense's objection, without proper foundation to prove transmission, the accused relies on the testimony of the Base Sergeant Major, Master Sergeant W. E. Slivka, to support his contention that teletypes (Pros. Exs. 1, 2, 5, 10, 13, 14, 16, 39, 40, 42, 45, 62, 63, 68, 77) were erroneously admitted, in that Sergeant Slivka who performed "duties in connection with the transmission

of teletype messages," testified on cross-examination that he had no personal knowledge that the original of the teletypes, as specified above, were transmitted by the First Air Force Signal Center. The question presented is whether the prosecution failed to introduce proof connecting the initiation of the aforesaid teletype, through the Base Signal Center to the First Air Force Signal Center for transmission to the destination contained in the teletypes. For a better understanding of the practice used at Mitchel Field for the transmission of teletypes emanating from the Regional Station Hospital, the prosecution presented evidence that the teletype messages from the hospital are sent to the Base Headquarters from where they are forwarded to the Base Signal Center, where a number and identifying marks "M.T.L." for Mitchel Field and "M" for medical are placed, and the original copy is taken by messenger to the First Air Force Signal Center for transmission. One copy is returned to the Base Headquarters for filing, one copy retained by the Base Signal Center where it is placed in a master file and any additional copies are returned to the section which originated the TWX teletype message. The number on the message and the stamp by the Base Message Center showing the date received and the fact that the messages are not returned or cancelled, is the method for determining that the messages have been transmitted. The prosecution established the agencies through which a teletype is processed for transmission by Sergeant Slivka, who identified Pros. Exs. 1, 2, 5, 10, 13, 14, 16, 39, 40, 42, 45, 62, 63, 68, 77) as messages sent to the First Air Force Signal Center. Therefore it is presumed in the absence of anything to the contrary that the messages received in evidence had been transmitted on the reasoning set forth in Ruling Case Law, Vol. 26, paragraph 26, page 598, which reads as follows:

> "The presumption is that a telegram properly addressed and deposited in a telegraph office, with charge prepaid reached its destination and was delivered in accordance with the obligation which the law imposes upon telegraph companies."

The defense raises no questions that the messages were not sent by the Base Signal Center by messenger to the First Air Force Signal Center, nor that the Base Signal Center was not an agency of the First Air Force Signal Center. Therefore it would seem that the messages in controversy had been transmitted. The court properly admitted in evidence the teletypes identified as Pros. Exs. 1, 2, 5, 10, 13, 14, 16, 39, 40, 42, 45, 62, 63, 68, 77, as the defense has not offered evidence to overcome the presumption above stated.

The sixth point assigned as error refers to morning reports (Pros. Exs. 18, 23, 25, 27, 28, 30, 43) which were received in evidence over objection by the defense. The objection was that the entries contained in these morning reports were not current entries and therefore were hearsay. The objection to the morning reports' (Pros. Exs. 23, 27, 30, 43) admission in evidence should have been sustained, but the admission

of the morning reports (Pros. Exs. 18, 25, 28) was proper, as the record contains the proof that TWX, dated 21 October 1943 (Pros. Ex. 14), addressed to Private Joseph Tafuri's organization, stating that Tafuri was a patient in the Regional Station Hospital, is sufficient to support the entries made in said morning report (Pros. Ex. 18) on the reasoning cited in CM 273922, Artega, 47 BR 116-117. Special Orders No. 69, dated 9 March 1944 (Pros. Ex. 24) support the entries in the morning report (Pros. Ex. 25) under the above citation. The conversation that Captain Stilphen had with the accused relative to Private Tafuri's coming to Squadron "B" for assignment and his subsequently being assigned is considered a current entry as Captain Stilphen, the Commanding Officer of Squadron "B", duly authenticated the extract copy of the morning report (Pros. Ex. 28) and did have personal knowledge.

The seventh point assigned as error concerns the failure of the prosecution to prove beyond a reasonable doubt that the accused committed the offenses alleged in the Charges and any Specifications thereunder, and that the accused was within the jurisdiction of the court. The argument in support of this contention is contained in the accused's brief, termed the "Appellant Brief," and covers from pages 10 to 67. To set out excerpts of such argument, in support of matters as to which errors are assigned, would needlessly prolong this opinion.

We have carefully analyzed the argument presented by the accused as to point seven, and all the evidence contained in the record, and conclude that the accused was within the jurisdiction of the court. Even assuming the provisions of Articles of War 70 and 71 were not literally complied with, no substantial rights of the accused were prejudiced. A penetrating review by the Staff Judge Advocate in the Brown case (CM 206697), is quoted in support of the Board's opinion:

> "If * * * a thorough and impartial investigation is not had [and] nevertheless the charges are preferred for trial, a fair trial is had which results in conviction and the sentence is approved; all that the accused has suffered is injuria sine damno, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted and sentenced; and, if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case therefore falls within the exact language of A.W. 37. * * * It was no part of the purpose of the authors of A.W. 70 to prevent the trial, conviction, and punishment of a guilty man."

The court properly overruled the defense motion to strike Specification 3 of the Charge as being a lesser included offense of Specification 2 of the Charge, Specification 4 of the Additional Charge as being a lesser included offense of Specification 3 of the Additional Charge, Specification 6 of the Additional Charge as being a lesser included offense of Specification 5 of the Additional Charge, Specification 8 of the Additional Charge as being a lesser included offense of Specification 7 of the Additional Charge, and Specification 13 of the Additional Charge as being a

lesser included offense of Specification 12 of the Additional Charge. The Specifications alleging wrongful acts of transfer of the soldiers concerned are substantive offenses and therefore are not included in the Specifications alleging conspiracy with the accused and others. It was proper to prosecute for the conspiracy as well as for the substantive offenses, which were the object of the conspiracy (CM 273791, Gould, 47 BR 67, 68). The defense cited paragraph 24b, page 22, TM 27-255, February 1945, and paragraph 27, MCM, 1928, pertaining to the unreasonable multiplicity of charges, as authority in support of its motion. In the present case the Charges and Specifications allege separate and distinct offenses, therefore, the rule against multiplicity of Specifications is inapplicable (MCM, 1928, par. 149g; Digest of Opinions of the Branch Office of The Judge Advocate General, MTO, page 14). For further discussion on the offenses charged, a brief narration of what constitutes common law conspiracy and how it differs from the Federal Criminal Code in the only material fact that an overt act is not required to be either alleged or proved is as follows: A criminal conspiracy is a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner (Pinkerton v. United States, 145 Fed. (2), 252, 254; CM CBI 114, Ranzenger et al). This definition of a common law conspiracy was first enunciated in 1821 by the Court of Appeals of Maryland in State v. Buchanan, 5 Harr. and J. 317, 9 Am. Dec. 534, and has been almost universally followed in the Federal Courts as well as in most of the State courts ever since. The Federal Criminal Code has not changed the nature of the offense of conspiracy, but has added merely the requirement that an overt act to effect the object of the conspiracy be charged and proved. It is necessary to prove under the Federal Criminal Code not only the existence of the unlawful combination but also that one or more of the confederates did an overt act to effect the common object (McGinniss v. United States, 256 Fed. 621; CM 273791, Gould, 47 BR 65). "Punishment for a conspiracy to commit a crime and for the overt act which is the object of the conspiracy does not constitute double punishment" (Sec. 385, Criminal Law; 15 Am. Jur. 60, citing Sneed v. United States (C.C.A. 5th), 298 Fed. 911; 37 A.L.R. 772, Writ of Certiorari denied in 265 US 590; 68 L. Ed. 1195; 44 S. Ct. 635).

In this case both the conspiracy and the subsequent acts of the accused are serious offenses. If one is considered more serious than the other, then they properly fall within the rule in paragraph 27, MCM, 1928, that lesser offenses may be alleged when the less serious "serve to explain the circumstances of the former" or to show aggravated circumstances, or when sufficient doubt as to facts or law exists to warrant making one transaction the basis of charging two or more offenses.

Evidently the court followed the rule in paragraph 80a, page 67, MCM, 1928:

"If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect."

in arriving at the sentence of the accused.

6. Sufficiency of Proof.

Specifications 1, 2, 4 and 5 of the Charge allege generally that accused knowingly caused false official reports to be made, respecting Asta (Spec. 1), Frankel (Spec. 2), Arlotta (Spec. 4), and Marino (Spec. 5), to the respective commanding officers, with the intent to deceive each commander concerning the true status of such member of his command.

The essential elements of each offense, as charged, are the falsity of the report, that accused caused it to be made, that he then knew it to be false, and that it was intended by him to deceive. Direct evidence proves that the accused caused TWX's to be sent each commanding officer, stating the respective member of his command had been admitted to the Station Hospital, Mitchel Field, and that the records of such Hospital failed to show any such admissions, thus definitely establishing the first two elements. The remaining elements of knowledge and intent are so intermingled they must stand or fall together. It was accused's official duty to know whereof he spoke and he had easy access to the Hospital admission records. It is certainly a reasonable presumption that he did know, and consequently that he intended to deceive by his acts. The defense sought to establish at least an inference that such messages, as well as similar messages referred to in other Specifications, were of a routine nature and were simply processed by the accused, in a ministerial capacity, without personal knowledge of the truth or falsity of their contents. During this period a large number of men were processed through the Hospital, and it is conceivable that, in some instances of routine nature, an officer charged with over-all supervision of administration might sign documents prepared by his subordinates without checking their veracity. However, in three of these instances, it is affirmatively proven that accused acted in a capacity beyond that of an impersonal administrator performing a ministerial act: he personally knew and had several conversations with Asta, and he personally telephoned directions to send the TWX's concerning Asta, Frankel, and Arlotta. Obviously the evidence supports the findings of the court as to these three Specifications. As to the Marino case (Spec. 5) the Board has considered carefully the possible inference of innocent error, but in the light of all the evidence pointing to full knowledge by the accused we are unable to justify any conclusion other than that of his guilt.

Specification 3 of the Charge alleges generally that accused wrongfully and without authority caused a convalescent furlough to be issued

Frankel when he was not entitled thereto. Direct evidence proves: Frankel was not entitled to the furlough; accused had no authority to cause its issuance; and that accused did nevertheless cause it to be issued. This act is wrongful in itself, but its culpable nature is more clearly and definitely inferred from the fact that accused personally directed the issuance of the furlough when there is every reason to believe he knew he was without authority to do so. Again the evidence of surrounding circumstances, particularly his personal interest in behalf of Frankel, negatives any inference of innocent ministerial error.

Specifications 2, 4, 6 and 8 of the Additional Charge allege generally that accused wrongfully and without authority caused Santa Maria (Spec. 2), Sposato (Spec. 4), Giangrasso (Spec. 6), and Vigorito (Spec. 8) to be transferred from their proper organizations to various hospital installations at Mitchel Field, for the purpose of enabling them to evade further duty with their proper organizations. The essence of each offense, as charged, is the causing of the transfer, the lack of authority for such act, and the wrongful purpose as alleged.

Direct evidence proves that the men in question were regularly assigned: Santa Maria and Sposato to companies in Infantry Replacement Training Centers, Giangrasso to a training unit of the Army Service Forces Training Center at Fort Warren, and Vigorito to the Casual Detachment, Boston Port of Embarkation. It further proves all were transferred to units of the Medical Department, Mitchel Field, as alleged, that such transfers were caused by accused, and that accused had no authority to so act.

There remains the element of wrongful purpose. Obviously such transfers "enabled" the soldiers in question to "evade further duty with" their "proper organizations," and in view of the unauthorized nature of the transfers it is reasonable to assume that the men themselves hoped and intended to trade a hard and precarious assignment for the safety and proximity to home of their hospital berths. The real question which must be resolved is whether accused acted in innocent error or with a wrongful purpose as alleged. The evidence is amply clear that accused was well aware of the true military status of each of these men and had more than a casual knowledge of their personal affairs and desires. That he was fully aware of the culpable nature of his own acts in these transactions is clearly disclosed by his own confession.

Specifications 11 and 12 of the Additional Charge allege generally that accused wrongfully and without authority caused Greenberg (Spec. 11) and Senate (Spec. 13) to be transferred to a Separation Center for the purpose of disability discharge, then knowing they had not been found by competent authority to be below required physical standards.

The essential elements of these offenses are: That accused lacked authority to make the transfers; that he caused them to be made;

that he knew the men had not been found by competent authority to be below minimum physical induction standards; and that his purpose was to obtain their discharges as alleged.

Direct evidence proves that the transfers were made, that they were caused to be made by accused, and that the transferees had not been found by competent authority to be below the minimum physical induction standards. Likewise, from this same evidence, the purpose of the transfer is obviously established. There remains then the question of whether or not the accused knew of the lack of preliminary medical determination or realized its necessity as a legal basis for such actions. Certainly if he did have such knowledge there can be no question of his guilt.

Such transfers and discharges were made under color of the provisions of AR 615-365 and War Department Circular 370 (1944) but without proper compliance therewith. The official duties of the accused demanded that he have a thorough working knowledge of those provisions. He obviously must have known, since evidence introduced by the defense clearly indicates he was an exceptionally capable officer of above average intelligence, that they required in all such cases, as is plainly stated therein, a finding by competent medical authority that the subject was physically below minimum induction standards. An even cursory reading of the evidence in respect to these two transactions, as hereinabove abstracted, proves beyond a doubt that accused was well acquainted with both Greenberg and Senate, and the conclusion that he was fully aware of the wrongful nature of his actions respecting their transfers is inescapable. Greenberg's commanding officer, a medical officer, remonstrated with accused concerning that transfer and was told by accused "that it wasn't any of his business." Federal Bureau of Investigation agents, while questioning accused, mentioned Senate. Accused refused to make any statement regarding Senate, and told the agents "that's the case which would hang me."

Specifications 3, 5, 7, and 12 of the Additional Charge allege generally that accused conspired with another (Santaniello as to Specs. 3, 5, and 7; "a person or persons unknown" as to Spec. 12) to defraud the United States by causing soldiers (Sposato, Spec. 3; Giangrasso, Spec. 5; Vigorito, Spec. 7; and Senate, Spec. 12) to be wrongfully transferred. A consideration for such action was alleged in Specification 5 ($1,250.00) and Specification 12 ($5,000.00). (The court, in its findings, deleted an allegation of consideration in Spec. 7). The essence of each offense is the conspiracy as distinguished from any resulting action, but if monetary considerations, as alleged in Specifications 5 and 12 are to remain therein, they must likewise be founded upon legal evidence, since they go to the degree of the offense though not to its substance. It seems obvious that the acts, as alleged, in themselves show a fraud against the United States.

Direct evidence proves that each of the transfers referred to

herein were in fact made and were effected by the accused (See discussion of sufficiency of proof as to Specs. 4, 6, 8, and 13). This leaves then only the matter of conspiracy, and where applicable the monetary consideration, for discussion here.

Sposato testified, during the trial, generally as follows: He had known Santaniello for some time. Santaniello told him he knew a captain at Mitchel Field who would see that he was treated and taken care of, took him to Mitchel Field, introduced him to the accused, and then told Sposato "they would take care of him."

Ginagrasso testified, during the trial, generally as follows: He had known Santaniello for six or seven years. He made an agreement with Santaniello that, in consideration of the payment to Santaniello of $1250.00 he would be transferred and stationed at Mitchel Field as long as a "captain," known to Santaniello, who would effect the transfer, would be stationed there. He was taken to Mitchel Field twice by Santaniello and on the latter visit was introduced to the accused who, after a conversation with Santaniello out of witness' hearing, sent him to Squadron B. He paid the $1250.00 to Santaniello and his supposed agent.

Senate testified, during the trial, generally as follows: He met a man named "Al" and agreed to pay him $5000.00 in consideration for an introduction to a "friend" of Al's who would, if Senate were below minimum physical standards, get him a discharge. "Al" thereupon introduced Senate to the accused, telling the accused this was the fellow he mentioned that was sick. After a conversation between "Al" and the accused, out of Senate's hearing, the accused took Senate to Mitchel Field. Senate paid "Al" the $5000.00.

If any doubt of a conspiracy as to these transactions remained it would be conclusively dispelled by the confession of the accused as to the Sposato and Giangrasso cases and, as to the Senate case, by his reply to the agents of the Federal Bureau of Investigation, when they asked him about it, that he would make no statement as "that's the case which would hang me." However, the conspiracy alleged in Specification 7 (with Santaniello to transfer Vigorito) is not so obviously proven <u>except</u> by accused's confession. Vigorito testified, respecting Santaniello, only that he had known him "about five or six years." It appears obvious that the court, in this instance, based their finding of guilty on accused's confession. The law is well established that the corpus delicti cannot be established by an accused's confession alone, unsupported by corroborative evidence (MCM, 1928, par. 114, p. 115). Such corroborative evidence must affirmatively appear as to <u>each</u> Specification. In this instance the Board is of the opinion that a demonstration of similar conspiracies, even though the conspirators involved are the same persons, coupled with a simple fact that Vigorito knew Santaniello, is not sufficient

as the basis for using accused's confession to prove this conspiracy as alleged. Therefore, the Board is of the opinion that there is not sufficient admissible evidence to support the findings of guilty by the court as to Specification 7.

Specification 1 of the Additional Charge alleges generally that the accused wrongfully and without authority caused Tafuri to be transferred for the "purpose of enabling him to" evade overseas duty "with his proper organization." Direct evidence proves Tafuri was regularly assigned to the 763rd Antiaircraft Artillery Battalion, then at the staging area, Camp Stoneman, California; that he was subsequently transferred to the Detachment, Medical Department, Mitchel Field; and that such transfer was made without proper authority. There remains then to be determined whether such transfer was "caused" by the accused for the "purpose" alleged.

Tafuri testified, in substance, that Camp Stoneman then included both a staging area and a port of embarkation; that his unit was at the staging area; that he had no knowledge that his unit had been alerted for overseas duty; that, aside from hemorrhoids, he considered he was physically fit for overseas duty; and he denied knowing the accused prior to his entry as a patient in the hospital at Mitchel Field. The confession of the accused states, in part:

> "* * * I met Jimmy and his father and a soldier by the name of Tafuri and the latter's father at the Terrace Room on Franklin Street, Hempstead, N. Y. Jimmy told me that the Tafuri family had had a lot of hard luck and illness and that the soldier was needed near home by the family. He asked me to have him transferred to Mitchel Field and I agreed to do so. Jimmy mentioned no money to me that night.
>
> "About a week later Jimmy brought this soldier Tafuri to Mitchel Field. I took him to the Detachment of Patients. I believe he was subsequently admitted to the hospital and later transferred to the Medical Detachment. I don't recall what Tafuri's ailment was * * *" (Pros. Ex. 55).

The personal interest of accused in Tafuri is further disclosed by accused's directions, given personally to at least two noncommissioned officers of Squadron B as to what disposition would be made of Tafuri.

There is a reasonable inference from the evidence that Tafuri realized the probability of overseas duty if he reported back to his proper organization. Whether he did or not is only important insofar

as it points to his communication of such opinions to the accused. Before the transfer was made the accused knew the unit to which Tafuri belonged, and its location, and he had discussed the transfer with Tafuri and Tafuri's father. There arises a compelling inference that the accused caused such transfer and did so with the clear intent to enable Tafuri to evade overseas duty.

The Specification of the Second Additional Charge alleges generally that accused wrongfully and unlawfully accepted and received from Patrissy $500.00 for the purpose of effecting Patrissy's transfer, thus enabling him to evade overseas duty as a replacement. Direct evidence proves Patrissy was attached, unassigned, to the New York Port of Embarkation, Casual Detachment, Camp Kilmer, New Jersey, where he was being processed for overseas shipment, and that he was transferred from there to the Detachment of Patients, Regional Hospital, Mitchel Field, although he was never a patient, nor was he even examined by a doctor, at such hospital. Patrissy testified in part substantially: That he made an appointment with accused by telephone to see him "that night" at the Club Zanzibar, at which meeting accused "* * * said that I was hot where I was at. I said, 'yes, I am hot'"; that he then asked accused to "* * * get me over to Mitchel Field" because he "had home troubles" and wanted to stay at Mitchel Field "for a while." Respecting mention, during such conversation, of a $500.00 consideration for such transfer, Patrissy testified:

> "Q. The first time when that money came up was when you said to him that 'all you had or could give him was $500.'? Is that right?
>
> "A. Well, I don't know axactly how it come up, but we happened to be talking about it, and I got the impression that there was some sort of reimbursement. I said, 'That's all I have, is 500 bucks.'
>
> "Q. You got that impression from talking with that officer, did you not?
>
> "A. Yes, sir.
>
> "Q. Did that officer ask you directly for any money?
>
> "A. Well, not directly.
>
> "Q. You just imagined that money was involved? Is that right?
>
> "A. Well, I don't know the exact words of the conversation. I don't recall.

"Q. Well, I wouldn't expect you to. It is rather remote.

"A. I don't know how it come up but that is the impression I got.

"Q. It was your impression that money was involved?

"A. That's right, sir.

"Q. Though that officer did not ask you how much, or to give him any money? Is that right?

"A. I suppose so."

Patrissy further testified, in substance: that as a result of such conversation he went the following day to the "main gate" at Mitchel Field, where he was met by the accused who was then driving a private car; that he entered the front seat of the car with the accused and remarked that he was "a little leery about this"; that accused then drove him to Santini and during the trip "I /Patrissy/ took the money out of my pocket and put it on the seat of the car * * *. The money I says I was going to give him * * * five hundred dollars"; that he remained at the hospital, working at the Detachment of Patients, four or five weeks, and then went to Fort Dix and was discharged; and that he did not see accused after his trip with him to Santini.

Patrissy was first called as a witness for the prosecution and at that time definitely identified the accused as the officer he saw at the Cafe Zanzibar on or about 20 September 1944. Later Patrissy was called as a witness for the defense, was examined by the accused personally as to such prior identification, and during this examination he gave incoherent testimony as to whether the accused was the officer he saw at the Cafe Zanzibar, stating that "it is a mental thing with me. I can't see myself taking so much responsibility, that's what I am afraid of. See, I don't know - maybe I am wrong that's why." This witness was before the court; they weighed his testimony, and considered what part was believable evidence in arriving at their findings as to this Specification. The Board is in full accord with the court's evaluation of this testimony.

It is obvious that an agreement existed between Patrissy and some officer whereby Patrissy was to pay the officer $500.00 in return for a transfer enabling him to evade overseas duty as a replacement. The facts relating to the actual consummation of such transfer are of evidentiary value but are not necessary elements of the offense as charged. The finding by the court that accused was the officer with whom Patrissy dealt is supported, in the opinion of the Board, by ample and conclusive evidence as above outlined.

General Discussion: The defense failed to refute any of the material evidence introduced against the accused. It would be remarkable if, in the course of so long a trial, some errors did not intervene in proceedings involving numerous issues of fact. In the admission of such a mass of testimony and documentary evidence, it would be difficult to prevent the introduction of some which might later prove to be incompetent. But as pointed out the errors committed, in the opinion of the Board of Review, were not fatal, nor did they effect the substantial rights of the accused except as to Specification 7 of the Additional Charge as above discussed.

7. The accused is 28 years of age and is married. He entered the service on 28 April 1939 and served as an enlisted man (reaching the grade of master sergeant) until, having successfully completed the Officers' Candidate course at the Medical Administration School, he was commissioned and appointed a temporary second lieutenant in the Army of the United States on 28 November 1942. He was promoted to the temporary rank of first lieutenant on 19 March 1943, then to the temporary rank of captain on 23 September 1943, and lastly to the temporary rank of major on 14 December 1944. Most of his service was at the Regional and Station Hospital, first as an enlisted man, then as Adjutant, then as Executive Officer, and finally as Admission and Disposition Officer.

8. The court was legally constituted and had jurisdiction of the person and the offense. In the opinion of the Board of Review the record of trial is legally insufficient to support the finding of guilty of Specification 7 of the Additional Charge, but legally sufficient to support all the other findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal and confinement at hard labor for three years are authorized upon conviction of a violation of Article of War 96.

Thomas J. Wilson, Judge Advocate.

Robert E. McMillan, Judge Advocate.

Edward J. Robinson, Judge Advocate.

JAGN-CM 307119 1st Ind NOV 14 1946
WD JAGO, Washington 25, D. C.
TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Major Alphonse J. Fabbricatore (0-1534478), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully causing the issuance of a convalescent furlough, under one Specification; of wrongfully causing the making of false official reports, under four Specifications; of wrongfully causing transfers of soldiers to enable them to evade further duty with their proper organizations, under four Specifications; of wrongfully causing transfers of soldiers to enable them to be discharged without proper authority, under two Specifications; of wrongfully causing transfer of a soldier to enable him to avoid overseas duty with his proper organization, under one Specification; of acceptance of a bribe to effect a wrongful transfer of a soldier to evade overseas duty, under one Specification; and of conspiracy to defraud the United States, under four Specifications; all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the finding of guilty of Specification 7 of the Additional Charge, but legally sufficient to support all other findings of guilty and the sentence, and to warrant confirmation thereof.

The record shows that the accused used his office of honor and trust in the establishment of unlawful schemes, devices, and plans resulting in false official reports, a wrongfully granted convalescent furlough, unauthorized transfers - some to evade specific military duties or assignments - unlawful discharges, and conspiracies to defraud the United States through effecting transfers of enlisted men. Some of these acts were done individually, some in concert with others, and all involved moral turpitude. I recommend that the sentence be confirmed and ordered executed.

4. Consideration has been given to briefs filed by Jacob Steinfeld, counsel for accused, as well as oral argument before the Board of Review.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Form of action
3 - Briefs filed by
Jacob Steinfeld

(G.C.M.O. 356, 21 November 1946).

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

SPJGK - CM 307120

6 MAY 1946

UNITED STATES v. Second Lieutenant WALTER C. SEEWAGEN (O-1317569), Infantry	WESTERN BASE SECTION THEATER SERVICE FORCES Trial by G.C.M., convened at Seine Section, Paris, France, 26 December 1945. Dismissal, total forfeitures and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
KUDER, CARROLL and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Walter C. Seewagen, attached unassigned 179th Replacement Company, 39th Replacement Battalion, 19th Replacement Depot, United States Forces, European Theater, United States Army, did, at or near Company "A" 10th Infantry Regiment, Berdorf, Luxembourg, on or about 4 February 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at or near Luxembourg City, Luxembourg on or about 5 October 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. All of the members of the court recommended that so much of the sentence as imposed confinement at hard labor be suspended. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

An extract copy of the morning report of Company A, 10th Regiment Infantry, for 10 February 1945 was introduced in evidence, without objection by the defense, showing accused "fr dy to AWOL 1000 hrs 4 Feb 45" (R. 5; Pros. Ex. A).

It was stipulated that if First Lieutenant R. J. McCaig, a member of the Military Police, were present in court he would testify that on 5 October 1945 he placed accused under arrest at Military Police headquarters in Luxembourg City, Luxembourg, and that accused had been previously requested by telephone to report to that headquarters (R. 5; Pros. Ex. B).

For the defense.

After an explanation of his rights, the accused elected to be sworn as a witness, and testified substantially as follows:

He is 24 years old, and was born and reared in Philadelphia where his father has been a chief tester at the Philadelphia Quartermaster Depot for eleven years. He has one sister and two brothers, one of whom has been in the service but is now discharged. At the age of 16, after completing one year of high school, he worked one year for a fruit and produce outfit, and for one year was in business for himself. After that he went to work for a general store and at the time of his induction, 12 August 1942, had become assistant manager. Following his infantry basic training at Camp Wheeler, Georgia, he was sent to Officer Candidate School at Fort Benning, Georgia, from which he graduated and was commissioned on 7 April 1943. Upon his graduation he married the girl to whom he was engaged and had known four years, and now has one boy, nine months old, whom he has never seen. Upon being commissioned, he served as an infantry training officer at Camp Roberts, California, for three months and then as Supply and Mess Officer at Fort Ord, California, until August, 1944 (R. 9), when he went overseas. In October he was assigned as rifle leader of the second platoon, 1st Battalion, 10th Regiment, and joined them while they were in combat and had just been "drawn off" Fort Driant, France (R. 10). He retained this assignment under combat conditions from 13 October 1944 until his "departure". During that period he fought at the battle of Metz and then above the Saar region for 14 days. After waiting at Saarbarturn his organization fought in the battle of the Bulge and then went around the entire area of Dierkick and Ettelbruck. There were casualties, the platoon was never at full strength, and they were under constant conditions of danger. He was not wounded but had some "close calls." (R. 11,12) At one time he was under heavy artillery concentration for from twenty to forty-five minutes and at another time a mortar hit near his foot and stunned him and he ran for seventy-five yards (R. 15). He was not examined by a medical officer because he had no reason to be examined (R. 12). Around the first of January he began to feel as though he was incapable of leading men into combat. He had a confusion of thought - he wanted to protect his men but felt he was becoming incapable. They were supposed to take "blue eighty-eight" tablets every three or four days, a drug that induced sleep and relaxed one's nerves. Taking them became more or less of a habit and, although he did not form a habit, he remembers taking them. Things did not seem real to him but he cannot describe the feeling. He did not get enough sleep and his nerves were getting the best of him. He had no reason to be

examined by a medical officer (R. 12). When he left his organization in February it was in reserve "approximately three and one-half to four miles out of the front lines" (R. 13). He did not have permission to leave but did not realize he was absent without leave - he did not realize anything, he felt incapable and could not think. He had no intention of going absent without leave. He went to Luxembourg and then to the town of Longley where he started drinking and stayed drunk for two weeks. From day to day he kept thinking he would go back but has no excuse for not having done so (R. 13). He was afraid of the consequences (R. 14). At first, during his absence he lived with some organizations, then a little later met a French family and stayed with them "quite a while" (R. 13). At the time of his apprehension he had been around the hospital for some seventeen days (R. 15) visiting a nurse whom he had known for some time and was at her home when the military police officer called by phone (R. 16). When he received the telephone call from the military police he felt relieved and turned himself in immediately. He knew he "did wrong" and "I hope the court will show me mercy" (R. 14).

Without objection, the defense introduced the report of a board of medical officers, convened 20 November 1945 to examine accused under the provisions of paragraph 35c, Manual for Courts-Martial, 1928, and Army Regulations 420-5 (R. 16; Def. Ex. 1). The board found that accused

> "*** is sane and responsible for his actions at the present time, and is so far free from all mental defect, disease or derangement as to be able to distinguish between right and wrong and to be able to cooperate in his own defense, and to adhere to the right."

It also found that accused

> "*** was sane and responsible for his actions during the period when he is alleged to have committed certain acts for which disciplinary action is now pending."

(An exhibit attached to this report refers to accused's being charged with desertion from 4 February 1945 to October 1945.) The board made the following "recommendation":

> "It is felt that in Jan and in Feb 1945 that this patient was suffering from severe combat fatigue. It is quite likely that the presence of this condition could have obtunded his judgment at the time he went AWOL. It is felt, too, that at the present time he still has some mild residual symptoms."

4. The morning report, the stipulation concerning the return of accused to military control, and the admissions made by accused on the witness stand, clearly establish that accused was absent without leave from his organization or place of duty from 4 February 1945 to 5 October 1945. The question then

remains whether his absence was accompanied by an intention not to return to his place of duty.

The proved period of accused's absence was 243 days, 91 days of which preceded the date of the German surrender on 7 May 1945, with 155 days of the period succeeding that date. From a much-prolonged period of absence without leave, not satisfactorily explained, a court will be justified in inferring an intent to remain permanently absent (MCM, 1928, par. 130a, p. 143). It has been held that an unexplained absence without leave of as few as 37 days in an active theater of operations was sufficient to establish desertion (CM ETO 1629, O'Donnell).

According to the stipulation and accused's testimony, he turned himself in after being requested by telephone to come to Military Police headquarters. It is obvious from the record that accused had ample opportunity to surrender himself to military authorities, prior to 5 October 1945, but he failed to do so. In fact, he "lived with some organizations at first," before staying with a French family.

The board of officers found that accused was sane and responsible for his actions "during the period when he is alleged to have committed certain acts for which disciplinary action is now pending." The board, however, said in its "recommendation" that it was felt that in January and February, 1945, accused was suffering from severe combat fatigue and that it was likely that the presence of this condition could have "obtunded" his judgment at the time he went absent without leave. The effect of this "recommendation" upon the finding that accused was sane and responsible during the period of the offense, need not be decided here, for the gravamen of the offense of "straight desertion" under Article of War 58 is absence without leave, accompanied by the intent, formed at some time during his absence, not to return to the place of duty (MCM, 1928, par. 130a, p. 142; CM ETO 10568, Ritchie). There is no indication that accused suffered severe combat fatigue during the more than seven months that he was absent without leave subsequent to February of 1945.

The conditions existing at the time accused left his place of duty, as described in his testimony, his failure to turn himself in until requested to do so by the military police, his prolonged absence without leave of 243 days, and other evidence in the record as set forth in the statement of facts herein, support the court's finding that accused was guilty of desertion as alleged.

5. War Department records show that accused is 25 years of age and is single. (According to accused's testimony at the trial, he is married and has one child.) He completed two years of high school. From 1938 to 1939 he was employed as a sales clerk in a fruit produce market, and from 1939 to 1942 he served as assistant manager and sales clerk in a meat and produce market. He was inducted into the Army on 12 August 1942. Upon

graduation from Infantry Officer Candidate School, he was commissioned second lieutenant, Infantry, Army of the United States, 17 April 1943.

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

William B. Huder, Judge Advocate

Donald K. Carroll, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307120 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 21 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Walter C. Seewagen (0-1317569), Infantry.

2. Upon trial by general court-martial this officer was found guilty of desertion in violation of Article of War 58. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. All of the members of the court recommended that so much of the sentence as imposed confinement at hard labor be suspended. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was assigned as rifle leader of the Second Platoon, Company A, 1st Battalion, 10th Infantry Regiment, and retained this assignment from 13 October 1944 until 4 February 1945, when he left his organization, which was in reserve at the time, approximately three and one-half to four miles from the front lines near Berdorf, Luxembourg. He went to the city of Luxembourg, then to the town of Longley, where he stayed drunk for two weeks. He kept thinking he would return to his outfit, but did not do so because he was afraid of the consequences. On 5 October 1945 he was requested by telephone to appear at the Military Police Headquarters in the city of Luxembourg, where he then appeared and was placed under arrest. A board of officers, appointed to examine accused, reported that it "felt" that in January and in February, 1945, he was suffering from "severe combat fatigue" and that it was quite likely that the presence of this condition could have affected his judgment at the time he became absent without leave. The report further states, "at the present time (20 November 1945) he still has some mild residual symptoms."

All the members of the court sitting at the trial signed a petition for clemency, attached to the record of trial, reading in part as follows:

> "All members who sat on the court do hereby recommend clemency and that so much of the sentence as imposes confinement at hard labor be suspended. The court is highly influenced

in this recommendation by its appreciation of the influences and effects of combat duty, by the apparent honorable service of this officer prior to the date of his absence without leave, by the fine personal impression made by the accused upon the stand and by the very evident presence of combat fatigue which this officer suffered and which must have influenced his actions both at the time of his absence and subsequently."

The record thus indicates that accused was suffering from severe combat exhaustion in January and February 1945. Accused, however, failed to turn himself in to the military authorities until 5 October 1945, seven months after his severe exhaustion appears to have subsided. Then he appeared at a military police headquarters at the request of the military police. No adequate excuse was offered for this long delay. The first three months of this period were, as accused had particular reason to know, an extremely critical time for his comrades in arms. Accused's conduct constituted an egregious military offense and violated the standards of an officer. Under all the circumstances, I recommend that the sentence be confirmed and ordered executed, and that a disciplinary barracks be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 153, 28 May 1946).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH-CM 307121

15 JUN 1946

UNITED STATES v. Second Lieutenant JEROME E. STRAUSS (0-558371), Infantry, and Private First Class SIDNEY ROSEN (31035973) and Private RICHARD R. GRAVELY (33049146), both of 54th Armored Field Artillery Battalion.	3RD ARMORED DIVISION Trial by G.C.M., convened at Darmstodt, Germany, 26, 27 May 1945. Strauss: Dismissal, total forfeitures and confinement at hard labor for life. Rosen: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Gravely: Dishonorable discharge, total forfeitures and confinement at hard labor for forty (40) years. Penitentiary, Lewisburg, Pennsylvania.

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

2. The three accused were tried in the same trial upon the following Charges and Specifications:

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

Specification 1: In that Second Lieutenant JEROME E. STRAUSS, Company C, 32nd Armored Regiment, and Private First Class Sidney Rosen, Service Battery, 54th Armored Field Artillery Battalion, acting jointly and in pursuance of common intent, did, together with other persons unknown at Korbach, Germany, on or about 1 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Marlene Schoemer, Stechbahn 26, Korbach, Germany.

Specification 2: In that Private First Class Sideny Rosen, Service Battery, 54th Armored Field Artillery Battalion, and Private Richard R. Gravely, Service Battery, 54th Armored Field Artillery Battalion, acting jointly and in pursuance of common intent, did, at Korbach Germany, on or about 1 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Magdalena Schuler, Stechbahn 26, Korbach, Germany.

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

Specification 1: In that Second Lieutenant JEROME E. STRAUSS, * * *, did, at Korbach, Germany, on or about 1 April 1945, with intent to commit a felony, viz., rape, commit an assault upon Fraulein Marlene Schoemer, Stechbahn 26, Korbach, Germany, by forcing her to lie upon a bed and attempting to insert his penis into her private parts.

Specification 2: In that Private First Class Sidney Rosen, * * *, did, at Korbach, Germany, on or about 1 April 1945, with intent to commit a felony, viz., rape, commit an assault upon Frau Magdelena Schuler, Stechbahn 26, Korbach, Germany, by forcing her to accompany him into a room and attempting to insert his penis into her private parts.

Specification 3: In that Second Lieutenant JEROME E. STRAUSS, * * *, did, at Korbach, Germany, on or about 1 April 1945, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection, per os, with Fraulein Marlene Schoemer, Stechbahn 26, Korbach, Germany.

Specification 4: In that Private First Class Sidney Rosen, * * *, did, at Korbach, Germany, on or about 1 April 1945, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection, per os, with Fraulein Marlene Schoemer, Stechbahn 26, Korbach, Germany.

Each accused pleaded not guilty to, and was found guilty of, the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced. Accused Strauss was sentenced to be shot to death with musketry, and accused Rosen and Gravely were each sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence as to accused Strauss and forwarded the record of trial for action under Article of War 48; approved the sentence as to accused Rosen, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½; approved the sentence as to accused Gravely but reduced the period of confinement to forty (40) years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½. The Theater Commander, as confirming authority, confirmed the sentence as to accused Strauss but commuted it to dismissal, total forfeitures and confinement for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The prosecution introduced evidence to show that on 1 April 1945, five German women, Maria Schoemer, Magdalene Schuler, Marlene Schoemer, Anna

Peifer and Kaethe Ney, lived in an apartment in a house in Korbach, Germany (R.6,25,43). Maria Schoemer was the grandmother of Marlene Schoemer, a girl seventeen years of age, and Magdalena Schuler was Marlene's aunt (R.25,50). The apartment occupied by these women was on the first floor adjacent to a restaurant located on the same floor of the building. There were other housing accomodations on the upper floors of this building in which a total of twelve men, including the three accused, were billeted on the evening of 1 April 1945 (R.7,55).

On that evening the three accused entered the living quarters of these women. Mrs. Schuler asked accused Strauss if he was an officer to which he replied in German that it was none of her business. She then stated that he must be a gentleman and would not harm them to which accused Rosen replied in German, "We are the boss now, you don't have anything to say anymore" (R.8,20). Turning to Marlene Schoemer, accused Strauss stated that she was to accompany him. Marlene refused to do so stating that she preferred to be shot while her grandmother, Maria Schoemer, grasped her arm and also objected to the demand stating that Marlene was but a child. Accused Rosen at first suggested they leave the girl alone but after conversing in English with accused Strauss, he pulled Mrs. Schoemer's hand from Maria, told her she had nothing to say about the matter and threatened to shoot. Thereupon Marlene, who testified she was fearful that they all would be shot, stated that she would go with the accused. Grasping her arm, accused Strauss conducted her from the room accompanied by accused Rosen (R.8,9,19,25-27,33,44,45,47,50-52).

Within a few minutes accused Rosen returned to the women's quarters whereupon accused Gravely grasped Mrs. Magdalena Schuler who was smoking a cigarette and commenced to pull her from the room. Escaping from him, she rejoined the other women. Rosen then stated in German that she was to go with them and she accompanied the two soldiers to the empty restaurant across the hall (R.9,10,21,46,48,52). Magdalena Schuler testified that the following events occurred thereafter. Rosen remained in the hall while Gravely entered the vacant restaurant with Mrs. Schuler. After leaning his rifle near the door, Gravely tried to force her to the floor. Unsuccessful in that effort, he then pushed her to a table to which she clung to prevent being thrown to the floor, meanwhile dropping the cigarette she had in her hand. As she leaned against the table, Gravely removed her pants, raised her dress and inserted his penis in her private parts (R.9-11,21,24). After Gravely completed this act, Rosen promptly entered the restaurant where Mrs. Schuler was half recumbent on the table with her pants removed and her dress raised. Rosen tore her corset open and grasped her breast. He then tried to insert his pehis in her private parts but she stiffened her body and he did not succeed. He brandished no weapon during this time. Thereafter the two accused left the restaurant and she returned to her quarters from which she had been absent about 20 minutes or a half hour and commenced to cry (R.13-15, 21,52).

Mrs. Schuler offered no resistence to these overtures of either Gravely or Rosen because although neither of them actually threatened her with a

weapon, she feared she would be shot if she did not do as they wished. She had heard over the radio that women were treated by the Americans as they were by the Russians only "in a finer way" and that women "had to do everything they were asked to do." Believing that the accused "were the bosses now, and I have to do as they say", Mrs. Schuler did not resist vigorously but only "hoped it would all be finished soon" (R. 9-12,14,23). Mrs. Schuler also testified that when Strauss entered the women's apartment, he did not threaten anyone with a pistol nor state that he would shoot anyone (R. 19). She also testified that before she went to the restaurant and before Marlene went upstairs, the accused did not point weapons at any of the women but threatened them "only verbally, not actually" (R. 22).

After Strauss and Rosen had conducted the girl, Marlene Schoemer, from her quarters, they took her to the third floor of the building where the soldiers were billeted. She cried out when she stumbled on the stairway but did not otherwise resist mounting the stairs because, as she said, she was fearful of being shot. Both of the accused were wearing pistols (R. 27, 28, 32). Corporal Vern A. Braness observed the two accused ascending the stairs with Marlene who seemed to be proceeding unwillingly as she "had her hands in front of her and was hanging back." He saw all three enter the room in which Strauss, Rosen and another soldier, Carey, were billeted, and saw Rosen soon reappear and proceed downstairs (R. 56, 57, 61). It was then about 10:00 p.m. (R. 35). As to events occurring in that room, Marlene Schoemer testified as follows:

After entering the room she fell to the floor and Strauss and Rosen picked her up and placed her on the bed. Rosen left the room and Strauss then proceeded to remove all of her clothes. As he pulled her dress over her head, a pin in it pricked her nose so she opened the pin and also the belt of the dress. After undressing the girl, Strauss removed his clothing and lay upon her. He tried to insert his penis in her private parts but did not succeed. Marlene testified she offered no resistance to his efforts because of fear. After some 10 or 15 minutes, Strauss left the room and Rosen entered (R. 28, 29, 35, 39). Rosen unbuttoned his fly, lay on top of her nude body and inserted his penis in her private parts. He remained in the room about 5 or 10 minutes. Marlene observed no weapon on him and was not as afraid as she had been with Strauss (R. 29, 39, 40). Thereafter eight men entered the room in progression and all tried to have sexual relations with her, three or four of them succeeding in penetrating her person. Strauss then returned, entered the bed and again attempted to engage in sexual intercourse. Unsuccessful in that, he pushed Marlene under the covers, forced her head down, raised himself up and told her to take his penis in her mouth. She refused to do so and he then pushed his penis into her mouth. Thereafter Marlene who was suffering from a headache vomited and Strauss wiped her mouth with the bed cover (R. 30, 32, 36). Rosen thereafter returned to the room and he also inserted his penis in her mouth. Then several soldiers entered the room, talked to Strauss and

he turned to Marlene and asked her if she wished to return to her folks. Putting on her dress she testified that she found she could not stand and asked accused Strauss if he would take her to her folks which he did (R. 31). It was then about midnight (R. 35).

While in bed with Strauss, Marlene returned one of his kisses because he asked her to do so (R. 35). She also told him there were two older girls in the house and asked him why he did not take them. When Strauss mentioned something about America she asked him if it was nice there and also inquired "you won't shoot me now". Receiving no answer she asked him if he would take her to America so that "he would not shoot me after all". When Strauss asked her if she loved him she answered yes because she did not have the nerve to say no. She also stated that Strauss' behavior was neither brutal nor friendly (R. 35, 37).

When Marlene and Strauss re-entered the quarters occupied by the women, Kaethe Ney observed that Marlene's hair was messed but otherwise she appeared composed. Thereafter, Marlene washed and retired (R. 46). Strauss told the women if they said anything about what had occurred they would have reason to be afraid (R. 32). Earlier both Strauss and Rosen had entered the women's quarters while Marlene was upstairs, had threatened them with pistols, told them they would be shot if they said anything and instructed them to retire (R. 15, 52, 53). Before Strauss left Marlene he inquired "Again tomorrow night" and she replied yes out of fright (R. 53). Mrs. Schuler was so glad to see Marlene that she offered Strauss her hand and then asked for a cigarette. He threw a package to her and told her to keep them (R. 17).

Corporal Vern A. Braness who had observed Strauss and Rosen enter the upstairs room with Marlene later saw Strauss come from the room as the corporal was preparing for guard duty. Strauss asked the corporal if he wanted "some of that" to which the corporal replied "not that way". When he returned from guard duty after about 45 minutes he heard sobbing in the quarters occupied by the women (R. 57, 58). Thereafter Corporal Braness and other men in the building became "tired of what was going on" in Strauss' room and of what Strauss was doing so they entered his room, told him to stop and to take the girl downstairs which he did within a few minutes. When they entered the room Corporal Braness observed that the girl was covered to her breast and that Strauss was nude (R. 59-62). Private Charles L. Smith who like Corporal Braness had also refused Strauss' prior offer of a "piece" entered the room with Corporal Braness. He saw the girl lying naked in bed and she acted as if she didn't care whether she left the room or not (R. 63-66). Private John E. Carey who was billeted in that room with Strauss and Rosen had seen Strauss and Rosen occupy the bed successively with the girl (R. 67). He had seen Strauss grasp the girl by the neck and then her head disappeared under the bed clothes. When Rosen came into the room on one occasion Strauss told him that "she sucked him off" and Carey then observed Rosen enter the bed and bring the girl's head down to his penis which he inserted in her mouth (R. 68). While in the room the girl did not seem either happy

or unhappy to Carey. She "looked like she liked" Strauss and did not seem afraid. He saw her with her arms around Strauss several times and also saw her vomit twice (R. 70, 71).

4. Accused Rosen and Gravely elected to remain silent but accused Strauss made an unsworn statement to the court, describing as follows the events occurring that evening. After entering the apartment occupied by these women Strauss spied Marlene Schoemer and told her that if she would come with him he would give her mother some cigarettes. The mother inquired if Strauss was to be the only one and he replied affirmately. As he walked from the apartment holding the girl's hand he noticed that Rosen was following them. Entering the upstairs room the girl walked to the bed while Strauss removed a portion of his clothing. Thereafter he commenced to undress her with her assistance. He attempted to have relations with her but was unsuccessful since he failed to have an erection. He then arose, left the house and walked about outside. Feeling tired he returned to the room, found the girl still in bed and undressed and joined her (R. 73). Again he failed to have an erection so he visited the latrine. After he returned to the room some soldiers entered and informed him that he "should get the girl downstairs". Asking Marlene what she wished to do she replied that she preferred to stay with Strauss. Apparently, however, the men were insistent that she leave so Strauss escorted her downstairs, giving cigarettes to the woman whom he thought to be the girl's mother but who in fact was her aunt (R. 74). Strauss further stated that the only time he saw Rosen during this incident was when Rosen walked past the room and peered inside. He denied that he committed sodomy with Marlene and insisted that all of his relations with her were with her consent (R. 75).

Captain Malcom Block, neuropyschiatrist of the Third Armored Division, testified that after examining accused Strauss he concluded that he was sane and responsible for his actions although he was "definitely abnormal in his psycho-sexual sphere of behavior" (R. 77, 78).

5a. Alleged rapes and attempted rape on Marlene Schoemer.

Accused Strauss and Rosen were charged with acting jointly, together with other persons unknown, in raping Marlene (Chg I, Spec 1) and Strauss was also charged with attempting to rape Marlene (Chg II, Spec 1). From the evidence it is apparent that since Strauss did not penetrate Marlene's private parts his guilt of the joint rape charge depends upon whether or not he aided and abetted Rosen or others who did effect penetration.

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Where there is in fact no consent, the force essential to rape may be found in the force involved in effecting penetration of the woman's genitals. "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". (MCM, 1928, par 148b). Although reluctant consent negatives rape, nevertheless there can not be said to be consent to an act of intercourse when the woman fails or ceases to resist only because of a well founded fear that resistance will cause death or at least severe bodily harm (CM 240674, Rinke, 26 BR 91; CM 260624, Richmond, 39 BR 361; CM 227809, 1 Bull JAG 364; CM 236612, Tyree, 23 BR 67).

There is ample evidence revealing that Rosen had sexual intercourse with Marlene and that Strauss assisted, aided and cooperated with him in having such relations and attempted unsuccessfully himself to have coition with her. The prime question presented by the record is whether or not the court was warranted in concluding that Marlene did not consent to these sexual relations. In determining the legal sufficiency of a record of trial it is our function to examine the evidence and decide whether it is sufficient under the rules of law to exclude every reasonable hypothesis except that of accused's guilt; that is, whether there is sufficient proof of every element of the offense charged to satisfy a reasonable man beyond a reasonable doubt when guided by normal human experience and common sense (CM 253683, Filipow, 35 BR 65; CM 267760, Lawrence, 44 BR 113; CM 223336, Wills, 49 BR 195). By such measure of evidence must the non-consent of Marlene be here established if these findings of guilty are to be sustained.

The evidence shows that Marlene at first refused to accompany Strauss and Rosen from the women's quarters and finally did so only after Rosen had threatened to shoot. Both accused possessed weapons although they did not brandish them or level them at the woman. Marlene unwillingly accompanied Strauss and Rosen to the upstairs bedroom but offered no resistance when they sought sexual intercourse with her. Although no weapons were exhibited or threats were made during her stay in that room she testified that she only submitted because of fear. At one time while Marlene was in the bedroom Strauss and Rosen entered the women's quarters, threatened them with pistols and told them they would be shot if they said anything. When Strauss returned Marlene to her friends he advised them if they said anything about what had occurred they would have reason to be afraid. One enlisted man who had seen Marlene and the two accused enter the upstairs bedroom had refused Strauss' invitation to have relations with her, stating he did not desire it "that way".

From all of this evidence can it be said that Marlene consented, albeit reluctantly, to the overtures of Strauss and Rosen or is it clear that she did not in fact consent? Certainly, where weapons are brandished and levelled at German women by American soldiers to compel their submission to sexual intercourse, it cannot be said that the women consented (CM ETO 13897 Cuffee; CM ETO 17442, Blakely). However, where German women have followed the directions of American soldiers and proceeded to rooms where they have disrobed and permitted sexual ralations, without firearms being exhibited menancingly or threats of violence made to compel them to do so, non-consent

has not been held to be established merely because the women claimed they had a general fear they would be harmed if they did not submit (CM ETO 10446, Ward and Sharer; CM ETO 9301, Flackman). The case before us falls somewhere between these two classes of cases. Although it does not here adequately appear that weapons were levelled at Marlene to compel her obedience, there is evidence that these two accused made it plain to the women that they were now the "bosses". Thereafter they separated Marlene from the group of women and took her from the room after Rosen threatened to shoot. Although no weapons were brandished both of these accused wore pistols in holsters. Thus they had the means of promptly executing the threat and such fact was apparent to the women. It is apparent that after such threats were made Marlene stated she would accompany these accused and thereafter submitted without resistance. By no stretch of the imagination could either of these two accused have believed they had the voluntary consent of this girl to their overtures. It is quite apparent that they used their superior position as armed hostile soldiers to frighten and bully Marlene into submission. Indeed they were compelled to make threats to shoot before such submission ensued. The testimony of certain of the enlisted men who were also billeted in the house makes it quite plain that to them the situation did not appear to be one involving consensual, sexual relations between man and woman. Accordingly, there was sufficient evidence to warrant the conclusion that Marlene did not consent, even reluctantly, to sexual relations with either Strauss or Rosen. It cannot be said upon this record that the court was unwarranted in returning findings of guilty under Specification 1 of Charge I and Specification 1 of Charge II.

b. Alleged acts of sodomy on Marlene Schoemer. Sodomy is committed when a man has sexual connection with a woman by inserting his penis within her mouth (MCM, 1928, par 149k; CM 302940, Manuel and Jones). It is immaterial whether or not the parties consent since the unnatural sexual relation is the thing condemned by the law. Here Marlene's testimony definitely established commission of that offense by accused Strauss and Rosen. If corroboration of her testimony be necessary it is found in the testimony given by Private Carey who was present when both incidents occurred. He testified that Rosen committed the offense alleged and that he also saw Strauss grasp the girl by the neck, force her head beneath the bed clothing and thereafter he heard Strauss state to Rosen that the girl had "sucked him off". Such evidence conclusively established commission of the sodomies alleged in Specifications 3 and 4 of Charge II.

c. Alleged rapes and attempted rape on Magdalena Schuler.
The evidence sufficiently establishes that accused Gravely had sexual intercourse with Magdalena and that accused Rosen attempted to have such relations. It is also apparent that Rosen collaborated with Gravely and assisted him in conducting the woman to the empty restaurant where the acts occurred. If Gravely was guilty of rape on this woman it is quite apparent

that Rosen was jointly guilty with him because of the aid and assistance he furnished Gravely.

As in the case of Marlene, the prime question here is whether or not Magdalena consented to have sexual relations with Gravely and Rosen. She had been in her quarters with the other women when Rosen and Strauss entered and told the women that now they were the bosses. She had also heard verbal threats made to the women although no weapon had actually been levelled at any of them and had seen Marlene lead from the room. When Gravely first sought to remove her to the restaurant she broke away from him and only proceeded there finally because Rosen told her she must. Even so, while in the restaurant she resisted Gravely's efforts to throw her to the floor and stiffened her body sufficiently to prevent sexual penetration of her person by accused Rosen. Although this resistance was not vigorous it was quite sufficient to show that she was not willingly receiving the embraces of Gravely and Rosen. She testified that her resistance was no greater because (a) she feared that she would be shot and (b) she had heard over the radio that German women must do as the Americans asked. Certainly she had reason to fear being shot for she had heard Rosen threaten all of the women with such a fate and, in addition, accused Gravely possessed a carbine which he leaned against the wall before having relations with her. Further, it is quite apparent that the accused intended her to fear being shot so that she would submit to their desires.

From all this evidence we cannot say that the court was unwarranted in concluding that Magdalena did not consent to sexual relations with Gravely but submitted thereto only through fear induced by threats made by accused Rosen.

In addition to the rape perpetrated on Magdalena Schuler by accused Gravely with the assistance of accused Rosen, the latter himself assaulted and sought to have sexual relations with her but did not effect penetration. The court found accused Rosen's conduct with her sufficient to constitute the offense of assault with intent to rape. The intent essential to constitute that offense is the intent "to overcome any resistance by force, actual or constructive, and penetrate the woman's person" (MCM, 1928, par. 149l). Our observation with respect to Magdalena's resistance and her submission to accused Gravely applies equally as well to her conduct in the presence of the accused Rosen alone. We are of the opinion that the force and intimidation which she had been subjected to prior to Rosen's personal attack carried over and that she had the right to believe that further resistance against him would be futile and dangerous to her safety. It is clear therefore that the ensuing acts of accused against Magdalena were without her consent. Having reduced her to a state of submission, he proceeded to tear her corset, grasped her breast and tried to insert his penis in her private parts. These facts standing alone were sufficient to warrant the court in inferring that when accused Rosen committed the initial assault on Magdalena Schuler he had the intent to commit rape. However,

there is other evidence indicating that she stiffened her body when he sought to effect penetration and that he did not thereafter consummate entry of her person. In view of all the evidence as to Rosen's conduct with this woman, it was for the court initially to determine whether accused Rosen desisted because he never at any time entertained the intent to use all force, actual or constructive, to effect penetration, or whether he desisted only because he subsequently abandoned the intent he originally entertained to use the requisite force to effect penetration. Upon all the evidence, we cannot say that the court was unwarranted in concluding that his failure to effect penetration arose from abandonment of an original intent by accused Rosen to commit rape. Accordingly, the record of trial is legally sufficient to sustain the findings of guilty of Specification 2 of Charge I and Specification 2 of Charge II.

d. Comments on briefs and argument of civilian counsel for accused Strauss.

Many of the contentions of civilian counsel for Strauss are based upon matters set forth in Strauss' application for a new trial in which he alleges that various errors were committed either prior to or during trial. These matters, excluding such as have been previously disposed of in this opinion, may be listed as follows, viz:

(1) Although four investigations were conducted by military authority prior to trial, Strauss was only allowed to be present and to examine prosecution's witnesses at one of these investigations which was conducted by a Major Bagett;

(2) Both prior to and at the trial he asked to see "depositions" made by "the girl" and Private Carey but these documents never were made available to him;

(3) When Colonel Rohsenberger, a member of the court, was challenged peremptorily he pounded his fist on a table as he left the court room and cried out, "By God! They're all guilty as hell";

(4) During the trial when defense counsel sought to present certain enlisted men as witnesses, they were not available and the trial judge advocate stated he had returned them to their organizations because he thought they were not wanted; and,

(5) Strauss was denied the right to a separate trial.

Considering first the objection raised with respect to the "investigation" it may well be that the failure of Strauss to raise that matter at the time of trial constituted a waiver of such objection. However, we do not rest our conclusions on that basis. It well may be that several investiga-

tions were made into the incidents upon which the present charges were founded. However, according to the papers accompanying the record of trial, on 10 May 1945, First Lieutenant Robert B. Brugler was appointed investigating officer to investigate, under the provisions of Article of War 70, the charges against all three accused which were dated that same date. It appears on the face of the report of that official investigating officer that all accused were acquainted with the expected testimony of some ten witnesses including that of Marlene Schoemer and Private John E. Carey and that none of those witnesses were called in person because the accused stated they did not desire to cross-examine them. Thus it appears that during the investigation conducted under Article of War 70 accused Strauss was accorded full opportunity to examine these witnesses. It may be argued that error in an official investigation under Article of War 70 may affect the validity of a subsequent trial if such error has injuriously affected the substantial rights of an accused (See CM 273879, Simpson, 47 BR 99; CM 273791, Gould, 47 BR 29). However, it does not appear on the record before us that any such error occurred (CM 274812, Tracy, 47 BR 293). On the contrary, it does appear that accused was in fact accorded the very rights he now claims were denied him.

So far as the second and fourth objection listed above are concerned, it does not appear on the record before us that at the trial accused Strauss made request for the "depositions" of "the girl" and Private Carey or objected because they were not available. Defense counsel had full opportunity to cross-examine these witnesses and at no time indicated a desire for these "depositions" to facilitate his examination. It does not appear that defense counsel was denied the presence of any enlisted man as witnesses at his trial. Indeed, the record of trial reveals that when the defense rested, the trial judge advocate inquired whether the court or the defense desired any witnesses called or recalled and defense counsel replied, "The defense does not" (R. 80).

The record of trial contains nothing to substantiate accused's contention with respect to the conduct of Colonel Rohserberger. Even had the alleged incident occurred it does not appear that the remark was heard by the members of the court. Further, defense counsel raised no objection at any time to indicate that such conduct was indulged in by Colonel Rohsenberger. So far as the alleged request for separate trial is concerned there is nothing in the record of trial to indicate that any such request was made by accused Strauss. Since the offenses were committed at substantially the same time and place and certain elements thereof were to be established by the same witnesses it was appropriate for the convening authority to direct a single trial of all accused, at least in the absence of specific objection thereto (CM 195294, Fernandez, Smith and Stowell, 2 BR 205).

In addition to all of the foregoing it should be noted that after receipt of accused Strauss' request for new trial, the Commanding General, United States Forces, European Theatre of Operations, directed that an in-

vestigation be made of the alleged errors recited by this accused. Pursuant thereto an affidavit was obtained from the president of the court which heard and adjudicated this case. In that affidavit dated 28 February 1946, the president, John N. Scoville, recites that his recollection is that Colonel Rohsenberger left the court in the normal way after being challenged and that he heard no such outburst as Strauss alleges. Further, he had no recollection that any motion for new trial was made by any accused or that the defense was denied any witnesses it desired to have called.

6. Accused Strauss is 22 years of age. After graduation from high school he attended City College of New York taking a two year course in Public Service. On 2 September 1944 after completing this course of instruction at Armored School, Fort Knox, Kentucky, he was commissioned a second lieutenant.

Accused Rosen is 26 years of age and was inducted into military service on 10 September 1941. Accused Gravely is 25 years of age and was inducted into military service on 2 June 1941.

7. There has been substantial correspondence, too voluminous to itemize, which has been received by various authorities on this case and all of which has been considered by the Board of Review and is forwarded herewith. On 18 April 1946, a full hearing before the Board of Review was accorded civilian counsel for Strauss at which Attorneys William N. Nitzberg and Edward M. Rand of Philadelphia, Pennsylvania, were present. Full consideration has been given to the oral argument then made and to the matters asserted in the two briefs filed by these attorneys and by the late Attorney Maurice Rose, formerly of Philadelphia, Pennsylvania.

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

Thomas N. Taffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trevethan, Judge Advocate.

JAGH - CM 307121 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Secretary of War AUG 1 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jerome E. Strauss (0-558371), Infantry, and Private First Class Sidney Rosen (31035973), and Private Richard R. Gravely (33049146), both of the 54th Armored Field Artillery Battalion.

2. In a joint and common trial by general court-martial Lieutenant Strauss was found guilty of rape in violation of Article of War 92 (Chg I, Spec 1), assault with intent to commit rape and of sodomy in violation of Article of War 93 (Chg II, Specs 1, 3), all of said offenses having been committed upon the same person, a German girl seventeen years of age. No evidence of previous convictions 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 Article of War 48. The Theater Commander, as confirming authority, confirmed the sentence but commuted it to dismissal, total forfeitures and confinement at hard labor for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

On the evening of 1 April 1945 the accused, who was billeted in a house in Korbach, Germany, entered an apartment of that house which was occupied by five German women. The apartment in which the women resided was on the first floor of the building. The accused's quarters, together with those of about eleven soldiers, were located on the upper floors of this building. Upon entering the living quarters of the women, accused, accompanied by Private First Class Rosen, both of whom were armed with pistols, was asked by Frau Schuler if he was an officer. He replied that it was none of her business. To her entreaty that he was a gentleman and would not harm them, the accused responded by directing Fraulein Marlene Schoemer, a seventeen year old niece of Frau Schuler, to accompany him. The girl at first refused stating that she would rather be shot. Her grandmother, Maria Schoemer, grasped her arm, objecting to accused's demand and stating that Marlene was but a child. Rosen told her she had nothing to say about the matter and threatened to shoot. Grasping Marlene's arm, accused accompanied by Rosen conducted her from the room and forced her to go to the third floor where the soldiers were billeted. Upon entering the room she fell to the floor whereupon accused and Rosen picked her up and placed her on the bed. Rosen

left the room and Strauss removed her clothing. He tried to insert his penis in her private parts but did not succeed. Marlene testified that she offered no resistance to his efforts because of fear. After some ten or fifteen minutes, Strauss left the room and Rosen entered. Rosen inserted his penis into Marlene's private parts and thereafter eight men entered the room in progression, four of them succeeding in penetrating her person. Strauss then returned, entered the bed and again attempted to engage in sexual intercourse. Unsuccessful in that, he directed Marlene to take his penis in her mouth but when she refused, he pushed it in her mouth. She became ill and vomited. Rosen thereafter returned to the room and also forced his penis into the girl's mouth. Marlene testified that following these events, she found she could not stand and at her request the accused returned her to her quarters. There the women observed that while her hair was messed, she otherwise appeared composed. Strauss told the women that if they said anything about what had occurred they would have reason to be afraid. Earlier both Strauss and Rosen had entered the women's quarters while Marlene was upstairs, had threatened them with pistols, told them they would be shot if they said anything and instructed them to retire. One of the soldiers billeted in the building heard sobbing sounds coming from the apartment occupied by the women.

The record of trial also contains evidence relating to offenses committed on Frau Schuler, Marlene's aunt, by Rosen and Private Richard A. Gravely, who were tried by joint and common trial with accused, but as the evidence applicable thereto has been summarized in the accompanying opinion of the Board of Review and in no way involves Lieutenant Strauss, it is not discussed herein.

The accused, Strauss, made an unsworn statement to the court to the effect that Marlene accompanied him willingly from the women's quarters to his room in consideration of his promise to give her "mother" (apparently the aunt, Frau Schuler) some cigarettes. When they reached his room he undressed her with her assistance but was unable to have sexual intercourse because of his inability to have an erection. He then arose, left the room and the house and subsequently returned, finding Marlene still in bed and undressed. He joined her but again was unable to have an erection so he visited the latrine. After his return to the room, some soldiers entered and informed him that he "should get the girl downstairs". The girl stated that she preferred to remain but apparently the men were insistent and accused escorted her to her apartment giving cigarettes to Mrs. Schuler. He denied that he committed sodomy with the girl and contended that all of his relations with her were with her consent.

Although there was sufficient evidence to warrant the conclusion that Marlene did not consent, even reluctantly, to sexual relations with either Strauss or Rosen and although it is patent that both Rosen and Strauss used their superior position as armed hostile soldiers to frighten and bully Marlene into submission, the degree of force used was not great. I recommend that the sentence be confirmed but that the period of confinement be

reduced to fifteen (15) years, that the sentence as thus modified be carried into execution, and that an appropriate United States Penitentiary be designated as the place of confinement.

Rosen and Gravely were tried jointly with the accused Strauss in this case. The former was found guilty of the rape of Marlene Schoemer, of committing sodomy with her, of the rape of Frau Schuler, Marlene's aunt, and of an assault upon said Frau Schuler with intent to rape her. Gravely was found guilty of the rape of Frau Schuler. Rosen and Gravely were each sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence as to each, but as to Gravely reduced the period of confinement to forty (40) years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each and forwarded the record of trial in these two cases for action under Article of War 50½. Recommendations to the reviewing authority with respect to action to be taken in the case of Private First Class Rosen and in the case of Private Gravely are being withheld pending your decision in the instant case of accused Strauss.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(As to accused STRAUSS, GCMO 260, 16 Aug 1946).

(As to accused ROSEN & GRAVELY, GCMO 298, 7 Oct 1946).

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

JAGK - CM 307122

19 JUN 1946

U N I T E D S T A T E S	)	SEVENTH ARMY
v.	)	Trial by G.C.M., convened at Gutersloh, Germany, 24 July 1945. Dishonorable discharge and confinement for life. Penitentiary.
Private SAMUEL E. COLEMAN (34900151), 3699th Quartermaster Truck Company.	)	

REVIEW by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War

Specification 1: In that Private Samuel E. Coleman, 3699th Quartermaster Truck Company, did, at Senne I, Germany, on or about 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Else Gassel.

Specification 2: In that Private Samuel E. Coleman, 3699th Quartermaster Truck Company, did, at Senne I, Germany, on or about 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Gustel Aldag.

He pleaded not guilty to and was found guilty of each Specification and the Charge. Evidence was introduced of two previous convictions, one by summary court-martial for "Violation of curfew regulations," in violation of Article of War 96, and one by special court-martial for misapplication of an Army vehicle and absence without leave for eleven hours, in violation of Articles of War 94 and 96, respectively. In the instant case the accused was sentenced to be shot to death with musketry, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. That officer confirmed the sentence, but commuted it to dishonorable

discharge, total forfeitures and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

At about 1930 hours on 7 May 1945, the accused, a colored soldier, was joined in a vehicle by Privates Johnson, Minor and Smith, also colored (R. 7, 12,17,34,35). The accused was armed with a carbine and one of the other soldiers had a pistol (R. 26,36). At about 2000 hours, the four of them met two Polish civilians who were going to take them "to a house where some girls were" (R. 17,23). One of the Polish civilians testified that the reason he "wanted to get the girl for them" was that the accused threatened him with a carbine (R. 26). Before leaving the company area the accused had been drinking and, according to the testimony of one of the Poles, the accused and his companions "were drunk and they still had a bottle of liquor with them" when they met the Poles (R. 23,26). Private Smith, one of accused's companions, testified that they were drinking before they left their company area "but nobody was drunk" (R. 36). The six men first went to a house where there was a girl "who used to go with *** colored men", and failing to find her there, went to another house because they "saw her riding on her bicycle" to the second house (R. 23,26). They did not find the girl and about 2200 hours, led by one of the Poles, went to a farm house located at No. 8, Senne I, Germany, (R. 6,7,11,21,23,24,27,35). In this house there were Else Gassel, age 49, her husband, Paul Gassel, a Herr Nieder Gassel, Gustel Aldag, a widow, age 49, and her daughter and there either were or had been some "young girls" there (R. 6, 7, 11,14,27). Upon entering, the Poles, who did most of the talking while in the house, asked where the girls were and were told they were upstairs (R. 18,21,22). Four of the men including the accused went upstairs and entered the Gassel bedroom where, at that time there were Frau Gassel, her husband, and Frau Aldag and her daughter (R. 7,11,18). The room was illuminated by a lamp on the night table (R.11,33,37). Paul Gassel asked the men to leave (R. 7). While in this room one of the men pointed a carbine at Paul Gassel and asked "for Schnapps" (R. 8,12,18,28). The latter gave accused, "I think one bottle which was full but I don't know exactly," and at about 2230 hours the men left the house. After they left there was some shooting outside and in about "15 or 20 minutes, perhaps 30 minutes" they returned (R. 12-14). In the meantime Frau Aldag's daughter and "the other young girls" had run away (R. 12-14).

When the men returned they asked for the girls and the accused and another soldier came back into the Gassel room (R. 8). The other soldier removed Frau Gassel's clothes while the accused stood in front of her with a pistol which he pointed towards her (R. 9,10). She was "always holding [her] dress tight so they could not undress" her (R. 11). She "had to lie" on the bed and then the other soldier "led" his sexual organ into hers. She had intercourse with

him because she "was scared because [she] thought they would shoot" her (R. 9, 11, 15). Both men then left (R. 9,11,15). "After a while" the accused returned with the same soldier. They put her back on the bed and while the accused was standing beside her with a pistol, the other soldier put his finger into her sexual organ. At this juncture Frau Gassel's husband entered the room and was struck by the accused. The accused then brought in another soldier who had sexual intercourse with her, (R. 10). She did not consent to any of the acts of sexual intercourse (R. 11). During the course of the evening and before the other colored soldiers had relations with Frau Gassel, the accused was in bed with her and without her consent had sexual intercourse with her. The accused "always had the pistol in his hand even at the time he was in bed with" her (R. 15,16).

In the course of the evening one of the Poles and a colored man "pulled" Gustel Aldag out of the "room of Frau Gassel" into her own room where the Pole after telling her to "undress quickly", took off her clothes and "tore [her] stockings down" (R. 28). A soldier threw her on the couch, hit her with his fist, choked her with both hands, hit her over the eye with something hard, "turned [her] around" and had sexual intercourse with her (R. 28). Thereafter, "colored men were coming back and forth at all times" (R. 29). In succession four soldiers had sexual intercourse with her (R. 29,30). She did not consent to any of the acts of intercourse and tried to "protect" herself with her fists and knees and by twisting her body (R. 28-30). She called for help but "Nobody could come as there was only Frau Gassel and Herr Gassel in the house," the others having "hid themselves in the woods through the back door" (R. 31). After the fourth act of sexual intercourse she dressed but one of the colored soldiers and a Pole returned to her room and told her to undress and as she "wasn't doing it fast enough for them they started tearing [her] clothes off" (R. 31). The soldier asked her to lie on her daughter's bed, threw himself upon her, pinned back her shoulders, pinched her "bloody" on her "limbs" and had sexual intercourse with her (R. 32) Four colored soldiers had sexual intercourse with her that evening, "two came two times. It could have been three; that I don't know exactly" (R. 32). She was unable to "recognize" the accused at the trial (R. 28). At about 0130 hours the following morning the men left the house (R. 11).

Private Willie Smith, a companion of accused on the night in question, testified that he saw the accused in Gustel Aldag's room, at which time accused was having sexual intercourse with her (R. 35-36). One of the Poles present at the house that night testified that he saw accused "lying in bed" with her (R. 24). Private Johnson another of accused's companions, testified he saw accused leaving Frau Aldag's room and, when he asked accused "was any business going on in there he said yes" (R. 20).

It was stipulated that if August Hitzler were present in court he would testify that he is a German physician; that during the afternoon of 8 May 1945 he examined Gustel Aldag and Else Gassel; that this examination revealed that Gustel Aldag had sustained a tear in the back part of her vagina; that there was a blood stream under the skin in the front part of her vagina; that there were blood splotches on her face; and that the examination of Frau Gassel dis-

closed "no fresh places where she had been hurt" on either her face or vagina, but that in view of Frau Gassel's marital status and the fact that she had at least two children, the negative findings with respect to her are not inconsistent with Frau Gassel's having had sexual relations on 7 May 1945 (R. 38-39, Pros. Ex. 1).

4. Evidence for the Defense.

Accused, after being apprised of his rights as a witness, elected to remain silent (R. 39).

5. In the opinion of the Board of Review the record of trial fully supports the findings by the court that accused raped both Frau Else Gassel and Frau Gustel Aldag, on the dates and at the times respectively set forth in the Specifications.

"Rape" is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's female organs by the male genital organ is sufficient carnal knowledge. While force and want of consent are indispensable in rape, the force involved in the act of penetration is alone sufficient where there is in fact no consent. The woman is required to take such measures to frustrate the execution of the man's design as she is able to exercise and as are called for by the circumstances (MCM, 1928, par. 148b, p. 165).

The uncontradicted testimony of Frau Gassel that accused pointed a pistol at her while another soldier removed her clothes; that accused had sexual intercourse with her without her consent and that he stood by with a pistol while two other soldiers had intercourse with her without her consent, establishes beyond any reasonable doubt the guilt of accused as alleged, unless we deem her testimony unworthy of belief. There is nothing in the record of trial which in any way weakens the effect of her testimony and the Board sees no reason to disregard her positive testimony. Although there was no evidence of physical resistance on her part, and a medical examination revealed no hurts or bruises, proof of her lack of consent to the acts of intercourse were not negatived thereby. The accused "always had the pistol in his hands" and she "was scared because [she] thought they would shoot" her. The rule applicable in this situation is aptly and properly expressed in Winthrop's Military Law and Precedents, 2d Edition, page 673:

> "It is not essential that the force employed consist of physical violence; it may be exerted in part or entirely by means of other forms of duress or by threats of killing or of grave bodily harm or other injury ***."

The offense against Frau Gassel was committed under circumstances similar to that in CM ETO 3933, Ferguson, etal, where the Board of Review, in holding

the offense to be rape although it was shown that the complaining witness may not have forcibly resisted, used the following language:

> "*** such non-inculpatory evidence is but one facet of the complete evidentiary matrix, which cogently reveals that the women had been reduced to a state of submission by accused's threatening and menacing use of firearms and other lethal weapons, ***. Under such influence she has submitted to intercourse."

The accused by his active support, cooperation and approval is equally guilty as a principal in the rape of Frau Gassel by the other soldiers (18 U.S.C. 550; 35 Stat. 1152; CM 296113, Gilmore; CM 266724, McDonald, 43 BR 296-8).

The rape of Frau Gustel Aldag by accused is also proved beyond any reasonable doubt. Although she could not identify the accused in court, she testified that four different colored men each had sexual relations with her at least once, and there is independent proof of record that the accused was one of the four colored soldiers in the house during the time in question. Moreover, one of the Poles present testified that he saw accused lying on the bed with Frau Aldag, and Private Smith, one of accused's companions testified he saw the accused engage in sexual intercourse with her. Private Johnson, another of accused's companions, saw him leave Frau Aldag's room, at which time accused stated there was "business" going on in the room. Frau Aldag testified that each of the colored men used force and had sexual relations with her without her consent. She tried to protect herself with her fists and knees and by twisting her body and calling for help. Her testimony was in nowise contradicted and was in fact corroborated by independent witnesses and by medical testimony of injuries about her head, face and vagina.

It is not necessary that we determine which of the men caused the injuries that gave proof of force, since the several assaults were committed under such circumstances that, in contemplation of law, each was responsible as a principal as to each of the assaults committed upon her (CM 240646, Campbell, 49 BR 295,311, 3 Bull JAG 188; CM 267067 (NATO 2121) Fields, 3 Bull JAG 236).

6. The Charge Sheet shows that accused is approximately 34 years of age and that he was inducted into the Army at Camp Forrest, Tennessee, on 17 September 1943 without prior military service. According to the review by the staff judge advocate of the reviewing authority, accused is single, and completed the 8th grade in school. He was employed in civilian life as a laborer and was serving overseas as a truck driver.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, section 2801, of the District of Columbia Code.

William P. Kuder, Judge Advocate

Gilbert E. Lynch, Judge Advocate

Earl W. Wingo, Judge Advocate

(GCM 82296, 16 July 1946).

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

JAGK - CM 307125

20 JUN 1946

UNITED STATES v. Captain OLIVER F. KELLER (O-1699455), Air Corps.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 22 January 1946. "Dishonorable discharge", total forfeitures and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

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

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

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

Specification 1: In that Captain Oliver F. Keller, Squadron "Y" (Student Officer), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 7 September 1945, with intent to defraud, wrongfully and unlawfully make and utter to Officers' Club, Keesler Field, Mississippi, a certain check in words and figures as follows, to wit:

Biloxi, Miss., 7 September 1945

PAY TO
THE ORDER OF OFFICERS' CLUB
Keesler Field, Miss.

Ten and no/100 - - - - - - - - - - - - - - - - - DOLLARS, $10.00
Value received, and charge the same to account of

TO Bank of America Sacramento Calif.	I hereby represent that the amount drawn for in this draft is on deposit to my credit, free from any claims, and acknowledge that this amount has been paid to me upon my representation of such facts. Name Oliver F. Keller Rank Capt AC O-1699455 Sqdn "Y"

and a certain check in words and figures, as follows, to wit:

Biloxi, Miss., 7 September 194 5

PAY TO
THE ORDER OF OFFICERS' CLUB
Keesler Field, Miss.

Ten and no/100 - - - - - - - - - - - - - - - - - - DOLLARS, $10.00
Value received, and charge the same to account of

To Bank of America
Sacramento
Calif.

I hereby represent that the amount drawn for in this draft is on deposit to my credit, free from any claims, and acknowledge that this amount has been paid to me upon my representation of such facts.

Name Oliver F. Keller

Rank Capt AC O-1699455

Sqdn "Y"

and by means thereof did fraudulently obtain from said Officers' Club, Keesler Field, Mississippi, the total sum of Twenty Dollars ($20.00)in United States currency, he, the said Captain Oliver F. Keller, then well knowing that he did not have, and not intending that he should have any account with the said Bank of America, Sacramento, California, for the payment of said checks.

NOTE: Specifications 2 to 17 inclusive vary materially from Specification 1 only with respect to the number of checks mentioned in each Specification, the date of offense and the date and amount of check as follows:

Spec.	Date of offense	Date of check	Amount of check
2	8 Sept.	8 Sept.	$10.00
		8 Sept.	10.00
		8 Sept.	10.00
3	10 Sept.	10 Sept.	10.00
4	11 Sept.	11 Sept.	10.00
		11 Sept.	10.00
5	12 Sept.	12 Sept.	10.00
		12 Sept.	10.00
		12 Sept.	10.00
		12 Sept.	10.00
6	14 Sept.	14 Sept.	10.00
		14 Sept.	10.00
		14 Sept.	10.00
		14 Sept.	10.00

Spec.	Date of offense	Date of check	Amount of check
7	15 Sept.	15 Sept.	$20.00
		15 Sept.	10.00
		15 Sept.	10.00
8	17 Sept.	17 Sept.	10.00
		17 Sept.	10.00
9	18 Sept.	18 Sept.	20.00
10	19 Sept.	19 Sept.	10.00
		19 Sept.	10.00
		19 Sept.	20.00
		19 Sept.	10.00
11	20 Sept.	20 Sept.	10.00
		20 Sept.	10.00
		20 Sept.	20.00
		20 Sept.	10.00
12	21 Sept.	21 Sept.	10.00
13	22 Sept.	22 Sept.	20.00
14	25 Sept.	25 Sept.	10.00
15	26 Sept.	26 Sept.	20.00
		26 Sept.	10.00
		26 Sept.	10.00
		26 Sept.	10.00
		26 Sept.	20.00
16	29 Sept.	29 Sept.	10.00
		29 Sept.	10.00
		29 Sept.	10.00
17	30 Sept.	30 Sept.	10.00
		30 Sept.	10.00

NOTE: Specifications 18 to 23 inclusive vary materially from Specification 1 only with respect to the number of checks mentioned in the Specification, date and place of offense, date and amount of check, payee and person or institution defrauded, as follows:

Spec.	Date of offense	Place of offense	Date of check	Payee	Defrauded	Amount of check
18	20 Oct.	New Orleans	20 Oct.	Cash	J. Velcich	$20.00
19	15 Sept.	Keesler Fld.	15 Sept.	"	First Bank of Biloxi	10.00
20	20 Sept.	" "	20 Sept.	"	" " " "	20.00
21	21 Sept.	" "	21 Sept.	"	" " " "	20.00
22	27 Sept.	" "	27 Sept.	"	" " " "	20.00
		" "	27 Sept.	"	" " " "	20.00
23	26 Sept.	Biloxi, Miss.	26 Sept.	Stanley E. Waters	Stanley E. Waters	40.00

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

Specification: In that Captain Oliver F. Keller, ***, did at Keesler Field, Mississippi, on or about 7 October 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Jacksonville, Florida, on or about 20 November 1945.

He pleaded not guilty to "both Charges and the Specifications." He was found guilty of Charge I and its Specifications "except the words 'any account' and substituting respectively therefore the words 'sufficient funds', of the excepted words not guilty, of the substituted words guilty," not guilty of Charge II but guilty of a violation of the 61st Article of War and guilty of the Specification of Charge II "except the words 'desert' and 'in desertion', substituting therefore respectively the words 'absent himself without leave from' and 'without leave', of the excepted words not guilty, of the substituted words guilty." Evidence was introduced of one previous conviction by general court-martial for "issuing checks with insufficient funds to cover same" in violation of the 96th Article of War. The sentence as approved on 13 March 1945 provided that he was to be officially reprimanded, to be restricted to the limits of Keesler Field, Mississippi, for one month and to forfeit $50 of his pay per month for two months. In the instant case he was sentenced "to be dishonorably discharged the Service of the United States, to forfeit all pay or allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of five (5) years." The reviewing authority approved the sentence but remitted two years of the period of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Charge I and its Specifications.

The fifty checks described in the Specifications of Charge I were admitted into evidence as Prosecution's Exhibits 1 to 50 inclusive (R. 31). It was stipulated between the prosecution, defense and accused that

> "*** these were checks issued by Captain Keller /accused/ on the dates appearing thereon for the sums appearing thereon to the various payees alleged in the Specifications, for which checks Captain Keller received the amounts appearing on the face; and that each of these checks were returned to the payees unpaid by the bank on which they were issued, and that there were insufficient funds in the bank to meet the payment of each of these checks upon presentation. ***" (R. 31).

Statements for August and September 1945 of the drawee bank were admitted into evidence as Prosecution's Exhibits 52 and 53 respectively, and it was stipulated by the prosecution, defense and accused that these statements were "ledger accounts of the checking account that Captain Keller had with

the Bank of America, Sacramento, California" (R. 31). These exhibits show that $75 was deposited in this account 1 August 1945, and that successive withdrawals reduced the balance to zero by 27 August, and that $100 was deposited 1 September which was reduced to zero by successive withdrawals by 19 September. The withdrawals and subsequent balances in September were as follows:

5 Sept.	2 checks $10.00 each -	Balance, $80.00
13 Sept.	2 checks $10.00 each	Balance, $60.00
17 Sept.	4 checks $10.00 each, 2 checks $5.00 each	Balance, $10.00
19 Sept.	1 check $10.00	Balance, .00

According to the deposition of the assistant cashier of the bank the accused "opened" the account 1 August 1945 with a Western Union money order for $75, and the account was "closed September 1945 with a check for $10 which was the balance in the account at that time." The August statement was mailed 3 September 1945 and the September statement was mailed 2 October 1945; each was addressed to "Capt. Oliver F. Keller O-1699455 Sqdn. Y. Keesler Field, Mississippi" (Pros. Ex. 51).

Charge II and its Specification.

An extract copy of a morning report of "Sq Y 3704 AAF BU Keesler Fld Miss" stated by the certificate of the custodian to relate to accused was admitted into evidence without objection as Prosecution Exhibit 54. This extract showed an entry reading as follows: "dy to AWOL 0800 7 Oct 45". An extract copy of the morning report of "MP Det #1 1440 SCU Dist #5, Jacksonville, Fla." was admitted into evidence without objection as Prosecution Exhibit 55. This extract showed an entry reading as follows:

"28 November 1945
Keller Oliver F O-1699455 Capt
Above Officer atchd fr Sq 'Y' Keesler
Field Miss fr AWOL to conf this Sta
1000 20 Nov 1945"

It was stipulated between the prosecution, defense and accused that if certain witnesses were present they would testify under oath respectively as follows (Pros. Ex. 56): (1) Mrs. Flora A. Hart, Manager of the Cedar Lawn Hotel, New Orleans: Accused rented a room at the hotel 22 September 1945 and remained a guest at the hotel until about 24 October. Witness saw accused "on four occasions and on each occasion he was dressed in an Army uniform." On 23 November she removed articles of clothing from accused's room and stored them in the hotel office. (2) William O. Hamill, who on 31 October was in the military service and on duty in the Finance Office at Keesler Field: About 1530 hours that day accused entered the Finance Office and asked for his October pay. Knowing that accused's pay had been stopped because of the fact that he was absent without leave,

Hamill told accused "that there was nothing for him there and asked him to see Captain Tucker who was the Finance Officer. Captain Keller merely answered 'thanks' and walked out of the door." (3) Three residents of Jacksonville, Florida: They saw accused at his father's home in Jacksonville and in other parts of the city between 8 November and 20 November dressed in civilian clothes. Accused told one of these witnesses "he wanted very much to get back into the swing of civilian life and find a job", stated "that he had been out of the service about a week" and "did not say anything one way or the other about staying or returning to the Army." (4) First Lieutenant Norton A. Nelson, Corps of Military Police: On 20 November he apprehended accused in civilian clothes at his father's home in Jacksonville. Accused admitted he was absent without leave. (5) Private First Class William C. Gregory: On 30 November he secured accused's clothing, consisting of army uniforms and civilian clothes, from Mrs. Hart.

Mr. Oliver P. Keller, accused's father, testified that accused came to his home in Jacksonville about 8 November and remained there about 12 days (R. 32,33). During that period accused wore civilian clothing and whenever his father saw him was under the influence of liquor and "in a pretty nervous, brokedown condition ***. He was a completely different man" prior to going overseas (R. 38).

Mrs. Gertie Mae Keller, accused's stepmother, testified that she saw him in Jacksonville from 8 November to 20 November (R. 42) and that during that period he bought some civilian clothes (R. 45,46). Most of the time he was in an intoxicated condition, drank more and was a "lot more nervous" than he was before his overseas service (R. 50).

> "*** on numerous occasions he made the statement to me that he was out of the Army and different people would ask him and he would say he was on some kind of a leave awaiting discharge and was out of the Army. I think the word used was terminal leave." (R. 44)

It was stipulated between the prosecution, defense and accused that on 7 October 1945 general court-martial charges for dishonorable failure and neglect to pay debts were pending against accused, which charges had been preferred on 10 August 1945, and that accused had received due notice that such charges were pending against him (R. 52).

4. Evidence for the Defense.

Mrs. Oliver F. Keller, accused's wife, testified that she noted "definitely a marked change" in his behavior after he returned from overseas duty. "*** he was really restless. He didn't seem to know what he wanted to do and he was awfully moody when he returned from overseas" (R. 60). He told her he had left the Army to get a job to pay back the

money he owed but that "he was going back and give himself up the next day. That was the day he was picked up by the M.P.s in Jacksonville" (R. 66).

Yeoman Second Class Clement Duchesney, Jr., U.S. Naval Reserve, a friend of accused who had known him for twelve years (R. 68) testified that after accused returned from overseas he seemed to be upset easily, was very moody, "would brood about things and he just was not steady at all," and drank to excess (R. 70).

After an explanation of his rights accused elected to be sworn as a witness (R. 74) and testified substantially as follows: In October 1939 he volunteered for the Royal Canadian Air Force and was subsequently commissioned a pilot officer. On 27 May 1942 he was transferred to the "United States Air Force" (R. 75, 76). He arrived overseas 19 November 1943 as a captain and was assigned to the 447th "Bomb" Group (R. 77). On 13 April 1944, after he had completed 19 bombing missions as a flight commander, his plane was shot down and he made a crash landing in Switzerland. He was interned there until September 1944, at which time he escaped into neutral hands (R. 78). He has been awarded the Distinguished Flying Cross and the Air Medal with Oak Leaf Clusters, and his unit was awarded a Presidential citation (R. 106,107). He identified Prosecution's Exhibits 1 to 50 as checks issued and signed by him. The money from those checks cashed at the Club "was used for drinking, mainly, and gambling a little and living around here. It is rather expensive to live in Biloxi" (R. 82). When he drew these checks he did not intend that "he should not have a bank account at the bank" and "had no reason to believe that they would not be honored" (R. 83,84). He had an account with the Bank of America at Sacramento, California, which he opened in 1942 and reopened in 1945 (R. 79), when he had "a bunch of money on" him and friends suggested that he bank it, which he did with a Western Union money order (R. 80). He was drunk at the time he sent this money order and did not know how much he had deposited (R. 91) and "had been drinking" when he made a deposit for $100 on 1 September 1945 (R. 92). He was depending on his winnings from playing poker to balance his checking account, but did not realize he had written checks in the amount of $700 (R. 95). On 28 August 1945 he tendered a resignation in lieu of trial by court-martial for wrongfully failing to pay his debts, for which charges were then pending. He maintained his hotel room in New Orleans from 22 September to 24 October but spent "just one night there the first week. *** I just rented it for a week to make sure I would have it" (R. 98). He left Keesler Field 7 October 1945 without authority (R. 85). During his absence he returned to Keesler Field on three occasions (R. 86), once on the last day of October to secure his pay for that month. When he arrived that day he heard through the "grapevine" that they were looking for him at the Officers' Club for some bad checks (R. 82) and was unable to secure his pay since he was in an absent without leave status. He did not receive notification that his bank account had been closed until after 20 November, while he was in prison at Keesler Field (R. 85). After his departure from Keesler Field 7 October he "ended up in" New Orleans where

he was somewhat intoxicated (R. 83), and stayed until 6 November when he went to Jacksonville. He was drunk when he went absent without leave but soon "sobered up" and then "had a slight inkling" that he was absent without leave. He did not then return because "I figured I was going to get AWOL charges any way so I might as well enjoy myself" (R. 102). During the time he was in Biloxi and New Orleans he was in uniform. He purchased civilian clothing in New Orleans and in Jacksonville and wore civilian clothing during his stay in Jacksonville (R. 87). He purchased this clothing because "I figured I would be finished with the Army very shortly. *** I thought I would be discharged and the fact that I had put in an application for resignation" (R. 88) but he admitted that he had been told that there was no assurance the resignation would be accepted (R. 101). He told his father and mother when he was home that he was on terminal leave and concealed the fact that he was absent without leave because "people do not advertise the fact that they're AWOL very much" (R. 105). In Jacksonville accused "laid around the house most of the day, drank most of the night" (R. 105). He was unable to pay his hotel bill in New Orleans on 24 October and did not write a check for this bill because "after a while it comes to a limit how many checks you can make" (R. 100). He intended to ask his father for $300 "for the checks which I found out on October 31st were no good" (R. 103), but realized upon arrival at home in Jacksonville that his father did not have the money to give him (R. 105).

5. The evidence for the prosecution together with the testimony of the accused establish beyond a reasonable doubt that the accused without leave absented himself from the service of the United States on or about 7 October 1945 at Keesler Field and remained absent without leave until he was apprehended in Jacksonville on or about 20 November 1945, as found by exceptions and substitutions by the court. Accused's return to Keesler Field to secure his pay 31 October and his presence there, according to his testimony, on two other occasions between 7 October and 31 October, did not serve to terminate his absence without leave. There is no evidence and he does not allege that he reported for duty on any of these occasions. Even though he may not have been continuously absent for the entire period alleged, his casual visits to the field in pursuit of his personal affairs did not interrupt the status of the absence without leave (see CM 225754, Wykoff, 14 BR 335,336; CM 237138, Kohlhepp, 23 BR 277). The form of the findings follows that suggested in paragraph 78c, Manual for Courts-Martial, 1928, page 65, and sufficiently states an offense in violation of the 61st Article of War.

The evidence establishes that accused in a period of less than two months uttered the 50 checks described in the Specifications of Charge I and received a total of $650 for these checks as alleged, and that, as found by the court, he did not have "sufficient funds with" the drawee bank

for the payment of these checks. Since accused thus issued checks against his insufficient account and the condition of the account was entirely the result of his own acts, he being the only person active in using the account, an "evidentiary situation" was created where,

> "*** in the absence of adequate explanation or countervailing proof, the inference of fact is fully justified, from common human experience, that the accused knew that his account was insufficient and did not intend that it should be sufficient. If there be evidence of extenuation or excuse the accused is the person to furnish it. This rule is well established, often stated in the language that the accused, under such circumstances, is 'chargeable' with knowledge of the condition of his own account (CM 202601, Sperti, 6 BR 171,214; CM 236070, Wanner, 22 BR 279; CM 257069, Bishop, 37 BR 7, 13; CM 257417, Sims, 37 BR 111,117; CM 258314, Reeser, 37 BR 367,378; CM 259005, Poteet, 38 BR 197,206), and that the 'burden' (of going forward with proof in his defense to dispel the ordinary inferences from established facts) in such an evidentiary situation is on the accused (CM 249232, Norren, 32 BR 95, 103; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397,402)" (CM 280789, Hughes; accord, CM 280898, Dannelly).

The only attempt by the defense to dispel the inference that accused knew there were insufficient funds in his account is his testimony that he did not discover until 31 October and then through the "grapevine" that some of his checks had been dishonored, and did not definitely learn the state of his account until after his apprehension and return to Keesler Field 20 November. His statement that he did not pay his hotel bill by check 24 October because "after a while it comes to a limit how many checks you can make" was an admission that he knew, without having been told, that at some time prior to 24 October he had reached the limit of his credit. He was uttering worthless checks with such rapidity and in such volume that it was physically impossible for evidence of his guilt to be produced before he had finished the course of his reckless financial transactions. He was responsible for knowing under these circumstances the state of his account from day to day as he made it what it was. His uttering of 50 worthless checks in the short period of less than two months and thus procuring $650 was clearly fraud. The fact that until 19 September he had in his account funds equal in amount to some of the worthless checks uttered on and after 7 September does not absolve him in any way, since by issuing certain checks which cleared the bank prior to those issued on and after 7 September he created a condition in his account such that on the dates when he uttered the worthless checks there were not in fact funds sufficient for the payment thereof; such funds as he then had were, as it developed, sufficient only to pay checks which had cleared the bank before the worthless checks were presented for payment.

Where an accused was found to have fraudulently uttered certain checks

"well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for the payment thereof and the evidence showed that he passed 27 checks in the total amount of $695 over a period of less than three months, during which period his account with the drawee bank "was insufficient in amount for the payment of the checks upon presentment" (underscoring supplied), even though on two dates his bank balance was slightly more than the amounts of the respective checks issued on such dates, the Board of Review was of the opinion that the finding of fraud was justified and said:

> "*** Such repeated acts clearly justified the court in assuming that accused knew of the condition of his account and in concluding that he made and uttered the checks with the fraudulent intent alleged (CM 236509, Veal, 23 BR 31).
>
> "It is true that the duplicate statement of accused's account shows a balance on the dates of 23 and 26 September of slightly more than the amounts of the respective checks issued on such dates; but in view of the stipulation as to the insufficiency of the account, and the actual insufficiency shown by the statement on 27 September, it seems apparent that accused, at the time he gave the checks, had already issued other checks in amounts which he knew would deplete the account before the checks dated 23 and 26 September would clear the bank in the ordinary course of business. Under such circumstances the court was justified in finding him guilty as to such checks (22 Am. Jur. 479)." (CM 275648, Creighton, 48 BR 122,123; accord CM 265339, Manning, 42 BR 399,403; CM 228394, Jarbeck, 16 BR 139,158 ("the successive frequency of his acts tends to negative innocence on his part," p. 158).)

The variance between the allegation that accused "did not have *** any account" and the finding that he "did not have *** sufficient funds" is immaterial. At the outset of the trial the trial judge advocate and the defense counsel in effect stipulated that the case would be tried on the theory that accused had insufficient funds, as follows:

> "PROSECUTION: *** I might state now that the charges read that he, Captain Oliver F. Keller, issued the checks, knowing that he did not have or not intending that he should have an account with the bank. The Prosecution will show what may be considered in a measure a lesser included offense; that Captain Keller did have an account in the bank and the Court may accordingly find him guilty by substituting 'issuing the checks, not having sufficient funds and not intending that he should have sufficient funds', if the evidence so discloses in substitution of 'having no account.'
>
> "DEFENSE: Yes, sir." (R. 30)

The defense was thus not misled by the pleading and the court could have amended the specification accordingly (par. 73, MCM, 1928, p. 57).

The Board of Review is of the opinion that no question of "lesser included offense" is involved. The essence of the fraud is that the checks relied upon were of no value. Whether they were worthless because drawn against no account or against an empty account is relevant only in so far as the amount of proof of intent to defraud is concerned. It may be easier to prove fraud where an accused uses a fictitious account, but a check is as worthless in one case as it is in the other, and the fraudulent intent once established is the same. Thus where an accused was alleged and found to have fraudulently uttered two checks "then well knowing that he did not have and not intending that he should have any account with or sufficient funds in" (underscoring supplied) the drawee bank and the evidence showed that accused "conceded that he had not had an account in that bank in 11 or 12 years," the Board of Review did not raise the question that the pleading might be multifarious and simply stated in its opinion that the accused was guilty of fraud because:

> "He knew that the two checks would not be paid when presented to the bank on which they were drawn. Failure to disclose this knowledge evidences an intent to deceive and defraud the person to whom the checks were negotiated" (CM 260755, McCormick, 40 BR 1,3,4).

Where it was alleged and found that an accused fraudulently uttered checks "well knowing that" they "would not be honored by" the drawee bank and the evidence showed that accused had instructed the bank to stop payment on checks, the Board of Review stated in its opinion that:

> "The act of accused in executing and delivering these checks, when he knew that he had instructed the bank not to pay them, was as wrongful and dishonorable as if he had drawn checks upon a bank in which he had no account, or upon an account in which he had insufficient funds. In either case the effect is to pass an instrument as one which will be paid upon presentation, when the person uttering it knows that it will not be paid. ***" (CM 240347, Beserosky, 26 BR 33,39).

Where it was alleged and found that an accused fraudulently uttered checks "well knowing that he did not have and not intending that he should have any account" in the drawee bank, in violation of the 95th Article of War, and the evidence showed that accused had an account in the drawee bank, which account had been "closed" more than one year before he uttered the checks in question, and that he wrongly assumed his checks would be "held" by the payee, the Board of Review did not raise the question of a possible variance between the allegations and proof, but stated in its opinion that:

> "'Giving a check on a bank where he knows or reasonably should know there were no funds to meet it and without intending that there should be' is definite of an offense in violation of Article of War 95 (MCM 1928, par. 151). *** Securing cash by the utterance of the checks against a long closed bank account without an agreement not to present them for payment provides adequate basis upon

which the court properly inferred the accused's fraudulent intent" (CM 259234, Holladay, 38 BR 293,296,297).

Thirteen of the specifications each alleged the fraudulent uttering of more than one check and thus were objectionable because they were duplicitous. No objection was made however, and since each check and offense was fully described and alleged the defense cannot be said to have been misled, and no prejudice to the substantial rights of the accused was caused by this error. Where eight checks were similarly set forth in one specification alleging wrongful making and uttering, the Board of Review in its opinion stated:

> "Consideration has been given to the fact that Specification 3 of Charge II, in alleging the wrongful making and uttering by the accused of eight worthless checks contravenes the provision of the Manual for Courts-Martial that 'One specification should not allege more than one offense either conjunctively or in the alternative' (par. 29b). When, however, it appears that the accused has not been misled by the duplicitous character of the Specifications and that the allegations fully apprize him of the facts upon which he must prepare his defense, the Board of Review has held:
>
> > 'The fact that a specification is multifarious is not of itself a sufficient reason for setting aside a finding of guilty' (CM 202601, Sperti, 6 BR 171,207) See also CM 218876, Wyrick et al., and CM 224765, Butler.
>
> Since, in the present case, each check was described as to date, payee, and amount, and the accused interposed no objection, it is believed that, while contrary to good pleading, the form of the Specification did not prejudice his substantial rights." (CM 285699, Schaurer; accord, Sperti, supra, pp. 238,239.)

6. War Department records disclose that this officer is 29-2/3 years of age, is married, and has one child. He is a high school graduate and attended college for two years, majoring in engineering. From May 1938 until October 1940 he was a clerk in a U.S. postoffice. From 23 October 1940 until 27 May 1942 he served as a pilot officer in the Royal Canadian Air Force and on the latter date was appointed second lieutenant, Air Corps, Army of the United States, and ordered to active duty. He was promoted to first lieutenant 19 January 1943 and to captain 5 November 1943. He served overseas as a pilot with the 447th Bombardment Group and was awarded the Air Medal 16 February 1944, an Oak Leaf Cluster thereto 14 March 1944, and the Distinguished Flying Cross 8 May 1944 "for extraordinary achievement while serving as pilot of a lead aircraft of a combat wing of B-17 aircraft on a heavy bombardment mission over Berlin, Germany, 8 March 1944." He was interned in Switzerland from April 1944 to September 1944 and returned to the United States in November 1944. On 7 March 1945 he was tried by a general court-martial and found guilty of wrongfully failing to maintain a sufficient bank balance to meet seven checks which he had uttered and was sentenced to be officially reprimanded, to be restricted to the limits

of Keesler Field, Mississippi, for a period of three months and to forfeit $100 of his pay per month for a like period. The reviewing authority approved the sentence but remitted two months of the restriction and forfeitures in excess of $50 of his pay per month for two months and ordered the sentence executed 13 March 1945. On 28 August 1945 accused tendered his resignation as an officer for the good of the service. This resignation was not accepted by order of the Secretary of War 5 December 1945.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for conviction of a violation of either Article of War 61 or Article of War 96.

William B. Hyde, Judge Advocate

Gilbert E. Ashmead, Judge Advocate

Earl W. Wingo, Judge Advocate

JAGK - CM 307125 1st Ind

WD, JAGO, Washington 25, D. C. JUL 1 1946

TO: Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Oliver F. Keller (O-1699455), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully making and uttering 50 checks and fraudulently obtaining by means thereof $650 (Specs. 1 to 23 of Charge I) in violation of Article of War 96 and of absenting himself without leave for a period of 44 days terminated by apprehension in violation of Article of War 61. He was sentenced to be "dishonorably discharged the service" to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence but remitted two years of the period of confinement and forwarded the record of trial for action under Article of War 48.

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

Between 7 September 1945 and 20 October the accused cashed 49 checks for $10 or $20 each and one check for $40 and thus obtained $500 from the Officers' Club at Keesler Field, Mississippi, $90 from the Keesler Field branch of a bank in Biloxi, Mississippi, $40 from an individual in Biloxi and $20 from another individual in New Orleans. There were insufficient funds in the drawee bank in Sacramento, California, to meet these checks upon presentation, accused's September bank balance of $100 having been exhausted by 19 September by other checks he had previously issued. He testified that money from those checks he cashed at the Club was "used for drinking, mainly, and gambling a little and living around here." He testified that he hoped to balance his checking account with the proceeds from poker games. On 7 October he went absent without leave from Keesler Field and remained absent until he was apprehended at his home at Jacksonville, Florida, 20 November. He was drunk when he left Keesler Field, but did not return when he became sober because, according to his testimony, "I figured I was going to get AWOL charges any way so I might as well enjoy myself."

The accused is nearly 30 years of age and has a good combat record. He completed 19 missions over Germany as a pilot with the 447th Bombardment Group and was awarded the Distinguished Flying Cross and the Air Medal with one Oak Leaf Cluster. On his last mission, in April 1944, his airplane was

shot down and he landed in Switzerland where he was interned until September 1944 when he escaped and was returned to the United States.

In his personal financial transactions the accused seems to have been untrustworthy. He secured approximately $550 in Switzerland from two brother officers by means of two worthless checks to provide funds for his escape and did not repay these debts. He incurred other debts of about $250 in Switzerland, contrary to the orders of the Military Attache, of which $38.10 was ultimately repaid by the accused through the Attache's office in May 1945. In March 1945 he was found guilty by a general court-martial of wrongfully failing to maintain sufficient funds to meet seven checks in the total sum of $115 which he had uttered at Keesler Field. The sentence as approved provided for restriction to Keesler Field for one month, a reprimand and forfeiture of $50 pay per month for two months. Immediately prior to his trial he borrowed $300 from an enlisted man and repaid only about $50 of this debt. On 10 August 1945 charges were preferred against him for borrowing from this enlisted man and for dishonorably failing to repay this debt and approximately $700 of the debts contracted in Switzerland. On 28 August accused tendered his resignation for the good of the service. This resignation was not accepted in view of the charges then pending in the present case.

Due consideration of his combat record was accorded to the accused by the clemency exercised in his previous trial. He has shown himself by his present offenses and past conduct to be dishonest and I therefore recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that a United States disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 233, 23 July 1946).

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

SPJGK - CM 307127

8 MAR 1946

UNITED STATES v. Private First Class WILLIAM H. FINGER (34737989), Company I, 160th Infantry.	40TH INFANTRY DIVISION Trial by G.C.M., convened at Headquarters 40th Infantry Division, APO 40, 17 November 1945. Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. The Philippine Detention and Rehabilitation Center, APO 75.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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1. The record of trial in the case of the soldier named above was examined in the Branch Office of The Judge Advocate General, U. S. Army Forces in the Pacific, and there found legally insufficient to support the findings. Thereafter it was referred to and examined by the Board of Review in that Branch Office and found by it to be legally insufficient to support the findings and sentence. Prior to action by the Commanding General, U. S. Army Forces in the Pacific, his powers, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50½ and 51, were terminated 19 January 1946, by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department dated 21 January 1946, the Assistant Judge Advocate General, U. S. Army Forces in the Pacific, forwarded the record of trial to The Judge Advocate General for appropriate action.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private First Class William H. Finger, Company I, 160th Infantry, did, at APO 40, on or about 1600, 22 October 1945, by force and violence and by putting him in fear, feloniously take steal and carry away from the person of Mr. Chong Tehri Kim (civilian), the property of a wrist-watch, value about twenty dollars ($20.00).

He pleaded not guilty to, but was found guilty of, the charge and specification, and was sentenced to dishonorable discharge, total forfeitures and

confinement at hard labor for two years. The reviewing authority approved the sentence, remitted one year of the confinement, suspended execution of the dishonorable discharge until the accused's release and designated the Philippine Detention and Rehabilitation Center, APO 75, as the place of confinement. The findings and sentence were promulgated by General Court-Martial Orders Number 22, Headquarters 40th Infantry Division, 30 November 1945.

3. The Board of Review concurs in the conclusion reached by the Board of Review in the Branch Office of The Judge Advocate General, U. S. Army Forces in the Pacific, that the record of trial is legally insufficient to support the findings and sentence and adopts the following statement of facts as set forth in the opinion:

The evidence reveals that on 22 October 1945, civilian refugees from Japan were being processed under military supervision at a place identified only as the waterfront. Under the procedure followed, after exchanging their money, they were "disbursed out into an area for transportation to where they are going" (R. 4). Armed guards were posted (R. 4) to keep others out of the area and to "help the refugees into their positions" (R. 5). The witness Smith, a Counter-Intelligence Corps special agent, while talking with another soldier, observed the accused about 30 feet distant. He was seen to motion to a Korean civilian refugee, Chong Tehri Kim, who was within a barbed-wire inclosure. After conversing with him the accused "reached over and felt both wrists of the refugee. Finger then helped the refugee remove his wrist watch and was in the process of putting it in his left field jacket pocket" (R. 4, 6, 7) when the witness approached and asked "what authority he had to relieve a refugee of his watch. He replied that he had none" (R. 4). A few minutes thereafter accused stated to a lieutenant that "he had no authority and intended keeping it" (R. 5). He did not know why he took it (R. 6).

No commotion was observed and the Korean made no objection either verbally or physically (R. 5). Accused did not "grab" the refugee and the incident took place openly (R. 6).

The accused was armed with a rifle, as were the other guards in the area (R. 4).

The Korean did not testify at the trial.

The watch was admitted in evidence (R. 6; Ex. A) and was stipulated to be valued at $18.00 (R. 7; Ex. B).

4. The Board of Review is of the opinion that the evidence completely fails to establish the elements of robbery, and of larceny, a lesser included offense of robbery. Accused's statements were in no way a confession that he had taken the watch from the refugee by force or other act of trespass,

or by coercion or putting him in fear, but merely a declaration that he was not officially vested with authority to relieve this refugee of his watch. In the opinion of the Board it would be a distortion of the ordinary meaning of words to interpret this declaration as a confession of guilt of the crime of robbery or larceny. While in a case of this kind the Board of Review is precluded from weighing the evidence, it has the right and duty to determine whether there may be found in the record any competent evidence to establish the accused's guilt or to serve as any reasonable basis for an inference of guilt (CM 212505, Tipton, CM 228831, Wiggin; CM 238972, Lowry; CM 274647, Trujillo). The Board of Review is of the opinion that in the present case there are no such facts and no reasonable basis for an inference from the facts to support the findings of the court.

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

Thomas W. Mayo, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307127 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 12 March 1946

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class William H. Finger (34737989), Company I, 160th Infantry.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 81, 25 April 1946)

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

JAGN-CM 307139

UNITED STATES v. Private First Class RALPH R. YOUNG (36599902), and Privates DAVID C. WILSON (34634278), and JAMES A. SOLOMON (18060927), all of 3458th Quartermaster Truck Company.	)	102ND INFANTRY DIVISION Trial by G.C.M., convened at Bayreuth, Bayreuth, Bavaria, Germany, 26-29 September 1945. Wilson: Death. Solomon: Dishonorable discharge and confinement for twenty-five (25) years. Disciplinary Barracks. Young: Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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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. Accused were tried upon the following Charges and Specifications:

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

Specification: In that Private First Class Ralph R. Young, Private David C. Wilson, and Private James A. Solomon, all of the 3458th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Bayreuth, Bayreuth, Bavaria, Germany, on or about 18 August 1945, in the night-time, feloniously and burglariously break and enter the dwelling house of certain female Displaced Persons whose identities are unknown, with intent to commit a felony, viz: rape therein.

CHARGE II: Violation of the 66th Article of War.

Specification: In that Private First Class Ralph R. Young, Private David C. Wilson, and Private James A. Solomon,

all of the 3458th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Bayreuth, Bayreuth, Bavaria, Germany, on or about 18 August 1945, voluntarily join in a mutiny, which had begun within a militarily occupied area in Bayreuth against the lawful military authority of Brigadier General T. L. Harrold, 9th Armored Division, the commanding officer thereof, responsible for the military government and military discipline therein, and did, with intent to over-ride for the time being the lawful authority of the said Brigadier General T. L. Harrold, as sought to be enforced by Staff Sergeant William J. Kelly, Sergeant Nicholas Hudobenko and Private Claude N. Brady, military guards acting under his authority, with force and arms wrongfully rescue and deliver up from the custody of the said military guards two military prisoners who had been lawfully taken into custody by the said military guards. (As amended at trial).

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

Specification: In that Private First Class Ralph R. Young, Private David C. Wilson, and Private James A. Solomon, all of the 3458th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Bayreuth, Bayreuth, Bavaria, Germany, on or about 18 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Claude N. Brady, a human being, by shooting him with a firearm loaded with live ammunition.

They pleaded not guilty to all Charges and Specifications. They were found guilty of the Specification of Charge I with the exception of the words "in the night time, feloniously and burglariously break and enter the dwelling house," substituting therefor the words "wrongfully trespass the living quarters," and deleting the words "with intent to commit a felony, viz; rape therein"; not guilty of Charge I but guilty of a violation of the 96th Article of War; and guilty of the remaining Specifications and Charges. Evidence was introduced against Wilson of three previous convictions, two by a summary court-martial for violation of a curfew law and for failure to obey a lawful order, both in violation of Article of War 96, and one by a special court-martial for willful disobedience of the lawful orders of a noncommissioned officer in violation of Article of War 65; against Solomon of three previous convictions, two by a special court-martial for absence without leave for 137 days and 26 days in violation of Article of War 61, and one by summary court-martial for operating a Government vehicle at an excessive rate of speed in

violation of Article of War 96; and against Young of one conviction by a special court-martial for being drunk and disorderly in uniform in violation of Article of War 96. Accused Wilson was sentenced to be shot to death with musketry and accused Solomon and Young were sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for life. The reviewing authority in the case of each accused disapproved the findings of guilty of the Specification of Charge I and Charge I and approved only so much of the findings of guilty of the Specification of Charge II and Charge II "as involves a finding of guilty of mutinous conduct in violation of Article of War 96." In the case of Solomon and Young he disapproved the findings of guilty of the Specification of Charge III and Charge III. He approved the sentence as to Wilson, "but owing to the special circumstances" in the case recommended that it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life, and forwarded the record of trial for action under Article of War 48. In the case of Solomon and Young he approved the sentence but reduced the period of confinement to twenty-five years and five years, respectively, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence, pursuant to Article of War 50½.

3. On the evening of 17 August 1946 the three accused, Technician Fifth Grade William H. Gilliam, Private John S. Dorsey, members of the 3458th Quartermaster Truck Company, Private David E. Alston of the 3284th Quartermaster Service Company, and a Corporal Claiborne, were drinking in accused Young's billet at Bayreuth, Germany (R. 8, 75, 76). All three accused were armed with pistols (R. 65). Just before bed-check, which was ordinarily made at 2300 hours, accused Young and Solomon, Dorsey, Gilliam, Alston, and Claiborne went to the motor park in a vain search for women which ended when Solomon accidentally discharged his gun and the First Sergeant ordered them back to their billets (R. 9). After bed-check the group, with the exception of Corporal Claiborne, ostensibly for the purpose of obtaining liquor, set out for a Displaced Person's Camp which was "off-limits" (R. 10, 79). Enroute they were joined by accused Wilson (R. 12).

On arriving at the camp the six entered one of the buildings but failed to find what they were looking for. At this point Alston left and Wilson suggested "Let's try another place." The remaining five then entered another building described as "Barracks 13" (R. 13). They knocked at a door and when an occupant of the room said "Get away from there before I put a slug through there," Gilliam and Dorsey left and went outside (R. 16). When the pounding continued and the glass on the door was broken the two people who were in the room, an American soldier and a Polish woman, jumped out the window (R. 95). Apparently unable to effect an entrance through the door, Wilson came

outside and climbed in the window only to find the room empty (R. 18). Wilson, Dorsey, and Gilliam then walked over toward the direction of "the stables" (R. 19).

In the meantime, Private Claude N. Brady, who was on duty at the camp, reported the disturbance to his organization, Troop D, 89th Cavalry Reconnaissance Squadron (Mechanized) which, as part of the 9th Armored Division under the command of Brigadier General Harrold, was assigned the duty of guarding the camp (R. 105, 139, 140). Sergeant Nicholas Hudobenko, who was sergeant of the guard that night and armed with a carbine, and Staff Sergeant William J. Kelly, who was off duty, and was armed with a .32 caliber German pistol, responded to Private Brady's call in a jeep, driven by Sergeant Hudobenko (R. 105, 107, 112, 119, 121, 120). They met Brady at the gate in his jeep and toured the camp (R. 106). On a road that ran by the stables they saw two negro soldiers, one of whom was standing still and the other running (R. 7; 106; Pros. Ex. A-2).

Wilson was the first to see the jeeps and after warning the others hid in the grass which bordered the road. Gilliam ran down the road and Dorsey remained where he was (R. 19). Sergeant Hudobenko ordered Private Brady to pick up Dorsey while he pursued Gilliam (R. 107). Private Brady stopped on the side of the road next to the grass plot and, complying with his orders, Dorsey climbed in the jeep. At this point Wilson arose from the grass with a .32 caliber pistol in his hand, advanced on the jeep until he was just a step away from it, said, "All right, God damn it, get out of the jeep," and ordered Brady to surrender a carbine he was carrying (R. 23, 24; Pros. Ex. A-2-b). When Dorsey got out he saw Young in the rear of the jeep. Young asked Dorsey a question and walked a few paces away from the jeep with him (R. 34, 35).

In the meantime, Sergeant Hudobenko had caught Gilliam, put him in the rear of the jeep he was driving, and backed up, stopping beside Private Brady's jeep (R. 55, 107). Sergeant Kelly alighted and was immediately confronted with two colored soldiers armed with pistols who were standing on the right side of his jeep (R. 120, 128, 188; Pros. Ex. A-2-e). At the same time Solomon, who was standing between the two jeeps, covered Sergeant Hudobenko with a .45 caliber revolver and ordered Gilliam to get out (R. 55, 107, 108). The latter complied and walked toward the rear of the jeeps where he saw both Young and Dorsey (R. 57).

The two prisoners rescued, Solomon ordered Sergeant Hudobenko to "Get the hell out here." The latter passed the order on to Private Brady and both jeeps started forward (R. 109, 120). Wilson was still standing on the left side of Private Brady but he now held a carbine at his hip (R. 25, 26, 27; Pros. Ex. A-2-a). As the jeeps moved Wilson fired the carbine at Private Brady's jeep. The latter slumped

over on the seat and the jeep he was driving "jerked forward" (R. 27, 28, 57). A series of shots then followed (R. 26). Out of control, Brady's jeep left the road, crossed a grass plot, and did not stop until it crashed into an embankment. Sergeant Hudobenko followed in his jeep but neither he nor Sergeant Kelly were able to give immediate assistance to Brady because shots were being fired (R. 109, 110). At no time did Hudobenko discharge his carbine (R. 112). They succeeded in summoning help by telephone, however, and, when they returned about ten or fifteen minutes later, they found that Brady's carbine was missing and that Brady was dead (R. 112, 120, 153; Pros. Ex. M). It was then about 0130 hours, 18 August (R. 30). Death was caused by a gunshot wound "the missle [entering] the left orbit, [traversing] the brain in a direction from front to back and left to right, emerging from the right parietal area and severely fracturing the right side of the skull" (R. 163; Pros. Ex. N).

As soon as the first shot was fired Dorsey and Gilliam ran, followed by Young and Solomon. The former went out a gate and climbed a fence. Young followed but had difficulty in getting over the fence because he mistakenly believed he was shot. Dorsey helped him and while so doing picked up a .45 caliber pistol which Young said was his. These four then returned to the barracks where they agreed to keep quiet about the events of the evening (R. 28, 29, 60). Wilson did not arrive at the barracks until some thirty minutes later. When asked by Gilliam where he had obtained the carbine he replied that he had taken it from the "MP" (R. 60). Sometime after midnight Wilson told a guard at the CP of the 3458th Quartermaster Company that an "MP" had been shot (R. 85, 86).

Later the same morning, a German civilian on his way to work found a carbine on the street bordering the camp (R. 130, 131; Pros. Ex. A-1). Nine expended carbine shells were found at the scene of the shooting, eight of them close together in the road, and the ninth in the grass plot bordering the road. In addition, an expended 7.65 cartridge shell was found in the immediate vicinity (R. 127, 138, 146; Pros. Ex. A-2-f). Troop records revealed that as late as 8 August 1945 Brady had been assigned carbine No. 5567051 (R. 135) and it was stipulated by and between the prosecution, defense, and accused that eight of the carbine shells found at the scene of the shooting had been fired from that carbine. The ninth shell, which was minus a primer, was not identifiable (R. 137, 165, 169; Pros. Exs. H, P). The record does not reveal where the unidentifiable cartridge was found (R. 147).

Each accused made an extra judicial statement which was properly admitted in evidence. Their version of their movements and actions on the night in question up to the shooting substantially accords with that set forth above.

Wilson claimed that he played no part in the rescue of either Dorsey or Gilliam and stated that he did not have a gun that evening

(R. 176; Pros. Ex. I). Solomon admitted that he was the soldier who was standing between the two jeeps and who covered the driver of the jeep Gilliam was in with a .45 caliber pistol. He further admitted ordering Gilliam out of the jeep and then ordering the driver to "get going" but he specifically denied that he fired his weapon (R. 178; Pros. Ex. J). Young stated that he had his pistol in his hand when he went in Barracks 13 but that when he reached the rear of the jeep he put it in his pocket. He identified a .45 caliber colt pistol, serial number 874150 as the weapon he was carrying and stated that the blood stains which were on it were due to the fact that he cut his hand climbing the fence (R. 185; Pros. Exs. K and L). In addition, a witness who was present at the time the statements were taken from Young testified that Young said that he dropped the pistol while climbing the fence and that blood from a cut on his hand stained it when he picked it up (R. 186, 187). The pistol was received into evidence (R. 187; Pros. Ex. Q).

4. After being advised of their rights each accused elected to remain silent (R. 194).

In the course of the cross-examination of Dorsey and Gilliam the defense introduced two sets of charges which were referred to and tried by a special court, and in which both witnesses were alleged to have absented themselves without leave on 17 August 1945, wrongfully entered a Displaced Person's Camp, wrongfully carried a foreign pistol in violation of orders, and conducted themselves in a disorderly fashion in a public place (R. 41, 70; Def. Exs. 1, 2).

5. Accused Wilson stands convicted of murder in violation of Article of War 92 (Spec., Chg. III) and, together with accused Solomon and Young, of mutinous conduct in violation of Article of War 96 (Spec. Chg. II).

Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought may exist when there is 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. It may also be found when there is an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace. MCM, 1928, par. 148a.

The uncontradicted evidence shows that the accused, together with Dorsey and Gilliam, left their billets after bed-check to visit a Displaced Person's Camp which was "off-limits" and that they entered two of the barracks there and conducted themselves in a disorderly and even violent manner. Frustrated in their ostensible purpose to obtain liquor the group separated momentarily with Wilson,

Gilliam, and Dorsey proceeding in the direction of "the stables." At this juncture the members of the guard, who were charged with the security of the camp, arrived to investigate the disturbance and in the course of their investigation apprehended both Dorsey and Gilliam. Then followed the rescue of both of these men and the fatal shooting of Private Brady and the question presented on this branch of the case is whether there is competent substantial evidence in the record to support the court's conclusion that Wilson killed him.

The Board concludes that there is. There can be no doubt that the bullet that killed Brady was fired from the left side of the jeep he was driving. The autopsy revealed that the fatal shot entered Brady's head near the left eye, travelled to the right, and came out the back of his head. The court could thus conclude that Brady was shot when he turned his head to the left rear as he drove away.

Moreover, it seems clear that Brady was killed with a .30 caliber bullet from his own carbine. Nine expended carbine shells were found at the scene and eight of these had been fired from that carbine. The ninth was unidentifiable, but this too must have come from Brady's carbine since the only other person there armed with a carbine - Hudobenko - stated he did not fire his, a statement which is supported by other evidence which shows that at all times he remained seated behind the wheel of the jeep he was driving. To be sure a 7.65 expended cartridge was also recovered, but since Sergeant Kelly was the only man present who was shown to have been armed with a foreign pistol and since he was never physically in a position to shoot Brady in the left eye the court was more than warranted in its conclusion that that cartridge was not the fatal one.

Brady, then, was killed by a bullet fired from his own carbine by a man who stood at the left side of his jeep and that man was Wilson. Both Dorsey and Gilliam testified that he was standing there and the latter specifically charged him with the shooting. Wilson admitted to Gilliam that he had taken Brady's carbine. He did not return to the barracks until one-half hour after the others, from which the court could conclude that it was he who remained behind to fire the fusillade of bullets at the guards. Dorsey and Gilliam were, of course, to some extent accomplices, but the court that saw and heard their testimony chose to accept their version of the tragedy and we perceive no reason why we should disturb their conclusions. Beyond any doubt, the killing was murder. No provocation is shown and the record raises no issue of self-defense. The requisite malice can be found both in the knowledge with which Wilson is chargeable that his act might cause death or grievous bodily harm to the deceased and in the intent to resist the guards in the performance of their duty of arresting trespassers in the camp. The record is legally sufficient to support

the findings of guilty of the Specification of Charge III.

Accused were jointly charged with joining in a mutiny already begun on 18 August 1945 at Bayreuth, Germany, with intent to override the authority of Brigadier General T. L. Harrold by rescuing two persons lawfully taken into custody. All three accused were found guilty but the reviewing authority in his action as to each accused approved only so much of this finding "as involves a finding of guilty of mutinous conduct in violation of Article of War 96."

The essential element that distinguishes mutiny from other types of insubordinate conduct is "the intent to resist lawful authority in combination with others." MCM, 1928, par. 136a.

Speaking of this element of the offense, Winthrop says:

> "It is this intent which distinguishes it from the other offences with which, to the embarrassment of the student, it has often been confused both in treatises and General Orders. * * * Still more frequently has the designation of 'mutiny' been erroneously attached to disorders of the class known as 'mutinous conduct' - such as defiant behaviour or threatening language toward superiors, mutterings or murmuring against the restraints of military discipline, combinations of soldiers with a view to acts of violence or lawlessness which however are not committed, intemperate and exciting discussions at meetings held for the purpose of protesting against orders, declining to perform service in the honest belief that the term of enlistment has expired, &c. Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offence of mutiny, but are commonly to be treated as 'conduct to the prejudice of good order and military discipline' in violation of Art. 62." Winthrop's Military Law & Precedents, 1920 Reprint, p. 578.

The same author quoting Simmons (p. 579, n. 45) says:

> "Mutinous conduct implies behaviour tending to mutiny: * * * a soldier whose conduct is evidently of a mutinous character may yet be clear of the completion or commission of that offense."

It is clear from the foregoing that certain insubordinate actions not undertaken with intent to usurp lawful authority may still be punished as "mutinous conduct" under Article of War 96, and since it differs from joining in a mutiny only in that it lacks that intent it is a lesser included offense of joining in a mutiny.

The evidence shows that there was in this case a concerted attempt, which proved successful, to rescue at gun point two prisoners who were lawfully arrested by military guards. The part played by Wilson has already been described. As for Solomon the evidence shows, and he admits, that, armed with a pistol, he effected the release of Gilliam. The part played by Young, however, presents a more difficult question. Admittedly he was in the immediate vicinity and admittedly he was armed, although he contended that he had put away his weapon when he arrived at the scene of the disturbance. Dorsey and Gilliam placed him in the rear of the two jeeps during the entire incident and completely cleared him of any participation in it. On the other hand, both Sergeant Kelly and Sergeant Hudobenko stated that there were two armed men on the right of their jeep and another man between the two jeeps. Wilson was definitely placed at the left of Brady's jeep and there is no doubt that Solomon was the man between the two jeeps. The court could conclude that two of the remaining three, Dorsey, Gilliam and Young, were the men to whom Sergeants Kelly and Hudobenko had reference. Sergeant Kelly, however, stated that Gilliam could not have been one of these two men since they were standing there as he, Gilliam, was getting out of the jeep. The court could find, accordingly, that one of these men was Young. In reaching this conclusion the court necessarily had to accept the testimony of witnesses in part and reject their testimony in part, which was well within their power (CM 270281, Hoffer, 45 BR 223), and, since this case is before the Board under Article of War 50½, it is not our function to say that they were in error in so doing. CM 223336, Wills, 49 BR 195. Clearly the actions of these three men transcended mere disorderliness and, involving as it did, resistance to lawfully constituted authority, is properly described as mutinous. CM 258821, Santioemma, 38 BR 119.

The action of the reviewing authority as to this Specification is unduly limited in its phraseology. Only so much of the Specification "as involves a finding of guilty of mutinous conduct" is approved. In reducing the offense from joining in a mutiny with intent to override the authority of the general named, to mutinous conduct, it is apparent from the wording of the original Specification, from the wording of the action, and from the evidence, that the reviewing authority did not intend to negative the averments of the Specification as to the time and place of the offense and the manner in which the offense was committed. The proof clearly supports these allegations of the Specification which the action fails to specifically approve. Their omission is clearly the result of faulty draftsmanship. This conclusion is fortified by reference to the Staff Judge Advocate's Review which reveals that his recommendation for the partial disapproval of the findings was based upon his belief that the intent to override superior authority was not proven. No question was raised as to the sufficiency of the record to sustain the allegation that accused did at the time and place alleged rescue two prisoners who were lawfully in the custody of military guards.

The Manual for Courts-Martial provides:

> "Any action taken may be recalled and modified before it has been published or the party to be affected has been duly notified of the same." MCM, 1928, par. 87b, p. 78.

The action taken in this case has not been published and it does not appear that it has been communicated to the accused. In the circumstances the Board is of the opinion that corrective supplemental action may properly be taken supplying the missing averments.

In accordance with the provisions of Article of War 46 corrective action must be taken "by the officer appointing the court or by the officer commanding for the time being." War Department records disclose that the command of the reviewing authority has been inactivated and transferred to the control of the War Department (WD Ltr., AG 322 (7 Feb 46) OB-I-SPMOU-M, 12 Feb 46, Subject: Inactivation of Certain Army Ground and Service Force Type Units (Category IV)). Since action cannot be taken by the officer appointing the court, the function necessarily devolves upon "the officer commanding for the time being." Winthrop states:

> "Where, pending the proceedings in a case on trial, the command of the convening officer has been discontinued and included in a larger or other command, as where one department has been merged in another or in a division, the commander of the latter will be the authority answering to the description of 'the officer commanding for the time being,' and will properly act upon the proceedings and sentences as indicated in Arts. 104 and 109. Where, under similar circumstances, the command of the convening officer has been discontinued altogether without being renewed in any form or included in another command, the General, if any, duly assigned by the President to the command of the army, will be 'the officer commanding for the time being,' or, if there be no authorized military commander of the entire army, the President himself as constitutional Commander-in-chief." Winthrop's Military Law and Precedents, 2nd Ed., 1920 Reprint, p. 451.

Under the authority quoted, corrective supplemental action may be taken by the President.

There remains only the question of the legality of the sentence. The Table of Maximum Punishments (MCM, 1928, par. 104c) provides no limitation or punishment for mutinous conduct or mutiny. No

statute deals with such conduct. It follows that, short of death, there is no limitation on the punishment imposable by a court-martial on those guilty of this offense.

6. The charge sheet shows that accused Wilson is 25 years of age, and was inducted on 12 June 1943 at Camp Shelby, Mississippi; that accused Solomon is 22 years, 7 months of age, and enlisted on 16 December 1941 at Houston, Texas; and that accused Young is 28 years, 5 months of age, and was inducted on 29 April 1943 at Detroit, Michigan.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge III and Charge III as to accused Wilson; legally sufficient to support so much of the findings of guilty of the Specification of Charge II and Charge II as involves findings that accused Wilson, Solomon and Young, did, at Bayreuth, Bayreuth, Germany, on or about 18 August 1945, engage in mutinous conduct, by wrongfully, and with force and arms, rescuing and delivering up from the custody of Staff Sergeant William J. Kelly, Sergeant Nicholas Hudobenko and Private Claude N. Brady, military guards, two military prisoners who had been lawfully taken into custody by the said military guards, in violation of Article of War 96; legally sufficient to support the sentences as to each accused and to warrant confirmation thereof. The penalty of death is authorized upon conviction of a violation of the 92nd Article of War.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clamer, Judge Advocate.

Gerald Dalton, Judge Advocate.

JAGN CM 307139 1st Ind

WD, JAGO, Washington 25, D. C. AUG 9 1946

TO: The Under 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 First Class Ralph R. Young (36599902), and Privates David C. Wilson (34634278), and James A. Solomon (18060927), all of the 3458th Quartermaster Truck Company.

2. I concur in the opinion of the Board of Review that the record of trial in the case of Wilson is legally sufficient to support the findings of guilty of the Specification of Charge III, and Charge III, alleging murder, and the sentence to death in his case and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement, and that the sentence as thus commuted be ordered executed.

3. I further concur in the opinion of the Board of Review that, in the case of each accused, the record of trial is legally sufficient to support so much of the findings of guilty of the Specification of Charge II and Charge II as involves findings that accused, acting jointly and in pursuance of a common intent, did, at Bayreuth, Bayreuth, Bavaria, Germany, on or about 18 August 1945, engage in mutinous conduct by wrongfully and with force and arms rescuing and delivering up from the custody of Staff Sergeant William J. Kelly, Sergeant Nicholas Hudobenko, and Private Claude N. Brady, military guards, two military prisoners who had been lawfully taken into custody by the said military guards, in violation of Article of War 96, and legally sufficient to support the sentences in the case of accused Solomon and Young. I further concur in the opinion of the Board of Review that the action of the reviewing authority, while intended to reach the same result as the Board, is vague and, inasmuch as his command has now been inactivated without assumption of his command functions by any other officer, the President, as "the officer commanding for the time being" under Article of War 46, may withdraw the reviewing authority's action in this respect and take corrective action in accordance with the opinion of the Board. I recommend, accordingly, that the action of the reviewing authority be withdrawn so far as it concerns the findings of guilty of the Specification of Charge II and Charge II; that a new action be approved in accordance with the opinion of the Board of Review; that, in the case of Solomon and Young, the sentences be approved, but reduced in the case of Solomon to ten years; and that, as thus modified, they be duly executed.

3. Consideration has been given in the case of accused Young to letters from Honorable C. Wayland Brooks, United States Senator from Illinois; from Honorable Scott W. Lucas, United States Senator from Illinois, inclosing a letter from Mrs. Katie N. Young, wife of accused, and a copy of a letter from accused to Mrs. Young; from Honorable Dwight H. Green, Governor of Illinois; and to correspondence from Honorable Melvin Price, Representative in Congress from Illinois, inclosing letters from Mrs. Katie N. Young, accused's wife, Mrs. Rita Enlaw, accused's sister, and a copy of a letter from accused to his wife. Consideration has also been given in the case of accused Wilson to a letter from Mrs. V. Wilson Brack, accused's mother, and from Honorable Dan R. McGehee, Representative in Congress from Mississippi; and in the case of accused Solomon to an inquiry from Honorable Albert Thomas, Representative in Congress from Texas.

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 foregoing recommendation, should such action meet with approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

9 Incls
1 - Record of trial
2 - Dft. of ltr. for sig. Sec. of War
3 - Form of Executive action
4 - Ltr. fr. Hon. C. Wayland Brooks
5 - Ltr. fr. Hon. Scott W. Lucas w/incls
6 - Ltr. fr. Hon. Dwight H. Green
7 - Corres. fr. Hon. Melvin Price
8 - Ltr. fr. Mrs. V. Wilson Brack
9 - Ltr. fr. Hon. Dan R. McGehee

(GCMO 283, 13 Sept 1946)

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

SPJGN-CM 307140

UNITED STATES v. First Lieutenant RALPH M. FRANCISCO (0-1946733), Transportation Corps.	DELTA BASE SECTION COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS Trial by G.C.M., convened at Marseille, France, 25 September 1945. Dismissal, total forfeitures and confinement for eighteen (18) months. Disciplinary Barracks, Greenhaven, New York.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Ralph M. Francisco, 530 Port Company, Transportation Corps, did, at or near Calas, France, without proper leave, absent himself from his organization from about 7 August 1945 to about 6 September 1945.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for a period of eighteen (18) months. The reviewing authority approved the sentence

and forwarded the record of trial for action under Article of War 48. On 7 January 1946 the confirming authority, the Commanding General, United States Forces European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and, pursuant to Article of War 50½, withheld the order directing the execution of the sentence. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces European Theater, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated, whereupon the record of trial was forwarded to The Judge Advocate General, Washington, D. C. for appropriate action.

3. The evidence for the prosecution, as fully and accurately summarized by the Acting Assistant Theater Judge Advocate, European Theater, shows that the accused, a member of 530th Port Company, stationed at Calas Staging Area (R. 8), was placed on Detached Service with the 40th Traffic Regulating Battalion on 20 June 1945 (R. 6; Pros. Ex. 1), and that on or about 2 August 1945 he was relieved from this assignment to report back to his proper unit (R. 7; Pros. Ex. 2). On or about 6 August 1945, he reported back to his organization, and, in a conversation with his company commander, Captain Walter B. Cochran, Jr., said he was "returning to his organization soon from DS" (R. 8). Between 7 August and 7 September 1945, the accused was not present on duty with the 530th Port Company (R. 9). An extract copy of the Morning Report of 530th Port Company for 22 August 1945 which reported the accused's status "Fr dy to AWOL 0600 as of 7 August 1945" and an extract copy of the unit Morning Report for 7 September 1945 which reported the accused's status "Fr AWOL to dy 0600," were received in evidence (R. 7, 9; Pros. Ex. 3). A statement dated 13 September 1945, in the handwriting of and signed by the accused, was received in evidence without objection (R. 10-13; Pros. Ex. 4). In this statement the accused in substance said: About 18 July 1945 his girl friend came to Marseille from Lyon and informed him she was pregnant and wanted an abortion performed to hide the circumstance from her husband, from whom she was securing a divorce; she remained until about 1 August 1945 and then returned to Lyon. About 5 August he (accused) was released from detached service with the 40th Traffic Regulating Battalion but had not received the formal orders; he therefore moved his clothing back to his parent unit, the 530th Port Company, and reported to his company commander; there he learned that his formal written orders returning him to his unit had not yet been received. He then took some toilet articles and said he would report back in two or three days. He hitch-hiked to Lyon where he remained with his girl friend, who had had the abortion and was very ill and in pain. He had intended returning to Marseille in two or three days, but, as the girl's illness and pain recurred, he stayed with her. Although he tried to telephone his company commander to ask for a formal leave - "to make his absence legal" - he was unable to contact him; he intended several times to return, but the days went by and his

girl had a fever, so he remained; by the time she had recovered to where he felt she was out of danger it was 6 September 1945 (Pros. Ex. 4).

4. The accused, having been fully advised concerning his rights as a witness, elected to testify in his own behalf (R. 14-15). He stated that he had nothing to add to his signed statement already in evidence except that he regretted the occurrence and desired to continue on duty with his organization. He had been in the service four and one-half years, been overseas thirty-six months, was not married, and had never been previously court-martialed (R. 16).

5. The evidence for the prosecution clearly established that the accused did at Calas, France, on or about 7 August 1945 absent himself from his organization without leave and remained away until 6 September 1945. Although the accused took the stand in his own defense he offered no legal defense to the charge but sought the clemency of the court by indirectly admitting his absence and reaffirming his mitigating reasons for the absence. All of the elements of the offense having been established beyond any reasonable doubt the findings of guilty should be sustained.

6. Documents accompanying the record show that accused is 29 years of age and single. He was inducted into the service on 19 March 1941 at Los Angeles, California, and on 1 December 1943 was commissioned Second Lieutenant, AUS, Transportation Corps. He has had more than three years overseas service without combat record. There is no record of any previous disciplinary action. His efficiency ratings average "excellent".

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 and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Earle S. Shepherd, Judge Advocate.

Walmot T. Baughn, Judge Advocate.

Robert J. Kamm, Judge Advocate.

SPJGN-CM 307140 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War APR 1 0 1947

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Ralph M. Francisco (0-1946733), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his organization, then located in Calas, France, for a period of one month, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. On 7 January 1946 the confirming authority, the Commanding General, United States Forces European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and, pursuant to Article of War 50½, withheld the order directing the execution of the sentence. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces European Theater, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated, whereupon the record of trial was forwarded to The Judge Advocate General, Washington, D. C. for appropriate action.

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

The accused, who had been on detached service for several months in Southern France, was relieved from this assignment and reported back to his organization located at the Calas Staging Area. The following day he left without authority and remained away for a period of one month. His excuse was that his "girl friend" was extremely ill as the result of an abortion in which he took no part and he visited her at her home in Lyon during this period of time and remained away until she was out of danger. The accused's conduct demonstrates his irresponsibility and unfitness to continue to be an officer but in view of his previous good record and the fact that his absence occurred long after hostilities had ceased in the European Theater, it is recommended that the sentence

be confirmed but that the confinement and forfeitures be remitted and that the sentence as thus modified be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 86, 1 May 1946).

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

SPJGN-CM 307143

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1
v.	)	Trial by G.C.M., convened at Camp Pickett, Virginia, 7 February 1946. Forfeiture of $33 per month for six months and confinement for like period.
Private First Class ALLEN KLINGENSMITH (19131648), Company D, 18th Replacement Battalion, 5th Replacement Regiment.	)	

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Allen Klingensmith, Company D, 18th Replacement Battalion, 5th Replacement Regiment, did, at Camp Pickett, Virginia, on or about 24 January 1946, knowingly and wilfully misappropriate:

2 GI Sheets, value about	$2.38,
2 GI Pillow Cases, value about	.60,
1 Duffel Bag, value about	2.80,
5 Khaki Shirts, value about	9.45,
4 Khaki Pants, value about	9.60,
1 O.D. Pants, value about	9.94,

4 Bath Towels, value about	1.75,
1 pair Gloves, value about	.94,
12 pairs Socks, O.D., value about	4.20,
4 Cotton Undershirts, value about	1.24,
3 New Type Field Jackets, value about	31.50,
1 Mackinaw (Mechanic), value about	9.48,
1 Hood, value about	2.69,

of a total value about $86.57, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence was introduced of any previous conviction. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence but remitted the dishonorable discharge, all confinement at hard labor in excess of six months, and all forfeitures of pay in excess of $33 per month for six months. The result of the trial was published in General Court-Martial Orders #7, Headquarters Army Ground Forces Replacement Depot No. 1, dated 15 February 1946.

3. The evidence for the prosecution, fully and accurately summarized by the Office of The Judge Advocate General, is as follows: At about 0830 on the morning of 24 January 1946, accused was a passenger in a civilian automobile which was seen to approach one of the gates at Camp Pickett and suddenly turn around and go back in the direction from which it came, inside the camp (R. 6). Sergeant John J. Collins, an investigator from the Post Provost Marshal's office was stationed at the gate with another soldier "spot checking automobiles entering and leaving the reservation." In a jeep he overtook the civilian car, which was driven by a private. Accused, upon being asked why they had turned around, stated that he thought he had forgotten his pass and that he wanted to go back to get it, but he thereupon produced the pass (R. 6-7; Pros. Ex. B). Sergeant Collins searched the car and found a barracks bag containing various articles of clothing and two bed sheets and two pillow cases, which accused stated were his (R. 6, 7). A list was made of the articles and they were turned over to accused's company commander who gave a receipt therefor (R. 7, 8; Pros. Ex. C). Accused had been company supply clerk for about three and a half months (R. 14, 16, 18) before his admission to the hospital about five days prior to his apprehension (R. 14). He had returned to his organization the evening before the morning of the incident under investigation (R. 14). Accused was to be discharged and his clothing and equipment Form No. 32 had been credited with salvage, surplus and

other items to be turned in, though these items had not actually been turned in. His Form No. 32 had been forwarded to a Separation Center and was not available at the time of the alleged offense nor at the trial (R. 18, 19, 20). Accused had not been separated from his company and under the customary procedure he had until that time to turn in salvage and surplusage (R. 20, 21). It was stipulated "that all articles listed in the specification were of a type and kind furnished and intended for, and used in the military service of the United States," and that the values alleged were the values shown "for such articles in Army Regulations 30-3000, 16 Oct 44." (R. 6; Pros. Ex. A).

4. The accused, having been advised concerning his rights as a witness, elected to remain silent (R. 13).

5. Accused has been found guilty of knowingly and willfully misappropriating various articles of clothing apparel of a total value of $86.57, property of the United States, furnished and intended for the military service thereof, in violation of Article of War 94. One of the essential elements of proof of this offense is that the property belong to the United States (MCM, 1928, par. 150i, p. 185). The evidence clearly established that the accused did have in his possession the articles described in the Specification at the time and place alleged therein and that they were of the value averred. The record, however, is barren of any competent legal proof that the items found in the accused's possession were in fact property of the United States. A stipulation received in evidence admitted merely that the items were "of a type and kind furnished and intended for, and issued for use in the military service of the United States." It did not admit that the items were property of the United States. There was no evidence that any Government property of this nature was missing at that time and place. Two witnesses, in referring to the property, expressed personal conclusions that it was "Government property." Their statements were descriptive of the property and not based upon any disclosed facts from which this conclusion could be drawn, and there is not, therefore, competent evidence to support such a conclusion (CM 250426, Hecht, 32 BR 361; CM 255114, Caracappa, 36 BR 35). In disapproving the findings of guilty in the first cited case, which involved the wrongful misappropriation of Government property, the Board of Review held as follows:

> "The only evidence of ownership as to these articles was the stamp on the inside of the belt band of each pair [of underwear]. Giving full credence to this stamp, and the interpretation thereof by the prosecution's witnesses, all that is proved is the quality of the article and that it was manufactured by the manufacturer whose name appeared thereon under a contract * * * with the War Department * * *. But when and where it became government property is not established. Even if it had

become government property, there is, for consideration, evidence that articles of the same kind were sold at numerous commissaries to military personnel and that these articles continued to retain similar markings. It was, therefore, reasonably possible for the accused to have obtained lawful possession and ownership of the drawers in question. While the probabilities are strong that the accused procured these articles from one of the warehouses in his charge, unless such theory is founded upon competent evidence deemed sufficient to exclude every reasonable hypothesis except the one of the accused's guilt, the conviction of guilty remains unsupported and must be disapproved. Findings may not be sustained on strong suspicions or probabilities."

In the Caracappa case, similar in facts to the case under discussion, the Board stated:

"The record is barren of any competent legal proof that the property found in accused's possession and described in the Specification was, in fact, 'property of the United States Government, furnished and intended for the military service thereof.' * * * There is no proof in the record that any Government property was missing at that time and place, or that the accused committed any act of trespass: * * * Accordingly, the findings of guilty and the sentence cannot be sustained."

In the absence of any competent proof that the articles in question were the property of the United States, the findings and the sentence are not sustained.

6. The Charge Sheet shows that accused is 22 years of age and he was inducted into the service on 10 May 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as herein noted. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty and the sentence.

Earle Stephens, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert Holander, Judge Advocate.

SPJGN-CM 307143 1st Ind

Hq ASF, JAGO, Washington 25, D. C., APR 2 3 1945

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Allen Klingensmith (19131648), Company D, 18th Replacement Battalion, 5th Replacement Regiment, Army Ground Forces Replacement Depot No. 1, Camp Pickett, Virginia.

2. I do not concur in the opinion of the Board of Review and I submit for your consideration and action my dissent therefrom.

3. The Board of Review in its opinion has correctly stated that one of the essential elements of proof of the offense, of which accused was charged to wit, the misappropriation of property of the United States, furnished and intended for the military service thereof, under the 94th Article of War, is that the property belonged to the United States (MCM 1928, para. 150i, p. 185). It is asserted by the Board of Review that the record of trial is lacking in legal proof that the items described in the specification were in fact property of the United States. It is upon this basis that the Board of Review concluded that the record of trial is legally insufficient to support the findings of guilty and the sentence.

4. It was stipulated at the trial that the items were "of a type and kind, furnished and intended for, and issued for use in the military service of the United States." It may be assumed that this stipulation is not broad enough to include the further element that the property was owned by the United States Government. I agree that there is no affirmative testimony which was particularly directed to the proof that these items were property of the United States, but I believe that the facts of the case and the above stipulation support the inference that they were Government property. Accused had been a supply clerk of his company for about three and one-half months before his admission to the hospital, which occurred about five days prior to his apprehension. He returned to his organization the evening before the morning of which the incident gave rise to the charge. The evidence definitely shows that the property described in the specification was not the property which had been issued to him. He was, therefore, found in physical possession of property to which he had no right. The items described in the specification were discovered in an automobile occupied by the accused and a fellow soldier who were about to drive from the military reservation. They changed their minds upon seeing the presence at the gate of Sergeant Collins and Private Kersley. The evidence, makes clear that opportunity was thus afforded accused to secure

possession of Government property of the kind involved herein, and that he did avail himself of this opportunity to take possession of it. The transaction occurred on a military reservation. The property itself was of the nature that governmental ownership would be usual. It would be unusual for a soldier to own it when at the same time he held possession of property of similar type and kind regularly issued to him. Under these circumstances I believe the fair and just inference is that it was property owned by the United States and such inference seems to be the only reasonable hypothesis under the circumstances. Paragraph 150i of the Manual for Courts-Martial states:

> "Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended."

5. I am satisfied that there is substantial evidence in the record upon which to base the inference that the property described in the specification was owned by the United States Government at the time of its misappropriation. I therefore disagree with the conclusions of the Board of Review and recommend that the sentence be approved.

6. I transmit herewith forms of action for your use; one for use in the event you are in accord with the conclusion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence; and one for use in the event you agree with the conclusion set forth in this, my dissent, that the record of trial is legally sufficient to support the findings of guilty and the sentence.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH - CM 307164

21 MAY 1946

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.CM., convened at Nancy, France, 28, 29 August 1945. Dismissal and confinement for one (1) year.
Second Lieutenant JAMES J. CLOUATRE (0-2072110), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant James J, Clouatre, Headquarters 10th Reconnaissance Group, then Headquarters 42nd Bomb Wing, did, in conjunction with Private Seymour Kane, 322nd Signal Company Wing at Dijon, France, on or about 20 July 1945, feloniously take, steal and carry away one (1) woman's handbag, value about ten dollars ($10.00) and about seven hundred and fifty (750) francs, French currency, of the value of about fifteen dollars ($15.00), total value of about twenty-five dollars ($25.00), the property of Mademoiselle Marie Louise Cleinent.

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

Specification 1; In that * * *, did, near Dijon, France, on or about 20 July 1945, wrongfully drink intoxicating liquor in a public place, to-wit Cafe de Aviation, in company with Private Seymour Kane, Sergeant John J. Whelehan and Technician Fifth Grade Robert H. Reiber, all enlisted men of the 322nd Signal Company Wing, to the prejudice of good order and military discipline.

Specification 2: In that * * *, did, at Dijon, France, on or about 20 July 1945, wrongfully enter the Hotel Meuble, a known house of prostitution, for the purpose of having sexual intercourse with female inhabitants therein, in company with

Private Seymour Kane and Sergeant John J. Whelehan, both enlisted men of the 322nd Signal Company Wing, to the prejudice of good order and military discipline.

Specification 3: In that * * *, did, at Dijon, France, on or about 20 July 1945, wrongfully enter the Hotel Meuble, an establishment duly posted and designated by proper authority as "Off Limits" to United States military personnel.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that on 20 July 1945 accused was a member of the 42d Bomb Wing stationed at Dijon, France (R.6). On that date at about 10:00 or 10:30 p.m. he and First Lieutenant Ross P. Seaton, a member of the same organization, entered an establishment near Dijon, known as the Cafe de Aviation (R.6). The place was crowded and there were no empty seats except those at a table placed next to one occupied by three enlisted men, Private Seymour Kane, Technician Fifth Grade Robert H. Reiber and Sergeant John J. Whelehan, all of the 927th Signal Battalion (R.7, 10). At the invitation of Private Kane, the accused and Lieutenant Seaton seated themselves at the end of the table adjoining the one occupied by Kane and the other enlisted men (R.7,45). Being in close proximity, the enlisted men joined in the general conversation between accused and Lieutenant Seaton and during the course of the evening they drank wine together. Accused and Seaton purchased two bottles and the enlisted men also bought some. An unidentified acquaintance of Kane sent to their table another bottle of wine from which the accused and the enlisted men drank (R.9,44,51,78,84). Kane testified that the Cafe was one in which enlisted men congregated and that on the two or three occasions he had been there, he noticed no officers (R.62). The entire party remained in the Cafe conversing and the subject of women eventually came up. Kane mentioned that he knew of a place in Dijon where their sexual desires could be satisfied (R.11,45).

At about midnight the accused, Lieutenant Seaton and the three enlisted men left the Cafe de Aviation and drove to Dijon in a jeep which Reiber and Kane obtained from the motor pool of their organization located a few hundred yards from the Cafe (R.10,11,45,78). Kane was intoxicated so Reiber drove the jeep (R.20,53).

Upon arrival at the Hotel Meuble, 42 Rue Du Bourg, Dijon, France, Reiber remained at the wheel of the car while the others went to the door of the Hotel and were admitted after Kane, known as "Robert" to the proprietress, was recognized as a patron of the house (R.11,33,47). Kane knew this place to be a house of prostitution (R.46), although in response to accused's inquiry he replied that it was not "off-limits" (R.60). Lieutenant Seaton stayed there for only a few minutes and then returned to the jeep (R.11,47).

Kane, Whelehan and accused went upstairs to the room of Mademoiselle Marie Louise Cleinent, a self-admitted prostitute, and each had sexual intercourse with her (R.25,47,80).

Sergeant Crisante, a member of the 360th Military Police Company stationed at Dijon and assigned to the investigation section of the area in which the Hotel Meuble was located, knew it to be a house of prostitution. He testified that on 20 July and for a week before there was a sign about 24 inches by 12 inches in black letters on a white background painted on the door and on the sides of the door designating said place as being off-limits to military personnel (R.65,66). He "knew" the establishment was off-limits but had no knowledge of the source of the order placing it off-limits, nor did he know that such an order actually existed (R.71,72).

Mademoiselle Marie Louise Cleinent testified that she had been engaged as a prostitute at the Hotel Meuble, a house of prostitution, since 16 May and that her employer was Madame Susan Collet, who operated the brothel (R.23). On the night in question she had sexual relations with the accused as well as with Kane and Whelehan and received 200 francs from each as consideration therefor. She placed the proceeds in her pocketbook which she kept in her bedroom (R.25,26). Upon completion of the intercourse, the two soldiers left but accused, although requested by her so to do, refused (R.27). She called Madame Susan Collet who came to the room, but as accused did not appear to understand French, Madame Susan went in search of an interpretor. Shortly thereafter Kane returned to Marie's room and he and accused spoke together (R.28,38,41). She understood only a few words of English (R.36). Accused then led Marie to the window of the room and asked her if she could see the jeep. At the same time he placed the palm of his hand around her neck. When she turned around, she observed Kane leaving the bedroom with her pocketbook which had been lying on the mantlepiece. She immediately followed him, calling, "Madame Susan, my pocketbook," but as she was going down the stairs, the accused ran after her and pushed her aside. As she reached the entrance hallway, she demanded the return of her purse and attempted to wrest it from Kane's jacket. Accused succeeded in opening the door, pulled Kane out and as he did so, the handle of the pocketbook was torn off by Marie. Accused and Kane ran down the street and Marie sought and found the military police, whom she accompanied on a search for the jeep and accused. The jeep was found and Marie identified the accused as one of the occupants. She heard the accused say to the military police, "We don't have the pocketbook" when they made inquiry concerning it, but nevertheless one of the military police found the purse under the rear seat of the jeep. It contained 750 francs, accounted for by Marie as the amount which she had received from Kane, Whelehan and accused earlier in the evening plus about 150 francs which she had on hand before their arrival (R.28,29,30,31,34). She identified this pocketbook as the one which had been taken by Kane and the handle as the part thereof which had become separated from the purse during the struggle. Said articles were received in evidence without objection (R.25,39; Pros. Ex. 1A). She had purchased the purse in February 1945 at the Belfort Department Store at Mourrie for 9700 francs (R.25,34), and she testified it had a value of five or six thousand francs "because (she) had to buy another one for which (she) had to pay ten thousand francs" (R.26).

Private Kane's testimony substantially corroborated Mademoiselle Cleinent in all respects. He testified concerning the sexual relations of Whelehan, accused and himself with her and of each paying her 200 francs as her fee (R.47). He then stated that after all three had completed acts of intercourse, they congregated in Mlle. Cleinent's boudoir and were smoking and talking when "some way or other we all noticed this pocketbook that was resting on a mantlepiece right in the center of the room, I believe it was. And so me, or some way or another, we hit upon the idea of taking this pocketbook, I don't remember how it just came about, but we all decided upon it" (R.47,48). The accused joined in this conversation (R.48). Accused told Whelehan and Kane to leave and to bring the jeep to the Hotel where he would meet them in about ten minutes "with the bag." They left, located the jeep nearby and when accused did not appear in the specified time, Kane returned to Mlle. Cleinent's room. Accused and the girl were still there and the pocketbook was in the same place (R.48).

A passing vehicle attracted her attention; she walked to the window and was followed by accused who placed his arm around her shoulder and, as testified by Kane, said, "he could hold the girl's attention for me at the window and I could grab the pocketbook and run" (R.49). This Kane did, but "a few minutes after that" Mlle. Cleinent and accused came running down the stairs and when Kane had difficulty in opening the door, Mlle. Cleinent caught up with him. She tried to grab the pocketbook from him and tore off the handle. During the scuffle, accused pushed Kane and her to one side, got the door open and he and Kane ran down the street toward the jeep which they entered. The vehicle was then driven away but they proceeded only a short distance when they heard a pistol shot and were halted by a military police vehicle and weapons carrier. In the meantime Kane had placed the pocketbook under the seat in the rear of the jeep (R.49). When stopped by the military police with whom Mlle. Cleinent was riding, accused was seated in the front seat of the jeep with the driver, Reiber and Whelehan, Lieutenant Seaton and Kane were in the back (R.49). Prior to this and while driving back to camp, accused, according to Kane, made a statement to the effect that "we had gotten our sexual desires furnished for us free of charge more or less and that we would split the contents of the money in the bag between the five of us" (R.49). Two military policemen testified that when they stopped the jeep in which accused was riding they found a pocketbook containing "700 and some odd francs" under the seat of the jeep (R.68,73,74).

Whelehan testified that while he, Kane, and accused were in the bedroom following intercourse with Mlle. Cleinent, "a pocketbook was mentioned." On the return trip either Kane or accused had a pocketbook (R.80,81). Technician Fifth Grade Reiber testified that as they were returning to camp, accused "raised his voice above the rest of the crowd, (said) something about splitting money" (R.86).

A voluntary statement made by accused to the investigating officer on 21 July 1945 was received in evidence without objection (R.65; Pros. Ex. 2, 2A). Therein accused described in detail his activities on the night in

question. With respect to the events which transpired at the Cafe, he related that upon entering with Lieutenant Seaton they were greeted by three American soldiers and invited to sit at their table and "would say that the soldiers had been drinking quite a lot before we met them." At about 2400, Kane invited accused and Seaton to accompany the enlisted men in a jeep to Dijon where they could find some women. Accused asked if the place was off-limits and Kane replied that it was not, that it was a coiffeur shop. The invitation was accepted and the party drove to the place suggested by Kane in Dijon. Upon being admitted, accused, Seaton and "two soldiers" entered and went upstairs but Seaton did not remain. The remaining three paid the "Madame of the House" 50 francs each for the room. After all three had engaged in sexual intercourse and while getting dressed, one of the soldiers said that the woman "wasn't worth a damn" and Kane suggested taking her pocketbook. Accused told Kane and the other soldier to leave and locate the jeep; that he would meet them in a few minutes. Accused then saw the jeep pass the house and whistled but it did not stop. Almost immediately thereafter he saw a military police truck pass and hesitated to leave. Kane returned within a few minutes and when the woman said something about military police and ran to the window, accused followed her and said to Kane, "Now is a good time to get that purse if you want it", at the same time drawing a curtain "to prevent her from seeing Kane." She immediately drew the curtain back and pursued Kane who was then going downstairs. Accused followed her down the stairs and as she reached Kane near the entrance, accused passed both and made his exit. Kane followed him out and they proceeded down the street to the corner where the jeep was standing, They entered the jeep and drove away. As they started out of the town, the lights on the vehicle went out. Accused made the remark, "Well, we didn't pay for our tail after all." Thereafter the jeep was halted by the military police and the occupants were taken to the station.

4. After having been advised of his rights, accused elected to give sworn testimony in his own behalf. He testified with respect to his presence with Lieutenant Seaton at the Cafe, stating that the only unoccupied seats were those at a table adjoining the one at which the three enlisted men were seated. He and Lieutenant Seaton ordered and drank a bottle of red wine, but accused denied that he had partaken of any which belonged to the enlisted men. He asserted that the Cafe was frequented by officers as well as by enlisted men (R.89,90) although he did not see any other officers there on the night in question (R.101). Thereafter he related the incidents which transpired from the time they left the Cafe and drove to the Hotel until the apprehension by the military police. Except as hereinafter related, his testimony as to the ensuing events was, in all material respects, identical with that of the other witnesses. He testified that after all three had completed sexual intercourse, Whelehan complained about the quality of the services rendered and it was then that Kane suggested taking the purse. Up to that time accused had no knowledge that the Hotel was off-limits. He had seen no such sign at the entrance but when something was mentioned about military police, he became concerned and realized that the place must be off-limits (R.91,92). Whelehan and Kane left to locate and bring the jeep (R.91) but when the latter returned alone some few minutes thereafter, accused said to

him, "If you want that purse, now is the time to get it." He testified that by the remark he meant "I wanted to leave the place, if he wanted to go, to get and get out with me because I didn't want him to hang behind and get caught by the military police and bring me in" (R.92). Following the above-mentioned remark to Kane, accused pulled the curtain which was behind the window where he and Mlle. Cleinent were standing because he figured "if Kane wanted to get the money, he's got to get it now so he could get the hell out of there in case the military police get back." Accused did not want Kane to be caught stealing the pocketbook because it would result in accused being found in an off-limits place (R.92,98). He had no intention of stealing any money (R.92).

He stated that he was sober at all times and admitted that while in the jeep after leaving the Hotel he made the remark "We didn't pay for our tail after all." Asked what he meant by the remark, he testified, "I meant - I don't know, it is just an after-thought; the guys didn't get their rooking after all." They had complained about the quality of the service rendered by the prostitute (R.93). He denied that he stated the money would be "split five ways" (R.95). He further testified that he is 22 years of age, has had three years of military service having been a bombardier and that prior to his entry on duty he was employed in civil life as assistant manager of a Post Exchange at Camp Claiborne, Louisiana (R.90,93). It was stipulated that if Lieutenant Colonel J. F. Loftus and Major C. B. Gradden were present they would testify that they knew accused and that his general reputation and character were excellent (R.102).

6a. Charge II, Specification 1

The evidence clearly shows that on the date and at the place alleged, the accused and another officer entered a public cafe and seated themselves at a table occupied by three enlisted men. While the establishment was crowded, it was apparent to the accused when he sat down that the enlisted men had had considerable to drink. Although accused denied that he drank wine out of a bottle from which the others partook, there is substantial evidence that he did and there can be no question but that as the evening wore on, the association between accused and enlisted men developed into something more than engaging in casual conversation and exchanging pleasantries. They sat together in this cafe imbibing wines for more than an hour, during the course of which the subject turned to women and the obtaining of one for the gratification of their sexual desires. When one of the enlisted men suggested a trip to a place in the nearby town of Dijon for the accomplishment of such desires, the accused readily consented, although he knew that this enlisted man was intoxicated. Where the drinking of intoxicating liquor in a public place by an officer with an enlisted man is accompanied by a spirit of camaraderie and conviviality between them from which there springs a plan to mutually seek carnal pleasures, such conduct by the officer is clearly prejudicial to good order and military discipline and in violation of Article of War 96 (CM 236209, Jordan, 22 BR 345; CM 252961, Martin, 34 BR 223; CM 252075, McPherson, 33 BR 328).

6b. Charge II, Specification 2

After leaving the Cafe, accused, in company with the enlisted men, drove to the town of Dijon where Private Kane led the party to a notorious house of prostitution. Despite accused's denial that he knew said place was one of prostitution, the overwhelming weight of the evidence is to the contrary. Considering the conversation at the Cafe relating to the plans for visiting the establishment, the hour of the visit, the unusual circumstances under which the party was admitted and the fact that accused paid the madame of the house her fee for the use of the room prior to engaging in sexual intercourse with the prostitute, to whom he also paid a fee, the court was fully warranted in inferring that accused had knowledge that he was entering a house of prostitution. Such conduct was wrongful and doubly so in view of the fact that it occurred in the presence of and with the assistance of enlisted men. Indeed, it was conduct unbecoming an officer and a gentleman and would have constituted an offense in violation of the 95th Article of War had it been so charged (CM 227191, Saul, 15 BR 197).

c. Charge II, Specification 3

Our next consideration is the offense alleged in Specification 3 of Charge II in its relation to Specification 2 of said Charge hereinabove discussed. It will be noted that both Specifications charge accused with wrongfully entering the Hotel Meuble. In Specification 2 the gravamen of the offenses is the wrongful entry of a known place of prostitutiom in the company of certain enlisted men for "the purpose of having sexual intercourse" therein. In Specification 3 accused is again charged with "wrongful entry" of said establishment. The time involved is identical under both Specifications. The only difference between the allegations of the respective Specifications is that under the prior one, the purpose of the wrongful entry is set forth whereas in the latter no purpose is set forth, the Specification merely alleging that accused did "wrongfully enter" said hotel, followed by words describing the hotel as being "Off-Limits." It may have been the intention of the draftsman of the Specification to charge accused with violating an "Off-Limits" directive which, indeed, would have constituted an offense not charged in Specification 2 of Charge II, but the language used therein utterly fails to allege such an offense. The most that can be said is that it is descriptive of the establishment and informs accused why his entry of it was wrongful. Hence, the Specification in effect charges the identical offense alleged in Specification 2 of said Charge. In view of the finding of the Board in connection with the second Specification, a finding of guilty of the third Specification would be a prohibited duplication (CM 258324, Ninman, 37 BR 381). Even were this not so, and assuming that the Specification did charge a separate offense, the proof fails to show beyond reasonable doubt that the Hotel Meuble was "an establishment duly posted and designated by proper authority as 'Off-Limits' to United States military personnel." Accordingly, the findings of guilty of this Specification cannot be sustained.

d. Charge I, Specification

There remains for consideration the offense charging accused with the

larceny of Mlle. Cleinent's handbag, value about $10, and 750 francs, French currency, value about $15. The evidence is undisputed that after sexual intercourse with Mlle. Cleinent for which she had received the emolument of 600 francs from accused and his two associates, one of the enlisted men in the presence of accused expressed his dissatisfaction with the service rendered by her and it was suggested that her purse be taken to even accounts. This suggestion was accepted by accused. Indeed, by his own testimony he admitted that he assisted the enlisted man, Kane, in its asportation. Immediately before the theft he said to Kane, "If you want the purse now is the time to get it" and with that he attracted Mlle. Cleinent to the window and drew a curtain to obstruct her view of Kane who then took the purse and started to leave the premises. As Mlle. Cleinent immediately became aware of the theft and sought to overtake Kane on the stairway, accused impeded her progress and even assisted Kane in avoiding her though she struggled with Kane for the purse. Thereafter accused was heard to make a remark that the proceeds of the theft were to be distributed among the occupants of the vehicle in which he was riding. When recovered the purse was found to contain 750 francs, the amount which Mlle. Cleinant testified was in it when taken by Kane.

From these facts it is clear that accused aided and abetted the commission of the larceny and consequently became a principal (Wharton's Criminal Law, 12th Ed., sec. 255; USC Title 18, sec. 550; CM 224318, Long, 14 BR 113; CM 240646, Hall, et al, 49 BR 327).

With respect to the value of the stolen francs, the court, composed of members of a military command stationed in the area where these offenses were committed, was entitled judicially to notice the rate of exchange between French francs, a common medium of exchange, and United States currency and, accordingly, to determine the value of 750 francs, French currency, to be of the value of $15 as alleged (CM ETO 1671 (1944); 3 Bull JAG, 1944, sec. 451 (44), p.190).

On the question of value of the stolen purse, the only testimony was that of the owner, Mlle. Cleinent, who testified that she had purchased it in February 1945 at the Belfort Department Store at a cost of 9700 francs. She testified its value was five or six thousand francs because she had to buy another one for which she had to pay 10,000 francs. Clearly such testimony was entitled to no weight. It has been uniformly held by the Board of Review that the testimony of the owner of stolen personal property as to its value is not competent unless he is an expert or has special knowledge on the subject. It is immaterial that the article itself has been offered in evidence. To permit the court on its inspection alone to find definite market values of articles "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possess" (CM 268007, McKinney, 44 BR 205 and cases cited therein).

When the grade of the offense depends upon the value of stolen property, the goods allegedly stolen must be proved to be of the value charged in the indictment (32 Am. Jr. 1051, sec. 139). Failure to establish more than that the goods had some value warrants conviction of only the minimal offense. While

the court from its inspection of the handbag could determine that it had some value (MCM, 1928, par. 173), it could not arbitrarily fix it as the amount alleged so as to find the aggregate value of the stolen property to be greater than $20 (McKinney, supra). The evidence supports only a finding that the accused did at the time and place and in the manner alleged, take, steal and carry away one woman's handbag of some value, and 750 francs, French currency, of the value of about $15, of a total value unknown but not greater than $20, the property of Mademoiselle Marie Louise Cleinent.

6. Subsequent to trial, six out of seven members of the court which tried accused signed a plea for clemency recommending to the reviewing authority that the confinement adjudged be remitted because it was felt that "the poor judgment of the accused which involved him in this incident is a result of his youth."

Consideration has been given to several letters from the Honorable James H. Morrison, a member of Congress from the state of Louisiana, addressed to the War Department on behalf of the accused and to three clemency recommendations from officers who became acquainted with him following commission of the instant offenses.

7. War Department records show the accused to be about 23 years and 6 months of age and single. He graduated from high school and from January 1941 to December 1942 was employed at the Camp Claiborne Post Exchange as Assistant Manager. On 2 January 1943 he entered military service as an enlisted man and eventually became an aviation cadet. He was commissioned a second lieutenant, Army of the United States, on 30 September 1944 with aeronautical rating as Aircraft Observer (Bombardier). Thereafter he was assigned to the European Theater of Operations and on 7 April 1945 was awarded the Air Medal for meritorious achievement while participating in aerial flight. The Oak Leaf Cluster was awarded him on 1 May 1945. He received an efficiency rating of Excellent for performance of duty from 30 September 1944 to 31 December 1944 but was rated "Unknown" for the period 1 January 1945 to 30 June 1945 because the time he had served under the rating officer was insufficient to enable the latter to estimate his efficiency. An entry appears om said report showing that accused was reprimanded on 29 May 1945 and ordered to forfeit $75 of his pay by the Commanding General of the 42nd Bomb Wing for "entering the premises of an 'Off-Limits' house of prostitution at Dijon, France."

8. The court was legally constituted and had jurisdiction of the accused and the offenses. 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 insufficient to support the findings of guilty of Specification 3 of Charge II, legally insufficient to support so much of the findings of guilty of the Specification of Charge I as finds the stolen handbag to be of a value other than undetermined and the total value of the stolen property greater than $20 and

legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 93 or 96.

Thomas H. Tappy, Judge Advocate.

Joseph J. Sterri, Judge Advocate.

Robert C. Trevithick, Judge Advocate.

JAGH - CM 307164 1st Ind

WD, JAGO, Washington 25, D. C. JUN 15 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James J. Clouatre (0-2072110), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of a pocketbook and 750 French francs, of a total value of $25 (Charge I, Specification), in violation of Article of War 93; and of drinking intoxicating liquor in a public place in the company of enlisted men (Charge II, Specification 1); of wrongfully entering a house of prostitution in the company of said enlisted men (Charge II, Specification 2), and of wrongfully entering the same establishment at the same time, the Specification alleging that said establishment was "duly posted and designated by proper authority as 'Off-Limits' to United States military personnel" (Charge II, Specification 3), all in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for one (1) year, effective 29 August 1945. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support so much of the finding of guilty of the Specification of Charge I as finds the stolen handbag to be of a value other than some undetermined value and as finds the total value of the stolen property to be greater than $20, legally insufficient to support the findings of guilty of Specification 3 of Charge II (entering house of prostitution posted as off-limits), and legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 20 July 1945 accused entered a public cafe near Dijon, France, and sat at a table occupied by three enlisted men, with whom he spent about an hour drinking wine and conversing. The conversation turned to women and at the suggestion of one of the enlisted men, accused accompanied the men to the town of Dijon, France, in a jeep, where three of the party, including accused, entered a known house of prostitution. Accused and two of the enlisted men, after paying the required fee, had sexual intercourse there with a prostitute.

One of the men expressed to accused his dissatisfaction with the prostitute's services and as her pocketbook, into which she had placed the proceeds of her business, was observed resting on a mantlepiece, it was agreed between accused and one of the enlisted men that while the former diverted her attention, the latter would take the purse and make his exit. The accused led the woman to a window of the room and drew a curtain to conceal the movements of his accomplice, but she observed the enlisted man and quickly followed him in an effort to retrieve her purse. As she pursued him, the accused impeded her progress and assisted the enlisted man in making his exit. They proceeded to the jeep and drove away. A short time thereafter the accused and the occupants were apprehended while driving in the direction of their station. The prostitute's purse containing the full amount which she testified had been taken (750 francs) was found in the jeep. No competent evidence was introduced as to the value of the purse. Neither was it shown beyond reasonable doubt that the house of prostitution had been declared off-limits "by proper authority".

Six of seven members of the court subsequently recommended that the period of confinement imposed be remitted because of the youth of accused which the members felt was responsible for his exercise of poor judgment resulting in the commission of these offenses. Accused holds the Air Medal with Oak Leaf Cluster for his participation as bombardier in aerial flights over Germany. Against his record is one punishment under Article of War 104 for entering the premises of an "Off-Limits" house of prostitution at Dijon, France, on 29 May 1945. I recommend that the sentence be confirmed and carried into execution.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 215, 9 July 1946).

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

SPJGK
CM 307173

19 Mar 1946

UNITED STATES v. Private ANDREW SABANSKY (36370421), attached -unassigned 480th Reinforcement Company, 72d Reinforcement Battalion (then Detachment 97, Ground Force Reinforcement Command).	SEVENTH UNITED STATES ARMY Trial by G.C.M., convened at Marburg, Germany, 16 January 1946. Dishonorable discharge (suspended) and confinement for five (5) years. Wurzburg Disciplinary Training Center, Wurzburg, Germany.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Andrew Sabansky, attached-unassigned 480th Reinforcement Company, 72d Reinforcement Battalion (then Detachment 97, Ground Force Reinforcement Command), did, without proper leave, absent himself from his organization at Munster, Germany, from about 27 April 1945 to about 27 September 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence and ordered its execution, but suspended execution of the dishonorable discharge until the soldier's release from confinement and designated the Wurzburg Disciplinary Training Center, Wurzburg, Germany, or elsewhere as the Secretary of War may direct, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 34, Headquarters Seventh United States Army, APO 758, 26 January 1946. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50½.

3. The only evidence offered to establish the commencement of the alleged period of absence without leave was an extract copy of the morning report of Detachment 97, Ground Force Reinforcement Command, which showed that the original morning report entry had been signed by one First Lieutenant Richard S. McNeill (Pros. Ex. A). This document was admitted into evidence over the objection of the defense that it was incompetent because the entry was based on hearsay. The defense accepted an offer by the prosecution "To stipulate with the defense, that if the maker of the morning report were present in court and sworn as a witness, he would testify that he does not have personal knowledge of the entry in question," and the stipulation was "received" by the court (R. 8). Defense did not waive its objection. Morning report entries "are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge" (MCM 1928, par. 117a, p. 121). These provisions have been interpreted by The Judge Advocate General's Office "as requiring the officer responsible for the morning report to have personal knowledge of the entries made therein *** lack of such personal knowledge may be established by extrinsic evidence" (SPJGN 1945/3492, 29 March 1945, IV Bull JAG, Sec 395 (18), p. 88). In view of the stipulation that Lieutenant McNeill would testify that he did not have personal knowledge of the fact of accused's absence without leave as entered in the morning report, such entry was incompetent evidence of the alleged absence

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

Herman Moyse, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307173 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War Mar 21 1946

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Andrew Sabansky (36370421), attached-unassigned 480th Reinforcement Company, 72d Reinforcement Battalion (then Detachment 97, Ground Force Reinforcement Command).

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

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

Thomas H. Green

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 178 13 June 1946).

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

SPJGN-CM 307181

U N I T E D S T A T E S	)	NINTH SERVICE COMMAND
v.	)	Trial by G. C.M., convened at Presidio of San Francisco, California, 6 February 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private LeROY W. CHRIST (33344324) Company C, Medical Department, 1960 SCU Presidio of San Francisco, California.	)	

HOLDING of the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient, in part, to support the findings and the sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and the sentence.

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

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

Specification: In that Private LeRoy W. Christ, Company "C", 1960 Service Command Unit, Hospital Train Unit, Presidio of San Francisco, California, having been duly placed in confinement in Guard House, Presidio of San Francisco, California, on or about January 3, 1946, did, at Presidio of San Francisco, California on or about January 15, 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private LeRoy W. Christ, Company "C", 1960 Service Command Unit, Hospital Train Unit, Presidio of San Francisco, California, did, at the Presidio of San Francisco, California, on or about September 20, 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at San Francisco, California on or about January 2, 1946.

He pleaded not guilty to, and was found guilty of, the Charges and Specifications. Evidence was introduced of three previous convictions: one by a summary court-martial and one by a special court-martial for absence without leave for 23 days and 15 days respectively, in violation of the 61st Article of War; and one by a special court-martial for failure to obey a lawful order of a commissioned officer in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence, reduced the period of confinement to three years, suspended the dishonorable discharge until the soldier's release from confinement, and designated the Southwestern Branch, United States Disciplinary Barracks, Camp Haan, California, or elsewhere as the Secretary of War might direct, as the place of confinement. The proceedings were published in General Court Martial Orders No. 57, Headquarters Ninth Service Command, Fort Douglas, Utah, 15 February 1946.

3. The Board of Review is concerned solely with the Specification of Charge II and Charge II since the evidence is unquestionably legally sufficient to sustain the findings of guilty of Specification of Charge I and Charge I.

The prosecution introduced in evidence, Defense Counsel specifically stating he had no objection thereto, an extract copy of a morning report reading as follows:

"EXTRACT COPY OF MORNING REPORT OF—
Company C 1960 SCU Hospital Train Unit
M/R 21 Sept 45
Dy to AWOL 0630 20 Sept 45

/s/ Joseph H. Funk
/t/ JOSEPH H. FUNK
1st Lt., Inf.

1960 SCU HTU Presidio of San Francisco Calif 4 Jan 46

I, ARTHUR G. HARRISON Capt., AUS, certify that I am commanding officer of Company C 1960 SCU and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Presidio of San Francisco Calif. for the dates indicated in said copy which relates to Christ Leroy W 33344324 Pvt Co C 1960 SCU Hospital Train Unit Pres of SF Calif

/s/ Arthur G. Harrison
ARTHUR G. HARRISON
Capt., AUS" (R7; Pros. Ex. 1)

In addition, there was testimony that on 2 January 1946 accused was taken into custody in San Francisco by the Military Police; that he was dressed in civilian clothes; that he gave a fictitious name; that he claimed to be a discharged sailor; and that he was in possession of what purported to be an honorable discharge from the United States Navy, a Social Security Card, and a membership card in the American Legion, all bearing the fictitious name accused gave (R 7-11).

4. Accused, after an explanation of his rights, elected to remain silent (R 14).

5. Manifestly accused's conviction of desertion must rest upon the competency of the extract copy of the morning report to establish his initial absence. The difficulty with the extract copy is, of course, that the body of it does not contain accused's name or his serial number. If the conviction is to be sustained at all, therefore, it must be sustained on the basis that the certification to the effect that the entry does pertain to accused is sufficient, in the absence of objection, to warrant a finding of that fact.

It has been decided that when a document, duly authenticated as a copy of a certain public record, fails to show on its face that the record pertains to the accused, a statement to that effect in the authenticating certificate is not competent evidence of the fact so stated. C.M. 156186, Potter; Dig. Ops. JAG, 1912-30, par. 1299; C.M. 162209, C.M. 162245, 162476; Dig. Ops. JAG, 1912-40, sec. 395 (17).

In CM 210207, Kennerson, 9 BR 219, accused was tried for fraudulently procuring his enlistment in the Army by willfully concealing that he had received a bad conduct discharge from the Navy. In support of its allegation of fraud, the prosecution introduced into evidence, without objection, a photostatic copy of accused's enlistment in the Navy, photostatic copies of accused's fingerprints and of a paper "in the nature of final entries in a service record, one showing the discharge * * * 'on account of sentence of S.C.M. with bad conduct discharge' of a man whose name is not disclosed by the paper itself." Attached to these papers was a certificate signed by the Acting Chief of the Bureau of Navigation stating that the annexed copies related to enlistments and discharges of accused.

In considering the admissibility of these enlistment and discharge records the Board of Review referred to CM 156186, Potter, supra, in which a similar question was presented, and in which it was held that the document was erroneously received in evidence for the reason that it could not be determined that it pertained to accused. The Potter case further held that the certificate could not be relied upon to prove that the document related to accused because the certificate was not evidence. The Board observed that the position taken in the Potter case was "logical but highly technical." Quoting the Manual for Courts-Martial (1928), paragraph 116b, to the effect that:

> "A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection",

it urged that "genuineness" should be given a broad meaning, i.e., authentic and applicable to accused, or at least that the case should be regarded as within the spirit of the quoted rule which should be applied by analogy.

They also quoted paragraph 117a, Manual for Courts-Martial (1928), which reads:

> "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, when an official duty exists to know and to make one or more records of certain facts and events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e. prima facie) evidence of such facts and events* * *"

The opinion concluded with the statement that "the Potter case should not be followed in the present and future like cases ***. No injustice will be done by so holding. If there existed the least doubt that the entry in question applied to Kennerson, he or his counsel would have objected to its admission."

A related problem was considered in CM 296303, Burdick. In that case accused, who was described in the Specification as assigned to the East Coast Processing Center, was charged with desertion. The prosecution offered in evidence a photostatic copy of a morning report of Company C, 101st Engineer Combat Battalion, with an entry, "KWC 29 Pvt. Burdick duty to AWOL 1930 CRF." The accused objected to the admission of this document on the grounds that it did not properly identify the accused because it failed to give his first name, middle initial, and Army serial number. The objection was overruled. The Board held that accused by his plea of not guilty admitted that he was Private Wilbert F. Burdick of the East Coast Processing Center; that there was a complete lack of proof to establish that he was Private Burdick of Company C, 101st Engineer Combat Battalion; and that consequently the document was erroneously admitted. To the same effect see CM 298331, Martin; CM 298783, Morris.

CM 298371, Lofaro, presented a different situation, although it relied on Burdick, Martin and Morris, supra, as the basis for its decision. The specification alleged that accused was assigned to the East Coast Processing Center and that he had deserted the service on 25 March 1943. The prosecution offered in evidence an extract copy of the morning report of "Hq & Hq Det 60th QM BN (Ldry)" for 27 March 1943 containing an entry:

"Pvt. Lofaro fur to AWOL as of 0001, Mar 25/43."

The copy contained the conventional certificate which in this case stated that the original related to "John Lofaro, 32499727, Pvt, Hq Det, 60th QM Bn (Ldry)". The defense objected to the admission of the extract copy on the grounds that the serial number noted was not accused's, and that he was never a member of the organization indicated. The prosecution also introduced into evidence without objection, an extract copy of a morning report of the Post Guard House, Fort Jay, New York, which gave accused's serial number as 32499727 and described him as a member of the 14th Evacuation Hospital Unit. Accused in an unsworn statement

asserted that his serial number was 32499797 and that he had never been a member of "Hq and Hq Det, 60th QM BN (Ldry)." The Board held that the admission of this document was improper because there was no showing that it related to accused. With respect to the certificate, the Board assumed, without deciding, that it could be accepted as evidence of the identity of the soldier referred to in the body of the copy, but pointed out that it did not establish that John Lofaro who was described in the specification as a member of the East Coast Processing Center was the same John Lofaro who was a member of, and absented himself without leave from, "Hq & Hq Det, 60 QM BN (Ldry)". almost three years before.

The relation between the certificate and the body of the extract copy was further considered in CM ETO 12619, Hatfield, where it was held that the failure to include in the latter the signature or initials of the maker was not fatal to its admissibility even in the face of an objection and despite the form of the certification. CM ETO 4756, Carmisciano was thus overruled.

We can easily dispose of the cases dealing with the photostatic copies of original morning reports where only fragments of accused's name appeared and the report itself was from a different organization from that to which it was alleged accused belonged on the grounds that there was no certificate to clarify the reference in the report itself. Nor does the Lofaro case offer any difficulty, since the certificate there failed to identify with any definiteness that the report related to the accused.

Here the accused admitted by his plea of not guilty that he was Private LeRoy W. Christ of Company C, 1960 Service Command Unit, Hospital Train Unit, Presidio of San Francisco, California. Burdick, supra. The Commanding Officer of that unit certified over his signature that a certain entry in the morning report of that unit related to Private LeRoy W. Christ of that unit. We can see no reason why, in the absence of a challenge to that statement, it cannot be considered by the court as evidence of the truth of the matter asserted in it. Without the certificate the copy of the morning report could not properly be admitted in evidence (CM 156131) and the statement in the certificate as to the source of the material contained in the document authenticated is prima facie evidence of that fact. CM 161038. The certificate does, therefore, have force and effect, and we do not think that in giving weight to the assertion therein that the entry it certifies pertains to accused we are departing from accepted principles. The suggestion

in the Kennerson case that it is an official statement in writing seems to us to be sound. The commanding officer of the reporting unit is the custodian of the duplicate original of the morning report (par. 6b, AR 345-400, 3 Jan 1945) and is required to certify an extract copy thereof immediately on reporting a man absent without leave (par 7, AR 615-300, 25 March 1944). He thus has a duty to record on the extract copy the entry on the original report and he has a duty to know that what he certifies as being on the original report is in fact there. This satisfies the requirements of an official written statement which, as defined in the Manual, specifically includes "a certificate". Manual for Courts-Martial (1928), paragraph 117a, page 121.

It may be urged that the certificate shows that the original report did not contain accused's name since it states that it is a "true and complete copy" of the original. This argument neglects the concluding portion of the statement, however, which says that the entry relates to accused. In the absence of objection we think we are entitled to assume that the certifier thought it unnecessary to copy accused's name in the body of the extract copy since he was stating below that the entry did in fact pertain to him. While it is a practice not to be commended, still it is not altogether illogical for the custodian to conclude that there was little point in saying the same thing twice.

For these reasons we think the record is legally sufficient to sustain the findings and the sentence.

6. The charge sheet shows that accused is 22 years of age and was inducted 3 November 1942 at Philadelphia, Pennsylvania.

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 sustain the findings of guilty and the sentence.

Walmot T. Baughn, Judge Advocate.

Robert J. Clarner, Judge Advocate.

[illegible], Judge Advocate.

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TITLE

DATE	BORROWER'S NAME	EXT.