OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 65

1946-1947

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

JAGH-CM 315477

NOV 1946

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| UNITED STATES<br><br>v.<br><br>Private RAYMOND L. WISNIEWSKI (36925363), Company B, 127th Airborne Engineer Battalion, and Private WILLIAM HOWARD (39428108), Company E, 187th Glider Infantry. | 11TH AIRBORNE DIVISION<br><br>Trial by G.C.M., convened at Sapporo, Hokkaido, Japan, 6, 7, 8 June 1946. Dishonorable discharge, total forfeitures and confinement for life. United States Penitentiary. |

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REVIEW by 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 above-named soldiers.

2. In a joint and common trial the accused were tried upon the following Charges and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William Howard, Company E, 187th Glider Infantry, and Private Raymond L. Wisniewski, Company B, 127th Airborne Engineer Battalion, acting jointly, and in pursuance of a common intent did, at APO 468, on or about 6 May 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Riyohei Nagasawa, a human being by striking him on or about the head with their fists and a rock, and by striking his head against the pavement.

ADDITIONAL CHARGE as to accused Private William Howard: Violation of the 69th Article of War.

Specification: In that Private William Howard, Company E, 187th Glider Infantry, having been duly placed in confinement in the Regimental Stockade, 187th Glider Infantry Regiment on or about 6 March 1946, did, at APO 468, on or about 5 May 1946, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE as to accused Private Raymond L. Wisniewski: Violation of the 69th Article of War.

Specification: In that Private Raymond L. Wisniewski, 127th Airborne Engineer Battalion, having been duly placed in confinement in the Regimental Stockade, 187th Glider Infantry Regiment on or about 5 April 1946, did, at APO 468, on or about 5 May 1946, escape from said confinement before he was set at liberty by proper authority.

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

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review.

4. Attached to the record of trial is a letter from the Staff Judge Advocate, dated 26 September 1946, which transmits, for consideration in the review of this case, a letter from Private Raymond Pierce, 38574588, a letter from the accused Howard, and a sworn statement made by Pierce, on 28 August 1946. Howard requested a new trial on the ground of newly discovered evidence contained in Pierce's sworn statement.

At the trial, Pierce was called as a witness for the prosecution and was granted immunity from trial in connection with the murder of Nagasawa on condition that he testify against Howard and Wisniewski. However, Pierce refused to testify despite the guarantee of immunity.

In his sworn statement made on 28 August 1946, Pierce stated in part that he was with Wisniewski and Howard at the time of the alleged assault on the deceased. He further states that the deceased was riding a bicycle

along a streetcar track and fell down and that Howard did not pull him from the bicycle. However, he states "I looked back and Private Howard was leaning over the Jap and I says 'Come on' so Howard raised up and says 'I think this Jap was hurt.' I believe Wisniewski had a rock in his hand and he hit the Jap with the rock and then we went on."

Technically, there is no such thing as a "new trial" in court-martial procedure. However, a reviewing or confirming authority, upon disapproval of the findings and sentence, may order a "rehearing" in a case in which execution of the sentence has not previously been ordered (AW 50½). Conceivably, the disapproval of the proceedings and the ordering of a rehearing might be based upon newly discovered evidence (CM 274516, Phillipp, 47 BR 199, 207). In a case where a rehearing is requested upon that ground, resort to the principles adopted by the civil courts is proper. Those principles are stated in Clark's Criminal Procedure (2nd Ed), page 587, as follows:

> "* * * To authorize a new trial on this ground (1) the evidence must have been discovered since the trial; (2) it must be such as reasonable diligence on the part of the defendant could not have secured on the former trial; (3) it must be material, and not merely collateral or cumulative or corroborative or impeaching; (4) it must be such as ought to produce a different result on the merits on another trial; (5) it must go to the merits, and not rest on merely a technical defense."

In the instant case Pierce refused to testify as a witness for the prosecution, but he was not called as a witness for the defense. Failure on the part of Howard, who was represented by individual counsel, to call Pierce as a witness negatives a showing of reasonable diligence on his part to secure Pierce's testimony in his own behalf. Furthermore, since Pierce stated that he was 5 to 8 feet away from Howard, and saw Howard leaning over the deceased when he "looked back," it is obvious that he was not in a position to know whether Howard pulled the deceased off the bicycle or whether the deceased fell accidentally. Accordingly, it does not appear to the Board of Review that the "newly discovered evidence ought to produce a different result on the merits on another trial" as to accused Howard. (See Clark's Criminal Procedure, above.)

5. The court was legally constituted and had jurisdiction over each accused and the offense. No errors injuriously affecting the rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. 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 92 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C. 452, 454).

M. Lottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

_____, Judge Advocate

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

JAGN-CM 315512

AUG 7 1946

| | | |
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| UNITED STATES | ) | FIRST ARMY |
| v. | ) | Trial by G.C.M., convened at Fort Dix, New Jersey, 20 June 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks. |
| Private ROBERT PITTMAN (42143146), 4th Company, 1262d SCU, Reception Center. | ) | |

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HOLDING by the BOARD OF REVIEW
SCHINDLER, HOTTENSTEIN 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert Pittman, 4th Company, 1262d SCU, Reception Center, Fort Dix, New Jersey, then of Company E, 1229th SCU, Reception Center, Fort Dix, New Jersey, did, at Fort Dix, New Jersey on or about 8 June 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Dix, New Jersey on or about 14 March 1946.

He pleaded not guilty to the Charge and Specification, and was found guilty, by exceptions and substitutions, of absence without leave, 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 at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, designated the Atlantic Coast Receiving Branch, United States Disciplinary Barracks, Fort Hancock,

not preclude us from requiring it in those cases where consideration of justice and fairness demand it.

"Doubtless some of the arguments adduced above would have equal application in the case where it appears that the statute has outlawed the original specification brought against accused. On the other hand, there are considerations, to which we have had reference, applicable here that are inapplicable in that situation. That case is not before the Board, however, and does not have to be decided. What the Board does decide is that where, as here, an accused is found guilty by exceptions and substitutions of an offense against which the statute has apparently run, although it had not run against the offense with which he was originally charged, and the record fails to disclose that he was cognizant of his rights to plead the statute, and there is no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of that specification."

Accordingly, on the authority of Sawyer, supra, the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

4. The charge sheet shows that accused is 24 years and 7 months of age, and was inducted on 3 June 1944 at Harrison, New Jersey.

5. For the foregoing reasons, the Board of Review holds that the record of trial is legally insufficient to sustain the findings and legally insufficient to sustain the sentence.

Irwin Schindler, Judge Advocate.

R. Wittenstein, Judge Advocate.

Gerald Bolton, Judge Advocate.

JAGN-CM 315512 1st Ind.
WD, JAGO, Washington, D. C.
TO: Commanding General, First Army, Governors Island, New York 4, N. Y.

1. In the case of Private Robert Pittman (42143146), 4th Company, 1262d SCU, Reception Center, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated.

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

(CM 315512).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

MAY 8 1947

JAGQ - CM 315525

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| UNITED STATES ) | 6TH INFANTRY DIVISION |
| ) | |
| v. ) | Trial by G.C.M., convened at |
| ) | Taegu, Korea, APO 6, c/o Post- |
| Private First Class ) | master, San Francisco, Cali- |
| GILBERT D. VAUGHN ) | fornia, 29-30 May 1946. Dis- |
| (39752259), Medical De- ) | honorable discharge and con- |
| tachment, First In- ) | finement for life. |
| fantry. ) | Penitentiary. |

REVIEW by the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Gilbert D. Vaughn, Medical Detachment, First Infantry, APO #6, did at Taegu, Korea, on or about the 27th April, 1946, forcibly and feloniously, against her will, have carnal knowledge of An Kyung Buni.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. About 7:30 P.M., Saturday, 27 April 1946, two soldiers drove up in front of the home of Hong Chun Kim, 1223 Kum Tan Dong, Taegu, Korea, in an Army jeep (R. 6); they searched the area, went away, returned, then went to the house next door where they found a 16-year old girl named An Kyung Buni, and dragged her to their jeep (R.6, 10-11, 17, 25); they placed this girl in the jeep and when her father and brother

tried to remove her, they pushed them away and one of the soldiers pointed an M-1 rifle at the father and pulled the trigger, however the father pushed the barrel of the gun just in time and he was not injured but it frightened him so that he backed away (R. 10, 11, 17). The two soldiers then drove off with the girl while the father, brother, and the neighbor ran after the car (R. 25). About a mile away (R. 56) the soldiers parked their car, turned out the lights, undressed the girl, and forced her to lie down on an Army blanket where each in turn had intercourse with her against her will (R. 25). Each took turns on "guard" duty (R. 16) and when the father and son approached the area, they heard the victim crying but saw the soldier with the gun and were told not to come closer (R. 11, 17, 24, 26). When the soldiers finished, they put on their clothes and drove off; the girl put on part of her clothes and ran to her father where she collapsed and had to be carried to the home of a neighbor (R. 30). The incident was reported to both civil and Army authorities that night. (R. 33).

The victim was examined about 2300 that same evening by an Army doctor and a Korean doctor but only the Army doctor appeared as a witness at this trial. He testified that the hymen was perforated but there was no evidence of bleeding or a tear. There was some swelling around the entrance to the vagina and inside was a milky fluid, indicating either recent intercourse or possible gonorrhea. His conclusion was that "the girl had probably had intercourse that evening. However, on the basis of our examination, we were unable to substantiate rape as the evidence was not substantial." (R. 31-32).

On the morning following the offense, Lieutenant Donald J. Arthur, Battalion Provost Marshal, went to the scene of the crime. There was the track of a quarter-ton truck outlined along the side of the road. In the road he found two cundrums and the contents of an Army prophylactic kit. In the field on top of a bank, about 25 feet from the place where the offense occurred, there was a clearly outlined footprint (R. 34). He measured the shoeprint with a stick and, comparing it with his own shoe, he "estimated" the footprint to have been made by a size "8" shoe. The heel portion of the print showed the letters "GOO" and the trade mark of the manufacturer (R. 37).

Lieutenant Arthur next conducted a thorough investigation of "almost all" military vehicles in the Taegu area looking for a vehicle that would answer the description of that given by the victim, her father, and her brother. There were about 100 jeeps in the area (R.39).

About 1330, 29 April, Lieutenant Arthur and Lieutenant Moursand discovered a Medic quarter-ton truck which answered this description in the Headquarters Company Motor Pool (R. 34). An Army blanket was found on the front seat containing stains (R. 34) which laboratory tests revealed as human spermatozoa (probably of quite recent origin) and Army-issue prophylactic material (Ex. 4).

While examining this jeep, accused walked up and asked what the officers were doing. He was asked who had been with him on Saturday night and he stated Sergeant Huntington. These two men and the jeep in question were taken to victim's home, and they were later questioned in the presence of the Regimental Adjutant (R. 35).

At the trial, the victim, her father, brother and neighbor identified accused as one of the two soldiers who committed this offense (R. 6, 10, 17, 25). On cross-examination, the father stated that he was sure of his identification of accused because he had seen him five or six times before driving by his house in a jeep (R. 22) over a period of three months prior to 27 April 1946 (R. 23). The soldier always wore big colored glasses but the road was so near the father could see the soldier's face (R. 22) and "having seen him on and off several times so I could remember his face" (R. 23). The victim's brother identified accused as the soldier who seized his sister. He was sure of his identification because he had seen accused many times before driving by his house in a jeep. He saw him for the first time on 2 February (Korean calendar) or 2 March (American calendar) (R. 12, 13, 15). He was sure of the date because it was a holiday (R. 13). On the various trips passing witness' home, accused always wore goggles but he was not wearing any on the night of the offense (R. 14). Witness did not observe any markings on this jeep because the jeep always went by quickly and "Even if I saw the alphabet I don't know" (R. 16).

The victim, on cross-examination, stated that when the accused and Huntington were first brought to her home, she was not sure that accused "was the same soldier that attacked me but in the meantime my brother said so too"; that her hesitancy in identifying accused was explained as follows: "In my mind I was sure he was the attacker but I don't want to make a wrong statement, that was why I hesitated" (R. 29). She recognized accused by his face (R. 29) and she had seen him drive by her house 10 days before wearing glasses (R. 30).

Lieutenant Arthur testified that Vaughn told him that he wore a size 8 shoe. He inspected the heel of Vaughn's shoe and found it was a "Goodrich" heel that was identical to the trademark of the print on the ground (R. 37).

Lieutenant Moursand testified that he also examined the footprint mentioned above, that the heel had the letters "GOO" and "EFG"; that he also examined accused's GI shoes and they had GOODRICH heels with the letters "EFG" in the center (R. 55).

The gun which the tall soldier fired was about 3½ feet long (R.11). Lieutenant Arthur requested that the ground around the vehicle be searched (R. 37); victim's father later found a shell approximately 3 inches in length in the area and gave it to the police station (R. 18); the police later gave Lieutenant Arthur an empty shell from an M-1 rifle cartridge (R. 37).

Two witnesses testified that there was an M-1 and a carbine in Vaughn's car during a hunting trip the afternoon of 27 April 1946 (R. 40, 58). The M-1 rifle was handled but not fired during this hunting trip (R. 42, 58). An M-1 rifle and a carbine were seen in Vaughn's jeep about 1900, 27 April 1946 (R. 44).

About 1700, 29 April, Lieutenant Arthur found an M-1 rifle stripped and lying on a table in the quarters occupied by accused and others. It had been fired and had not been cleaned (R. 35). The gun belonged to Corporal Garfield (R. 35).

Corporal George C. Garfield testified that Vaughn had borrowed his M-1 rifle the week previous to 27 April; that his rifle was in good condition for inspection on Saturday morning, 27 April 1946; that he noticed it was missing sometime after inspection and he next saw it by Vaughn's bed; that he observed that it was dirty (R. 52). On 29 April, Lieutenant Moursand found 3 full clips of M-1 ammunition, one empty clip and 7 loose rounds on a shelf in accused's quarters (R. 54-55).

4. Evidence for the accused.

Having been advised of his rights in open court, the accused testified as follows:

He arrived back from the (hunting) trip at Po Hong Dong about 1800, "got some chow", drove down to the Red Cross where he picked up Sergeant Marsden and T/5 Bartley at about 1830. He drove them back to quarters, found Huntington in the APO, asked him to drive back with him, and all four returned to the Red Cross International Club. They picked up Private First Class Twente on the way, waited for him at a Korean tailor shop, and arrived at the International Club about 1915 or 1930. These three friends departed and Huntington and accused returned to quarters. They went inside, came out, talked to Sergeant Krill a few minutes, saw

a Korean girl walking by, drove back to the International Club - somewhere around 1945. Upon starting in the building, accused and Huntington found that they were both out of cigarettes so they drove back to quarters, detouring around the railroad station. A few minutes after they had arrived back at Quarters, Sergeant Chesshire and Private First Class Agee came in and they all decided to go to the International Club and get some beer and doughnuts - this was between 2015 and 2025. They went up to the third floor of the International Club but were unable to get any doughnuts so they all drove over to the 3d Battalion Red Cross, arriving there about 2045. Accused talked to Miss McCubbin for about 15 or 20 minutes, then obtained a platter full of doughnuts and returned to CP - about 2140 or 2150. Accused and Huntington turned in their passes and after Huntington was in bed, accused remembered that he had left his blanket in the jeep and thinking it might rain, he brought the blanket inside and stayed in quarters the rest of the night (R. 69-70). He denied knowing where victim lived prior to being taken there on 29 April (R. 70).

On cross-examination, accused denied that there were any weapons in his jeep on his trip to the International Club about 1900 or 1915, 27 April. He stated that he had seen a carbine on the hunting trip that afternoon but he did not know of an M-1 rifle being in the jeep during that trip; that he borrowed Corporal Garfield's M-1 rifle just before afternoon chow on 27 April and put it between his bunk and Sergeant Krill's bunk (R. 73).

The testimony of Sergeant Krill (R. 46, 48, 62), Private First Class Twente (R. 57, 59-61), Private First Class Agee (R. 39, 42), Sergeant Marsden (R. 43, 45), Sergeant Chesshire (R. 49, 51), Miss McCubbin (R. 67), and Sergeant Huntington (R. 63, 65, 67, 81) substantiate in all essential parts the testimony of accused.

Morning reports were introduced to show that accused arrived in Korea on 11 March 1946; and that he arrived in Taegu on 15 March. He testified that he was not assigned a jeep until 27 March 1946; that his jeep was deadlined from 29 March to 10 April; and that he was away from Taegu from 14 to 16 April (R. 71, 72; Exs. A, B, C).

5. The evidence clearly establishes that a rape was committed and the only real question was whether the accused was one of the two soldiers who committed this offense.

Four Korean witnesses positively identified accused. The identification by the victim's father and brother was based on their having

seen accused on many previous occasions driving by their home in a jeep. Both claim to have seen accused on dates prior to his arrival in Korea (if accused's testimony and the morning reports are accepted as true). On that basis, these witnesses must be mistaken, either as to the date when they first saw accused or in their identification of accused as the soldier they saw on that date. Neither witness made a satisfactory explanation as to how they recognized accused without glasses on the night of the offense, when he always wore them as he drove by on previous occasions (R. 15), nor how they were able to recognize accused's features when he drove so quickly they could not observe any markings on the jeep (R. 16). The victim's identification of accused was also weakened by her failure to identify accused when he was first brought to her home (R. 29).

The evidence regarding the footprint found near the scene of the offense is not convincing but it is "some evidence tending to show that the accused was there when the crime was committed. *** The bare opinion of a witness as to the identity of the tracks, however, should have no weight with a jury; but if the witness gives his reasons for entertaining the opinion, the whole of the testimony should be allowed to go to the jury, in order that they may determine whether the grounds of the opinion are reasonable and satisfactory" (Par. 934, Wharton's Criminal Evidence, p. 1630).

The evidence regarding the blanket is also inconclusive but the court had a right to receive this information and consider it for what it might be worth.

The evidence regarding the M-1 shell (R. 18 and 37) should have been excluded inasmuch as it was not shown that the shell identified by Lieutenant Arthur was the same one found by the victim's father.

The record also shows that the accused and Vaughn were not the first soldiers presented to the witnesses for identification. Two other soldiers were taken to the victim's home on the previous day and were not identified (R. 28).

The defense to the charge was that of an alibi. Accused gave a detailed account of his activities on the night of 27 April 1946. Other witnesses corroborated his testimony except for a period of approximately 45 minutes. Ten to 12 minutes were required for the trip from town to the scene of the offense (R. 91), fifteen minutes or more were used in searching the houses, and the rape itself took 40 minutes. This adds up to a minimum of one hour and 15 minutes. Although the record of trial is filled with testimony as to when certain events took place and how long they lasted, no one looked at a watch and the time figures are all estimates.

The court, in a closed session, ruled that the defense counsel would be limited in his attack on the credibility of the victim to statements made in court (R. 29). This was an improper ruling but the court did not enforce this ruling and immediately permitted the defense counsel to question the victim regarding an identification not previously covered by her testimony in court (R. 29-30).

While the evidence is conflicting on the very essential fact of identification of the perpetrators of the offense, and accused's testimony to the effect that he was in the company area and at the Red Cross during the entire evening of 27 April is substantiated by several of his fellow soldiers, which if true would be a defense to the charge, such are controverted issues of fact for the court to determine. The record does contain direct evidence sufficient to support the findings of guilty.

In its review of this case, the Board of Review has considered various letters from soldiers who served with and testified for accused, from Huntington's parents, from Vaughn's wife, and from civilian friends and neighbors of accused.

6. The accused is 19-8/12 years of age, married, and has one child. He was inducted into the military service on 7 June 1945. On 8 December 1945, he enlisted for one year. Prior to the offense, the character of his service is listed as "excellent". There is no record of previous convictions.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory, upon conviction of a violation of Article of War 92. 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 punishable under section 278, Criminal Code of the United States (18 U.S.C. 457).

W. H. Johnson Jr., Judge Advocate

Joseph J. Stone, Judge Advocate

Carlton G. Schenck, Judge Advocate

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

15 MAY 1947

JAGH - CM 315554

| | | |
|---|---|---|
| UNITED STATES<br><br>v.<br><br>Private First Class EDWARD E. HOLMES (36908927), Company G, 4th Infantry, and Privates BILL T. SPOON (38679256), Headquarters Company, 25th Infantry and WILLIAM A. PANZINO (31484691), Company F, 4th Infantry | ) | 25TH INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Osaka, Honshu, Japan, 19 June 1946. As to each accused: Dishonorable discharge (suspended) and confinement for six (6) years. The Branch United States Disciplinary Barracks |

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Bill T. Spoon, Headquarters Company, 25th Infantry Division, Private Edward E. Holmes, Company G, 4th Infantry, and Private William A Panzino, Company I, 4th Infantry, acting jointly, and in pursuance of a common intent, did at or near Morishoji Station, Honshu, Japan, on or about 16 March 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Masao Tanimura, 90 yen, one chop, one brassard, one purse and several name cards, the property of Masao Tanimura, value about $10.00.

Specification 2: In that Private Bill T. Spoon, Headquarters Company, 25th Infantry Division, Private Edward E. Holmes, Company G, 4th Infantry, and Private William A Panzino, Company I, 4th Infantry, acting jointly, and in pursuance of a common intent, did at or near Morishoji Station, Honshu, Japan, on or about 16 March 1946, with intent to commit a felony, viz. robbery, commit an assault upon Tosaburo Kuramae, by willfully and feloniously striking the said Tosaburo Kuramae, about the head with their fists.

Specification 3: In that Private Bill T. Spoon, Headquarters Company, 25th Infantry Division, Private Edward E. Holmes, Company G, 4th Infantry, and Private William A. Panzino, Company I, 4th Infantry, acting jointly, and in pursuance of a common intent, did at or near Morishoji Station, Honshu, Japan, on or about 16 March 1946, with intent to do him bodily harm, commit an assault upon Takeji Onishi, by shooting at him with dangerous weapons, to wit: pistols.

The three accused pleaded not guilty to all the Specifications and the Charge. The findings of the court as to each of the accused were as follows:

"Of Specification 1 of the Charge: Guilty, except the words and figures, '90 yen, one chop, one brassard, one purse and several name cards', substituting therefor the words and figures, 'approximately 87 yen, one chop or stamp, one brassard, one purse or wallet'; of the excepted words and figures, not guilty, and of the substituted words, guilty'.

"Of Specification 2 and Specification 3 of the Charge: Guilty.

"Of the Charge, Guilty."

The accused were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence as to each accused, but remitted four years of the confinement, ordered the sentences as thus modified to be executed, but suspended the execution of the dishonorable discharge until the soldiers' release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 15, Headquarters 25th Infantry Division, APO 25, dated 8 July 1946.

3. Evidence for the prosecution:

Testimony of Takeji Onishi: Onishi and three other Japanese men were walking down the street when Panzino and Takenaka, Panzino's girl friend, passed them at a distance of about ten feet. Panzino then came back, grabbed Onishi by the collar and began beating him. Onishi then turned and ran toward the streetcar station. At that time Holmes and Spoon came out of the station and shot their pistols, possibly in the air. One grabbed Onishi by the collar and began beating him, whereupon Onishi ran back, passing the girl. As he ran, he felt a shot pass through his raincoat. He did not know where Panzino was when Holmes and Spoon were attacking him, and when he first saw Panzino, he did not know where the others soldiers were. His testimony with respect to whether Panzino had a pistol was contradictory, stating at one time that during the incident he saw all three soldiers with pistols, but saw only two firing, and later stating that he saw only Holmes and Spoon with pistols. He testified, however, that Panzino did not shoot (R 7-15).

Testimony of Tayoko Takenaka: Takenaka testified that she got off the streetcar and was walking along the street with Panzino, followed at about two or three meters by Spoon and Holmes. Four Japanese approached and one of them whistled, whereupon Panzino became angry and attacked one of the four, later identified as Onishi. Spoon and Holmes then came up and attacked the other two, referred to in another place as three Japanese. Shots were fired and Onishi passed her, running away. She then saw a Japanese on the ground and Tanimura being searched by Spoon and Holmes. She also saw Kuramae being assaulted but she did not see who did it, nor did she see any person other than Tanimura being searched. She testified that she and the three soldiers then went to the inn together. She also testified that they were not together on the way to the inn after the incident, but that she and Panzino arrived five or ten minutes ahead of Spoon and Holmes. In the inn she saw the stolen articles in the possession of Holmes, at which time all three soldiers were together. She saw all three soldiers with pistols during the incident, but she was not sure Panzino had a pistol at the time the shots were fired at Onishi (R 15-25).

Testimony of Masao Tanimura: Tanimura and his companions were walking near the station, and he saw a short soldier (Panzino) embracing a girl. He then saw the short one (Panzino) assaulting Onishi. Onishi escaped and Panzino then yelled something in English. At this time two soldiers came from the station with pistols in their hands, saying, "OK," "OK," and approached Tanimura and his companions. Onishi then ran back toward the group of Japanese and one of the soldiers fired his pistol. Tanimura then heard two more shots and Spoon and Holmes approached Tanimura and his companions. One of the soldiers had his pistol pointed toward him, and the other (Holmes) searched him and took his property. After they had searched him, they assaulted him, throwing him to the ground. Then all three soldiers hurried after Kuramae and assaulted him. Tanimura witnessed the assault while still lying on the ground. After the assault, the soldiers left together. Panzino and the girl were at first alone, but they later were with the other two soldiers. Tanimura could definitely identify Holmes only (R 25-31; 39-40).

Testimony of Tasaburo Kuramae: Kuramae and three other Japanese were walking home when they met a girl and Panzino walking along, embracing. Panzino and the girl passed them, and one of the group—thought to be the fourth member, Kitahata, whistled at the girl. Panzino then struggled with Onishi, struck him about the face with his fists, and then yelled in a loud voice. At this time the other two soldiers approached, and fired two or three shots with their pistols. They then pointed their pistols at the group of Japanese and indicated that they were not to run. Onishi ran and someone fired a shot at him. Spoon and Holmes then pointed a pistol at Tanimura and searched him, during which time Panzino approached Kuramae, who was standing about fifteen feet from Tanimura, and stood near him watching him and also watching the assault on Tanimura. Panzino did not threaten Kuramae while Spoon and Holmes were assaulting and robbing Tanimura, who fell to the ground. Spoon and Holmes then came to Kuramae. Pistols were pointed at Kuramae, but Kuramae does not know by whom because he "had his face down." Kuramae was then searched but apparently nothing was taken from him. Panzino and the other two then beat him to the ground by hitting him about the face with their fists. When he was on the ground they kicked him on the hips. During the incident Kuramae saw only two of the soldiers with pistols. Panzino did not have one (R 31-39).

4. Evidence for the defense:

Panzino took the stand under oath as a witness in his behalf. He stated that he was at the Morishoji Inn all night, on the night of the 16th of March 1946, and left the inn at about 7 o'clock in the morning, that he did not see the girl, Takenaka, that night but was with another girl, named Tazako. He did admit, however, that on the night of the 17th, he, Spoon, Holmes, and Takenaka were together and got off the tram at Morishoji Station where another girl was waiting for them. He and Takenaka took the road to the hotel, but Spoon and Holmes with the other girl took another road. He further stated that he and Takenaka went into the hotel, but that the girl with Holmes left him in the street and that Spoon and Holmes then came into the hotel. He denied having a fight with anyone. In fact, he denied all guilt of the offenses charged or any knowledge thereof and also stated that he had not seen Kuramae. He did state that Spoon and Holmes told him about having a fight with some Japanese and that both he and Spoon had a pistol on the night of 16 March. He saw Spoon and Holmes with two wallets but he did not know of any shooting and the wallets exhibited to him in court were not the ones he had seen in the possession of Spoon and Holmes (R 44-50).

5. The only question presented for consideration is whether the evidence is sufficient to support the findings of guilty and the sentence as to the accused Panzino.

Accused Panzino and his girl friend, Takenaka, were walking along the street leading from the station to the hotel when they were passed by three or four Japanese, namely, Takeji Onishi, Masao Tanimura, Tasaburo Kuramae,

and Kitahata. Kitahata whistled at the girl, Takenaka, whereupon accused, Panzino, became angry, turned back and grabbed Onishi and struck and beat him about the face with his fists. Onishi broke away from Panzino and ran toward the station, but was turned back by the accused Holmes and Spoon who came from the station in response to the calls or yells from Panzino. Holmes and Spoon were armed with pistols and began firing them. Onishi felt a bullet pass through his coat as he ran. Holmes and Spoon levelled their pistols upon Tanimura and Kuramae and commanded them to stand and not run, which they apparently obeyed. Holmes and Spoon then went to Tanimura and searched him, taking from him certain items of personal property. They struck and beat him and threw him to the ground, while in the meantime accused, Panzino, stood and watched Kuramae, who was standing about fifteen feet away from Tanimura. Spoon and Holmes then approached Kuramae and pointed their pistols at him. After these two had searched him, the three accused then struck and beat Kuramae to the ground and kicked him.

6. As to Specification 1 of the Charge, there is no evidence of community of purpose between the accused, Panzino, and the other two accused, Holmes and Spoon, insofar as the robbery of Tanimura is concerned. From the evidence it is logical to presume that Panzino called to Holmes and Spoon and requested their assistance in assaulting the Japanese. Therefore, it must be conceded that the robbery of Tanimura was not in pursuance of any common agreement or plan and could not have been foreseen by Panzino. Although the common purpose of the three to commit an assault upon the Japanese was in itself unlawful, it cannot be said that the robbery was contemplated by Panzino in execution of the common unlawful purpose of assaulting the Japanese to right a supposed insult. If, however, the act of robbery were a probable consequence of the execution of the common unlawful assault, accused Panzino would have been equally as guilty as Holmes and Spoon (Sec 47, Clark's Criminal Law, Sec Ed, p 105). The mere presence of a person at the scene of a crime committed by another, in the absence of preconcert or attempt to participate, is not a sufficient basis for an inference of participation in the crime (CM 186947; CM 314446, Fertado). Therefore, it is our opinion that the evidence is not legally sufficient to support the finding of guilty of Specification 1 of the Charge as to accused Panzino.

As to Specification 2 of the Charge, the same reasoning applies, as there is no evidence to the effect that Panzino had any notice of the intention of Spoon and Holmes to rob or attempt to rob Kuramae. It was not shown that he was aware of the fact that Spoon and Holmes had taken any property from Tanimura, and for all that appears in the record, he was justified in assuming that they were searching for concealed weapons, a natural and reasonable assumption from all the circumstances. Furthermore, the only definite evidence as to when Panzino himself struck Kuramae, shows that he did so after Spoon and Holmes had searched him. At any rate, no affirmative evidence was introduced showing that he joined Spoon and Holmes in their purpose to commit robbery (CM 314446, Fertado). The evidence is ample however to support so much of the findings of guilty of

Specification 2 of the Charge, as to accused Panzino, as involves a finding of guilty of assault and battery in violation of Article of War 96.

As to Specification 3 of the Charge, the evidence is not sufficient to warrant the inference that accused Panzino, fired the shot that passed through Onishi's coat as he ran from Spoon and Holmes. It is not established beyond a doubt that Panzino was armed; in fact, one witness stated that he did not have a pistol. The evidence does show, however, that Panzino committed an assault and battery upon Onishi by striking and beating him with his fists, but there is no such battery alleged in the Specification. Furthermore this assault by Panzino took place prior to the shooting and before Holmes and Spoon, one of whom fired the shot at Onishi, appeared on the scene. Consequently, it is the opinion of the Board that the evidence is not legally sufficient to support the finding of guilty of Specification 3 of the Charge, as to accused Panzino.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial, insofar as it relates to accused Panzino, is legally insufficient to support the findings of guilty of Specifications 1 and 3 of the Charge, legally sufficient to support only so much of the finding of guilty of Specification 2 of the Charge as involves a finding of guilty of assault and battery in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

_____, Judge Advocate

On Leave
_____, Judge Advocate

_____, Judge Advocate

JUN 4

JAGH - CM 315554 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½ as amended by Act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522) is the record of trial in the case of Private William A. Panzino (31484691), Company F, 4th Infantry, et al.

2. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as to Panzino of Specifications 1 and 3 of the Charge, legally sufficient to support only so much of the findings of guilty as to Panzino of Specification 2 of the Charge as finds accused Panzino guilty of assault and battery in violation of Article of War 96, and legally sufficient to support only so much of the sentence in his case as provides for confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months. I concur in the opinion of the Board, and for the reasons stated in the opinion, recommend that the findings of guilty as to Panzino of Specifications 1 and 3 of the Charge be vacated, that so much of the findings of guilty of Specification 2 of the Charge as to Panzino be approved as finds that accused Panzino did, at the place and time alleged, commit an assault upon Tosaburo Kuramae by wrongfully striking the said Tosaburo Kuramae, about the head with his fist, in violation of Article of War 96, that so much of the sentence as to Panzino be vacated as is in excess of confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months, and that all rights, privileges, and property of which the accused has been deprived by virtue of the portions of the findings and sentence so vacated and disapproved be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 205, 9 June 1947.)

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

22 NOV 1946

JAGH-CM 315569

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| UNITED STATES | ) | NINTH AIR FORCE SERVICE COMMAND |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Erlangen, Germany, 20 June 1946. |
| Private First Class GEORGE DOSS | ) | To be hanged by the neck until |
| (42234663), 7th Air Ammunition | ) | dead. |
| Squadron. | ) | |

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OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class George Doss, 7th Air Ammunition Squadron, Hanau Air Depot, did, at Langen, Germany, on or about 6 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Technician 5th Grade Elmer Granholm, 4th Car Company, a human being by shooting him with a pistol.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. 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 forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is summarized as follows: At about 2200 hours, on the night of 5 April 1946, in Langen, Germany, the accused, and two other negro soldiers, Private First Class Arnold Cudjoe, and Private Oscar Davis called at the home of Anna Stieb, a German civilian. There were three other German civilian women present

at her house at this time. A party ensued and all danced and listened to the radio (R 18-19). Accused had a pistol which he carried in his hand (R 21). In the meanwhile, Staff Sergeant Robert A. Williams and Technician Fifth Grade Elmer Granholm, the deceased, having spent the day together, visited two enlisted men's clubs in the vicinity of Hirtz, Germany (R 9, 10). At about 2200 hours they decided to visit the home of Anna Stieb, near Langen, Germany, a distance of some 19 miles from Hirtz (R. 10). Sergeant Williams was drunk and the deceased had been drinking but was not drunk (R 10). The deceased had a jeep in his possession and the two soldiers drove to the home of Anna Stieb, arriving there about 2330 hours. When they arrived, and before entering the house, Frau Stieb came out to the jeep and informed them that there were some colored soldiers in the house and asked them to leave (R 19). About that time, the accused approached the jeep, pointed a gun at Sergeant Williams and said, "What are you looking for," and "Go away" (R 20). After some further conversation the two white soldiers entered the house, saw two colored soldiers together with some five German women therein. Either Sergeant Williams or the deceased ordered the colored soldiers to leave saying, "Raus, niggers" (R 40, 50). The colored soldiers, together with three of the German women, left the house and went to the home of Elsa Kolb, about 25 meters away from the Stieb house (R 37). The accused returned to the Stieb house about 10 minutes later. Anna Stieb met him at the door and saw that he had a pistol in his hand. The accused demanded a bottle of liquor, which he had forgotten and received it from Anna Stieb. He then pointed his pistol toward the kitchen where the deceased and Sergeant Williams were at the time, but he left without firing, at Anna Stieb's request (R 22). Those remaining at the Stieb house were Sergeant Williams, the deceased, Frau Anna Stieb and Marianne Geweniger. Sergeant Williams was admittedly very drunk and went to sleep almost immediately (R 11, 23).

At the Kolb house the three colored soldiers, Cudjoe, Davis and the accused, discussed the incident and were angry at the treatment they had been given (R 41, 51). Accused mentioned that he wanted to get even (R 42), but Cudjoe stated that he didn't want any trouble (R 51). The accused held in his hand a .45 caliber, semi automatic pistol with plastic handle, having a picture of a white girl, Elsa Kolb, on one side, and a colored girl on the other side (R 34, 42, 60; Pros Ex 2).

At about 0130 hours, Davis, Cudjoe and the accused left the Kolb house, presumably to go to a latrine (R 35). Davis and Cudjoe testified that all three went to the back of Anna Stieb's house to see what was going on (R 42-43; 51). Davis was looking in the back window of the Stieb house when somebody kicked over a can (R 43, 51-52). Cudjoe and Davis ran back to Elsa Kolb's house. As they reached the front door of the Kolb house they heard a series of shots fired (R 36, 43-44, 52). The accused returned to the Kolb house three or four minutes later and said that someone had held a light in his face whereupon he (accused) reached into his

battle jacket and fired (R 44, 52). Davis asked the accused if he had hit the white soldier and accused replied that he was not sure but that he had seen "the white soldier fall back in the vestibule, and he said he was hit" (R 53).

Anna Stieb testified that the deceased, Marianne Geweniger and the witness spent the evening talking, playing the radio and drinking coffee until approximately 0200 hours when they heard a noise outside (R 23). The deceased decided to investigate the noise and together with Frau Stieb, went to the front door, opened it and stepped partially out of the door. He directed the rays of a lighted flashlight around the yard and the beam of the light fell upon the accused who was near the right front corner of the house. At that time some shots were fired and Anna Stieb threw herself to the floor. The deceased staggered back into the room and slumped down onto the floor, unconscious (R 25). Shortly thereafter Anna Stieb and Sergeant Williams drove the jeep into Langen where they got a German civilian doctor who returned with them to the Stieb home, examined the deceased and pronounced him dead at that time (R 26).

On the morning of 6 April 1946, Captain Hyman Bodzin, the Provost Marshal of the 39th Field Artillery Battalion, conducted a search of the premises. He found a flashlight and three caliber .45 cartridge cases. Two cartridge cases were found about five feet from the right front corner of the house, as one faces the road. The third cartridge case was found about five feet directly in front of the front door (R 63, 64; Pros Ex 3, 4, 5).

Corporal Planing, an MP stationed in Darmstadt, found an unspent caliber .45 slug in the front yard about four feet from the front door (R 58-61, 74; Pros Ex 15). A piece of lead slug was found lying on the floor of the house approximately three feet from the body of the deceased (R 75; Pros Ex 16). Another piece of lead slug and some portions of copper jacket were embedded in the wood of the door jam next to the latch on the front door (R 72-76; Pros Exs 17, 18, 19). There was a bullet hole in the front door, in an inner door, and on the latch of the front door (R 83-84).

On the following day a United States .45 caliber pistol, which accused habitually carried, was found underneath his pillow in his quarters at Zeppelinheim (R 59). A qualified ballistic expert testified that the shell cases (Pros Ex 3, 4, 5), the unspent .45 caliber slug ( Pros Ex 15), and the pieces of copper jacket (Pros Ex 1, 18) were fired by accused's gun (Pros Ex 2; R 85-92).

Medical testimony showed that the deceased died as a result of a single gunshot wound in the chest and resulting injury to the lung and heart and the subsequent hemorrhage that followed immediately afterward (R 70; Pros Ex 11). The bullet entered the deceased's body on his left side and passed through his right side, causing death almost immediately (R 71).

On 7 April 1946, after he had been warned of his rights against self-incrimination in accordance with Article of War 24, the accused made an extra-judicial statement to two CID Agents. One of the agents prepared a written statement which was signed by the accused and sworn to by him before First Lieutenant Robert F. Stanton, a summary court officer of accused's organization. Before accused signed the statement, it was read to him by Lieutenant Stanton who again explained to the accused his rights under Article of War 24 ( R 77-78).

After it was shown that the original statement had been lost and that it had not been found after diligent search, the prosecution introduced into evidence a certified true copy of accused's statement signed on 7 April 1946 ( R 78-83; Pros Ex 20).

The accused's extra-judicial confession stated in pertinent part:

> "On the evening of the 5th of April, 1946, Friday, ARNOLD CUDJOE, OSCAR DAVIS and myself left the company about 8 PM and walked over to Langen. First we went to the home of ELSA KOLB No 12, but there was nobody home so we went over to the home of ANNA STIEB and the three of us went in. This was about 10 or 10:30 PM that night. I was dancing with ANNA, and we were sitting around talking for a while. About 11:30 or 12 PM 2 white fellows drive up to the house in a jeep. One of them was short and he was a Staff Sergeant, the other white soldier was very big. The Staff Sergeant said "Raus, niggers", so I left. I was outside at this time having gone to the toilet. I went on down to ELSA's house (GD) and stayed there. I was pretty mad and ELSA told me not to shoot. ARNOLD CUDJOE and OSCAR DAVIS were already in ELSA'S house when I got there. The three of us were sore about having been chased out by the white fellows. We sat around talking about it and about 1:30 PM we decided to go back to ANNA's house and see what was going on. We went around to the back of the house and I kicked a pail and someone in the house must have heard me because I heard ANNA say 'Don't go to the door, they might shoot'. Then I heard one of the white soldiers say "Niggers haven't got nerve enough to shoot'. ARNOLD and OSCAR took off through the back then and I went around to the front of the house. Just at that time, the big white fellow came to the door of the house and flashed his light around. I was about 40 yards away when he shone his flash light right in my face. He then fired a shot at me which didn't hit me. I fired my .45 cal pistol twice

back at him. He then fired once again at me. So I fired one more shot back at him. I saw him (GD) fall back into the house, but I don't know if I hit him. I went back to ELSA's house and ARNOLD and OSCAR. They asked me who fired the shots and I told them just what had happened. We stayed there for a few minutes and decided that we had better leave and get back to camp. The next morning, we had a formation and ANNA Stieb and (GD) MARIANNA came down to the camp and picked out (GD) ARNOLD, OSCAR and myself as the three colored soldiers who were over their house on Friday night. I had my .45 pistol with me all the time and I was the one who fired it. This is the same .45 pistol that Agent Pitchenick just showed me and has an 'H' scratched on the bottom of the trigger and (GD) guard. I also recognize the serial number 420091. I have read my statement of 3 1/2 pages and it is true. Signed, George Doss." (R 82-83)

4. The accused, after being properly advised of his rights as a witness, elected to be sworn as a witness and testified that about eight or eight-thirty one the night of 5 April 1946, he went to Langen, Germany, to visit Elsa Kolb, in company with Cudjoe and Davis. No one was home at the Kolb house, so they went to Anna Stieb's house where they found Elsa Kolb and four other German women. Sometime later Cudjoe, Davis and the accused went to the Kolb house to get some glasses and as they were returning, the deceased and Sergeant Williams drove up. The accused and Elsa Kolb approached Sergeant Williams who said, "Damn nigger, Raus Nigger" and accused walked away. He went back to the Kolb house where he was joined by Cudjoe, Davis and three of the German women. They waited half an hour to forty-five minutes and then returned to the Stieb house. Thereafter they went first to the jeep and then around in back of the house and looked through a window at the back. The accused kicked a pail over at that time. He heard one of the women in the house say, "Somebody's outside. Don't go to the window. They may shoot." Then he heard Sergeant Williams say, "No, niggers haven't nerve enough to shoot." Cudjoe and Davis left and the accused went around to the right side of the house. As he passed the corner of the house, he met the big Sergeant (the deceased) and the accused ran to the jeep. The deceased flashed a light around until he saw the accused and then fired one shot at accused. The accused then fired a shot at deceased. Thereafter deceased fired another shot and accused fired one more. The deceased went back inside the house and closed the door, and accused returned to the Kolb house, stayed there 15 or 20 minutes and returned to camp. On cross-examination, the accused testified that he looked at and signed the original of the statement introduced by the prosecution but that he had not read it and that Lieutenant Stanton advised him of his rights at that time. He further testified that the

pictures on the gun introduced in evidence as the accused's pistol were those of his wife and Elsa Kolb and that the gun he had the night of the shooting had the same pictures on it. He stated that the gun in evidence could be the same gun but "he didn't know exactly" (R 94-119). No other evidence was introduced by the defense.

5. The Specification of the Charge avers that the accused "did, at Langen, Germany, on or about 6 April 1946, with malice aforethought, willfully, deliberately, unlawfully, and with premeditation, kill one Technician 5th Grade Elmer Granholm * * *, a human being by shooting him with a pistol."

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought." The word "unlawful," as used in this definition, means "without legal justification or excuse." A justifiable homicide is "a homicide done in the proper performance of a legal duty." An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense or a sudden affray *****." The definition of murder requires that the death of the victim " * * * take place within a year and a day of the act or omission that caused it * * *" (par 148a, MCM, 1928). The most distinguishing characteristic of murder is the element of "malice aforethought." This term is a technical one and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

> "Malice aforethought.-- Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; * * *" (par 148a, MCM, 1928) (Underscoring supplied).

Indicative of authorities supporting the principles set forth in the Manual for Courts-Martial, are the words of Chief Justice Shaw, who in the leading case of Commonwealth v. Webster (5 Cush. 296, 52 Am. Dec. 711) explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart, regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.
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> * * *
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> "* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Underscoring supplied).

The following principles of law are also applicable in the instant case:

> "Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of the accused: but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (1 Wharton's Criminal Law, 12th Ed, Sec 426, pp 654-655). (Underscoring supplied)

> "An intention to kill * * * may be inferred from the acts of the accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the wilfull use of a deadly weapon" (40 CJS, Sec 44, p 905).

"Reckless disregard of human life may be equivalent of specific intent to kill." Looney v. State, 153 S.E. 372, 41 GA. App 495; Chambliss v. State, 139 S.E. 80, 37 Ga. App 124 (Ibid, CJS, fa. 67, p 944).

The elements of proof in this case essential to the findings of guilty of murder, as charged, are:

"(a) That the accused unlawfully killed Technician 5th Grade Elmer Granholm by shooting him with a pistol as alleged (this involves proof that Granholm is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that death took place within a year and a day of such act); and (b) that such killing was with malice aforethought" (MCM, 1928, par 148a, p 164).

The uncontroverted evidence establishes without doubt that at the time and place in question, the accused shot and killed, with a pistol, Elmer Granholm, the human being named in the specification. Medical testimony showed that the deceased was dead, that he died as a result of a gunshot wound and that death followed almost immediately after the injury. It was clearly established by the testimony of Anna Stieb, admissions made by accused to Cudjoe and Davis, immediately after the shooting, accused's extra-judicial confession, as well as his sworn testimony, that he fired at Granholm with a caliber .45 pistol and thus inflicted the fatal injury.

The accused was one of three negro soldiers who were guests in the home of Anna Stieb in Langen, Germany. The deceased and another white soldier arrived at the same home and brusquely ordered the negro soldiers to leave, saying, "Raus, niggers." The colored soldiers left and went to the home of a neighbor, Elsa Kolb, where they expressed resentment at their treatment. Accused said that he wanted to get even. At about 0130 or 0200 hours, on 6 April 1946, the three negro soldiers left the home of Elsa Kolb to see what was going on at the Stieb house. Accused took his pistol with him. The negro soldiers looked in the kitchen window and saw the deceased, Anna Stieb and another German woman in the kitchen. At that time someone kicked over a can which attracted the attention of the deceased and Anna Stieb. The deceased went to the front door with a flashlight and began to investigate the noise. Accused's two companions fled directly back to the Kolb house, but the accused went to the right front corner of the house. When the deceased directed the rays of the flashlight at the accused he began firing, and fired at least three shots from his caliber .45 pistol, one of which caused the death of the deceased.

The accused attempted to base his defense on the doctrine of self-defense.

If one kills in self-defense, the killing is legally excusable. The defense of self-defense is only applicable, however, if the person killing (a) was not the aggressor, (b) has reasonable grounds to believe that he must kill to save his own life and (c) has retreated as far as possible (MCM, 1928, par 148a, p 163).

Except for accused's uncorroborated statement, there is no evidence to show that he acted in self-defense. Anna Stieb and Sergeant Williams testified that the deceased was unarmed. All the cartridge cases and slugs found at the scene of the killing were fired from accused's gun. In his first spontaneous admissions made to his companions immediately after the shooting, accused said nothing about deceased firing at him. Furthermore, no pistol was found near the body of the deceased.

Viewing the evidence in the light most favorable to the accused, it is apparent that every action of the accused is inconsistent with the theory of self-defense. The overwhelming preponderance of the evidence shows that the accused was the aggressor. His own version of the shooting admits that he made no effort to flee from or avoid conflict with the deceased, although he could easily have taken cover behind the wall of the house - or behind the deceased's jeep.

The court was fully justified in finding that the shooting was intentional and without provocation and not in self-defense, and that the shooting was without legal justification or excuse, and therefore unlawful (MCM, 1928, par 148a pp 162-163).

The intent to inflict bodily harm is clearly established in this case by the accused's use of his pistol in a manner which was likely to result in death or grievous bodily harm. Any reasonable consideration of the evidence as a whole leads to the conclusion that the specific intent to kill or cause grievous bodily harm was formed by the accused at some time before the first shot was fired. The deliberate shooting of Granholm with a deadly weapon resulting in his death, was, under the circumstances, sufficient to justify the court in inferring malice aforethought (MCM, 1928, pars 112a, 148a, pp 110, 163; CM 307257, Purvis). Accordingly, the record of trial is legally sufficient to support the findings of guilty.

6. A recommendation for clemency, signed by one member of the court and the defense counsel, is attached to the record of trial, wherein it is recommended that the death sentence be commuted to life imprisonment. Careful consideration has been given the following communications pertaining to clemency on behalf of the accused: Letters from Mr. Charles L. Kellar, Member, Legal Committee of the National Association for the Advancement of Colored People (of which organization accused was a member), addressed to the President, The Secretary of War, and the Adjutant General, all dated 17 July 1946; Memorandum for The Judge Advocate General from the Chief, Legislative and Liaison Division, War Department Special Staff (WDSLL/997-1649), dated 29 July 1946, which transmitted a copy of a letter from the

Honorable Adam Clayton Powell, Jr., Representative in Congress, dated 24 July 1946, which inclosed an undated letter from the accused, addressed to "Gen. of the Army, Commander of the ETO, Washington, D.C."; letters from accused dated 30 June 1946 and 19 September 1946, which were addressed to the Honorable Owen J. Roberts.

7. The accused is 21 years of age, married and a resident of Brooklyn, New York. He was inducted into the military service on 8 May 1945 and enlisted thereafter at Robins Field, Georgia, on 26 November 1945, for 13 months.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

M. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Jean J. Flanagan, Judge Advocate

JAGH CM 315569

1st Ind

WD, JAGO, Washington 25, D. C. DEC 6 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 George Doss (42234663), 7th Air Ammunition Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Accused, a colored soldier, was found guilty of murder, in Germany, of another soldier, and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that accused shot and killed deceased after the deceased and another white soldier had brusquely ordered the accused and two other colored soldiers from the home of a German woman where they were being entertained. The shooting was the result of an incident largely provoked by racial friction. I do not believe execution of the death sentence would be justified, and recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of the natural life of accused, that the sentence as thus commuted be carried into execution, and that a U.S. Penitentiary be designated as the place of confinement.

4. One member of the court and the defense counsel signed a recommendation for clemency which is attached to the record. Consideration has been given to the following communications pertaining to clemency on behalf of the accused: Letters from Mr. Charles L. Kellar, Member, Legal Committee of the National Association for the Advancement of Colored People (of which organization accused was a member), addressed to the President, the Secretary of War, and The Adjutant General, all dated 17 July 1946; Memorandum for The Judge Advocate General from the Chief, Legislative and Liaison Division, War Department Special Staff (WDSLL/997-1649), dated 29 July 1946, which transmitted a copy of a letter from the Honorable Adam Clayton Powell, Jr., Representative in Congress, dated 24 July 1946, which inclosed an undated letter from the accused, addressed to "Gen. of the Army, Commander of the ETO, Washington, D.C."; and letter from accused dated 30 June 1946 and 19 September 1946, which were addressed to the Honorable Owen J. Roberts.

(38)

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

CM 315569

3 Incls
1 Record of trial
2 Dft ltr for sig USW
3 Form of Executive action

THOMAS H. GREEN
Major General
The Judge Advocate General

( G.C.M.O. 1, 2 January 1947.)

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

11 OCT 1946

JAGK-CM 315575

| | | |
|---|---|---|
| UNITED STATES | ) | ARMY AIR FORCES<br>TECHNICAL TRAINING COMMAND |
| v. | ) | Trial by G.C.M., convened at Colorado Springs, Colorado, 15 July 1946. Dismissal. |
| Captain CHARLES P. HEILMAN, JR. (0-688352), Air Corps. | ) | |

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OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 95th Article of War.

Specification: In that Captain Charles P. Heilman, Jr., 3500th AAF Base Unit, Headquarters AAFTTC (TC), was at Colorado Springs, Colorado, on or about 10 May 1946 in a public place, to wit: The Antlers Hotel, drunk and disorderly, while in uniform.

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

Specification 1: In that Captain Charles P. Heilman, Jr., 3500th AAF Base Unit, Headquarters AAFTTC (TC), was at Colorado Springs, Colorado, on or about 10 May 1946, in a public place, to wit: The Antlers Hotel, drunk and disorderly, while in uniform.

Specification 2: In that Captain Charles P. Heilman, Jr., 3500th AAF Base Unit, Headquarters AAFTTC (TC), did, at Colorado Springs, Colorado, on or about 10 May 1946, wrongfully strike Mrs. Florence Kerr on the face with his fist.

Specification 3: In that Captain Charles P. Heilman, Jr., 3500th AAF Base Unit, Headquarters AAFTTC (TC), did, at Colorado Springs, Colorado, on or about 10 May 1946, wrongfully strike Mr. Harold J. Patterson on the face with his fist.

Specification 4: In that Captain Charles P. Heilman, Jr., 3500th AAF Base Unit, Headquarters AAFTTC (TC), did, at Colorado Springs, Colorado, on or about 10 May 1946, wrongfully strike Private George C. Brooks in the stomach with his fist.

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

3. Evidence for the prosecution.

On the night of 10 May 1946, accused spent several hours in the service bar of the Antlers Hotel, Colorado Springs, Colorado. At about 11:45 p.m., after the bar had closed, accused caused a commotion by kicking some bar stools against the wall and entering into a verbal altercation with two of the bartenders during the course of which he repeatedly stated that the bartenders were his servants and servants of the Army and that he was privileged to do what he liked. One of the bartenders said to accused, "that was a hell of a way for a Captain to be talking." Accused telephoned the desk clerk in an attempt to have the bartender relieved and, getting no satisfaction from the call, slammed the telephone on the bar. He then slapped a lady sitting next to him, Mrs. Florence Kerr, in the face with the back of his hand. There had been no previous conversation between accused and Mrs. Kerr. The two bartenders sought to restrain accused by holding his arms and, in the scuffle that followed, one of them, Mr. Harold J. Patterson, was struck in the left eye by accused. The house detective then entered the bar and took accused by the arm in an effort to get him to leave. When accused pushed the detective away the bartenders again seized accused and unsuccessfully tried to eject him. At this point, Staff Sergeant Horace L. Wolfery interceded and led accused out of the bar. Accused "couldn't talk plain; his clothes were disheveled; his hair was mussy; he was very bleary-eyed." He was "under the influence of liquor" and his language and actions were abusive (R 8-17; Pros Ex 1).

Sergeant Wolfery, who had been in the bar since 10:00 p.m., and who had left to go "downstairs" shortly before it closed, returned to the bar as the two bartenders were holding accused. He had been gone about five minutes. He took the accused upstairs to accused's room, locked the room to keep accused "from coming out and getting into more trouble" and went downstairs to get accused's hat. Accused had not been acting in a boisterous manner while Sergeant Wolfery was sitting at the bar, nor was accused's dress out of order but, in the opinion of Sergeant Wolfery, accused was drunk, for he

staggered when walking and on reaching his room fell across the bed. When he returned to accused's room accused's bags were packed and just as they were about to check out of the hotel they were apprehended by the military police. The military police asked accused and Sergeant Wolfery to accompany them to their headquarters. Shortly after arriving at military police headquarters accused called the enlisted men therein to attention. One of the enlisted men, Private George C. Brooks, was telephoning with his arms on a counter and did not come to attention at the accused's command. Accused thereupon struck him in the stomach and was about to strike him again when he was restrained by another enlisted man. At the military police station accused staggered, his eyes were bloodshot and his speech was incoherent (R 27-33; Pros Ex 2).

4. Evidence for the defense.

Accused, his rights having been explained to him, elected to be sworn as a witness in his own behalf. He testified that on 10 May 1946 he arrived at the bar of the Antlers Hotel about mid-evening. After the bar had closed, he continued drinking. Mrs. Kerr, having been refused a drink on the ground that the bar was closed, asked the bartender, Mr. Patterson, why he had been willing to serve an Army officer but would not serve her. Accused told him that he, the bartender, was a servant to any patron who entered the bar, at which statement the bartender become very much annoyed. Accused attempted to call the manager to have Mr. Patterson relieved, but the desk clerk would not connect him with the manager. The argument then continued, Mr. Patterson saying that all Army captains and Army personnel were a "bunch of bastards" and that accused had no reason to call him a servant. Accused then reached out to hit him and inadvertently grazed the shoulder of Mrs. Kerr. Two bartenders then reached across the bar and held him but he got away from them and hit one of them. They thereafter succeeded in getting hold of him again, at which time Sergeant Wolfery interceded and took him up to his room (R 41).

Upon leaving the hotel, accused and Sergeant Wolfery were met by the military police who asked that they accompany them. When they arrived at military police headquarters accused called the personnel therein to attention. Private Brooks was leaning on a counter and would not come to attention when asked to do so by the accused. Accused then pushed Private Brook's arms across the counter and inadvertently touched his stomach in so doing. Thereafter, a lieutenant arrived at the military police headquarters and accused was taken to the Fifteenth Air Force bachelor officers' quarters for the night. Accused was not drunk nor was he under the influence of liquor during these incidents. He didn't kick the bar stools around. Mrs. Kerr and Mr. Patterson together had undoubtedly gotten accused "riled up" (R 41-46).

Accused has had over five years' active service in the Army. He was inducted into the service as an enlisted man before the war and, after undergoing basic infantry training, was assigned to an infantry regiment of the 28th Infantry Division. On 4 September 1942, he was appointed an aviation cadet and was commissioned a second lieutenant, Air Corps, in August, 1943,

after completing a course of bombardier training. In December, 1943, he went overseas with the 732nd Bomb Squadron, with which he served for nine months as "lead bombardier." He then returned to the United States and was assigned to Lincoln Army Air Base as Base Adjutant. He was awarded three combat commendations, the Distinguished Flying Cross "and Clusters," four Air Medals, "various" threatre ribbons, and four battle stars. He has applied for a Regular Army commission. According to defense Exhibit A, he has never had an efficiency rating below excellent and his last four efficiency ratings have been "superior" (R 42-44).

It was stipulated by and between the prosecution, defense counsel and accused, that if First Lieutenant Edwin Gorin were present he would testify that he was sitting at the bar in the Antlers Hotel with accused for about an hour and a half on the night of 10 May 1946, and that he left the bar at about 11:30 p.m. Accused remained at the bar. During this time there were no unusual incidents nor was there any misbehavior on the part of accused. Accused "was not out of uniform," disarranged or disheveled in appearance (Def Ex B).

5. The evidence is conflicting as to the degree of drunkenness and turbulence exhibited by accused at the Antlers Hotel, which is the subject of the Specification to Charge I and of Specification 1 of Charge II. The court, however, in finding accused guilty of these specifications resolved this question against him and the Board of Review finds no reason to disturb such findings in the exercise of its prerogatives under the second paragraph of Article of War 50½. Although it does not appear by direct evidence that accused was wearing his uniform and insignia of rank while in the bar, it does appear that one of the bartenders referred to him as a "Captain," that Mrs. Kerr objected to the serving of drinks after hours to "an army officer," plainly referring to accused, when she was refused such service and that, according to Lieutenant Gorin, accused "was not out of uniform." From this evidence the triers of fact were justified in inferring that accused was in uniform as charged (CM 262001, Nettles, 40 BR 385, 388). An officer of the Army who behaves himself in such a drunken, belligerent and uproarious manner in a public place as did this accused, who, during the course of his unseemly conduct, strikes two of the persons present, one being a lady with whom he had not even engaged in conversation, and whose actions are so violent as to necessitate his forcible ejection, at one and the same time disgraces himself and the honorable service he purports to represent. Such conduct is clearly violative of both the 95th Article of War (CM 262542, Myers, 41 BR 83; CM 315105, Rochon) and the 96th Article of War. It is not legally objectionable to charge the identical act as a violation of both Article of War 95 and some other applicable Article of War, provided such act amounts to conduct unbecoming an officer and a gentleman (CM 252773, Jonas, 34 BR 189, 193; CM 313772, Payne). The Board of Review is of the opinion, therefore, that the findings of guilty of Charge I and its Specification and of Specification 1 of Charge II must stand.

Accused, by his plea of guilty to Specification 3 of Charge II, admitted commission of the offense as charged and this judicial admission was not vitiated by his inconsistent plea of not guilty to Charge II (CM 241956, Blount, 26 BR 371, 373). Also the court had before it sufficient evidence to support its finding of guilty thereof. No extended discussion of Specifications 2 and 4 of this Charge is necessary, for the court's findings of guilty of these specifications are supported by ample evidence and the court was acting within its province when it refused to give credence to accused's version of the incidents set forth therein.

6. War Department records show that accused is 28 years of age and is unmarried. He is a high school graduate and attended Strayer Business College for three years. From 1934 to 1941 he was employed as a draftsman for an architectural firm at a final salary of $25 per week. On 18 April 1941 he entered the service as an enlisted man and served as such in the Infantry until he accepted an appointment as an air cadet on 4 September 1942. After successful completion of a course of bombardier training, he was commissioned and appointed a temporary second lieutenant in the Army of the United States on 5 August 1943. He was promoted to the temporary grade of first lieutenant on 28 May 1944 and to the temporary grade of captain on 4 January 1945. On 18 May 1944 he was awarded the Air Medal for meritorious achievements in accomplishing with distinction several aerial operational missions over enemy occupied Continental Europe and was subsequently awarded three Oak Leaf Clusters thereto for similar meritorious service. On 21 October 1944, he was awarded the Distinguished Flying Cross for extraordinary achievement while serving as lead bombardier on many heavy bombardment missions over enemy occupied territory and on 29 October 1944 he was awarded an Oak Leaf Cluster thereto. His name has been placed on the eligible list established for consideration in connection with future selections for Regular Army commissions.

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 mandatory upon a conviction of a violation of Article of War 95 and is authorized upon a conviction of an officer of a violation of Article of War 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Schroyer, Judge Advocate

JAGK - CM 315575 1st Ind

WD, JAGO, Washington 25, D. C. OCT 24 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 Captain Charles P. Heilman, Jr. (O-688352), Air Corps.

2. Upon trial by general court-martial the accused was found guilty of being drunk and disorderly while in uniform in a public place in violation of Article of War 95 and of being drunk and disorderly while in uniform in a public place and of wrongfully striking with his fist two civilians and one enlisted man in violation of Article of War 96. 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 and the sentence and to warrant confirmation of the sentence.

Accused, at about 11:45 p.m., on 10 May 1946, was drinking at the bar of the Antlers Hotel, Colorado Springs, Colorado. In the course of an altercation with two of the bartenders, he stated that the bartenders were his servants and servants of the Army and that he was privileged to do what he liked. One of the bartenders took exception to the statement and accused called the desk clerk over the telephone in an attempt to have the bartender relieved. Getting no satisfaction from the call, accused slammed the telephone on the bar and slapped the lady sitting next to him, Mrs. Florence Kerr, in the face with the back of his hand. There had been no previous conversation between accused and Mrs. Kerr. The two bartenders sought to restrain accused and, in the scuffle that followed, one of them, Mr. Harold J. Patterson, was struck in the left eye by accused. Thereafter, the two bartenders and the house detective unsuccessfully tried to eject him. At this point a noncommissioned officer interceded and took accused to his room. Accused was drunk and staggered and, when he reached his room, fell across the bed. He could not talk plainly, his clothes were disheveled, his hair was "mussy" and he was very "bleary-eyed." Accused was in uniform while at the bar. Upon leaving the hotel he was asked by the military police to accompany them to their headquarters. At the military police headquarters he called the enlisted personnel therein to attention. When Private George C. Brooks, who was telephoning at the time, refused to come to attention, accused struck him in the stomach and

was about to strike him again when he was restrained by another enlisted man. Accused was then taken to bachelor officers' quarters at a nearby post.

4. Accused is 28 years of age and is unmarried. He is a high school graduate and attended Strayer Business College for three years. From 1934 to 1941 he was employed as a draftsman for an architectural firm at a final salary of $25 per week. On 18 April 1941 he entered the service as an enlisted man and served as such in the Infantry until he accepted an appointment as an air cadet on 4 September 1942. After successful completion of a course of bombardier training, he was commissioned and appointed a temporary second lieutenant in the Army of the United States on 5 August 1943. He was promoted to the temporary grade of first lieutenant on 28 May 1944 and to the temporary grade of captain on 4 January 1945. On 18 May 1944 he was awarded the Air Medal for meritorious achievement in accomplishing with distinction several aerial operational missions over enemy occupied Continental Europe and was subsequently awarded three Oak Leaf Clusters thereto for similar meritorious service. On 21 October 1944, he was awarded the Distinguished Flying Cross for extraordinary achievement while serving as lead bombardier on many heavy bombardment missions over enemy occupied territory and on 29 October 1944, he was awarded an Oak Leaf Cluster thereto. His name has been placed on the eligible list established for consideration in connection with future selections for Regular Army commissions. According to stipulated testimony at the trial his last four efficiency ratings have been "superior."

5. Careful consideration has been given to the plea for clemency in behalf of the accused written by the defense counsel and appended to the record of trial. Consideration has also been given to the letter to the defense counsel from Florence R. Kerr, also accompanying the record, in which she states that in her opinion accused was too much under the influence of alcohol to realize what was happening and that she did not believe there was any malice in his actions.

6. While there is nothing in the record to justify the violent and unseemly conduct of accused, nevertheless, in view of his long and excellent service, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

CM 315575
2 Incls
1. Record of trial
2. Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

( G.C.M.O. 342, 13 November 1946,)
also G.C.M.O. 28, 3 February 1947).

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



JAN 13 1947

JAGQ - CM 315578

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| U N I T E D S T A T E S | ) | SAN BERNARDINO AIR MATERIEL AREA |
| v. | ) | Trial by G.C.M., convened at San Bernardino Army Air Field, California, 23 July 1946. Dismissal. |
| First Lieutenant WILBURN B. BELL (O-887302), Air Corps. | ) | |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Wilburn B. Bell, Air Corps, Squadron "B", 4126th Army Air Forces Base Unit, San Bernardino Army Air Field, California, did, at San Bernardino Army Air Field, California, on or about 14 May 1946, with intent to defraud, wrongfully and unlawfully make and utter to Cash a certain check, in words and figures as follows, to wit:

SAN ANTONIO, TEX.
~~SAN BERNARDINO, CAL.~~ _____ 19___ No.____

NATIONAL BANK OF FT. SAM HOUSTON
~~A M E R I C A N N A T I O N A L B A N K 90-134~~

Pay to the
Order of _____ Cash _____ $ 200.00

Two Hundred and No Cents _____ Dollars

/s/ Wilburn B Bell O-887302

and did wrongfully and unlawfully fail to maintain sufficient balance in the National Bank of Fort Sam Houston, San Antonio, Texas, to meet payment of said check when presented for payment through the normal banking process for checks.

NOTE: Since Specifications 2 to 20, inclusive, are couched in language substantially identical to that used in Specification 1, except as to the pertinent differences tabulated below, they are not here set out in full.

| SPECIFICATIONS | DATE OF EACH CHECK | AMOUNT OF EACH CHECK |
|---|---|---|
| 2 | 16 May 1946 | $800.00 |
| 3, 5 through 12, 14, 16 through 18 | 16 May 1946 | $100.00 |
| 4, 13, 15, 19 | 16 May 1946 | $200.00 |
| 20 | 17 May 1946 | $400.00 |

Specification 21: In that First Lieutenant Wilburn B. Bell, Air Corps, Squadron "B", 4126th Army Air Forces Base Unit, San Bernardino Army Air Field, California, did, at San Bernardino Army Air Field, California, on or about 15 May 1946, with intent to defraud, wrongfully and unlawfully make and utter to Cash a certain check, in words and figures as follows, to wit:

90-189 ~~Santa Ana Branch~~ 90-189
NATIONAL BANK OF FT SAM HOUSTON
~~B-A-N-K--O-F--A-M-E-R-I-C-A-~~ No._____
~~National Trust and Savings Association~~
SAN ANTONIO, TEX.
~~SANTA ANA, CALIF.~~, 15 May 19 46

PAY TO THE ORDER OF Cash $ 100.00

One Hundred and no Cents DOLLARS

/s/ Wilburn B Bell 0887302
1st Lt

by means whereof a holder of said check did secure from First Lieutenant Henry K. Carter, Air Corps, the sum of $100.00, and he, the said First Lieutenant Wilburn B. Bell, did wrongfully and unlawfully fail to maintain sufficient balance in the National Bank of Fort Sam Houston, San Antonio, Texas, to meet payment of said check when presented for payment through the normal banking process for checks.

The accused pleaded not guilty to, and was found guilty of, the Charge and all Specifications. No evidence of previous convictions was introduced. The accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution. First Lieutenant Henry K. Carter, AC, testified that he gave an officer, whose identity he could not recall, $100.00 in cash in exchange for a $100 check of accused (Pros. Ex. 1). He endorsed the check, deposited it to his account in his bank, to which it was returned with the notation of "Not sufficient funds" (Pros. Ex. 1; R 16-18). The check has not been paid in spite of demands for payment (R 19, 21).

Captain Jenkins testified in deposition that on 16 May 1946, seven officers, including himself and accused, participated in a poker game in which he was banker. At the conclusion of the game, he, as banker, had in his possession seventeen checks, payable to cash, drawn by accused on the National Bank of Fort Sam Houston. The total of the checks was approximately $2,600 (Pros. Ex. 2). Actually the face of the seventeen checks totalled $2,400 (Pros. Ex. 3-2 through 3-18). On 14 May 1946, during a poker game, Captain Jenkins also received a $200, undated check, drawn by the accused on the same bank (Pros. Ex. 3-1). All eighteen checks, admitted in evidence as Prosecution Exhibit 3 (R 22) were deposited by Captain Jenkins in his bank, and subsequently they were returned marked insufficient funds. On 21 May 1946, Captain Jenkins notified accused of the nonpayment of the checks. No reimbursement had been made by accused at the date of the deposition, 9 July 1946.

A check for $100 dated 16 May 1946 (Pros. Ex. 5), drawn on the National Bank of Fort Sam Houston by the accused was won in a poker game in which accused participated, by Major Walter R. Pentz. Upon presentment for payment, it was returned marked "Not sufficient funds" (Pros. Ex. 4; R 23). The check had not been paid up to the time of trial.

A check for $800 (Pros. Ex. 7) drawn on the National Bank of Fort Sam Houston by the accused for debts incurred on or about 16 May 1946, was presented for payment by Captain David B. Cavan, and returned "Not sufficient funds" (Pros. Ex. 6; R 24).

The deposition of Mr. William Logan Bailey, Assistant Cashier of the National Bank of Fort Sam Houston, San Antonio, Texas, was admitted in evidence, together with a copy of the statement of accused's account from 31 March 1946 to 10 July 1946 (Pros. Ex. 8; R 25). Mr. Bailey testified that twenty-one checks, corresponding to checks exhibited to him, were presented to the bank for payment, and all were returned unpaid and marked "Not sufficient funds." The statement of accused's account showed the balance

on 14 May 1946, the date the first check was drawn, to be $54.50, and at all times subsequent to that date was less than that amount until 10 July 1946, when the balance was $55.00. There were two deposits between those dates for $100 each, on 10 June and 10 July 1946, but $50 withdrawals on each of the respective dates prevented the balance from ever exceeding $55.

4. Evidence for the defense. Captain R. F. McKenna, AC, testified that he was Club Officer at San Bernardino Army Air Field beginning 10 March (R 26). He received a verbal order approximately either 14 April or 14 May from the President of the Mess Council, that a betting limit of $1.00 would be in effect in the club (R 27). Signs to this effect were posted on the 30th or 31st day of the same month (R 27). Witness advised at least one player at each table of the limit prior to the posting, but cannot recall so advising the accused (R 27).

First Lieutenant Alvin L. White, AC, and Chief Warrant Officer Charles N. Cost, USA, testified that they were participants in a poker game at the Officers' Club on 17 May 1946, in which accused and five other officers were engaged, and that Lieutenant White did not ask, nor Chief Warrant Officer Cost hear him ask, the accused if he had sufficient funds in the bank to cash the checks he had written, and if it was all right to seek payment.

The accused after being advised of his rights as a witness elected to remain silent.

5. The accused was charged with, and found guilty of 21 offenses involving the issuance of 21 worthless checks. The evidence clearly establishes that the accused did make and utter the 21 checks at the times and places alleged in the specifications, and that when they were presented for payment at the National Bank of Fort Sam Houston, San Antonio, Texas, the bank upon which they were drawn, payment was refused because the accused did not have sufficient funds on deposit with that bank for payment of the checks.

The statement of accused's bank account (Pros. Ex. 8) discloses that on 14 May 1946, the date the earliest check was uttered, his balance was $54.50. No deposits were made from that date until 10 June 1946, and the balance was always less than it was on 14 May 1946 until 10 July 1946, the final date of the statement, when it was $55.

Several of the witnesses testified that they notified accused of the nonpayment of the checks shortly after their utterance, therefore the insufficiency of accused's balance to cover $3,500 worth of checks issued in a period of four days was made known to him.

All the elements of the offenses charged in the specifications are sufficiently proved.

The Board of Review has stated in CM 249006, Vergara, 32 BR 5, 12, that:

"It is not necessary to show intent to defraud in order to sustain a finding of a violation of Articles of War 95 or 96 in the giving of worthless checks. In CM 224286 (1942) Hightower, a conviction of a violation of the 96th Article of War was sustained notwithstanding the fact that the findings of the court expressly omitted 'intent to defraud'. It was held that the negotiation by an officer of worthless checks without the intent to defraud was conduct of a nature to bring discredit upon the military service in violation of AW 96. See also CM 202027, McElroy; CM 208870, Moore; CM 220160, Faulkner.

"The court in retaining in its findings the words 'intent to defraud' and 'fraudulently obtain' convicted him not only of conduct of a nature to bring discredit upon the service but also of the commission of a criminal offense involving moral turpitude, that of passing worthless checks with intent to defraud. The addition of these words also interjects into the findings a moral turpitude that warrants the determination of whether they are supported by the weight of the evidence.

"Generally, in the civil courts, in order to prove an offense of this nature evidence is required not only of the passing of the check by the accused and its return for insufficient funds or other similar reason, but also that the accused defrauded or attempted to defraud someone of something of value. The case is usually tried in a manner similar to one of obtaining goods under false pretenses. In order to eliminate the necessity of the proof of intent to defraud many states as well as the District of Columbia have passed statutes which provide that the intent to defraud will be presumed from the act of passing the check which proves to be worthless provided that accused has failed to make good the check within a certain number of days after he is notified that his check has been returned (The District of Columbia Code, Title 22-1410 provides for five days).

"If the subject case had been tried under the District of Columbia Code the accused probably would have been aquitted because he did make good all of the checks involved within the five days statutory limit after receiving notice of their dishonor. If it had been tried without the aid of such a statute the burden would have been upon the prosecution to show intent to defraud - that is, that the accused intended when he passed the checks to defraud the person to whom he passed them of something of value.

"This distinction between the elements of a military offense and a civil offense involving the passing of worthless checks is

clearly recognized in CM 202601 (1935) Sperti where it was held:

> 'Apart from precedent and the Manual, the Board is of opinion that the view that no offense is committed in passing a bad check unless value be received for it is too strict and would cause unfortunate consequences. A check given in payment of a pre-existing debt or a gambling debt, a check given as a charitable contribution or as a gift, are all given without valuable consideration in the eye of the law; yet the giving of a bad check by an officer under any of the above circumstances would clearly be discreditable to the military service and would in many cases be conduct unbecoming an officer and a gentleman. The Board and The Judge Advocate General have in many cases passed convictions of giving bad checks in payment of pre-existing debts. Among such are CM 195513, Crose, and CM 199918, Safford.'"

An examination of the evidence supporting the findings of the Specifications discloses that in respect to the 18 checks received by Captain Jenkins totalling $2,600, and the one $100 check received by Major Prentz, the testimony was positive and direct that the checks were uttered to cover the losses of accused in the course of a gambling game, to wit, poker. Lieutenant Carter paid cash for his $100 check from a previous holder. Captain Cavan received his check for $800 for antecedent debts owed him by the accused.

Contrary to the situation recited in the Vergara case, supra, the accused herein had not redeemed any of the checks up to the date of trial, or the dates of depositions, which ranged from 7 to 10 weeks subsequent to utterance of the checks, although accused had been notified of nonpayment from one to two weeks after issuance.

With respect to the element of intent to defraud the Board of Review in CM 219428, Williams, stated:

> "* * * but the course of conduct of accused in writing a large number of checks within a comparatively short period of time, and his failure to exercise ordinary care with respect to the condition of his bank account at the time these checks were negotiated, reflects more than inadvertance, indifference or carelessness. Such repeated wrongful and unlawful acts lead to but one conclusion, viz., that accused made and uttered the checks specified, with knowledge and intent [to defraud] as alleged.***."

In the opinion of the Board of Review the acts of accused proved under Specifications 1 to 21, inclusive, of the charge, fall far short of the standards of honesty to be expected of an officer and amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95.

As stated in CM 275309 Sappington, 48 BR 25, "The fact that some of the checks may have been given in payment of pre existing or gambling debts does not preclude a finding that accused is guilty of the offense charged, in violation of Article of War 95."

6. War Department records show the accused to be 24 and 8/12 years of age. He is a high school graduate and is married. He served in the New Mexico National Guard from 9 January 1940 to 20 September 1940; as an enlisted man in the Regular Army, with the highest grade of Private First Class, from 21 September 1940 to 28 May 1942; as a Flying Cadet from 29 May 1942 to 25 June 1943; as a Flight Officer from 26 June 1943 to 20 August 1944; as a Second Lieutenant, AC, AUS, from 21 August 1944; and was promoted to First Lieutenant on 22 April 1946. He is a rated pilot and is authorized to wear the Distinguished Unit Badge, first Oak Leaf Cluster to the Air Medal, the European-African-Mediterranean Theatre ribbon with 7 battle stars. His efficiency ratings are not revealed by his 201 file. His records show no evidence of previous convictions, either civil or military.

7. The court was legally constituted and had jurisdiction of the subject matter and the person. 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 the Charge and all Specifications and the sentence and to warrant confirmation of the sentence, as approved by the reviewing authority. Dismissal is mandatory upon conviction of a violation of Article of War 95.

W. A. Johnson Jr, Judge Advocate

Charles M. Dickson, Judge Advocate

Francis J. Parker, Judge Advocate

JAGQ - CM 315578 1st Ind

WD, JAGO, Washington 25, D. C. FEB 1947

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 First Lieutenant Wilburn B. Bell (O-887302), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully making and uttering 21 checks in the aggregate amount of $3500 with insufficient funds in the bank for their payment, in violation of Article of War 95. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal 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 thereof. I concur in that opinion.

4. The record of trial shows that accused during a period embracing but four days issued 21 worthless checks, in the aggregate amount of $3500. With the exception of one check for $100 and possibly one check for $800, all of the checks were written during the course of poker games in which accused participated. Request was made for payment after the checks had been returned marked insufficient funds, but such payment, up to the time of trial had not been made. The accused did not have a balance of more than $55.00 in the bank on which the checks were drawn at any time during the period the checks were written.

5. War Department records show accused to be 24 and 8/12 years of age and married. He has served approximately 1½ years as an enlisted man, one year as a flying cadet, one year and two months as a flight officer, was commissioned a second lieutenant, AUS, AC, on 21 August 1944 and was promoted to first lieutenant on 22 April 1946. He is a rated pilot, and authorized to wear the Distinguished Unit Badge, Air Medal with cluster, European African Mediterranean Theater ribbon with seven stars. His efficiency ratings are not indicated in his 201 file. There is no evidence of previous conviction, military or civil.

6. By this misconduct, the accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution.

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

CM 315578

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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( G.C.M.O. 34, 17 february 1947.)

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

JAN 7 1947

JAGQ - CM 315654

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| U N I T E D S T A T E S | ) | WESTERN BASE SECTION US FORCES, EUROPEAN THEATER |
| v. | ) | |
| First Lieutenant ANTHONY F. THOMAS (O-1045613), C.A.C. | ) | Trial by G.C.M., convened at Antwerp, Belgium, 17 May 1946. Dismissal. |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant Anthony F. Thomas, 556th Antiaircraft Artillery (Automatic Weapons) Battalion, did, in conjunction with Staff Sergeant Calven A. Keene and Technician Fourth Grade Robert B. Holzschuh, both of the 556th Antiaircraft Artillery (Automatic Weapons) Battalion, at Camp Tophat, Antwerp, Belgium, on or about 22 March 1946, knowingly and willfully misappropriate a two and one-half ton truck, of a value of more than $50.00 property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Anthony F. Thomas, 556th Antiaircraft Artillery (Automatic Weapons) Battalion, did, in conjunction with Private First Class Vernon H. Hardy and Technician Fourth Grade Robert B. Holzschuh, both of the 556th Antiaircraft Artillery (Automatic Weapons) Battalion, at Camp Tophat, Antwerp, Belgium, on or about 22 March 1946, knowingly and willfully misappropriate a two and one-half ton truck, of a value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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

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

Specification 2: (Finding of guilty disapproved by Reviewing Authority).

Specification 3: (Finding of guilty disapproved by Reviewing Authority).

Specification 4: In that First Lieutenant Anthony F. Thomas, 556th Antiaircraft Artillery (Automatic Weapons) Battalion, did, at Camp Tophat, at or near Antwerp, Belgium, on or about 5 March 1946, wrongfully borrow about 10,000 Belgian francs, of the exchange value of about $220.00 from Technician Fourth Grade Robert B. Holzschuh, an enlisted man.

Specification 5: In that First Lieutenant Anthony F. Thomas, 556th Antiaircraft Artillery (Automatic Weapons) Battalion, did, at Camp Tophat, at or near Antwerp, Belgium, on or about 5 March 1946, wrongfully borrow about 750 Belgian francs, of the exchange value of about $33.00 from Staff Sergeant Calven A. Keene, an enlisted man.

Specification 6: In that First Lieutenant Anthony F. Thomas, 556th Antiaircraft Artillery (Automatic Weapons) Battalion, did, at Camp Tophat, at or near Antwerp, Belgium, on or about 5 March 1946, wrongfully borrow about 5,000 Belgian francs, of the exchange value of about $110.00 from Private First Class Vernon H. Hardy, an enlisted man.

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

Specification: In that 1st Lieutenant Anthony F. Thomas Jr, Headquarters Battery, 556th AntiAircraft Artillery Automatic Weapons Battalion, did, at or near Camp Tophat, Antwerp, Belgium, on or about 2 April 1946, feloniously embezzle by fraudently converting to his own use twenty-four thousand seven hundred and thirty-two (24,732) francs of the exchange value of five hundred and sixty-five($565.00) dollars, the property of the United States, furnished and intended as partial payroll payments for the 556th AntiAircraft Artillery Automatic Weapons Battalion, intrusted to him, the said 1st Lieutenant Anthony F. Thomas Jr, by Captain H. M. Thompson, Disbursing Officer, 64 Finance Disbursing Section.

Accused pleaded not guilty to, and was found guilty of, all the Charges and Specifications except for the figure "$200.00" in Specification 3, Charge II, substituting therefor the figure "$100"; except for the figure "$33" in Specification 5, Charge II, substituting therefor the figure "$16", and except for the words "5 March 1946" in Specification 6, Charge II, substituting therefor the words "1 February 1946", of the excepted figures and words not guilty, but of the substituted figures and words, guilty. No evidence was introduced of previous convictions. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 1, 2 and 3 of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On 5 January 1946 accused borrowed $100 from Technician Fourth Grade Robert B. Holzschuh saying he would repay it as soon as he received some money from home (R 8). The money was not repaid (R 9). In February 1946 accused borrowed 10,000 Belgian francs from Holzschuh saying he would repay it as soon as he could. It was not repaid (R 9). In the first or second week of February 1946 accused borrowed 5,000 Belgian francs from Private First Class Vernon H. Hardy which he said he would repay in a couple of days and which was not repaid (R 24, 25, 27). On 5 March 1946 accused borrowed 700 francs from Staff Sergeant Calven H. Keene which he said would be returned in a day or two and which was not repaid (R 21, 22).

In the early part of February 1946 accused asked Hardy if he would like to make some money by driving a truck across the border, saying that he, the accused, could get the necessary papers (R 25, 27). Hardy said he would think it over (R 25). During the month of March, Holzschuh was offered 40,000 francs by a Belgian civilian, if he would furnish a truck to transport "some stuff" from Belgium to France (R 13, 14). Holzschuh agreed to do so, told the accused of the agreement, and accused made out a requisition slip to enable the truck to cross the border (Pros. Ex. 1; R 13-16). Accused then gave Holzschuh authority to use a truck, and to sign accused's name to the trip ticket, which Holzschuh did (R 16, 17). The requisition slip was given to Hardy by Holzschuh so that Hardy, who was to drive the truck, could cross the border (R 16, 21). Accused was to receive 15,000 francs in the deal (R 14). On or about 23 March 1946, Hardy drove an Army truck from Antwerp with intent to go to France (R 26). He made the trip because of his conversation with accused and because Holzschuh told him he could make some money by driving the truck below the border and bringing it back loaded (R 26). He had a trip ticket to get across the border and a requisition slip, admitted in evidence as Prosecution's Exhibit 1, "to get the load back" (R 26). The truck was the property of the United States, and was being used for civilian purposes, not for official Army business (R 15, 26).

Another Belgian civilian agreed to give Holzschuh 15,000 francs for the use of a truck (R 16). Holzschuh agreed to get a truck and told accused about it (R 16, 17). Accused gave Holzschuh a requisition slip, which accused made out and signed in Staff Sergeant Keene's presence and which he gave to Holzschuh who gave it to Keene in accused's presence ( Pros. Ex. 2; R 16, 17, 22, 23). The requisition slip was to be used if Keene was stopped along the road by any customs or military police or if he had any accidents (R 23). In return the accused was to receive 5,000 francs (R 17). Accused authorized Holzschuh to sign accused's name to the trip ticket, which Holzschuh did (R 17). Accused knew the truck was going to be used to take "something over the border" (R 17). On 22 March 1946 Staff Sergeant Keene drove a 6 x 6 United States Army truck from Camp Top Hat, Belgium, in the direction of Paris (R 22). He was given two trip tickets which accused had told Holzschuh to make out (R 23). The trip was made in the interests of a Belgian civilian and was not on official United States Army business (R 17, 23).

In March 1946, as Class A Agent officer of his organization it was the duty of accused to secure the money for the pay roll of his men from the finance office and pay the men when they signed the pay roll (R 32, 45). On 6 March 1946 accused took a Partial Payment pay roll to the Finance Office which was returned to him with 163,714 Belgian francs, which was to be paid to his troops in accordance with the pay roll (R 35, 36, 37). Technician Fifth Grade Deininger, of accused's battalion, was listed on the payroll for a partial payment of $100.00, which he did not request or sign for (R 40, 41). Private First Class Duperreault, of accused's battalion, also listed on the pay roll for a $10.00 partial payment, did not sign for or receive such payment until about the 31st of March, or the first of April (R 43). A reasonable time for accused to have paid his troops and to have returned the unexpended funds with the pay roll to the Finance office would have been from seven to fourteen days (R 36). The Finance office wrote accused's commanding officer requesting return of the pay roll and unexpended funds (R 36, 45). Accused's commanding officer went to see accused at the hospital and asked him for the money (R 45). Accused said "he didn't have it at that time. He thought he would get out in a few days or words to that effect" (R 45). Near the end of March accused's commanding officer requested Lieutenant Power to see the accused and accompany him to the Finance Office (R 45, 46). Accused said "He was not ready then to go to the Finance Department" (R 46). Accused told Lieutenant Power where the pay roll was (R 46). It was placed in a drawer of a desk in the Claims Office at Camp Top Hat (R 46). On 29 April 1946 accused returned the pay roll and 24,733 Belgian francs to Finance (R 36, 37, 38).

It was stipulated by the parties that 44 Belgian francs are approximately equivalent to one American dollar and that the value of a United States Army 6x6 2½ ton truck is in excess of $50.00 (R 28).

After being advised of his rights as a witness by the law member the accused elected to remain silent (R 47, 48).

4. It is shown by clear and convincing evidence that accused actively participated in the misappropriation of two Government trucks, intended for the military service, that such trucks were procured at the instance of the accused and acting in conjunction with Keene, Holzschuh and Hardy, used in furtherance of the interests of Belgian civilians. It is not shown by direct evidence that the trucks were intended for the use of the military service, but the court in view of other proved circumstances was warranted in inferring that they were so intended. (CM 263858, Charles 41 BR 339) The findings of guilty of Charge I and the Specifications thereunder are fully substantiated by the record.

As to Specifications 4, 5 and 6, the findings of guilty are also fully supported by the evidence. It is uncontradicted that accused borrowed various sums of money from several enlisted men in his organization. There are numerous precedents for the proposition that it "is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships." (CM 230736, Delbrook, 18 BR 29).

With reference to the additional charge and specification the evidence is also uncontradicted that accused lawfully obtained 163,714 Belgium francs to pay his troops, that after a reasonable time failed to return the unexpended portion of the funds, and that when questioned at the end of March relative thereto he admitted not having such unexpended funds. All the elements of the offense are satisfactorily proven. Although accused subsequently returned the funds the law is well settled that a return of the property converted does not purge the taking of its criminality or constitute any defense to a prosecution therefor (2 Wharton's Criminal Law, Sec. 1147, p. 1465). It is observed that accused is charged with embezzlement of francs of a value of $565.00. The record reveals a stipulation that the approximate value of the francs involved is $500.00 (R 38). The accused could not have been misled and the variance does not prejudice any of his substantial rights.

5. Accused is 27 years of age. His enlisted service commenced on 9 October 1941 and ended 21 October 1942. On 22 October 1942 he was commissioned a Second Lieutenant and on 13 May 1943 he was promoted to First Lieutenant. He has no record of previous convictions. He has served as a battery range officer, a battery executive, motor transportation officer, and battery commander. His efficiency reports in chronological order are Very Satisfactory, Excellent, 4.96, 4.60, 4.00. He was graduated from high school and attended college for one year. He was employed as a bank teller prior to induction into the service.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the rights of 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, and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violations of Articles of War 93, 94 and 96.

W H Johnson Jr, Judge Advocate

Charles M Dickson, Judge Advocate

James S Bailey, Judge Advocate

JAGQ - CM 315654 1st Ind

WD, JAGO, Washington 25, D. C. JAN 1 1947

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 First Lieutenant Anthony F. Thomas (O-1045613), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of misappropriating two Government trucks (Specifications 1-2, Charge I), in violation of Article of War 94; of wrongful conspiracy and attempting to import tobacco and furs from Belgium into France (Specifications 1 and 2, Charge II), of wrongfully borrowing money from enlisted men in the amounts of $100, $220, $16 and $110 (Specifications 3-6, Charge II), in violation of Article of War 96; and of embezzling pay roll funds of the Army in the amount of $565 (Specification, Additional Charge), in violation of Article of War 93. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 1, 2 and 3 of Charge II, 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, as approved, and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that the accused entered into a transaction with enlisted men of his organization whereby Army trucks were dispatched under requisition of the accused and at his direction on business other than official Army business. The trucks were in fact being used to carry civilian goods across the French-Belgian border. The evidence further shows that accused borrowed sums of money from various enlisted men in his organization, none of which loans was repaid. The evidence further discloses that accused as a Class A agent of his battalion retained unexpended pay roll funds for an unreasonable time. Upon being questioned by his commanding officer, accused told his commanding officer that he did not then have the funds. Later the accused, on 29 April 1946, returned the pay roll and 24,733 Belgian francs to the Finance Office. Although accused returned the funds, the criminality is not purged nor does it constitute a defense to a prosecution.

5. War Department records show that accused is 27 years of age, and is married. He has served continuously from 22 October 1942 to the date of his trial as a battery range officer, battery executive officer, battalion

motor transport officer and battery commander. His efficiency reports in chronological order are: "Very satisfactory", "excellent", "4.96", "4.60" and "4.00".

6. By his misconduct, fully established by the record of trial, the accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution.

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

CM 315654

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 27, 3 Febuary 1947.)

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

JAGH-CM 315687

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| UNITED STATES | ) | HEADQUARTERS COMMAND US FORCES EUROPEAN THEATER |
| v. | ) | Trial by G.C.M., convened at APO 757, 11 June 1946. Dismissal and total forfeitures. |
| Captain BERNARD P. STANTON (0-331352), Field Artillery. | ) | |

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OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Captain Bernard P. Stanton, Office of the Chief Engineer, Headquarters, United States Forces European Theater, did, without proper leave, absent himself from his quarters at Frankfurt-am-Main, Germany, from about 1 April 1946 to 17 April 1946.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that Captain Bernard P. Stanton, * * *, did, at Frankfurt-am-Main, Germany, on or about 3 May 1946, fail to repair at the fixed time to his properly appointed place of duty at the Office of the Theater Chief Engineer, Headquarters, United States Forces European Theater.

Specification 4: In that Captain Bernard P. Stanton, * * *, did, at Frankfurt-am-Main, Germany, on or about 4 May 1946, fail to repair at the fixed time to his properly

appointed place of duty at the Office of the Theater Chief Engineer, Headquarters, United States Forces European Theater.

Specification 5: In that Captain Bernard P. Stanton, * * *, did, at Frankfurt-am-Main, Germany, on or about 6 May 1946, fail to repair at the fixed time to his properly appointed place of duty at the office of the Theater Chief Engineer, Headquarters, United States Forces European Theater.

He pleaded not guilty to, and was found guilty of, the Charge and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 2 of the Charge, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The accused was identified as Captain Bernard P. Stanton, Field Artillery, assigned to Procurement Branch, Supply Division, Office of the Chief of Engineers, Headquarters Command, United States Forces, European Theater (R. 30, 31, 32). In early March 1946 the chief of that unit, Major Harold C. Travers, interviewed the accused for the purpose of arranging for his assignment as executive officer of that branch. At the termination of this interview Major Travers advised the accused that he should report as soon as possible (R. 30, 31). By Special Orders, Headquarters United States Forces, European Theater, dated 12 March 1946, the accused was assigned to that headquarters for duty with the Office of the Theater Chief of Engineers (R. 30; Pros. Ex. 3). About 18 March 1946 the accused reported to Major Travers. He informed the latter that it was necessary for him to go to the hospital. Major Travers told the accused to go to the hospital, get such treatment as might be necessary and to return as soon as possible. He was not seen again by Major Travers until the day of trial (R. 31).

The accused was a patient in the officers' ward at the Second General Medical Dispensary at Frankfurt-am-Main on 1 April 1946 (R. 6, 7), having entered the dispensary on 19 March 1946 (R. 21). The ward surgeon concluded that it was necessary to transfer the accused to the 97th General Hospital, Frankfurt-am-Main, for further treatment (R. 7). Accordingly, during the morning of 1 April his transfer to the 97th General Hospital was arranged, and the accused was told that he was to proceed to that institution. Permission was given the accused to use his own transportation and to leave the dispensary for a short time in order to transact some personal business (R. 7, 8, 10-12, 13-15). The instructions relative to his transfer were given the accused orally by the ward surgeon under authority of the commanding officer of the dispensary (R. 9). The accused

paid his mess bill at the Second General Dispensary for the period 19 March to 1 April 1946 (R. 14-15, 16-21). Between 1 April and 17 April 1946, the accused was not seen at the Second General Dispensary (R. 7, 11, 12).

The accused reported at the 97th General Hospital about 7 April 1946 at 1700 hours and informed the medical officer on duty there that he was to be admitted to that hospital (R. 22). Although his records were supposed to have accompanied him from the Second General Dispensary (R. 9, 13-14), he did not have them with him (R. 22), nor could they be located (R. 23). The accused admitted that he had left the Second General Dispensary about 5 or 6 days previously and that he had been on a "toot" (R. 23, 24). The attending surgeon directed him to return to the dispensary of the 97th General Hospital the following day to pick up his clinic card and then report to the venereal disease clinic (R. 22-24). The accused did not report the following day as directed (R. 24). He was at no time prior to approximately 17 April 1946 present in the Dermatology and Venereal Disease Clinic of the 97th General Hospital (R. 25, 26). His actual stay in the hospital was from 17 April to 2 May 1946, on which date he was discharged for duty (R. 25-28, 29-30; Pros. Ex. 2).

On 7 April 1946 Major Henry H. Martin, Jr. became executive officer of the Procurement Branch, the position to which it had been intended to assign the accused (R. 33). During the several days subsequent thereto Major Martin tried to locate the accused. He ascertained the location of the accused's billet at No. 2 Vom Rath Strasse and on four occasions went there seeking the accused, but at none of these times was the accused present. On one occasion Major Martin left a note directing the accused to contact his office. At a later date Major Martin asked the accused if he had received the written note left in his room. The accused said he had received a note but thought it was a "gag" - that it had been left there to "kid" him (R. 33, 34, 35). Major Martin was at his office on the 3rd, 4th and 6th of May. On none of those days did the accused report for duty or transmit any message in regard to his absence (R. 34). Duty hours in the procurement Branch were from 0830 to 1730 hours and an officer assigned to duty there could not be excused from duty except by either the Executive or the Chief of Branch or by a higher headquarters (R. 36).

4. Evidence for the defense: A British civilian employee, Nora Gallagher, visited the accused at the Second General Dispensary, on 1 April 1946. She left at about 1500 hours, but later in the day returned in company with the accused. She entered the ward occupied by him and saw that the bedding had been removed from his bed, although the accused's personal effects were still in the room (R. 38-40). While Miss Gallagher was there the accused shaved and left the room two or three times for short intervals. She and the accused departed together, the accused taking his

personal effects with him (R. 40). She saw the accused every day during the ensuing two weeks (R. 41), meeting him frequently after she was through work, and seeing him in his apartment. At no time did she see the accused at the 97th General Hospital (R. 42).

According to Frau Anna Stenner, the billeting clerk at No. 2 Vom Rath Strasse, Frankfurt-am-Main, the accused occupied apartment 6 in block 2 at that address. He was present in, or in the vicinity of, his apartment each day during the approximately fourteen days between the time he was first in the hospital and the time of his entering the hospital the second time (R. 44-47). She remembered placing in the accused's apartment a note written by Major Martin (R. 47, 48-51; Def. Ex. A.).

An officer who had occupied the same billet as the accused since November 1945 testified that the accused was present in his apartment daily for about two weeks during the first part of April 1946 and that the accused also was present there a part of each day subsequent to his discharge from the 97th General Hospital, until one week prior to trial (R. 51-53). This was corroborated, in substance, by a civilian who resided in an apartment across the hall from the one occupied by the accused (R. 55-57).

The civilian last mentioned, who had served as an enlisted man under the accused during combat, attested as to the accused's reputation for character and good conduct in the battalion to which both were assigned (R. 58).

The accused, having been fully advised of his rights as a witness, declined to testify (R. 59-60).

5. At the conclusion of the prosecution's case the defense moved for a finding of not guilty of Specification 1 of the Charge. The grounds for the motion were:

a. That the prosecution failed to prove the accused was absent without leave from his proper quarters from 1 April to 17 April 1946 as alleged.

b. That there was no proof that the accused was absent without leave from the time he left the Second General Dispensary until he was admitted to the 97th General Hospital on 17 April 1946.

In the opinion of the Board the motion was properly denied.

Specification 1 of the Charge reads as follows:

"In that Captain Bernard P. Stanton, Office of the Chief Engineer, United States Forces European Theater, <u>did, without proper leave, absent himself from his quarters at Frankfurt-am-Main, Germany, from about 1 April 1946 to 17 April 1946</u>." (Underscoring supplied)

It is clear that the above Specification alleges an offense under Article of War 61. Article of War 61 reads:

> "Absence Without Leave. - Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station or camp without proper leave, shall be punished as a court-martial may direct."

In order to prove an absence without leave it is necessary for the prosecution to show (a) that the accused absented himself from his command, guard, quarters, station or camp for a certain period as alleged; and (b) that such absence was without authority from anyone competent to give him leave (par. 132, MCM, 1928).

The character of the offense presumes a duty to be at an appointed place (CM 292079, Murphy, (5 Bull JAG 93)).

The uncontradicted evidence of the prosecution proved that the accused was transferred on 1 April 1946 from the Second General Dispensary to the 97th General Hospital. He failed to report to the 97th General Hospital until 7 April. After having submitted to an examination on that day he left the hospital and did not return thereto until 17 April although the medical officer, who made the examination, ordered him to be at the hospital the next day for further examination, and hospitalization. Except as indicated above it is clear that the accused absented himself from the 97th General Hospital from 1 April to 17 April 1946 and that such absence was without authority.

In his argument on the motion for a finding of not guilty of Specification 1 the defense counsel stated:

> "He (the trial judge advocate) did not show that from the time Captain Stanton left the Second General Dispensary and was admitted at the 97th General Hospital on the 17th of April 1946, that he was AWOL from his quarters-from his legal quarters" (R. 37).

In the rebuttal to the argument made by the trial judge advocate in opposition to that motion, the defense counsel further stated:

> "He (the accused) was not picked up by the 97th General Hospital until the 17th day of April 1946 and he was released from-transferred from the hospital, the Second General Dispensary, on the first day of April 1946, and there has been no proof entered to show that he was AWOL" (R. 37).

It is clear that the accused and his defense counsel were fully apprised of the offense. The fact that the defense attempted to prove that the accused was in his billet during the time that he was charged with absence without leave is no indication that the defense was misled by the language of the Specification. The accused had no legal right or reason to be in his billet and even though he may have been there from 1 April 1946, to 17 April 1946, the fact remains that he knew he was supposed to be at the 97th General Hospital. The Second General Dispensary, the 97th General Hospital and accused's billet were all located in Frankfurt-am-Main. The accused was under orders to proceed to the 97th General Hospital for hospitalization and treatment - and his place of duty thereby became the hospital. It is obvious that the accused was not charged with absence without leave from his billet, since he had been transferred to the 97th General Hospital and his status was that of sick in hospital. It follows that his quarters, for the purpose of determining his status with respect to absence without leave, were in the 97th General Hospital.

Quarters, when used in a medical officer's report, means "* * * that an enlisted man is undergoing medical treatment, and that he is excused from ordinary duties and is to remain in quarters whether it be a barracks or tent * * *" (CM 218176, Jordan, 12 BR 7; Par. 68c (2) TM 12-250). The Army Dictionary defines quarters as the place or structure in which troops are housed; or a lodging for soldiers (p. 218, TM 20-205). Webster's New International Dictionary says it is a place of lodging, a temporary residence or shelter. It is the opinion of the Board that the term "quarters" as set forth in Specification 1 of the Charge meant the place where the accused was supposed to be during the period alleged, which in the instant case was at the 97th General Hospital.

Also, it has been held that a variance between the allegation and the proof as to the place of an unauthorized absence is immaterial (CM 12281, Dig. Op. JAG, 1912-40, Sec. 428 (12); CM 186501, Dig. Op. JAG, 1912-40, Sec. 416 (10); CM 242082, Reid, 26 BR 397; CM 259026, Coleman, 38 BR 227).

It appears from the facts disclosed by the record that the accused was reasonably apprized of the offense and that his substantial rights were not injuriously affected.

> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby" (par. 87b, p. 74, MCM, 1928).

The evidence shows that the accused reported to the 97th General Hospital on 7 April and failed to return to the hospital until 17 April.

Although it thus appears that the accused was not continuously absent for the entire period alleged in the Specification, the interruption of the status of absence without leave was of but a few hours duration on 7 April. The variance involved is immaterial and the findings need not be disturbed (CM 225754, Wykoff, 14 BR 335).

Specifications 3, 4 and 5 of the Charge allege that the accused failed to repair, on 3, 4 and 6 May 1946 to his properly appointed place of duty. The elements of proof as discussed in the Manual for Courts-Martial are: (a) That a certain authority appointed a certain place and time for a certain duty by accused, as alleged; and (b) that the accused failed to report to such place at the proper time (par. 132, p. 146, MCM, 1928).

The uncontradicted evidence shows that the accused was released from the hospital and returned to duty on 2 May 1946 and that he failed to appear at the Office of the Theater Chief Engineer, Headquarters, United States Forces European Theater, his assigned place of duty on 3, 4 and 6 May 1946.

In the opinion of the Board there is ample competent evidence to support the court's findings of guilty.

6. The accused is 33 years of age, married and supports two step-sons age 14 and 16 respectively. He is a high school graduate and studied at the University of Alabama for two and a half years. The accused states that prior to entering upon active service he was an independent contractor and earned $20,000 during the last year of business. His military record is as follows: Enlisted in the Colorado National Guard in 1933; appointed second lieutenant Field Artillery, National Guard of the United States 9 January 1935, called into active Federal service as a first lieutenant on 24 February 1941 and promoted to captain on 6 June 1942. There is no record available as to the date the accused arrived in the European Theater, nor is there any record of combat service.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. 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 forfeitures are authorized on a conviction of the 61st Article of War.

W. Hottenstein, Judge Advocate.

(Dissent), Judge Advocate.

James J. Shanagan, Judge Advocate.

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

JAGH - CM 315687

16 DEC 1946

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| UNITED STATES | ) | HEADQUARTERS COMMAND US FORCES EUROPEAN THEATER |
| v. | ) | |
| Captain BERNARD P. STANTON (0-331352), Field Artillery | ) | Trial by G.C.M., convened at APO 757, 11 June 1946. Dismissal and total forfeitures. |

Dissenting Opinion by SOLF, Judge Advocate.

1. I do not concur in the opinion of the majority of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specification 1 of the Charge.

2. Specification 1 of the Charge avers that the accused "did, without proper leave, absent himself from his quarters at Frankfurt-am-Main, Germany, from about 1 April 1946 to 17 April 1946" in violation of Article of War 61.

3. Two questions are presented by the record with respect to the legal sufficiency of the finding of guilty of this Specification:

a. Did the prosecution prove that the accused absented himself without proper leave from his quarters as alleged?

b. Is the Specification so vague and ambiguous, as not to apprise the accused fairly of the offense alleged? If this question is answered in the affirmative, it must be determined whether the accused was in fact misled in the preparation and conduct of his defense.

4. In considering the question presented in sub-paragraph a above it is noted that at the close of the Government's case the defense entered a motion for a finding of not guilty as to this Specification on the ground that the prosecution had failed to show that the accused was absent without leave from his quarters as alleged. The motion was overruled (R 37). The evidence for the prosecution reflects that the accused was not present from 1 to 17 April 1946, at the 97th General Hospital, to which he was transferred on 1 April, with the exception

that he reported there on the afternoon of 7 April and was told to return the following morning (R 22-23). This he failed to do (R 24). On four occasions during this period the Executive Officer of the accused's unit sought the accused at the apartment in his billet, but did not find the accused present there at those times. The issue thus raised by the motion was met again by the defense by presenting clear and convincing proof showing that at some time during each and every day of the alleged absence the accused was present at the apartment in the billet occupied by him since November 1945 at Frankfurt-am-Main (R 38-60).

It is the theory of the majority that the accused's appointed place of duty at the time alleged in the Specification was the 97th General Hospital, and that for the purpose of the offense alleged, his quarters were in that hospital. I agree that the accused's appointed place of duty was that hospital. Had the Specification alleged that the accused was absent from his command and station at the 97th General Hospital, there could have been no doubt as to the legal sufficiency of record.

Article of War 61 prohibits (in the disjunctive) absence without leave from command, guard, quarters, station or camp. The unauthorized absence from quarters having been alleged, it was incumbent upon the prosecution to prove that the accused had been assigned quarters and that he was absent without leave therefrom.

Paragraph 2b(1), Army Regulations 40-590, Administration of Hospitals, in pertinent part provides:

> "The commanding officer or one of his commissioned assistants will determine which patients are to be admitted to or discharged from the hospital. He will provide for their assignment to wards or subdivision according to the nature of their complaints" (Underscoring supplied).

Paragraph 2b(1), Army Regulations 40-590 further provides:

> "The commanding officer of a hospital will be responsible that no portion of a hospital building is occupied as quarters * * * except for patients, personnel * * * on duty thereat * * * " etc.

Since the accused did not report to the hospital for treatment and hospitalization until 17 April 1946, it cannot be said that he was assigned to a ward or to quarters at that hospital. It then becomes absurd to state that he was absent from such quarters.

The majority of the Board of Review has cited several cases wherein it was held that a variance between the allegation and proof as to the identity of the command or place from which the accused absented himself

is not fatal, the gravamen of the offense being the absence from command (CM 12281, Dig Op, JAG, 1912-40, Sec 428 (12); CM 186501, Dig Op, JAG, 1912-40, Sec 416 (10); CM 242082, Reid, 26 BR 397; CM 259026, Coleman, 38 BR 227). In the instant case, however, the gravamen of the offense as alleged is the absence from quarters. The prosecution did not prove an assignment to, or absence from, quarters at the 97th General Hospital, and for that reason the finding of guilty of the offense alleged in the Specification is not supported by the record. On the other hand the defense presented clear and convincing proof that during the period of the alleged absence he was present in the quarters occupied by him since November 1945 at Frankfurt-am-Main.

5. Should it be concluded that the prosecution proved its case on the theory that the gravamen of the offense alleged in the Specification is an unauthorized absence from the accused's proper place of duty, and that the allegation that such unauthorized absence was from the accused's quarters, is immaterial, there remains for consideration whether the Specification was sufficiently unambiguous to fairly apprise the accused of the offense alleged.

In considering the questions stated in sub-paragraph 3b above, it is noted that the original Specification as drawn by the accuser alleged that the accused absented himself without leave from the 2nd General Hospital Medical Dispensary at Frankfurt, Germany, from about 1 April 1946 to 17 April 1946. The Specification as drawn by the accuser was deleted by the Assistant Staff Judge Advocate who substituted therefor the Specifications upon which the accused was tried, apparently without further reference to the accuser.

The record shows that the accused was assigned to the Office of the Theater Engineer, Headquarters United States Forces European Theater at Frankfurt-am-Main, Germany since November 1945. He occupied regularly assigned Billets at 2 Vom Roth Strasse, Frankfurt-am-Main, an apartment building where numerous American officers and civilian employees were quartered. Sometime prior to 1 April 1946 the accused was a patient at the 2nd General Medical Dispensary, Frankfurt-am-Main. On or about 1 April 1946, he was told by the ward surgeon at the Dispensary that it was necessary to send him to the 97th General Hospital for further medical care. I will assume, although the record does not show it, that the 97th General Hospital was at, or in the vicinity of, Frankfurt-am-Main. In view of all the circumstances in the case, including the arbitrary deletion of the original Specification by the Assistant Staff Judge Advocate, the Specification could reasonably be construed to allege either, (a) that the accused absented himself from his "quarters" at 2 Vom Roth Strasse or, (b) that he absented himself from his "quarters" at the 97th General Hospital.

It is apparent that the pleader attempted to draw the Specification in so ambiguous a manner as to enable the prosecution to prove its case in the alternative, and it is clear that the prosecution attempted to prove that the accused, at the time alleged, absented himself either from:

(a) His billet at 2 Vom Roth Strasse

(b) The 2nd General Medical Dispensary

(c) The 97th General Hospital.

In opposing the defense's motion for a finding of not guilty at the conclusion of the prosecution's case on the grounds that the prosecution had not proved that the accused was absent from his quarters during the period alleged the trial judge advocate argued:

> "At this time the prosecution is not going into detail but will say that as to his quarters on Vom Roth Street it is shown by the witness, Major Martin, that from the 7th - approximately the 7th - of April on, he was unable to locate the accused there. But it is the theory of the prosecution that the quarters for the accused were not at his billet on Vom Roth Strasse -- he had never been returned to duty -- his quarters either were at the Second General Dispensary or the 97th, one of the two places. It feels it has given the court ample evidence to show he was not there during that period of time."

It is clear from the foregoing that the pleader's ambiguous draftsmanship not only confused the defense but also that it confused the prosecution.

A certain degree of latitude and simplicity is permissible in the framing of Specifications for trials by courts-martial. In 1855 Attorney General Caleb Cushing held:

> "A specifiction does not need to posses the technical nicety of indictments at common law. Trials by courts-martial are governed by the nature of the service, <u>which demands intelligible precision of language</u>, but which eschews <u>looseness or confusion in all things</u>, * * * . Hence undoubtedly the most bald statement of the facts alleged as constituting the offense alleged, <u>provided the legal offense itself be distinctly and accurately described in such terms of precision</u> as the rules of military jurisprudence require, will be tenable in court martial proceedings, and will be adequate groundwork of conviction and sentence" (Col. Montgomery's case, 7 O. Atty Gen. 604) (Underscoring supplied).

One specification should not allege more than one offense either conjunctively or in the alternative (MCM, 1928, par 29b), nor should it contain allegations of which the meaning is obscure or equivocal, and which are susceptible of different interpretations (Winthrop, Military Law and Precedents, (2nd Ed.) 1920 Reprint, p 133).

There can be little doubt but that the specification under consideration was ambiguous. Nevertheless, under the provisions of Article of War 37, the finding of guilty should not be disapproved solely because the specification is defective, if the facts alleged thereinand reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact injuriously affected thereby (MCM, 1928, par 87b, p 79).

Accordingly, the real test is whether, on the whole record, it appears that the ambiguity of the specification has resulted in injury to the substantial rights of the accused.

Since it is apparent that the accused did not report to the 97th General Hospital until 7 April 1946, it is obvious that he was not assigned quarters there. In the circumstances the most reasonable construction of the specification by a layman is that the draftsman intended to allege that the accused was absent without leave from his regularly assigned billet in Frankfurt-am-Main.

It is obvious that the defense so construed the specification and predicated its entire defense on the theory that the accused was in fact present at his billet during the period alleged.

After the prosecution rested, the defense moved for a finding of not guilty as to Specification 1 of the Charge. In support of the motion he stated:

> "I make that motion on the ground that the prosecution has failed to establish legal evidence in regard to that specification in that he did not show that the Captain was A.W.O.L. from his proper quarters between the period of April first to April 17th, 1946. He did not show that from the time Captain Stanton left the Second General Dispensary and was admitted to the 97th General Hospital on the 17th Day of April, 1946, that he was A.W.O.L. from his quarters -- from his legal quarters" (R 37).

After the defense's motion was denied by the court, the defense introduced four witnesses who testified that during the period between 1 April 1946 to 17 April 1946, the accused was in fact present in his quarters at 2 Vom Roth Strasse.

In view of all the circumstances I am of the opinion that the accused was seriously misled in the preparation and conduct of his defense by the ambiguity of the specification.

6. For the reasons stated above I am of the opinion that the record is not legally sufficient to support the finding of guilty of Specification 1, Charge I.

Waldemar A. Solf, Judge Advocate.

JAGH - CM 315687 1st Ind

WD, JAGO, Washington 25, D. C. JAN 7 1947

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 Bernard P. Stanton (O-331352), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from 1 to 17 April 1946, and of failing to repair at the fixed time to his properly appointed place of duty on the 3rd, 4th and 6th of May 1946, all in violation of the 61st Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

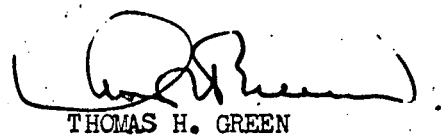
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 1 April 1946, the accused, a patient at the Second General Dispensary, Frankfurt-am-Main, was informed that he was being transferred to the 97th General Hospital which was also at Frankfurt-am-Main. He received permission to take care of some personal affairs and to travel to the 97th General Hospital by private transportation rather than in an Army ambulance. The accused did not report to the 97th General Hospital until 7 April and after being examined by a medical officer and found to be suffering from veneral disease, was told to report back to the hospital the next day for further examination and treatment. He did not report until the 17th day of April and then remained in the hospital until 2 May 1946. He failed to report on the 3rd, 4th and 6th of May at the Office of the Theater Chief Engineer where he had been assigned for duty.

On one occasion while awaiting trial, the accused broke arrest and on two occasions since trial he has violated the terms of his restriction.

In view of the nature of the offenses committed and all the circumstances in the case, I recommend that the sentence be confirmed but that the forfeitures be remitted and that the execution of the sentence as thus modified be suspended during good behavior.

4. 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

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( G.C.M.O. 10, 15 January 1947).

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



JAGK - CM 315713

11 SEP 1946

UNITED STATES )
)
v. )
)
Private LAWRENCE G. WILLIAMS )
(35669325), Quartermaster Corps, )
unassigned, attached to Squadron )
X, 4000th Army Air Forces Base )
Unit. )

AIR MATERIEL COMMAND

Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 11 June 1946. Dishonorable discharge (suspended) and confinement for two (2) years. Midwestern Branch No. 2, Disciplinary Barracks.

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

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

2. Accused was tried on 11 June 1946 upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lawrence G. Williams, Quartermaster Corps, unassigned (then 596th Quartermaster Laundry Company), attached Squadron X, 4000th Army Air Forces Base Unit, did, at Louisiana Maneuver Area on or about 24 February 1944 desert the service of the United States and did remain absent until he surrendered himself at Wright Field, Dayton, Ohio, on or about 11 March 1946.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "did desert the service of the United States" substituting therefor respectively the words "did absent himself without leave from the service of the United States", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of the 61st Article of War. Evidence was introduced of one previous conviction by summary court-martial for absence without leave from 13 May 1943 to 20 May 1943 in violation of the 61st Article of War, for which he was sentenced to be restricted to the company area for fourteen days. In the instant case 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, suspended execution of the dishonorable discharge, and designated the Midwestern Branch No. 2, United States Disciplinary Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 17, Headquarters, Air Materiel Command, Wright Field, Dayton, Ohio, 22 July 1946. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50½.

3. Accused's unauthorized absence from his organization over the period indicated in the Specification was proved beyond a reasonable doubt. However, since the inception of this absence occurred, and, therefore, the offense of which the accused was found guilty, namely, absence without leave, was committed, on 24 February 1944, and since nowhere in the record does it appear that accused was advised of his right to plead the statute of limitations, the sentence of the court is a nullity and the mentioned statute acts as a complete bar to punishment of the accused (MCM, 1928, par 67; AW 39; CM 313953, Sawyer). In the cited case the Board of Review held that where, as here, an accused is found guilty by exceptions and substitutions of an offense against which the statute of limitations has apparently run, although it had not run against the offense of which he was originally charged, and the record fails to disclose that accused was cognizant of his rights to plead the statute, there being no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of such offense.

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

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Goldfrank, Judge Advocate

JAGK - CM 315713 1st Ind

SEP 28 1946

WD, JAGO, Washington 25, D. C.

TO: The Under 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 Lawrence G. Williams (35669325), Quartermaster Corps, unassigned, attached to Squadron X, 4000th Army Air Forces Base Unit.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and, for the reasons stated therein, recommend that the findings of guilty and 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
Major General
The Judge Advocate General

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

( G.C.M.O. 323, 28 October 1946.)

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



JAGK - CM 315714

8 OCT 1946

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| UNITED STATES ) | FIFTEENTH AIR FORCE |
| ) | |
| v. ) | Trial by G.C.M., convened at Grenier Field, New Hampshire, 12 July 1946. Dismissal, total forfeitures and confinement for one (1) year. |
| ) | |
| Captain EDWARD C. WRIGHT ) (O-808488), Air Corps. ) | |

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

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1. The record of trial in the case of the above named officer 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 61st Article of War.

Specification: In that Captain Edward C. Wright, Air Corps, Squadron "G", 112th Army Air Forces Base Unit, did without proper leave, absent himself from his station at Grenier Field, Manchester, New Hampshire, from about 1 February 1946, to about 13 May 1946.

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

Specification: In that Captain Edward C. Wright, ***, did, at New York City, New York, on or about 7 February 1946, wrongfully and unlawfully utter to Dave Jacobs, a certain check, in words and figures as follows, to wit:

AMARILLO NATIONAL BANK 88-95
AMARILLO, TEXAS MAR 8 1946 No. 11
PAY TO THE ORDER OF CASH $100.00

ONE HUNDRED AND 00/100 DOLLARS

FOR _____ /s/ Edward C. Wright.

INDORSEMENT ON REVERSE SIDE:
/s/ Edward C. Wright
O-808488

with insufficient funds in the Amarillo National Bank for the payment of said check, so as to bring discredit upon the military service.

He pleaded guilty to Charge I and the Specification thereunder and guilty to the Specification of Charge II except the words "wrongfully and unlawfully" and "as to bring discredit upon the military service," and guilty of Charge II. The court treated this as a plea of not guilty to the Specification of Charge II and Charge II. He was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. War Department records show that the accused is 26-9/12 years of age and unmarried. He is a high school graduate. He entered the Army on 30 January 1940 and became a sergeant before being appointed an aviation cadet 10 November 1942. He was appointed and commissioned a second lieutenant, Army of the United States, 28 July 1943. On 29 June 1944 he was given a temporary promotion to first lieutenant and on 28 September 1944 he was given another temporary promotion to captain. He received the Air Medal and two oak-leaf clusters for meritorious achievement in aerial flights against the enemy from 6 May 1944 to 27 May 1944, 29 May 1944 to 30 June 1944 and 2 July 1944 to 31 July 1944. On 10 September 1944 he was awarded the Distinguished Flying Cross for extraordinary achievement while participating in aerial flights against the enemy on 29 May 1944 in the North African and Mediterranean Theaters of operations.

His efficiency index for the period 1 January 1945 to 30 June 1945 is 4.5. On 12 June 1945 he was punished under Article of War 104 by being severely reprimanded and restricted to the limits of his post for a period of seven days for being drunk and conduct unbecoming an officer and a gentleman on 2 June 1945. This reprimand referred to an administrative admonition for his similar conduct on 27 May 1945.

5. 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 thereof. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

Charles J. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert B. Colclough, Judge Advocate

JAGK - CM 315714 1st Ind

WD, JAGO, Washington 25, D. C. OCT 18 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 Captain Edward C. Wright (O-808488), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 1 February 1946 to 13 May 1946 in violation of Article of War 61 and of uttering a check in the sum of $100.00 with insufficient funds to pay the same to the discredit of the military service in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the Staff Judge Advocate's review which is adopted by 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 of the sentence.

The evidence shows the accused was absent without leave from 1 February 1946 to 13 May 1946. While absent without leave he cashed a check for $100.00 upon a bank where he had an account but his balance was insufficient to pay the same.

4. The accused is 26-9/12 years of age and unmarried. He is a high school graduate. Upon completion of aviation cadet training he was appointed a second lieutenant, Air Corps, Army of the United States; promoted to first lieutenant 29 June 1944 and promoted to captain 28 September 1944. He holds the Air Medal with two oak-leaf clusters and the Distinguished Flying Cross. From the Staff Judge Advocate's review it appears that he has seven months service in the European Theater of Operations where he flew a complete tour of fifty combat missions. He is entitled to wear the European-Africa-Middle East Theater ribbon with two battle stars and American Defense ribbon.

5. There is nothing in the record to justify the acts of the accused. I recommend that the sentence be confirmed and carried into execution and that a United States disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 349, 15 Nov 1946)

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

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



JAGK - CM 315733

16 SEP 1946

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| UNITED STATES<br><br>v.<br><br>Private First Class WALLACE B. CLAPP (RA 31421722), Company D, 382nd Military Police Battalion, U. S. Forces, European Theater. | SEVENTEENTH MAJOR PORT<br><br>Trial by G.C.M., convened at Bremerhaven, Germany, 13, 14 and 17 June 1946. Dishonorable discharge, total forfeitures and confinement for life. Penitentiary. |

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REVIEW of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 Wallace B. Clapp of Company "D", 382nd Military Police Battalion, acting in conjunction with Private First Class William W. Eads, Company "D", 382nd Military Police Battalion, and in pursuance of a common intent, did, at or near Bremen, Germany, on or about 27 February 1946, with malice, aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Edgar Knappe, a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the "United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct" as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the

accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. 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 murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Charles L. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert B. Ackroyd, Judge Advocate

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

JAGK-CM 315736

10 OCT 1946

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|---|---|
| UNITED STATES<br><br>v.<br><br>First Lieutenant LEONARD A. RISOLI (0-1322370), Infantry. | SEVENTEENTH MAJOR PORT<br><br>Trial by G.C.M., convened at Bremerhaven, Germany, 22 June 1946. Dismissal, total forfeitures and fine of $8,080.00. |

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OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 95th Article of War.

Specification: In that First Lieutenant Leonard A. Risoli. Detachment 3, 2nd Reinforcement Depot, did, at Namur, Belgium, on or about 28 April 1946, with intent to deceive Captain Francis Harkins, Finance Officer, 2nd Reinforcement Depot, officially state to the said Captain Francis Harkins, in words and figures as follows, to wit:

28/4/46
(Date)

SUBJECT: Exchange of Currency

TO : Finance Officer, 2nd Reinforcement Depot, APO 776, U.S. Army.

Currency as listed is submitted herewith for conversion to Belgian Francs:

| AMOUNT | | Amount in Belgian Francs |
|---|---|---|
| 99,200 | German Marks | 434,230 |
| | Austrian Shillings | |

| | | |
|---|---|---|
| ____________ | French Francs | ____________ |
| ____________ | Dutch Gulden | ____________ |
| ____________ | Luxembourg Francs | ____________ |
| ____________ | --------------- (Other - Specify) | ____________ |

I certify that in the case of German Marks and/or Austrian Shillings listed above, appropriate entries have been made in Currency Exchange Control Books of personnel involved in accordance with the provisions of Circular 139, Headquarters U.S.Forces, European Theater, dated 10 October 1945, and that amounts of currency turned in other than German Marks and/or Austrian Shillings have been checked against Currency Exchange Control Books of individuals concerned, and in no case exceed the limitations set forth in above cited circular.

s/ L.A. Risoli
(NAME)

1st Lt. Inf.,
(RANK) (ARM OR BRANCH)

379 R. Co.
(ORGANIZATION) "

,which statement was known by the said First Lieutenant Leonard A. Risoli, to be untrue, in that he knew appropriate entries had not been made in Currency Exchange Control Books of personnel involved in accordance with the provisions of Circular 139, Headquarters U.S.Forces, European Theater, dated 10 October 1945, as stated.

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

Specification: In that First Lieutenant Leonard A. Risoli, Detachment 3, 2nd Reinforcement Depot, did, at Namur, Belgium, on or about April 1946 wrongfully convert about 80,000 German Marks into Belgian Currency.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be fined eight thousand eighty dollars ($8,080). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

During the month of April 1946 the accused was a member of the 379th Replacement Company stationed at Namur, Belgium. The duties of accused consisted of currency control officer and commanding officer of the Second Platoon (R 8, 9). On 28 April 1946 the accused, as currency control officer of the Second Platoon, 379th Replacement Company, presented 99,200 German marks to a finance office in Namur, Belgium, and requested that the German marks be converted to Belgian francs. This request was accompanied by a certificate signed by the accused wherein he certified that in the case of the 99,200 German marks listed above, appropriate entries had been made in the currency exchange control books of personnel involved in accordance with the provisions of Circular 139, Headquarters United States Forces, European Theater, dated 10 October 1945, and that the amounts of currency turned in did not exceed the limitations set forth in the above cited circular. Thereupon Mr. Ralph H. Neuville, a civilian employee of the finance office, accepted the German marks and delivered to the accused 434,230 Belgian francs. Captain Francis Harkins was the officer in charge of the finance office (R 1, 2; Pros Ex A). On 29 April 1946, Captain William P. Burks, Headquarters 3rd Replacement Depot, conducted an investigation concerning the exchange of currency made by accused on 28 April 1946. The accused gave to Captain Burks eleven sheets of paper containing three hundred thirty-one names and stated that the man whose names appeared on the list each gave him 300 marks to be exchanged for Belgian francs (R 3; Pros Ex B). Under the currency control plan in force in this theater, each man could exchange a fixed amount of 300 German marks ($30) for Belgian francs (R 7). A check of the names which appeared upon Exhibit "B" as against the currency control books disclosed that of the 61 men whose names appear on pages 1 and 2 of Exhibit B, 18 men did not have a full balance of 300 German marks on their currency control book (R 4). The names of T/4 Luther Crew, T/4 Maxwell Ramsey, T/5 Harvey A. Tatum, and T/5 Filmore Kimbrou, all of the 379th Replacement Company, appear on Prosecution Exhibit B. Each testified that he did not turn in money to the accused and that he did not authorize the accused to exchange money for him (R 13, 14, 15). Captain Amedeo Jacobelli, the commanding officer of the 379th Replacement Company, checked the list of names submitted by the accused, Exhibit B, as against the company locator cards, to determine whether or not the men named thereon belonged to the 379th Replacement Company. His check disclosed that of the 331 men listed on Exhibit B, 182 of them had never been a member of the 379th Replacement Company and that 111 of them had been transferred from the company. Only three men listed on Exhibit B were transferred from the company prior to the time of the currency exchange (R 9, 10, 11; Ex B).

During the investigation conducted by Captain Burks, the accused orally stated that Exhibit B was illegal and that of the men named thereon only 58 actually turned money in to him and that the balance of the marks converted was his own money (R 4, 12). The accused also signed a statement which was introduced into evidence, wherein he stated that for $500 in Belgian francs and a $200 money order he purchased from an unidentified soldier 80,000

German marks. He received a total of 18,300 marks from 61 members of his organization. He listed the 61 names on a roster and added to the roster the names of 270 men, after which he took the 80,000 marks purchased by him and the 18,300 marks received from the men of his organization and exchanged them for Belgian francs. That on 30 April 1946, as he was about to deliver to the members of his organization the money exchanged for them, he realized that he had done wrong and thereupon admitted to Captain Burks and Lieutenant Shrair the facts concerning the exchange of currency on 28 April 1946 in an attempt to make things right as far as possible (R 4, Ex C).

4. For the defense.

The rights of the accused as a witness in his own behalf were explained to him and he elected to make an unsworn statement. The accused stated that he made a mistake and that he would pay for it. He stated that he received a BS degree from college in 1937. Upon completion of his college work, he was employed by the New York City Police Department and worked in the Juvenile Bureau until he volunteered for the Army. He was one of two supervisors. After eight months in the Army as an enlisted man (NCO handling platoon), he was selected for officers' candidate school. He was commissioned a second lieutenant, Infantry, in 1943. During April 1944, while in Louisiana, he was transferred to the First Division and sent overseas. He went through Normandy and Omaha Beaches and in the Battle of St. Lo he was wounded. From this wound he was unconscious for eight days. After two months in the hospital, he regained his hearing which had been impaired. His next assignment was with the 387th Battalion Military Police at Normandy. Later he was sent to Paris under General Alexander. During the Battle of the Bulge all combat officers were sent to the front. He was the only combat officer of his organization. One week after this battle, and at the request of his commanding officer, he was returned to Paris. His next assignment was instructor in officer candidate school. "This type of work caught up with me" and he asked for a transfer which was refused. After V-E Day he was transferred to the 84th Battalion, 14th Depot, as provost marshal. He again requested transfer which was refused. He was assigned to the 379th Replacement Company and again requested transfer which was refused. He then asked the commanding officer why he could not be released and received the reply that the commanding officer did not know him "well enough." In February 1946 he requested leave. While overseas he had four days' leave. This request was denied because he was essential, however, it was probably because the other officers had been shipped home. When new officers arrived they were given Swiss tours and other leave which he thought was unfair as his "TDY" was disapproved. He agreed to stay in the Army until June 1947 thinking he would go on temporary duty. He suggested to the battalion commander that one-half of the officers and cadre was sufficient to handle the company and was told not to try to run the battalion. He again asked for temporary duty which was refused. His only leave was 48 hours in France, half of which was spent on a train. He began to think that something was wrong and that he was getting an unfair deal. He could not get out until June 1947. Pressure began to build up

within him. "I did not sit with any officers. I was exluded and did not try to stay with them" (R 18). He was ready to explode. Other people were making big deals everywhere. His morale was "pretty low." He did this without much thought. He had the money for about a week and a half and was pretty nervous about it. He admitted almost everything in his original statement made to Captain Burks. This is the only time that he has been involved in a situation like this. All he desired to bring before the court was his frame of mind at the time this occurred and the fact that he wanted to go back and continue his work with juvenile delinquency (R 17, 18).

5. The evidence is clear, convincing and uncontradicted that the accused submitted the certificate, set forth in the Specification of Charge I, to the finance office operated by Captain Francis Harkins and that said certificate was false. It is also clear, convincing and uncontradicted that the accused wrongfully converted about 80,000 German marks into Belgian currency.

The proof shows that this certificate was presented to a clerk, in the Finance Office, Second Replacement Depot, named Ralph H. Neuville. Relying upon the certificate, Mr. Neuville converted German marks into Belgian francs. There is no showing in the record that this certificate was ever actually presented personally to Captain Francis Harkins. The false certificate was made by the accused and presented to a clerk in the finance office which was under the supervision of Captain Harkins. The certificate became a part of the official records of this finance office and the accused knew and intended that the finance officer would rely upon it. This false certificate was a false official statement made to Captain Francis Harkins, the officer in charge of the finance office, the same as if accused had uttered it orally in the officer's presence (CM 270061, Sheridan, 45 BR 190).

6. War Department records show the accused to be 32-2/12 years of age and married. In 1937 he received a BS degree in social sciences from Long Island University. From September 1936 to June 1942 he was employed by the Police Athletic League, New York City, earning a salary of $1650 per annum. He was inducted into the Army 17 November 1942. He attended officers' candidate school at Fort Benning, Georgia, and upon graduation was appointed and commissioned a temporary second lieutenant, Infantry, Army of the United States, on 14 July 1943. On 20 July 1944 he was wounded in combat in France and returned to duty 18 September 1944. The date of his appointment to first lieutenant does not appear, however, he is shown to be a second lieutenant at the time he was wounded. His efficiency index for the period 1 January 1945 to 30 June 1945 is 1.1 and for the period 1 July 1945 to 31 December 1945 it is 5.

7. Consideration has been given to the recommendation for clemency attached to the record and signed by eight members of the court, the trial judge advocate and the defense counsel.

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

Christy D. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

JAGK - CM 315736 1st Ind

WD, JAGO, Washington 25, D. C. OCT 24 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 First Lieutenant Leonard A. Risoli (O-1322370), Infantry.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement in violation of Article of War 95, and of wrongfully converting about 80,000 German marks into Belgian currency in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due and to be fined eight thousand eighty dollars ($8080.00). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On 28 April 1946 the accused as currency control officer, 2nd Platoon, 379th Replacement Company, presented 99,200 German marks to a United States Army Finance Office for the purpose of converting them into Belgian francs. In order to accomplish this exchange he certified that proper entries had been made in the currency exchange control books of the personnel involved. Theater orders provided that a soldier could convert a maximum of 300 marks into Belgian currency. The accused had collected for exchange purposes 18,300 marks from 61 members of his command. To this sum he added 80,900 marks belonging to himself. His certificate or official statement was false and his actions in converting 80,900 German marks belonging to himself was wrongful in that the maximum German marks any one person was entitled to convert was 300 marks.

4. The record presents a picture of an officer who, by his conduct, has made it impossible for his military superiors to rely upon his official statements. He has also shown that he will falsify his records in order to obtain personal gain. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be 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 ( G.C.M.O. 344, 13 Nov. 1946).
Major General
The Judge Advocate General

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

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



JAGK - CM 315761

23 SEP 1946

| | | |
|---|---|---|
| UNITED STATES | ) | BERLIN DISTRICT |
| v. | ) | Trial by G.C.M., convened at Berlin, Germany, 29 May 1946. Dismissal and $500 fine. |
| Second Lieutenant FRANCIS J. CONWAY (0-2019557), Infantry. | ) | |

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

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

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

CHARGE I: Violation of the 61st Article of War. (Finding of guilty disapproved by reviewing authority.)

Specification: (Finding of guilty with exceptions and substitutions disapproved by reviewing authority).

CHARGE II: Violation of the 85 Article of War.

Specification: In that Francis J. Conway, 2nd Lieutenant Infantry, US Hq. Berlin District, was, at Berlin Germany on or about 6 May 1946 found drunk while on duty.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification to Charge I with exceptions and substitutions and guilty of Charge I and guilty of Charge II and its Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and "to be fined five-hundred dollars". The reviewing authority disapproved "the finding of guilty under the Specification of Charge I, as amended, and Charge I," approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Major Robert A. Holzman, Quartermaster Corps Special Service, Berlin District, testified that from 1 May to 7 May 1946 he was Chief of the Special Service Section, Berlin District, and that on 4 May 1946 the accused reported to him for duty. On 6 May 1946, Major Holzman assigned the accused to duty

as Assistant to the Berlin District Club officer, whereupon accused left Major Holzman's office in the company of Captain Shahan, the Berlin District Club officer. Accused was to work directly under Captain Shahan's supervision (R. 6-8). Captain Glenn M. Shahan, Berlin District Club Officer, testified that accused was assigned to him for duty on the morning of 6 May 1946. From 11:00 a.m. to 12:00 a.m. Captain Shanan explained to accused the nature of his duties and told him that, beginning at 1:00 p.m., he was to go to the Headquarters Command Supply Division and there pick up a safe which was to be returned to Captain Shahan's office. From the Headquarters Command Supply Division he was to go to the Lightning Lounge Officers' Club in Steglitz to look over the bookkeeping system with the Lightning Lounge Club officer, Lieutenant Hoy, and then report back to Captain Shahan at his office between 3:00 p.m. and 4:00 p.m. Accused was sober during the conversation with Captain Shahan. Accused did not report back to Captain Shahan that day nor was the safe ever delivered to Captain Shahan's office (R. 9-11).

Second Lieutenant William A. Hoy, Headquarters Company, Berlin District, testified that at about 3:00 p.m. on 6 May 1946, accused arrived at the Lightning Lounge Officers' Club. Lieutenant Hoy showed him the council books of the club and accused looked at them for three or four minutes, saying that he had "operated" council books and understood all about it. Accused asked for a "drink" and had one immediately. He poured the "drink" himself and Lieutenant Hoy thought "it would have been two ounces." In Lieutenant Hoy's "opinion" accused was drunk when he came to the club. Speaking of accused's condition, Lieutenant Hoy testified,

> "*** I tried to get him upstairs to bed. He was in no condition at all to go back to Berlin District. I was to send the papers back, but I would not send him back. I asked if he wanted to go to bed. He said no. I asked him if he would go home. He said he would. He started out to the door, and I thought I would help him out the door.
>
> * * *
>
> "*** When he got in the room adjoining the office he went from one side of the room to the other, then went through the door, looked around for his vehicle. It wasn't in the yard, it was parked nearby in the theatre lot, and one of the men who work at the club, German men, got his driver to come over and put the Lieutenant in the jeep. We instructed his driver that he wanted to go home." (R. 15)

Lieutenant Hoy did not smell any "breath" on the accused (R. 14-17). Lieselotte Berger, secretary of the Lightning Lounge Officers' Club, testified that around 3:00 p.m. on 6 May 1946, accused entered the office of the club and asked Lieutenant Hoy to show him the bookkeeping system. After looking at the books, accused asked for a "drink" and got one. "He got a cognac glass, three shoots in that." Accused was drunk before he had the "drink," was "walking like a drunk man" and "talked like he was drunk." Accused stayed at the club for twenty or thirty minutes. Miss Berger could not smell any liquor "in the air" (R. 12-14).

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NAVY DEPARTMENT



4. Evidence for the defense.

Private First Class John Jacobs, Supply Division, Headquarters Command, Berlin District, testified that he had seen accused when accused came to the warehouse area to pick up the safe. Accused arrived in the area in the "middle part" of the afternoon. He was not drunk and walked and talked normally. He did not take the safe with him because it was too big to put in the jeep (R. 18,19). It was stipulated by and between the prosecution, defense counsel and the accused that if Sergeant Slayder, Headquarters Command, Supply Division, Berlin District, were present in court he would testify that he saw the accused in "the middle of the afternoon" of 6 May 1946 at the same time that Private First Class Jacobs talked to him and that he did not notice anything which would indicate that accused was drunk (R. 23).

Charlotte Erdmann, a German civilian and secretary at the Wansee Golf Course, testified that accused lived at the golf course and that she saw him there between 4:30 p.m. and 5:00 p.m. on 6 May 1946. At that time he walked and talked normally and did not appear to be drunk. She had known accused since August 1945, for he had been manager of the club (R. 19,20). Edmund Rietz, a german civilian, testified that he saw accused about 4:30 p.m. on 6 May 1946 at the Midnight Golf Club and that at that time he was "walking straight" and looked sober. Witness did not talk to accused (R. 21,22).

The accused, having been warned of his rights, elected to be sworn as a witness in his own behalf with reference to the Specification of Charge II. He testified that he arrived in Berlin on 4 May 1946 having just come back from the "States." He reported to Major Holzman on that day and again at 11:00 a.m. on 6 May. On this second occasion Major Holzman told him to read a book on checking the accounts of control councils, which he did. Captain Shahan was there at the time and to the best of his knowledge Captain Shahan did not give him any orders to report back. Captain Shahan did tell him to collect a safe from Headquarters Command Supply Division and to go from there to the Lightning Lounge and check on the council control book. At 1:15 p.m. he went directly to the Headquarters Command Supply Division to get the safe but it was too large to put in his jeep so he had to leave it there. While there he saw Sergeant Slayder and Private Jacobs and made arrangements to have the safe delivered to Captain Shahan's office later. He then went to the Lightning Lounge. He had nothing to drink on the morning of 6 May nor did he have anything to drink with his noon meal or while he was at Headquarters Command Supply Division. Arriving at the Lightning Lounge about 2:45 p.m. he met Lieutenant Hoy and looked over the council control books, which task "didn't take very long." He then sat down in a chair and talked to Lieutenant Hoy about not getting his "old job" back. Lieutenant Hoy got a bottle of whiskey out of his desk and accused had a "drink." He did not ask Lieutenant Hoy for a "drink"; Lieutenant Hoy offered him one. He had only one drink and left the Lightning Lounge about 3:30 p.m. He did not have any trouble getting to his vehicle and Lieutenant Hoy did not have to help him. He was not intoxicated after having the "drink" at the Lightning Lounge. From the Lightning Lounge he went directly to the Midnight Golf Course where he



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saw Miss Erdmann. He considered his day's work was finished when he left the Lightning Lounge and that he did not have to report back to Captain Shahan that afternoon. He had never seen Lieutenant Hoy before and did not know why Lieutenant Hoy testified that he was drunk in the Lightning Lounge (R. 23-30).

5. In order to sustain a conviction of being found drunk on duty in violation of the 85th Article of War, it is necessary to prove that accused was on duty and that he was found drunk while on such duty. 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 (CM 275196, Stewart, 48 BR 15).

The accused was admittedly on duty when, on the afternoon of 6 May 1946, he arrived at the Lightning Lounge Officers' Club to examine its financial records as he was ordered to do by his commanding officer. Lieutenant Hoy, the club officer, testified that accused looked at the club's books for three or four minutes and then asked for and received a "drink." At this time accused was drunk to such an extent that he "was in no condition at all to go back to Berlin District," "went from one side of the room to another" when leaving the club and had to be "put" in his jeep by one of the German attendants. The club secretary described the accused as "walking like a drunk man" and said that he "talked like he was drunk." The accused denied these occurrences at the Lightning Lounge Club, although he admitted having a "drink" at the invitation of Lieutenant Hoy, and denied that he was drunk at the time. Defense witnesses testified to having seen and talked to him while he was in a sober condition shortly prior to and after his visit to the club. However, since the court had the opportunity to see and observe the witnesses, the Board of Review finds no reason to disturb the court's findings that the accused was drunk on duty under the evidence present in this case, and is of the opinion that such findings are sustained by the evidence.

6. After sentencing the accused to be dismissed the service and to pay a fine of five hundred dollars, the court caused the following statement to be entered in the record of trial:

> "However, the court does feel that there is a chance of rehabilitation for this officer and respectfully recommends to the Commanding General that the execution of that portion of the sentence which requires dismissal be suspended for a period of six (6) months to allow this officer to rehabilitate himself."

The reviewing authority, in his action, approved "only so much of the sentence as provides accused to be dismissed the service and to be fined $500," thus impliedly disapproving the court's recommendation for clemency.

7. War Department records show that the accused is 32 years of age, is married and has one child. He is a high school graduate and attended the University of Toronto and Syracuse University, each for one year. From April 1934 to February 1941 he operated a barber shop business, earning a final income of $100 per week, and from March 1941 to December 1942 worked with an air conditioning concern, earning a final salary of $60 a week. He

was inducted into the service on 1 January 1943 and served as an enlisted man, reaching the grade of sergeant, until, having successfully completed the infantry officer candidate course at an overseas Ground Force Training Center, he was commissioned and appointed a temporary second lieutenant in the Army of the United States on 11 June 1945. As an enlisted man accused served overseas with the 121st Infantry Regiment as a machine gun squad leader during which service his character and efficiency ratings were "excellent."

8. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed by the court during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of an officer of a violation of the 85th Article of War in time of war.

Christy A. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Eckhardt, Judge Advocate

JAGK - CM 315761 1st Ind

OCT 4 1946

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Francis J. Conway (O-2019557), Infantry.

2. Upon trial by general court-martial the accused was found guilty of being found drunk on duty in violation of Article of War 85. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and "to be fined five-hundred dollars." 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 the sentence and to warrant confirmation of the sentence.

On 6 May 1946 accused was ordered by his commanding officer to proceed to the Lightning Lounge Officers' Club, located in the Berlin District, to examine its financial records. He arrived at the club about 3:00 p.m. that afternoon. The club officer testified that the accused looked at the club's books for three or four minutes and then asked for and received a "drink." At this time accused was drunk to such an extent that he "was in no condition at all to go back to the Berlin District," "went from one side of the room to another" when leaving the club and had to be "put" in his jeep by one of the German attendants. The club secretary described the accused, as "walking like a drunk man" and said that he "talked like he was drunk." The accused denied these occurrences at the Lightning Lounge Club, although he admitted having a "drink" at the invitation of the club officer, and denied that he was drunk at the time. Defense witnesses testified to having seen and talked to him while he was in a sober condition shortly prior to and after his visit to the club.

4. The accused is thirty-two years of age, is married and has one child. He is a high school graduate and attended the University of Toronto and Syracuse University, each for one year. From April 1934 to February 1941 he operated a barber shop business, earning a final income of $100 per week, and from March 1941 to December 1942 worked with an air conditioning concern earning a final salary of $60 a week. He was inducted into the service on 1 January 1943 and served as an enlisted man, reaching the grade of sergeant, until, having successfully completed the infantry officer candidate course at an overseas Ground Force Training Center, he was commissioned and appointed a temporary second lieutenant in the Army of the

United States on 11 June 1945. As an enlisted man accused served overseas with the 121st Infantry Regiment as a machine gun squad leader during which service his character and efficiency ratings were "excellent." According to the Staff Judge Advocate's review, accused departed the United States for foreign service on 12 May 1943 and was assigned to the 8th Infantry Division sometime after his arrival in England. He participated in the Normandy, Germany and Central European campaigns. On 16 April 1945 he was sent to the Officers' Candidate School at Fontainebleau, France, and, having been commissioned a second lieutenant upon graduation, was assigned duties as a special service officer for the Berlin District on 7 August 1945. On 28 January 1946 he was returned to the United States on temporary duty and arrived back in Berlin on 3 May 1946, three days before the commission of the offense for which he was here tried and found guilty.

5. After sentencing the accused to be dismissed the service and to pay a fine of five hundred dollars, the court caused the following statement to be entered in the record of trial:

> "However, the court does feel that there is a chance of rehabilitation for this officer and respectfully recommends to the commanding general that the execution of that portion of the sentence which requires dismissal be suspended for a period of six (6) months to allow this officer to rehabilitate himself."

The reviewing authority, in his action, approved "only so much of the sentence as provides accused to be dismissed the service and to be fined $500," thus impliedly disapproving the court's recommendation for clemency. It appears from the Staff Judge Advocate's review that this action was taken by the reviewing authority because -

> "An interview with the accused's immediate superior officer on 6 August 1946, revealed the fact that since his difficulties arose, accused has been steadily deteriorating and in the superior officer's opinion, is at present detrimental to the service. Since May 1946, the accused has been away without proper leave from his customary duties for short periods of less than a day each on several occasions. He is of a flighty disposition and states he is definitely not officer material.
>
> "On two instances, at official social functions within the Berlin District, accused has attended with a German female civilian, contrary to the customs established for those functions, causing considerable embarrassment to all concerned."

Also, according to the Staff Judge Advocate's review, accused was given a psychiatric examination in June 1946 with a resulting diagnosis of chronic alcoholism. Nevertheless, due to the excellent combat record of the accused and due to the fact that the circumstances surrounding the offense of which he was convicted were reprehensible only in a relatively minor

degree, especially in view of the conflicting evidence, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

CM 315761

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 326, 30 October 1946).

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



JAGK - CM 315771

6 SEP 1946

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| UNITED STATES<br><br>v.<br><br>Private CHARLES P. PETERICONIS (13083035), attached unassigned, Detachment 71, 2nd Reinforcement Depot, Ground Force Reinforcement Command, US Forces, European Theater. | WESTERN BASE SECTION<br>US FORCES, EUROPEAN THEATER<br><br>Trial by G. C.M., convened at Paris, France, 7, 12 and 13 June 1946. Dishonorable discharge and confinement for life. Penitentiary. |

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

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

Specification: In that Private Charles P. Petericonis, Detachment 71, 2nd Reinforcement Depot, did, in conjunction with Private Thomas A. Oates, Junior, Detachment 71, 2nd Reinforcement Depot, at or near Solessin, Belgium, on or about 5 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Leon Gregoire, a human being, by knocking him down and kicking him in the face and about the body.

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

Specification: In that Private Charles P. Petericonis, ***, did, in conjunction with Private Thomas A. Oates, Junior, Detachment 71, 2nd Reinforcement Depot, at Jemeppes, Belgium, on or about 5 February 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Cyrille Wybouw, the property of Cyrille Wybouw, viz., a wallet containing 600 Belgian francs, a gold wrist watch, and a gold ring, value of more than $50.00.

He pleaded not guilty to and was found guilty of each charge and specification. Evidence of three previous convictions was submitted. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence but in view of the fact that accused was already under a sentence with suspended dishonorable discharge which was to be ordered into execution, he suspended the dishonorable discharge in this case, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the 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 murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Chester E. Silver, Judge Advocate

On Leave, Judge Advocate

Albert E. Schroyer, Judge Advocate

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



JAN 3 1947

JAGQ - CM 315773

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| UNITED STATES | ) | THIRD AIR FORCE |
| v. | ) | Trial by G.C.M., convened at Greenville Army Air Base, South Carolina, 25 July 1946. Dismissal. |
| First Lieutenant PAUL A. GORDY (0-826140), Air Corps. | ) | |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 1st Lt. PAUL A GORDY, 71st Troop Carrier Squadron, did, without proper leave absent himself from his station at Greenville Army Air Base, Greenville, S. C., from about 6 June 1946, to about 16 June 1946.

Specification 2: In that 1st Lt. Paul A Gordy, 71st Troop Carrier Squadron, did, without proper leave absent himself from his station at Greenville Army Air Base, Greenville, S. C., from about 16 May 1946 to about 25 May 1946.

Accused pleaded guilty to Specification 2 of the Charge, not guilty to Specification 1 of the Charge and guilty to the Charge. Accused was found guilty of Specification 1, except the words "from about 6 June 1946, to about 16 June 1946", substituting therefor the words "from about 8 June 1946, to about 15 June 1946", of the excepted words, not guilty, and of the substituted words, guilty, and of Specification 2, guilty except the words "to about 25 May 1946", substituting therefor the words "to about 24 May 1946", of the excepted words, not guilty, and of the substituted words, guilty, and guilty of the Charge. No evidence of previous convictions 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 50½. The record of trial should be treated as forwarded under Article of War 48.

3. Evidence for the Prosecution.

Accused was released from assignment in 92nd Troop Carrier Squadron, 439th Troop Carrier Group, Sedalia Army Air Field, Warrensburg, Missouri, and transferred to the 434th Troop Carrier Group, Greenville Army Air Base, Greenville, South Carolina, to which station he was ordered to proceed on or about 26 April 1946 with an authorized 5 days' delay en route (R 7; Pros. Ex. 1).

On 20 May 1946 accused was carried on the morning report of the 71st Troop Carrier Squadron, 434th Troop Carrier Group, Greenville Army Air Base, the duly authenticated extract copy of which shows the following (R 7; Pros. Ex. 2):

"20 May 46
GORDY PAUL A 0826140 1st Lt 1051
fr abs delay enroute to AWOL
eff 0100 16 May 1946"

By stipulation it was agreed that if the Commanding Officer of Bergstrom Field, Austin, Texas, were present in court, he would testify in substance that accused was returned to military control at Bergstrom Field 25 May 1946 and departed therefrom by military aircraft en route to Greenville Army Air Base, Greenville, South Carolina, on 28 May 1946 (R 8; Pros. Ex. 3).

The following entries so far as they pertain to the accused are carried on the morning report of the 71st Troop Carrier Squadron, 434th Troop Carrier Group, dated 18 June 1946, as shown on the duly authenticated extract copy thereof (R 8; Pros. Ex. 4):

"11 June 1946
GORDY PAUL A 0826140 1st Lt 1051
(AC AUS) fr dy to AWOL eff 6 June 46

"17 June 1946
GORDY PAUL A 0826140 1st Lt 1051
(fr AWOL to dy eff 16 June 46"

4. Evidence for the defense. a. It was stipulated by prosecution, defense and accused that if the Commanding Officer of the 71st Troop Carrier Squadron, 434th Troop Carrier Group, supra, were present in court he would testify in substance that accused "was absent without leave the second time from 8 June 1946 to the night of 15 June 1946." (R 8, 9).

b. Accused, advised of his rights, elected to make an unsworn statement through his counsel. Shortly after accused's enlistment at the age of

19, he attended flying school, was graduated at the top portion of his class and was sent overseas, where he engaged in 251 combat missions and was credited with over 1000 combat hours. He had a rating of excellent for the entire period of service for which he was rated, has never previously been tried by court-martial and has no record of civilian offenses other than traffic violations. Accused, transferred from Bergstrom Field, Austin, Texas, to Greenville Army Air Base, Greenville, South Carolina, was granted 5 days' delay en route. He proceeded to Austin, Texas, to visit his fiancee, requested and received two extensions to his delay en route, one for five days, one for three days, at the termination of which his money was exhausted. He did not request another extension. He went to Bergstrom Field, because he was broke and lived at the field awaiting money for which he had wired in order that he might proceed to Greenville, South Carolina. On 18 June 1946, while at Bergstrom Field, accused was placed in arrest of quarters and later was sent under guard to Greenville Army Air Base, where he had been in arrest of quarters since 18 June 1946. Accused is the holder of a Distinguished Flying Cross with three Oak Leaf Clusters and the Air Medal with five Oak Leaf Clusters (R 9, 10).

5. Evidence on Behalf of the Court. The Commanding Officer, 71st Troop Carrier Squadron, 434th Troop Carrier Group, Greenville Army Air Base, Greenville, South Carolina, called as a witness by the court, testified that he had received a report that accused had not occupied his quarters from about 6 June 1946; that he personally checked accused's quarters on 9 June 1946 and observed that his room had not been occupied the previous night. The witness stated he knows of his own knowledge that accused was absent without leave from 8 June 1946 to 16 June 1946. The witness said that on 8 June 1946 he satisfied himself that accused was absent by making inquiries through regular channels (R 13).

6. As to Specification 1 of the Charge the evidence shows that accused was absent from his proper station at Greenville Army Air Base without leave from about 6 June 1946 to about 16 June 1946, as evidenced by the duly authenticated extract copy of the morning reports of the 71st Troop Carrier Squadron, 434th Troop Carrier Group, Greenville Army Air Base, but which absence is shown, by the testimony of the Commanding Officer of that organization, to be actually from 8 June 1946 to 15 June 1946. The finding of guilty, with the exceptions and substitutions, is amply supported by the record of trial.

The plea of guilty to Specification 2 of the Charge is corroborated by the unsworn statement of accused at the trial, the duly authenticated extract copy of the morning report of accused's organization showing accused absent without leave as of 16 May 1946, the testimony of the Commanding Officer, Bergstrom Field that accused was in military custody 25 May 1946,

and is sufficient to support the finding of guilty, with the exceptions and substitutions. The unsworn statement of accused contains only mitigating circumstances, and not matters of defense.

7. War Department records show that accused, a pilot, is 23 years of age and single. He entered active duty on 11 November 1942 as an enlisted man and was discharged on 11 March 1944 to accept a commission as a second lieutenant in the Army of the United States. He was promoted to first lieutenant on 1 January 1945. He attended high school for three years. His efficiency reports in chronological order are: "Excellent," "Excellent," "Unknown," "Unknown," "no report," "4.2," "3.6." He was awarded a Distinguished Flying Cross with three Oak Leaf Clusters and the Air Medal with five Oak Leaf Clusters. According to his unsworn statement and the recommendation submitted for clemency, this officer has served long and faithfully in combat, receiving excellent ratings for his entire period of service in combat.

8. 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 and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

W. H. Johnson Jr., Judge Advocate.

Charles M. Dickson, Judge Advocate.

Francis E. Fuller, Judge Advocate.

JAGQ - CM 315773 1st Ind

WD, JAGO, Washington 25, D. C. JAN 15 1947

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 First Lieutenant Paul A. Gordy (0-826140), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from his station at Greenville Army Air Base, Greenville, South Carolina, from about 16 May 1946 to about 24 May 1946, and from about 8 June 1946 to about 15 June 1946. 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 50½. The record of trial should be treated as being forwarded 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 thereof. I concur in that opinion.

The evidence shows that accused was absent without leave from about 16 May 1946 to about 24 May 1946 and from about 8 June 1946 to about 15 June 1946. Accused was transferred to the Greenville Army Air Base, Greenville, South Carolina, to which station he was ordered to proceed on or about 26 April 1946 with an authorized 5 days' delay en route. On 20 May 1946 he was carried on the morning report of the 71st Troop Carrier Squadron, 434th Troop Carrier Group, Greenville Army Air Base, as absent without leave effective 16 May 1946. The stipulated testimony of the Commanding Officer, Bergstrom Field, Austin, Texas, shows accused returned to military control on 25 May 1946. Accused pleaded guilty to this unauthorized absence. The morning report of his organization shows accused duty to absent without leave effective 6 June 1946 and from absent without leave to duty effective 16 June 1946. Other competent testimony, however, revealed the absence to be from 8 June 1946 to the night of 15 June 1946.

The accused, through his counsel made an unsworn statement containing the following pertinent facts. Shortly after his enlistment at the age of 19, he attended flying school, was graduated at the top portion of his class and was sent overseas, where he engaged in 251 combat missions and was credited with over 1000 combat hours. He had a rating of excellent for the entire period of service for which he was rated, has never previously been tried by court-martial and has no record of civilian offenses other than traffic violations. He is the holder of a Distinguished

Flying Cross with three Oak Leaf Clusters and the Air Medal with five Oak Leaf Clusters.

4. War Department records show that accused, a pilot, is 23 years of age and single. He entered active duty on 11 November 1942 as an enlisted man and was discharged on 11 March 1944 to accept a commission as a second lieutenant in the Army of the United States. He was promoted to first lieutenant on 1 January 1945. His efficiency reports in chronological order are: "Excellent," "Excellent," "Unknown," "Unknown," "No report," "4.2," "3.6". He was awarded a Distinguished Flying Cross with three Oak Leaf Clusters and the Air Medal with five Oak Leaf Clusters. He attended high school for three years.

A recommendation for clemency was submitted with the record, signed by the commanding officer of accused's organization, the accuser, the assistant defense counsel, and three members of the court.

5. While the actions of the accused are not to be condoned it is believed that his conduct may be justly considered in the light of his long and faithful military service, his combat record, and his youth.

In view of the recommendation for clemency and all the facts and circumstances, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $150.00 per month for two months, and that the sentence as thus modified be carried into execution.

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

CM 315773

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

THOMAS H. GREEN
Major General
The Judge Advocate General

( G.C.M.O. 22, 3 Feb. 1947.)

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

(115)

JAGK - CM 315774

6 SEP 1946

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| UNITED STATES<br><br>v.<br><br>Private THOMAS A. OATES, JUNIOR (34981133), attached unassigned, Detachment 71, 2nd Reinforcement Depot, Ground Force Reinforcement Command, US Forces, European Theater. | WESTERN BASE SECTION<br>US FORCES, EUROPEAN THEATER<br><br>Trial by G.C.M., convened at Paris, France, 6, 7, 11 and 13 June 1946. Dishonorable discharge and confinement for life. Penitentiary. |

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REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

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

Specification: In that Private Thomas A. Oates, Junior, Detachment 71, 2nd Reinforcement Depot, did, in conjunction with Private Charles P. Petericonis, Detachment 71, 2nd Reinforcement Depot, at or near Solessin, Belgium, on or about 5 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Leon Gregoire, a human being, by knocking him down and kicking him in the face and about the body.

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

Specification: In that Private Thomas A. Oates, ***, did, in conjunction with Private Charles P. Petericonis, Detachment 71, 2nd Reinforcement Depot, at Jameppes, Belgium, on or about 5 February 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Cyrille Wybouw, the property of Cyrille Wybouw, viz, a wallet containing 600 Belgian francs, a gold wrist watch, and a gold ring, value of more than $50.00.

He pleaded not guilty to and was found guilty of the Specification, Charge I, and Charge I; guilty of the Specification, Charge II, except the words "value of more than $50," substituting therefor respectively the words "said property of some value" of the excepted words not guilty, of the substituted words guilty, and guilty of Charge II. Evidence of one previous conviction was submitted. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence but in view of the fact that accused was already under a suspended sentence involving dishonorable discharge which was to be ordered into execution, he suspended the dishonorable discharge in this case, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the 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 murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Christy D. Silvers, Judge Advocate

On Leave, Judge Advocate

Gilbert E. Schroyer, Judge Advocate

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



JAGK - CM 315826

23 SEP 1946

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| UNITED STATES<br><br>v.<br><br>Private First Class OTTO SORNBERGER (31G859521) and Corporal GUENTHER SCHMIDT (31G2333558), both German Prisoners of War in the custody of the United States, 171st Labor Supervision Center, Depot O-609, US Forces, European Theater. | WESTERN BASE SECTION<br>US FORCES, EUROPEAN THEATER<br><br>Trial by G.C.M., convened at Reims, France, 6 July 1946. SCHMIDT: Confinement for life. SORNBERGER: Confinement for twenty (20) years. Each: Penitentiary. |

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REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the German prisoners of war named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that German Prisoner of War Guenther Schmidt, 8698th Labor Service Company, did, in conjunction with German Prisoner of War Otto Sornberger, 8698th Labor Service Company, at or near Pinon, France, on or about 30 April 1946, forcibly and feloniously, against her will, have carnal knowledge of Marie Louise Theron.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that German Prisoner of War Otto Sornberger, 8698th Labor Service Company, did, in conjunction with German Prisoner of War Guenther Schmidt, 8698th Labor Service Company, at or near Pinon, France, on or about 30 April 1946, forcibly and feloniously, against her will, have carnal knowledge of Marie Louise Theron.

Each accused pleaded not guilty to the Charge and Specification. Accused Schmidt was found guilty of the Charge and Specification. Accused Sornberger was found guilty of the Specification of the Charge, except the words "have carnal knowledge of Marie-Louise Theron" substituting therefor the words

"assault Marie-Louise Thereon with intent to have carnal knowledge of her" of the excepted words not guilty, of the substituted words guilty; of the Charge, not guilty, but guilty of violation of the 93rd Article of War. No evidence of any previous conviction was submitted as to either accused. Accused Schmidt was sentenced to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life, and to forfeit all pay and allowances, credits, accrued or to accrue, during the period of such confinement. Accused Sornberger was sentenced to be confined at hard labor, at such place as the reviewing authority might direct for twenty years, and to forfeit all pay and allowances, credits, accured or to accrue, during the period of such confinement. The reviewing authority approved the sentences, designated the U.S. Penitentiary, Atlanta, Georgia, or elsewhere as the Secretary of War might direct, as the place of confinement of each accused, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. 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, paragraph 2601, of the District of Columbia Code.

Martin D. Silverman, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert B. Asbrook, Judge Advocate

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

JAGH - CM 315844 4 DEC 1946

| | | |
|---|---|---|
| UNITED STATES | ) | FIELD ARTILLERY SCHOOL |
| v. | ) | Trial by G.C.M., convened at Fort Sill, Oklahoma, 31 July 1946. Dismissal |
| Second Lieutenant CHARLES E. BRYANT (0-1799937), Corps of Military Police | ) | |

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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 Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, did, at Tulsa, Oklahoma, on or about 4 March 1946, with intent to defraud, wrongfully and unlawfully make and utter to Mayo Hotel, a certain check, in words and figures as follows, to wit:

THE MAYO Tulsa, Okla., 4 March 1946

| | Dollars | Cents |
|---|---|---|
| Pay to the order of Mayo Hotel | ($50.00) | (0) |

Fifty and no/100 Dollars
With Exchange, Value Received, and Charge Same to Account of

To National Bank of Waco
Waco, Texas

I hereby represent that the amount drawn for in this draft is on deposit with the drawee to my credit, free from any

claims, and acknowledge that this amount has been paid to me upon my representation of such facts.

s/ Charles E. Bryant
Borden Gen Hospital
Det of Patients

Phone _____ Address

and by means thereof, did fraudulently obtain from Mayo Hotel the sum of $50.00 in cash money, he the said Second Lieutenant Charles E. Bryant, then well knowing that he did not have and not intending that he should have any account with the said First National Bank of Waco, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, being indebted to Lauterstein's, 514 E. Houston Street, San Antonio 5, Texas, in the sum of $24.15, for uniform clothing, which amount became due and payable on or about 1 December 1945, did, at San Antonio, Texas, from 1 December 1945 to 27 March 1946, dishonorably fail and neglect to pay said debt.

Specification 3: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, being indebted to Clarks, 317 S. Main Street, Tulsa, Oklahoma, in the sum of $42.64, for clothing, which amount became due and payable on or about 1 December 1945, did, at Tulsa, Oklahoma, from 1 December 1945 to 27 March 1946, dishonorably fail and neglect to pay said debt.

Specification 4: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, being indebted to Peacocks, 404 S. Main Street, Tulsa, Oklahoma, in the sum of $35.40, for a watch and Sheaffer Pen Set, payable $15.00 on or about 1 December 1945, $15.00 payable on or about 1 January 1946 and the balance of $5.40 payable on or about 1 February 1946, did, at Tulsa, Oklahoma, from 1 December 1945 to 27 March 1946, dishonorably fail and neglect to pay said debt.

Specification 5: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, did, at or near Tulsa, Oklahoma, on or about 20 January 1946, with intent to deceive Captain Glenn F. Williams, officially state to

the said Captain Glenn F. Williams, that he had paid a personal debt to Lauterstein's, San Antonio, Texas, in the amount of $24.15, which statement was known by the said Second Lieutenant Charles E. Bryant to be untrue.

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

Specification 1: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, did, at or near Tulsa, Oklahoma, on or about 1 January 1946, wrongfully borrow from Master Sergeant Thomas L. Bowman, an enlisted man, the amount of $20.00, this to the prejudice of good order and military discipline.

Specification 2: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachement, Tulsa, Oklahoma, did, at or neat Tulsa, Oklahoma, between on or about 1 December 1945 and on or about 29 January 1946, wrongfully borrow from Sergeant Leon O. Beck, an enlisted man, the amount of $24.00, this to the prejudice of good order and military discipline.

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

Specification 1: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, did, at Camp Crowder, Missouri on or about 15 April 1946, with intent to defraud, wrongfully and unlawfully make and utter to Camp Crowder Exchange, a certain check, in words and figures as follows, to wit:

Camp Crowder, Mo. — CITY
15 Apr 1946 — DATE

National Bank of Ft. Sam Houston — WRITE NAME OF BANK OR TRUST COMPANY ON ABOVE LINE
OF San Antonio, Texas — LOCATION OF BANK

PAY TO Camp Crowder Exchange OR ORDER $ 40.00

Forty and no/100 DOLLARS

0 1799937

For value received, I, the maker hereof, represent the above amount is on deposit in said Bank or Trust Company in my name, free from claims and is subject to this check.

( /s/ Charles E. Bryant, 1st Lt CMP
(ADDRESS Det of Patients, Regional Hospital, Cp. Crowder

and by means thereof did fraudulently obtain from Camp Crowder Exchange the sum of $40.00 in cash money, he the said Second Lieutenant Charles E. Bryant, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Charles E. Bryant, Corps of Military Police, 1828th Service Command Unit, Military Police Detachment, Tulsa, Oklahoma, did, at Camp Crowder, Missouri on or about 16 April 1946, with intent to defraud, wrongfully and unlawfully make and utter to Camp Crowder Exchange, a certain check, in words and figures as follows, to wit:

Camp Crowder 16 April 1946
CITY DATE

National Bank of Ft Sam Houston OF San Antonio, Tex
WRITE NAME OF BANK OR TRUST COMPANY ON ABOVE LINE LOCATION OF BANK

PAY TO Camp Crowder Exchange OR ORDER $ 30.00

Thirty and no/100 DOLLARS

For value received, I, the maker hereof, represent the above amount is on deposit in said Bank or Trust Company in my name, free from claims and is subject to this check.

(/s/ Charles E. Bryant
( 1st Lt, CMP, O-1799937
( ADDRESS Det of Patients
Reg. Hospital

and by means thereof did fraudulently obtain from Camp Crowder Exchange the sum of $30.00 in cash money, he the said Second Lieutenant Charles E. Bryant, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

He pleaded guilty to the Charges and Specifications and the Additional Charge and Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The prosecution and defense entered into a written stipulation, which was received in evidence (R 8; Pros Ex A).

Inasmuch as no other evidence was proffered or received on behalf of the Government, except photostatic copies of three checks referred to below, it is deemed advisable to quote at length from said stipulation:

"1. That the check referred to in specification 1 of charge I of the original charge sheet was, in fact, issued to the Mayo Hotel for consideration, and that at the time of the issuance thereof, the accused had no account in the First National Bank of Waco, Texas.

"2. That the account with Lauterstein's of San Antonio, Texas in the amount of $24.15 referred to in specification 2 of charge I of the original charge sheet was, in fact, contracted as stated in said specification and had not been paid at the time stated therein.

"3. That the account with Clarke's of Tulsa, Oklahoma in the amount of $42.64 referred to in specification 3 of charge I of the original charge sheet was, in fact, contracted as stated in said specification and had not been paid at the time stated therein.

"4. That the account with Peacock's of Tulsa, Oklahoma in the amount of $35.40 referred to in specification 4 of charge I of the original charge sheet was, in fact, contracted as stated in said specification and had not been paid at the time stated therein.

"5. That the accused made the statement to Captain Glenn F. Williams referred to in specification 5 of charge I of the original charge sheet, that the same was an official statement, and that said statement was not true in fact at the time that it was made.

"6. That the accused borrowed the sum of $20 from Master Sergeant Thomas L. Bowman, as stated in specification 1 of charge II of the original charge sheet, that said Sergeant Bowman was at that time an enlisted man in the organization of which the accused was an officer.

"7. That the accused borrowed sums equaling $24 from Sergeant Leon O. Beck between 1 December 1945 and 29 January 1946, as stated in specification 2 of charge II of the original charge sheet, and that said Sergeant Beck was at the time an enlisted man in the organization of which the accused was an officer.

"8. That the accused issued the check referred to in specification 1 of the additional charge sheet (dated 22 June 1946)

to the Camp Crowder Exchange, Camp Crowder, Missouri, as stated in said specification, and that the accused did not have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas at that time for the payment of said check.

"9. That the accused issued the check referred to in specification 2 of the additional charge sheet (dated 22 June 1946) to the Camp Crowder Exchange, Camp Crowder, Missouri, as stated in said specification, and that the accused did not have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas at that time for the payment of said check.

"10. That the character and efficiency of the accused during his period of enlisted service and prior to his entrance into Officers Candidate School was at all times at least excellent."

By stipulation and without objection by the defense, photostatic copies of the checks described in Specification 1 of Charge I (R 8; Pros Ex B), Specification 1 of Additional Charge (R 8-9; Pros Ex C), and Specification 2 of Additional Charge (R 9; Pros Ex D), were received in evidence.

4. Evidence for the defense: Accused, having been advised of his rights to testify in his own behalf, elected to make an unsworn statement (R 9-10), in substance as follows: He enlisted in the regular army 6 June 1939 and was assigned to the Infantry, Hawaiian Department. He returned to the United States in July 1941 and later went to the Pacific where he participated in the engagements at Milne Bay and Ora Bay in New Guinea and at Saipan. He attained the grade of Staff Sergeant while an enlisted man and was never reduced in grade or tried by courts-martial (R 10). He was assigned as recruit instructor in a Military Police organization in January 1945. At this time he was encouraged to, and did, apply for Officers Candidate School, which he successfully completed and accepted an appointment as a second lieutenant on 3 August 1945. He was then assigned to a company as executive officer for three months, transferred to Tulsa, Oklahoma as assistant provost marshal and later was sent to Borden General Hospital because of some difficulty with his ears. The accused stated that he had completed the tenth grade in school and expressed the opinion that he should never have been commissioned as an officer and that he would not again accept an appointment to an Officers Candidate School (R 11). The accused further testified that he is married, but that he has not seen his wife and child for sometime due to his present difficulty and that his wife is living with her parents (R 11). He expressed a desire to return to his family as soon as possible in order to support them, which he was sure he could do in view of the excellent job awaiting him in civilian life. He ascribed his present financial difficulties to mismanagement of his money matters and to the idea that he was "nigger rich" when he became a commissioned officer (R 12).

5. The accused pleaded guilty to a series of offenses, several being laid under Article of War 95, which carries a mandatory sentence of dismissal. The principal question presented by the record is whether the accused's plea of guilty to all Specifications and Charges was not, in fact, changed to a plea of not guilty by his subsequent testimony.

When after a plea of guilty, an accused makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court is required to proceed as though the accused had pleaded not guilty (AW 21, par 70, MCM, 1928). Although not set forth at length in the record, the meaning and effect of accused's pleas of guilty was explained to him at the outset and he replied that he thoroughly understood the same and desired the pleas to stand (R 8). During his unsworn statement the accused said:

> "Well, upon being commissioned I was transferred, as I stated, to Tulsa, Oklahoma. There were no officers' quarters or anything like that, no barracks of any type, and I had these debts. It wasn't my intention to have these debts catch up on me in this manner. I didn't want to defraud these people of any money in any way. I thought I would know something about these people pressing the debt before I saw it on a charge sheet, sir. My first knowledge of this was when I saw court-martial charges had been preferred against me. Before I saw these charges I had paid some of these debts, sir, and I have made every effort possible since that time to make these debts all good. I know that I did wrong. I know that I am to be punished for it. I know that if this court's mercy is so that the pay and allowances due me at this time will cover every bit of indebtedness that I have, and there is no need for me to say that I haven't learned my lesson, because, gentlemen, I have learned my lesson" (R 12).

Thereafter the president of the court further questioned the accused as to whether he realized that by pleading guilty he admitted that, among other things, he committed the acts alleged "with fraudulent intent" (R 13). The accused responded "* * * I didn't intend to deprive or defraud anyone of the amount of cash stated on this check" (R 14). The following colloquy then took place (R 14):

> "PROSECUTION: I think the accused is making this distinction. He says he intended to defraud and then he says he intended to make the fraud good.
>
> "DEFENSE: That is the general idea. In other words, Lieutenant Bryant did actually defraud the hotel and the fraud was complete at the time he received the money, but what Lieutenant Bryant says is he knew when the hotel received the check back they would make some effort to get the money and he believed

at the time the hotel would get in contact with him, at which time he would make some further effort to recoup the check."

Thereafter, the defense stated that the accused still desired the pleas of guilty to stand (R 14).

Of course, the issue of fraudulent intent as thus raised is applicable only to Specification 1, Charge I and Specifications 1 and 2 of the Additional Charge. There remain the other Specifications and Charges to which the accused also pleaded guilty and as to which no inconsistent statements were made. It is concluded that the court properly allowed the accused's pleas to stand as originally entered.

It is not deemed necessary to consider the adequacy of the proof adduced on behalf of the prosecution other than to state that it was all consistent with the accused's pleas of guilty and tended to corroborate his guilt.

Although no evidence to this effect was introduced at the trial, the accompanying papers show that accused has made full restitution to the victims of his wrongful acts. Nevertheless, the accused has pleaded guilty to, and has been found guilty of, acts which demonstrate his unfitness to be an officer.

6. As to the accused's military history and education the records of the War Department are in substantial accord with the statements made by the accused as detailed above. They further reveal, however, that the accused is 25 years of age, that early in 1946 he appeared before a Disposition Board at Borden General Hospital which on 3 May 1946 recommended that the accused be returned to duty in a temporary limited service status for six months, at the expiration of which time he be returned to the medical authorities for recommendation of his physical capacity for active duty. There is no record of previous disciplinary action.

7. Consideration has been given to a letter dated 9 March 1946, addressed to the President of the United States by Mrs. C. J. Bryant of 2637 South Ewing Avenue, Dallas, Texas, the mother of the accused, and a memorandum from United States Senator Elmer Thomas addressed to The Adjutant General, dated 30 September 1946.

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

A. Lottenstein, Judge Advocate
Waldemar A. Solf, Judge Advocate
Irat J. Hanogan, Judge Advocate

JAGH - CM 315844 1st Ind

WD, JAGO, Washington 25, D. C. DEC 12 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 Second Lieutenant Charles E. Bryant (O-1799937), Corps of Military Police.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of fraudulently making and uttering checks and obtaining the proceeds thereof (3 Specifications); dishonorably failing to pay debts (3 Specifications); and making a false official statement, all in violation of Article of War 95; and wrongfully borrowing money from enlisted men (2 Specifications), in violation of Article of War 96. 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. 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 sentence.

On 4 March 1946 the accused uttered and cashed a check in the sum of $50 on the First National Bank of Waco, Texas, in which bank he had no account. On the 15th and 16th of April 1946 the accused uttered and cashed two checks in the sums of $40 and $30, respectively, each drawn on the National Bank of Fort Sam Houston, Texas. At the time the checks were drawn there were insufficient funds in the accused's account to meet these checks. The accused, for about four months, and without apparent justification, neglected to pay three debts totaling $102.19 and subsequently made a false official statement in respect of payment of one of the debts. In December 1945 and January 1946 the accused borrowed $20 and $24 from two enlisted men. The accused redeemed the checks and has not paid the debts and personal loans. He made an unsworn statement that he did not intend ultimate fraud. The accompanying papers show that the accused is presently under investigation for executing three pay vouchers on which he failed to list allotment deductions.

4. This 25-year old officer completed six years enlisted service prior to his appointment as a second lieutenant on 3 August 1945. He participated in combat as an enlisted man at Milne Bay, Ora Bay in New Guinea and at Saipan. Consideration has been given to a letter dated 9 March 1946 addressed to the President by Mrs. C. Bryant, the mother of the accused, and a memorandum from the Honorable Elmer Thomas, United States Senate, addressed to The Adjutant General, dated 30 September 1946.

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

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

CM 315844

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 374, 17 December 1946.)

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



12 March 1947

JAGQ - CM 315848

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| UNITED STATES<br><br>v.<br><br>Private LEO W. CHRISTENSEN (39939590), 24th Signal Company, 24th Infantry Division. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | 24th INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Kokura, Kyushu, 8 July 1946. To be hanged by the neck until dead. |

OPINION of the BOARD OF REVIEW
SCHEID, BOYLES and PARSONS, Judge Advocates

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

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

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

Specification 1: In that Private Leo W. Christensen, 24th Signal Company, 24th Division, did, at Orio, Yawata, Kyushu, Japan, on or about 30 June 1946, forcibly and feloniously, against her will, have carnal knowledge of Sano Akiye.

Specification 2: In that Private Leo W. Christensen, 24th Signal Company, 24th Division, did, at Kokura, Kyushu, Japan, on or about 30 June 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kazuo Sakaguchi, a human being, by running over him with a motorcycle.

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

Specification: In that Private Leo W. Christensen, 24th Signal Company, 24th Division, did, at Orio, Yawata, Kyushu, Japan, on or about 30 June 1946, with intent to do him bodily harm, commit an assault upon Shimizu Yohachi, by willfully and feloniously striking the said Shimizu Yohachi on the face and body with his fists.

Accused pleaded not guilty to, and was found guilty of, all specifications and Charges, except that as to Specification 2 Charge I he was found

not guilty of the words "and with premeditation." Evidence of one previous conviction by summary court-martial of driving a vehicle with improper dispatch ticket and transporting Japanese without authorization, in violation of Article of War 96, was introduced. The accused was sentenced to be hanged by the neck until dead, all the members of the court present concurring therein. The reviewing authority approved only so much of the findings as to Specification 2 Charge I as involves a finding of guilty of manslaughter, in violation of Article of War 93, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Private First Class Woodhall, assigned to the 24th Signal Company, testified that accused was in the military service. On 30 June 1946 at 1315 this witness went with accused and others to Fukuoka to the Red Cross. From there they went to the Hollywood Cabaret. They left to return to Kokura about 1615. The second time they stopped to urinate was at an underpass about fifteen miles out of Kokura. At that time the accused disappeared. The others hollered and looked for him but could not find him and came back to camp. At that time accused was very intoxicated (R 4). This witness had seen accused intoxicated once before (R 5).

Shimizu Yohachi, a coal carrier, was walking home near Orio (R 7) with his four-year-old daughter at about 4:30 p.m., on 30 June 1946. He saw an American soldier with a Japanese woman leaning against a telephone pole, her hands were together and the soldier was trying to punch her in the head. The woman was yelling "please excuse me" in Japanese and was trying to get away. Yohachi did not attempt to stop the soldier nor to yell, but when Yohachi was about ten meters away he was attacked by the American soldier and hit on the head. Yohachi then ran to the Japanese police station and from there was sent to the hospital where he rested for two hours and was then sent home. His nose was bleeding and he was also bleeding through the mouth. Yahachi described his assailant as being about five feet six or seven inches tall with light brownish hair (R 5, 6). Yohachi did not identify accused as his assailant and did not know for sure whether his assailant had been drinking (R 7).

Sano Akiye testified she is a married woman, has three children, aged twelve, seven and two, lives at Orio and makes mats (R 7). At about five o'clock p.m., on 30 June 1946, her husband was away working, and her twelve-year-old daughter who had been playing outside came yelling into the house about a disturbance an American soldier was making. The soldier followed the daughter up to the porch and saw Sano. He entered the house, insisted that Sano enter the house with him and forced her to sit down. Then in the words of the witness, "Upon sitting down he started attacking me.

I tried to run away but with this soldier's strength I couldn't do anything. I was forced to undress myself. I couldn't undress myself so the soldier grabbed ahold of my clothing and then he grabbed underneath my clothes and lifted them up. He forced me to lie down on the mat floor and upon lying down he just grabbed hold of the bottom of my dress and pushed it up and attacked me". Sano did not wear pants but did wear a Japanese cloth to fold around the body and a simple dress. Sano was too frightened to scream but struggled and couldn't do anything with the soldier's strength. The act of intercourse actually took place. The American soldier asked her if she was a married woman. She was too frightened to struggle any more and let him do as he pleased. She was pressed to the floor and couldn't do anything. She worked with the soldier. His penis slipped out twice and she did not put it back in. The soldier did not caress her face or breasts. She was "having menstruation just after intercourse." Sano was looking for a chance to escape but all the time was attacked by this American soldier. Sano identified the accused in the courtroom as her assailant (R 8, 9). She didn't remember whether accused had been drinking. The daughter was frightened and ran and hid. Sano has never had sexual intercourse with any other soldier. She had not menstruated since September 1944, when her last child was born, until this day. She then bled for just two or three hours. An American Medical Officer told her she was about three months' pregnant (R10).

Captain Kup, Medical Corps, testified he examined Sano at about two o'clock on the afternoon of 1 July 1946 and that "in the pelvic region of the genitalia I found a small first degree laceration of the posterior wall of the vagina. There was a small tear there. There was a considerable amount of uterine bleeding. The woman had made the statement to the interpreter that she had taken a douche immediately after and because of that and because of the fact that she was in the process of heavy bleeding it was impractical to make a slide for the presence or absence of spermatozoa. * * * The lacerations were caused by some foreign body but whether it be a man's finger or penis I couldn't say. It is impossible to say that the man's penis had been entered. One would assume that a physical penetration had been forced, namely, a man's penis" (R 10). Sano is 31 years' old.

Hisaji Era, a wheat and fruit dealer, was returning from Kokura about 6:30 o'clock on the evening of 30 June 1946 with his motorcycle. Near the Kurosaki train station he was stopped by a soldier who raised his hand and said, "stop" (R 11). At this time Era saw a spot of blood right about accused's fly and a small spot on the lower part of his shirt and another blood spot on his right fist (R 13). Accused was walking zig zag and appeared intoxicated (R 15). The soldier took over the handle from Era, pointed to his watch, got on the forward part and told Era to ride on the back. Four or five times the engine stopped and every time the soldier asked Era to push it and told Era if he was late to his destination he would assault Era. The engine stopped again and two traffic policemen came alongside and tried to help, and the soldier told them to stand back and get away. In the witness' words:

"Upon starting again he went with a speed of 60 kilometers and he took a path further to the right from the center instead of to the left. While going at that speed in the distance before us I saw the children playing on the street and he just kept on going through the children. Just when we came to where the crowd was one of the children started to cross the street and of course the soldier gave a sudden jerk trying to stop the engine and at that time I was so frightened I just closed my eyes and don't remember much. I was the child struck by the motorcycle and was thrown to the side but although I thought the soldier would stop he still kept on going so I tapped his back but he didn't pay attention but just kept on going...." (R 13).

The accident happened right in front of Kyomezu's Market. The soldier tried to stop on the brake when he reached where the children were playing but the motorcycle was going not less than fifty kilometers when the child was hit. In the courtroom Era identified the accused as the soldier who had driven his motorcycle on this occasion (R 13). When accused hit the child he was a little to the girht on the road and there was no traffic approaching. The child came from the left and ran into the motorcycle and it threw him backwards to the left (R 14). The motorcycle stopped about six hundred meters from the accident (R 15).

Ohta Sukehiro, a school boy of fourteen, was playing baseball in the late afternoon of 30 June 1946 (R 15). After the game they were all gathering at the left side of the road and the youth that was killed was the only one who tried to cross the road when the motorcycle passed by. The motorcycle was on the right side of the road and was going fast. It did not slow down and did not stop. The driver was an American soldier, but this witness could not identify him (R 16). The name of the boy hit by the motorcycle was Sakaguchi Kazuo (R 21).

Doctor Aso Takatao, of Kokura Memorial Hospital, testified that on the evening of 30 June an American soldier came to the hospital and took him in an ambulance to east Kiyomizu town where he saw a person lying down with two sacks on his body. The witness examined the body, found no pulse beat, tested the heart with a stethoscope and pronounced the person dead. Doctor Takatao identified Prosecution Exhibit "A" as the death certificate shows the deceased to be Sakaguchi Kazuo, a nine-year-old boy who died at 1940 hours on 30 June 1946 at Fukuoka Ken, Kokura City, Krgomizu-machi, 3 chome.

In his statement accused admitted assaulting a Japanese boy, chasing a woman into a house "where he forced intercourse in her", and taking the motorcycle. As to the accident involving the motorcycle and the child he stated:

"..... When we hit this wide highway I was going pretty fast. Just before we came to the railroad tracks, I noticed some children in the street. I had just passed a Japanese truck and was on the right side. I blew my horn and turned the accelerator off. I don't know how many children there was but seem to remember two or three. One of them started running for the left hand side of the road. The others to the right. Just before I got to them this one that started running to the left whirled around and started running to the right and ran into me. The motorcycle stopped on the dirt road and this Japanese truck I had passed stopped beside me...." (Pros. Ex. B).

Lieutenant Grogan, assigned to the 24th Military Police Platoon, first saw accused at the 24th Signal Company while investigation the report of an accident. Later when accused was under arrest, he was brought to the Provost Marshal's Office, had the 24th Article of War read to him (R 19) and declined to make a statement. Later, on 3 July (R 20), accused was brought to the Provost Marshal's Office and again advised of his rights under the 24th Article of War (R 18). Accused said he wanted to say something and the witness told accused before he said anything he should read the charges and the statements of the witnesses. After accused did this he was asked if he wanted to make a statement and was told that he did not have to, but accused said he wanted to make a statement. Lieutenant Gibbons, of the 24th Military Police Platoon, also was present at that time (R 19). No threats were made nor were any dnducements held out to accused. When accused was warned of his rights that he did not have to make any type of statement, he stated he was brought up to tell the truth and that was the way he wanted to make it out. Lieutenant Gibbons wrote down the satement as accused gave it, had it typed up, and accused then read and signed it. After accused signed the statement, both Lieutenant Grogan and Lieutenant Gibbons signed it as witnesses (R 20). Both officers identified Prosecution's Exhibit "B" as the statement made by accused (R 19, 20).

4. Evidence for the Defense.

Lieutenant Freeman, Medical Corps, assigned to the 24th Division Sugreon's Office, as its neuropsychiatrist, testified he had examined the accused and found him intellignet and free of mental defects, and concluded that on 30 June 1946 accused was in a condition of pathological intoxication, meaning accused was then subject to impulsive behavior; his mental ability was impaired but he was able to control his physical behavior the same as when normal, and had far greater control of his physical behavior than would be true in other types of intoxication. Nothing compels the accused to drink. Accused was not temporarily insane.

This witness concluded his testimony by stating, "I would not or could not say he (accused) would temporarily be unable to control his behavior" (R 21,22).

Lieutenant Smith, assigned to the Signal Company, 24th Division, testified:

> "At Mitsuhsma, Shikoku, about 9 February, I was officer of the day, Having taken care of my duties about nine in the evening I heard some commotion on the street. I went outside and found Christensen out there about 50 yards from the building. He was crying and talking in a loud tone. He also had a cut chin. I asked him what was the matter and he was crying and said some son of a bitch had hit him. * * * He told me he had been drinking some saki that night about nine. I stayed with him about two hours and tried to quiet him down. He kept on talking saying he worried about his wife, that nobody liked him and that nobody had been his friend in the company. About twelve he quited enough so that I could leave and I warned the fellows around him to keep an eye on him. The next morning he came to see me and apologized for the trounle he had caused" (R22, 23).

Accused elected to be sworn and testified that he was assigned to the 24th Signal Company, 24th Division. He had been intoxicated five times in his life, three of them after coming overseas. On such occasions he seems to know what he is doing but cannot stop himself (R 23). In answer to questions by the court, accused stated he drank six bottles of Japanese beer on 30 June and that it made him drunk. He drank no saki that night and had never drunk more than one bottle of Japanese beer in one night before this time (R 24). Accused has been married for three years and on 29 June received a telegram from his wife telling him she had started a devorce but would wait until he got home. There is one child. The first time accused got drunk he found out he did things he could not control. Accused did not believe Sano was a prostitute and she gave him no encouragement to follow her (R 25). Concerning the assault on Yohachi accused testified:

> "I knew I was going to hit this fellow but I couldn't stop myself" (R 25).
>
> * * * * * * * * * *
>
> "On our way back to Kokura on this main road we turned to the left and I don't know how far we went to this little incline. I went down this incline and was this Japanese boy. I ran into him and grabbed him by the collar and hit him.
>
> * * * * * * * * * *

"I hit him two or three times and was trying to take him up this incline to the jeep and he broke away. I started chasing him. He broke away once before. I caught him and hit him two or three times more. I tried to take him up this incline and he broke loose and ran. I started after him and stumbled. That was the last time I saw him" (R 26).

There was no woman involved at this time. Accused identified the victim as having been present in the courtroom that day (R 27).

5. Charge I, Specification 1 - Rape.

The evidence to support the charge of rape comes from accused, the victim and the doctor who examined her. In his written statement (Pros. Ex. B) the accused said:

"On the right hand side of the street there was a woman standing in front of the house. I chased her into the house, into the first room where I forced intercourse in her. I stopped having the intercourse once and noticed I had blood on my pants and that she was bleeding. When I finished I asked her for some paper which she said she didn't have. I don't remember whether I used paper or didn't use anything to wipe off with." (Pros. Ex. B).

Sano Akiye, the victim, testified as follows:

"QUESTIONS BY THE PROSECUTION:

"Q. Tell the court exactly any unusual events that happened to you approximately 5 p.m. on the 30th of June.

"A. About 5 p.m. on the 30th of june my twelve year old daughter was playing outside and I came home and she came yelling to me that an American soldier had been making a disturbance outside. When my daughter came to me about the disturbance the American soldier saw me in the house. Upon seeing me in the house he followed my daughter in. He got up to the porch. The soldier saw me and entered the house and insisted I enter the house with him. Taking me into the house he told and forced me to sit down. Upon sitting down he started attacking me. I tried to run away but with this soldier's strength I couldn't do anything. I was forced to undress myself. I couldn't undress myself so the soldier grabbed ahold of my underclothing and then he grabbed underneath my clothes and lifted them up. He forced me to lie down on the mat floor and upon lying down he just grabbed hold of the bottom of my dress and pushed it up and attacked me.

"Q. Did the act of intercourse actually take place?
"A. Yes.

"Q. Did you try to scream or fight or try to get up at any time?
"A. I was too frightened to scream so I struggled but I couldn't do anything with the soldier's strength.

* * * * * * *

"CROSS EXAMINATION:

"QUESTIONS BY THE DEFENSE:

"Q. What kind of clothes did you have on that day?
"A. Just a simple dress.

"Q. No pants?
"A. Just a Japanese cloth to fold around my body.

"Q. Who pulled your dress and skirt up? Did you do it or the soldier?
"A. This American soldier.

"Q. Did you work with the soldier? Did you help him in intercourse?
"A. I was too frightened to struggle anymore so I let him do as he pleased.

"Q. What did he ask you?
"A. He just asked me if I was a married woman.

"Q. Did the soldier say anything to you during intercourse?
"A. He was mumbling something but I couldn't understand it.

"Q. Did you help him and work with him?
"A. Yes.

"Q. Did his penis slip out at any time?
"A. About twice.

"Q. What did you do then?
"A. I was pressed on the floor and couldn't do anything.

"Q. Isn't it true that you replaced his penis twice yourself?
"A. That part I didn't do anything in helping him.

"Q. You didn't put it back in?
"A. No.

"Q. You did help him work?
"A. Yes.

"REDIRECT EXAMINATION:

"QUESTIONS BY THE PROSECUTION:

"Q. Were you bleeding in any way?
"A. I was having menstruation just after intercourse.

"Q. Did the soldier have ahold of your arm all during this time?
"A. I was looking for a chance to excape but all the time I attacked by this American soldier.

"RECROSS EXAMINATION:

"QUESTIONS BY THE DEFENSE:

"Q. At any time during intercourse did he caress you with his hands on you face or otherwise?
"A. Not at all.

"Q. Did he touch you breasts?
"A. No.

"QUESTIONS BY THE COURT:

"Q. Is the soldier who attacked you present in the court?
"A. Yes.

"Q. Point him out.
"A. (Indicates accused by pointing) " (Underscoring supplied) (R 7-9).

An Army doctor examined the victim 1 July 1946 and testified in substance; "In the pelvic region of the genitalia I found a small first degree laceration of the posterior wall of the vagina. There was a small tear"—— "The lacerations were caused by some foreign body but whether it be a man's fingers or penis I couldn't say". He was asked "How old is the woman?" and he replied: "Thirty-one" (R 10-11).

According to the Manual for Courts-Martial a charge of rape must be sustained by "Proof, (a) That the accused had carnal knowledge of a certain female, as alledged, and (b) that the act was done by force and without her consent" (MCM, 1928, p. 165).

It is entirely clear that the proof in this case establishes that the accused had carnal knowledge of Sano Akiye, a female, as alleged, but the evidence does not establish that the act was done "forcibly and feloniously, against her will", as alleged.

Force and want of consent are indispensable in rape. Mere verbal protestations 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, p. 165).

The Manual also provides "but the force involved in the act of penetration is alone sufficient where there is in fact no consent"" (MCM, 1928, p. 165). It has been held that this statement cannot be accepted entirely without qualification. It is, of course, an accurate statement of the law as applied to cases where, for example, the woman, by reason of low mentality or unconsciousness is incapable of consenting and the accused knowing this fact, nonetheless proceeds to have intercourse with her (Mills v. United States, 164 U.S. 644, 17 S. Ct. 210, 41 L. Ed. 584 (1897)); 44 Am. Jur. Sec. 11, pp. 908, 909). However, where a woman is in possession of her normal faculties, and, although subjectively not consenting, nonetheless fails to manifest that lack of consent to the accused, the mere fact that he proceeds to have intercourse with her will not constitute his act that of rape, even though there has been both penetration and want of consent. This is true because in cases like that last mentioned, the basic underlying element of mens rea, or guilty knowledge on the part of the accused is lacking and his act therefore is not a criminal one" (CM 309813 - Nordike, 27 BR (ETO) p. 111).

To convict of rape force must be evidenced by specific acts of the accused and not mere opinions or conclusions of the witness. The acts must be such as are calculated to produce fear of death or bodily harm. "Facts must be shown. The testimony of the woman that she fought accused or did her utmost to resist him is merely an opinion or conclusion and not proof" (Underhill's Criminal Evidence, Fourth Edition, p. 1273). "It is a general rule that a witness must state facts and not his opinions or conclusions" (MCM, 1928, p. 111). In State v. Remley, 237 S.W. 489, the Supreme Court of Missouri cites with approval the follwoing paragraph from Ruling Case Law, Volume 22, page 1182:

> "No mere general statements of the prosecutrix, involving her conclusions, that she did her utmost and the like, will suffice to establish this fact of resistance, but she must relate the very acts done, in order that the jury and the court may judge whether any were omitted."

In this case now under review the accused stated "I forced intercourse in her". Prosecutrix gave her conclusions to the effect that accused "insisted" that she enter the house, "forced" her to sit down, "forced" her to undress herself and "forced" her to lie down on the floor. She "struggled" but said "I was too frightened to struggle any more so I let him do as he pleased". She helped him and worked with him. She was pressed on the floor and couldn't do anything. She said "I was looking for a chance to escape but all the time I was attacked by this American soldier."

There is no evidence that accused was armed. There is no evidence that her body was bruised. Accused did not touch her breasts and during the intercourse accused did not caress her with his hands on her face or otherwise. There was no outcry.

Upon applying the principles of law above set forth to the facts in the case under consideration, the Board of Review concludes that the record of trial is legally insufficient to sustain the finding of guilty of the charge of rape, in violation of the 92nd Article of War, but that the record is legally sufficient to sustain only so much of the finding of guilty as involves the lesser included offense of assault and battery, in violation of the 96th Article of War, the maximum punishment for which is confinement at hard labor for six months and forfeiture of two-thirds pay per month not to exceed six months.

As to Specification 2, Charge I.

The specification charges accused "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kazue Sakaguchi, a human being, by running over him with a motorcycle". He was found guilty except for the words "and with premeditation". The reviewing authority approved only so much of the specification "as involves a finding of guilty of manslaughter in violation of Article of War 93 ——".

The Manual for Courts-Martial, 1928 (par. 149a) defines manslaughter as follows:

> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary".
>
> * * * *
>
> "'Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law.'

"It is thus apparent that there are two separate and distinct ways in which involuntary manslaughter may be committed, (1) by unintentionally causing the death of another while engaged in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, and (2) by unintentionally causing the death of another by culpable negligence while performing a lawful act, or in performing an act required by law." (47 BR 316-317).

In the instant case it does not purport to allege an offense committed by causing death while engaged in the commission of an unlawful act not amounting to a felony, nor is it legally sufficient to have put accused upon notice that he would be called upon to defend against such theory. Thus, if at all, the conviction must be sustained on the theory that involuntary manslaughter was committed by the accused by causing death as a result of his culpable negligence while engaged in the doing of a lawful act.

In order that the evidence may be legally sufficient to sustain the finding of guilty, as modified by the reviewing authority, two things must appear : (1) that accused was guilty of "culpable negligence" at the time and place in question, and (2) that such negligence was a proximate cause of deceased's death. And it has been heretofore held by the Board of Review that the term "culpable negligence," as used in the definition of involuntary manslaughter, means a higher degree of negligence than mere simple negligence. It was stated in CM 240043, Vislan, 25 BR 349, at 352:

"Simple negligence is not sufficient to convert a homicide into involuntary manslaughter; there must be criminal or gross (culpable) negligence."

(See also CM 202359, Turner, 6 BR 87).. Common reason dictates that in order for one's negligence to subject one to criminal responsibility for a homicide, such negligence must be a proximate cause of the death. The necessity that the evidence establish this causal connection between an accused's negligent act or conduct and the death constituting the basis of the prosecution was expressly recognized by The Judge Advocate General in his dissent from the opinion of the Board of Review in CM 202359, Turner, supra, which dissent became the law of that case. This principle of law has been uniformly recognized by American civil authority (99 A.L.R. 772; 26 American Jurisprudence, Se. 215, p. 302).

In reviewing this case "We must look alone to the evidence as we find it in the record. It will not do to sustain convictions based upon

suspicions or inadequate testimony" (CM 274812, Tracy, 47 BR 326). We now apply that principle to the present record. It is uncontradicted that at the time of the accident the accused was somewhat under the influence of liquor, was operating a motorcycle at the rate of approximately 35 miles an hour, on the right hand side of the road. It is likewise shown that the accused saw the children and the children saw him as he approached. Further, it was stated by accused that the children, all but deceased, ran to the left side of the road - the deceased running to the right. Just before the vehicle reached the children the deceased reversed his direction and ran back across the road to the right. The accused attempted to put on the brake. According to the accused, the deceased "ran into me". The accused's statement is corroborated by an eyewitness who testified: "He came from the left and ran into it and it threw him backwards." The same eyewitness also stated, "....the soldier gave a sudden jerk trying to stop the engine and at that time I was so frightened I just closed my eyes and don't remember mush. I saw the child struck by the motorcycle and was thrown to the side ....". The circumstances appear to be that accused was aware that the child and the vehicle had collided and he must have known that the resultant injury was probably serious. Nevertheless, he left the scene of the accident without stopping to render aid. Unless all reasonable hypothesis consistent with the conclusion that the accident was no caused by culpable negligence on the part of the accused are EXCLUDED FROM THE EVIDENCE THE CHARGE OF MANSLAUGHTER CANNOT BE SUSTAINED (CM 202359, Turner, 6 BR 87, 124).

From the evidence it is to be concluded that the injury, and death if such there be, was actually caused by the child running into the side of the motorcycle and not by the motorcycle running over or into the child. We must recognize that the only reasonable inference is that deceased was aware of the approach of the motorcycle, that he withdrew to a place of safety, that he left the place of safety without warning; and that he ran into the motorcycle and was thrown backwards. As heretofore stated it is fundamental in order to sustain a conviction of manslaughter that the accused's acts be the proximate cause of the death. It is equally fundamental that if an independent intervening cause was responsible for the death, the chain of causation leading from the accused's acts to the fatal accident is broken and the accused escapes liability for the reason that his act or acts did not cause the death. So in this case the question arises, did the act of the deceased in running into the street and into the motorcycle constitute an independent intervening cause which would absolve accused of any liability for the accident? It must be kept in mind that not all intervening acts amount to "independent intervening" causes. The test is a simple one. "If the intervening act was one likely to result from the accused's acts, and did so result, the intervening cause is not 'independent' and the accused's act is the proximate cause" (CM 264509, Wassing, 42 BR 131; 26 Am. Jur. Homicide, Sec. 50). The converse would likewise be true, if the intervening act was not likely to result from

accused's acts, the intervening cause is "independent" and the chain of causation is broken, thereby relieving accused of liability. There is nothing in the record of trial to suggest that the act of deceased in leaving his place of safety and running into the vehicle was prompted by, resulted from, or such as could be reasonably anticipated from, the acts of the accused.

The state of the record does not exclude the reasonable hypothesis that the sole cause of the death of deceased was his running from a place of safety and into the vehicle which accused was driving; that the accused reasonably attempted to avoid the accident by attempting to put on the brake and trying to stop the engine; that the running into the street by the deceased was so sudden that even a sober person, driving in a careful manner, could not have acted in such a way as to prevent the accident. "Such hypothesis is far from unreasonable or even improbable, for accidents of that nature, without any negligence on the part of the motorist, are of almost daily occurrence." (CM 274812, Tracy, 47 BR 337). Quite to the contrary the evidence establishes that an intervening independent cause, to wit, the running into the street and into the motorcycle by deceased after having once reached a place of safety, was responsible for the accident. It is the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty. The record does disclose without contradiction that accused left the scene of an accident without stopping to render assistance, a violation of Article of War 96. Such offense, however, not being a lesser included offense of manslaughter may not here be considered.

The evidence introduced to establish identity of the victim of the accident and the deceased was unsatisfactory but in viewing the case as we do no determination need be made of the sufficiency of the record on this point.

As to the Specification and Charge II.

An assault with intent to do bodily harm may be committed by the use of fists alone (CM 209074, McCausland, 9 BR 63). The intent may be drawn from surrounding circumstances alone and need not be established by a verbal declaration of intention by the accused (CM 221170, Hemmitt, 13 BR 131). The evidence in the present case shows that as the victim Yohachi walked by with his small daughter accused was holding and trying to beat a Japanese woman, that Yohachi said and did nothing but was attacked by the accused, who grabbed his victim by the collar, hit him on the head two or three times and tried to carry him off to the jeep. The victim escaped and was recaptured twice by accused and beaten on both occasions. When the victim escaped the third time accused again pursued him and after tripping and temporarily losing track of his victim continued to seek him and to inquire of others where he had gone. The blows inflicted caused the victim's mouth and nose to bleed and required the victim to

suspicions or inadequate testimony" (CM 274812, Tracy, 47 BR 326). We now apply that principle to the present record. It is uncontradicted that at the time of the accident the accused was somewhat under the influence of liquor, was operating a motorcycle at the rate of approximately 35 miles an hour, on the right hand side of the road. It is likewise shown that the accused saw the children and the children saw him as he approached. Further, it was stated by accused that the children, all but deceased, ran to the left side of the road - the deceased running to the right. Just before the vehicle reached the children the deceased reversed his direction and ran back across the road to the right. The accused attempted to put on the brake. According to the accused, the deceased "ran into me". The accused's statement is corroborated by an eyewitness who testified: "He came from the left and ran into it and it threw him backwards." The same eyewitness also stated, "....the soldier gave a sudden jerk trying to stop the engine and at that time I was so frightened I just closed my eyes and don't remember mush. I saw the child struck by the motorcycle and was thrown to the side ....". The circumstances appear to be that accused was aware that the child and the vehicle had collided and he must have known that the resultant injury was probably serious. Nevertheless, he left the scene of the accident without stopping to render aid. Unless all reasonable hypothesis consistent with the conclusion that the accident was no caused by culpable negligence on the part of the accused are EXCLUDED FROM THE EVIDENCE THE CHARGE OF MANSLAUGHTER CANNOT BE SUSTAINED (CM 202359, Turner, 6 BR 87, 124).

From the evidence it is to be concluded that the injury, and death if such there be, was actually caused by the child running into the side of the motorcycle and not by the motorcycle running over or into the child. We must recognize that the only reasonable inference is that deceased was aware of the approach of the motorcycle, that he withdrew to a place of safety, that he left the place of safety without warning; and that he ran into the motorcycle and was thrown backwards. As heretofore stated it is fundamental in order to sustain a conviction of manslaughter that the accused's acts be the proximate cause of the death. It is equally fundamental that if an independent intervening cause was responsible for the death, the chain of causation leading from the accused's acts to the fatal accident is broken and the accused escapes liability for the reason that his act or acts did not cause the death. So in this case the question arises, did the act of the deceased in running into the street and into the motorcycle constitute an independent intervening cause which would absolve accused of any liability for the accident? It must be kept in mind that not all intervening acts amount to "independent intervening" causes. The test is a simple one. "If the intervening act was one likely to result from the accused's acts, and did so result, the intervening cause is not 'independent' and the accused's act is the proximate cause" (CM 264509, Wassing, 42 BR 131; 26 Am. Jur. Homicide, Sec. 50). The converse would likewise be true, if the intervening act was not likely to result from

accused's acts, the intervening cause is "independent" and the chain of causation is broken, thereby relieving accused of liability. There is nothing in the record of trial to suggest that the act of deceased in leaving his place of safety and running into the vehicle was prompted by, resulted from, or such as could be reasonably anticipated from, the acts of the accused.

The state of the record does not exclude the reasonable hypothesis that the sole cause of the death of deceased was his running from a place of safety and into the vehicle which accused was driving; that the accused reasonably attempted to avoid the accident by attempting to put on the brake and trying to stop the engine; that the running into the street by the deceased was so sudden that even a sober person, driving in a careful manner, could not have acted in such a way as to prevent the accident. "Such hypothesis is far from unreasonable or even improbable, for accidents of that nature, without any negligence on the part of the motorist, are of almost daily occurrence." (CM 274812, Tracy, 47 BR 337). Quite to the contrary the evidence establishes that an intervening independent cause, to wit, the running into the street and into the motorcycle by deceased after having once reached a place of safety, was responsible for the accident. It is the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty. The record does disclose without contradiction that accused left the scene of an accident without stopping to render assistance, a violation of Article of War 96. Such offense, however, not being a lesser included offense of manslaughter may not here be considered.

The evidence introduced to establish identity of the victim of the accident and the deceased was unsatisfactory but in viewing the case as we do no determination need be made of the sufficiency of the record on this point.

As to the Specification and Charge II.

An assault with intent to do bodily harm may be committed by the use of fists alone (CM 209074, McCausland, 9 BR 63). The intent may be drawn from surrounding circumstances alone and need not be established by a verbal declaration of intention by the accused (CM 221170, Hemmitt, 13 BR 131). The evidence in the present case shows that as the victim Yohachi walked by with his small daughter accused was holding and trying to beat a Japanese woman, that Yohachi said and did nothing but was attacked by the accused, who grabbed his victim by the collar, hit him on the head two or three times and tried to carry him off to the jeep. The victim escaped and was recaptured twice by accused and beaten on both occasions. When the victim escaped the third time accused again pursued him and after tripping and temporarily losing track of his victim continued to seek him and to inquire of others where he had gone. The blows inflicted caused the victim's mouth and nose to bleed and required the victim to

receive two hours of hospital care. This unprovoked, brutal, continued aggression by accused negatives any element of self defense, playfulness, inadvertence or other innocent intent. The bodily harm actually done and the conduct of the accused while perpetrating it fully justified the court in finding that this assault was committed with intent to do bodily harm.

Some attempt was made to urge that accused because of his mental state and intoxicated condition, was not responsible for his actions. From the entire testimony, however, the court was entirely warranted in finding accused was neither under such mental incapacity, nor so intoxicated, as to relieve him from the responsibility of his acts.

6. The charge sheet shwos accused to be 20 years of age, married, but it is indicated his wife is suing for divorce. He was inducted on 13 January 1945 for the duration and six months. He has a prior conviction by a summary court for an improper dispatch of a jeep. There is no evidence of any difficulties with the civil authorities prior to his induction.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors except as noted, injuriously affecting the substantial 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 only so much of the findings of guilty of Charge I and Specification 1 thereunder as involves a finding of guilty of the offense of assault and battery at the time and place and upon the person alleged, in violation of Article of War 96; legally insufficient to support the finding of guilty of Specification 2 of Charge I; legally sufficient to support the finding of guilty of Charge II and its Specification; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months.

s/ Arthur M. Scheid, Judge Advocate

s/ Francis R. Boyles, Judge Advocate

s/ Thomas R. Parsons, Judge Advocate

JAGQ - CM 315948 1st Ind

WD, JAGO, Washington 25, D. C. Mar 26, 1947

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 Leo W. Christensen (39939590), 24th Signal Company, 24th Infantry Division.

2. Upon trial by general court-martial accused was found guilty of rape, murder and assault with intent to do bodily harm, and sentenced to be hanged by the neck until dead.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and Specification 1 thereunder (alleging rape) as involves a finding of guilty of assault and battery at the time and place and upon the person alleged in the Specification, in violation of Article of War 96; legally insufficient to support the finding of guilty of Specification 2 of Charge I as modified by the reviewing authority (manslaughter); legally sufficient to support the findings of guilty of Charge II and the Specification thereunder (assault with intent to do bodily harm); and legally sufficient to support a sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months. I concur in that opinion except that I believe the record of trial is legally sufficient to support the ginding of guilty of Specification 2 of Charge I as modified by the reviewing authority (manslaughter) and to support a sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for four years and six months.

4. The evidence shows that on 30 June 1946 accused made an unprovoked attack on one Shimizu Yohachi, a Japanese civilian, beating him severely with his fists, causing Yohachi's nose and mouth to bleed for which Yohachi received hospital treatment.

The evidence further shows that at about 5 p.m. on 30 June 1946 accused entered the house of one Sano Akiye, a married woman about 31 years of age and had intercourse with her. There is testimony to the effect that accused "forced" the act of intercourse but such proof is insufficient to sustain a conviction of rape. The accused was not armed and he made no threats. There is no evidence of specific acts of violence or force. The woman stated that because of her fright she let the accused do as he pleased. She did not make any outcry and she helped him and "worked with him".

It was also established by the evidence that at about 6:30 o'clock in the evening of 30 June 1946 accused, who was under the influence of intoxicants, was driving a motorcycle, with the operation of which he was unfamiliar, upon a highway in a populated area at a speed of from 35 to 40 miles an hour. As he approached a point where a group of children who had just finished playing ball in the road in the road were gathered at the side of the road, the children scattered, all but one of them, the deceased, running to the left side of the road, Kazuo Sakaguchi, the victim, running to the right side, In the confusion caused by the sudden appearance of the motorcycle, the deceased, a nine-year-old Japanese boy, reversed his direction and ran into and was knowcked down by the machine. Before the accident accused had attempted to put on the brake and stop the engine, but because of his condition and his unfamiliarity with the motorcycle was unable to do so. He failed to stop after the accident and render aid or assistance to the victim.

Culpable negligence is shown. It certainly may not be said as a matter of law that under the circumstances indicated the action of the victim, a child of tender years, in reversing his direction and colliding with the motorcycle accused was riding was one not likely to result from the acts of accused in operating the vehicle under the circumstances and at the speed and in the manner brought out by the evidence.

Accused was examined by a neuropsychiatrist who found him intelligent and free from mental defects but subject to impulsive behavior. Accused was not temporarily insane and the neuropsychiatrist could not say that accused was temporarily unable to control his behavior.

5. War Department records shwo that accused is 20 years of age and is married and that he was inducted on 13 January 1945. He has a prior conviction by a summary court-martial for improper dispatch of a vehicle. There is no evidence of any difficulties with the civil authorities prior to his induction.

6. On 24 January 1947, Messrs. Ernest L. Wilkinson, Riley A. Gwynn, Woodruff J. Deem and Harold S. Harrison, attorneys representing the accused, Senators Glen H. Taylor, Henry C. Dworshak and other interested parties appeared before the Board of Review, at which time the attorneys and Senators Taylor and Dworshak presented oral argument on behalf of the accused. A memorandum brief was also presented by counsel. There are also in the file letters from Senator Warren G. Magnuson and Senator Charles G. Gossett, and two petitions urging clemency.

7. I recommend that only so much of the findings of guilty of Charge I and Specification 1 thereunder (rape) be approved as involves findings of guilty of assault and battery at the time and place and upon the person alleged in the Specification, in violation of Article of War 96, that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years; and that as thus commuted the sentence be confirmed and carried into execution, but that, in view of the youth of accused and all the other circumstances of the case the execution of that portion of the sentence adjudging dishonorable discharge be suspended until the soldier's release from confinement. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

8. Inclosed are two forms of Executive action, Form A is designed to carry out my recommendation as stated above. Form B is designed to carry out the opinion of the Board of Review.

s/ Thomas H. Green

4 Incls
1. Record of Trial
2. Dft ltr for sig USW
3. Form of Action - A
4. Form of Action - B

Thomas H. Green
Major General
The Judge Advocate General

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

SEP 23 1946

JAGQ - CM 315853

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| UNITED STATES<br><br>v.<br><br>Private SIEGFRIED L. HEINTZ (RA 45020054), Detachment A, 4th Air Vehicle Repair Squadron, Wiesbaden Air Force Station, APO 633. | UNITED STATES AIR FORCES IN EUROPE<br><br>Trial by G.C.M., convened at Wiesbaden, Germany, 16 July 1946. Dishonorable discharge (suspended) and confinement for six (6) months. Rehabilitation Center. |

OPINION of the BOARD OF REVIEW
WURFEL, OLIVER and MCDONNELL, Judge Advocates

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 to support the findings and sentence, has now been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Siegfried L. Heintz, Detachment A, 4th Air Vehicle Repair Squadron, Wiesbaden Air Force Station, did, at Wiesbaden, Germany, on or about 20 May 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Josef Mumm, a wrist watch, a stop watch, and a silver lighter, the property of Josef Mumm, being of some substantial value.

Specification 2: (Disapproved by Reviewing Authority).

Accused pleaded not guilty to the Charge and Specifications. He was found guilty of the lesser included offense of wrongfully taking and carrying away the property described in each of the two specifications, not guilty of the Charge but guilty of a 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 may direct for one year. The reviewing

authority disapproved the findings of guilty of Specification 2 of the Charge, approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months, ordered execution of the sentence, but suspended the dishonorable discharge until the soldier's release from confinement, and designated the Wurzburg Rehabilitation Center, Wurzburg, Germany, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 39, Headquarters United States Air Forces in Europe, APO 633, US Army, 2 August 1946.

3. The only question requiring consideration is whether the court which tried this case was legally constituted. The Charge was, by first indorsement, Headquarters United States Air Forces in Europe, 17 June 1946, referred for trial to Captain William R. Stack, Air Corps, Trial Judge Advocate of the general court-martial appointed by paragraph 2, Special Orders No. 114, Headquarters United States Air Forces in Europe, 5 June 1946.

The trial began and was completed on 16 July 1946. Lieutenant Colonel Robert L. Mason was present, sworn and sat as a member of the court (R 2). Lieutenant Colonel Mason was not included in the court appointed by paragraph 2, Special Orders No. 114, dated 5 June 1946.

By paragraph 3, Special Orders No. 142, Headquarters United States Air Forces in Europe, 17 July 1946, Lieutenant Colonel Mason was detailed as a member of the court, vice Lieutenant Colonel Schiltz, relieved.

4. It has been repeatedly held that where an officer who is not detailed thereon sits as a member of the court, the proceedings are thereby invalidated. A subsequent order amending the detail of the court is effective only from the date of its promulgation and cannot have any retroactive effect (CM 238607, Mashburn, 24 BR 307 and cases cited therein; CM 315653, Nading (15 August 1946) and cases cited therein). In the opinion of the Board of Review, Lieutenant Colonel Mason, who participated in the proceedings on 16 July 1946, was not on that date legally detailed as a member of the court.

5. The court was not legally constituted and therefore did not have jurisdiction of either the person or the subject matter. Accordingly, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Seymour W. Wurfel, Judge Advocate

R. Wayne Olive, Judge Advocate
On Leave

_____, Judge Advocate

JAGQ-CM 315853 1st Ind

WD, JAGO, Washington, D. C. SEP 28 1946

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. (1522), is the record of trial in the case of Private Siegfried L. Heintz (RA 45020054), Detachment A, 4th Air Vehicle Repair Squadron, Wiesbaden Air Force Station, APO 633.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has deprived by virtue of the sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

( GCMO 309, 18 Oct. 1946).

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

SEP 5 1946

JAGQ-CM 315877

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| UNITED STATES | ) | 2D ARMORED DIVISION |
| v. | ) | Trial by G.C.M., convened at Camp Hood, Texas, 22 July 1946. As to each: Dishonorable discharge and confinement for ten (10) years. Southern Branch, Disciplinary Barracks. |
| General Prisoners JOSEPH A. ELLIS, ORVAL L. ELLSWORTH and GEORGE A. ELROD. | ) | |

HOLDING by the BOARD OF REVIEW

WURFEL, OLIVER and MCDONNELL, Judge Advocates

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

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

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

Specification: In that Joseph A. Ellis, a General Prisoner with dishonorable discharge suspended, Orval L. Ellsworth and George A. Elrod, both General Prisoners with dishonorable discharge executed, all of Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, acting jointly and in pursuance of a common intent, did, at Camp Bowie, Texas, on or about 26 April 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private first class Paul G. Gilliam, one .45 caliber revolver value about $30.00, one suit of green fatigue clothing of some value, one helmet liner of some value, one key of some value, and about $3.35 lawful money of the United States, of a total value in excess of $33.35, the property of Private first class Paul G. Gilliam.

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

Specification 1: In that Joseph A. Ellis, a General Prisoner with dishonorable discharge suspended, Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, having been duly placed in confinement on or about 14 March 1946, in the Rehabilitation Center, Camp Bowie, Texas, redesignated Southern Branch No. 2, United States Disciplinary Barracks, effective 1 April 1946, did at Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, on or about 26 April 1946, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Orval L. Ellsworth, a General Prisoner with dishonorable discharge executed, Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, having been duly placed in confinement on or about 14 January 1946, in the Rehabilitation Center, Camp Bowie, Texas, redesignated Southern Branch No. 2, United States Disciplinary Barracks, effective 1 April 1946, did at Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, on or about 26 April 1946, escape from said confinement before he was set at liberty by proper authority.

Specification 3: In that George A. Elrod, a General Prisoner with dishonorable discharge executed, Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, having been duly placed in confinement on or about 14 January 1946, in the Rehabilitation Center, Camp Bowie, Texas, redesignated Southern Branch No. 2, United States Disciplinary Barracks, effective 1 April 1946, did at Southern Branch No. 2, United States Disciplinary Barracks, Camp Bowie, Texas, on or about 26 April 1946, escape from said confinement before he was set at liberty by proper authority.

Each accused pleaded not guilty to the Specification of Charge I and Charge I. To their respective Specifications of Charge II each accused pleaded "not guilty of the words 'escape from confinement' but guilty to the words 'attempt escape from confinement'. Of the excepted words not guilty, but of the substituted words guilty", and each pleaded guilty to Charge II. Accused were found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence as to each accused, designated the

Southern Branch, United States Disciplinary Barracks, Camp Hood, Texas, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. In the view we take of this case, no discussion of the evidence is necessary or appropriate.

4. The accused introduced as individual defense counsel the investigating officer who investigated these charges. As such he took sworn statements from each of the accused, and recommended trial of all three by general court-martial. The sworn statements made by the accused constituted full confessions as to each of the specifications and charges. These statements were introduced in evidence; each statement was separately tendered in evidence by the prosecution "Subject to objection by the accused, (name), and his defense counsel, who was the investigating officer and who took the statement of said accused, (name)"; in each instance the defense counsel stated there was no objection to the statement being introduced as evidence. This officer signed the record of trial as defense counsel, and it does not appear that the regularly appointed defense counsel, and assistant defense counsel, although present, participated in the trial in any way.

It must be presumed that the pleas of the accused were entered upon the advice of their defense counsel. Their pleas to their respective specifications of Charge II were inconsistent with their pleas to that Charge. Each pleaded not guilty of the escape from confinement alleged in the Specification relating to him, and instead pleaded guilty of attempt to escape, and then pleaded guilty to the Charge of violation of the 69th Article of War. Paragraph 139b, Manual for Courts-Martial, 1928, provides that an attempt to escape from confinement should be charged as a violation of Article of War 96. Notwithstanding the injunction of the Manual for Courts-Martial (par. 70) that such contradictory pleas will be regarded as pleas of not guilty, the court in this case accepted the pleas. "Immediately following the pleas of 'Guilty' the Law Member read to the accused an explanation of the meaning and effect of their pleas. The accused were asked if they fully understood the effect of their pleas, to which each of the accused replied in the affirmative" (R. 6). The improvidence, to say the least, of defense counsel's advice to enter such pleas therefore becomes self-evident.

Defense counsel stated in open court that the only defense witness was sick in the hospital and unable to appear in court. There is not even a suggestion in the record that defense counsel made any effort to obtain a continuance of the case until this witness could appear in court, nor that any attempt was made to procure his testimony by deposition, oral interrogatory, or stipulation.

> "... The language quoted reveals very clearly that it is the present purpose of military law to provide an accused not merely with defense counsel but with defense counsel not 'disqualified or unable' for any reason 'to perform his duties'. In CM 194200, Sanderson, 2 BR 125, and in CM ETO 4155, Broadus, the Board of Review recognized that the appointment of the accuser to serve as defense counsel was an error affecting the accused's substantial rights. Similarly in CM 211878, Mitchell, and CM 211941, McMullen, the Assistant to the Judge Advocate General 'condemned' the appointment of an investigating officer to serve as the defense counsel in a case which he had investigated."

In CM 211878, Mitchell, and CM 211941, McMullen, supra, the investigating officer was the appointed defense counsel. He had recommended trial by general court-martial. The accused in each case pleaded guilty to the charges and specifications. Neither of these was a Board of Review case. In the McMullen case the Chief of the Military Justice Section stated: "True again he plead guilty, but if anything this makes the case worse. Interested to have his official recommendation already made in the case sustained he might well have endorsed the plea of guilty. Certainly, if he did anything for accused it does not appear in the record." In a letter to the Corps Area Judge Advocate, the Assistant to The Judge Advocate General said:

> "Considering the circumstances in these two cases, this office concurs in the view taken by your assistant, as expressed in his review of the latter case, 'that this is bad practice and should be condemned'.
>
> "Since there is nothing in either file to indicate this matter has been brought to the attention of the court it is suggested that this be done, or better, that the practice be stopped through proper instructions from the convening authority when referring cases for trial".

However, both cases were held legally sufficient.

The grossly perfunctory manner in which the defense of the accused in the instant case was conducted, as above indicated, makes it impossible for us to ignore defense counsel's previous connection with the case as investigating officer. This record eloquently proclaims the grave dangers inherent in placing an officer in the compromising position of acting as

investigating officer and defense counsel in the same case. In his report as investigating officer, the officer who defended these accused stated in recommending that they be tried by general court-martial:

> "In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, of salvaging all possible military material, and the established policy of the War Department that trial by general court martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline".

That official statement by defense counsel, in his capacity of investigating officer, takes on uncommon significance here when it is considered that these accused were general prisoners at the time of the alleged offenses and at the time of the investigation of the charges. The records of their previous trials by general court-martial show that accused Ellis was under a sentence to confinement at hard labor for two years, total forfeitures and dishonorable discharge suspended; that accused Elrod was under sentence of four years' confinement at hard labor, total forfeitures and dishonorable discharge not suspended; and that accused Ellsworth was under sentence of two and one-half years' confinement at hard labor, total forfeitures and executed dishonorable discharge.

Paragraph 35a of the Manual for Courts-Martial states that:

> "Unless otherwise indicated by him, the submission of his report by an investigating officer will be regarded as a statement to the best of his knowledge and belief that the investigation of the matters set forth in the charges was made in substantial conformity with all requirements; that the matters set forth in the charges on which he recommends trial are true, and that such charges are in proper form" (Emphasis supplied).

In CM 284066, Mejie, supra, the Board of Review further said:

> "Although at the beginning of his trial the accused, in response to a question by the Trial Judge Advocate, stated that he wished to be defended by the regularly appointed defense counsel, we cannot assume from this answer that the accused

appreciated the full significance of such a choice or that he realized the inconsistent position in which defense counsel would be placed. Defense counsel, on the one hand, by his sworn statement asserted his belief in the guilt of the accused and, on the other hand, entered for the accused a plea of not guilty and undertook the duty of conducting the defense with undivided fidelity and by all honorable means known to the law. To expect the court to hear the accused's testimony, without being prejudiced by the defense counsel's pre-trial actions as the accuser, is to require the performance of a mental feat beyond the compass of ordinary minds. Article of War 8 provides that, 'No officer shall be eligible to sit as a member of such court when he is the accuser.' Thus military law forbids the accuser to sit in judgment upon the man he has accused. For equally good reasons, the law forbids an accuser to purport to defend the man he has accused. For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with 'undivided fidelity' and by all 'honorable and legitimate means known to the law.' ..."

In that case the Board apparently was unwilling to rest approval of the findings of guilty upon the narrow ground of the general proposition, expressly recognized in paragraph 45b of the Manual, that it is the duty of defense counsel to undertake the defense regardless of his personal opinion as to the guilt of the accused. We are not prepared to do so here. While it is true that the investigating officer does not, as the accuser is ordinarily required to do, make oath that he believes the charges to be true, nevertheless his report is regarded as an official statement that he believes the charges as to which he recommends trial are true. We are of the opinion, therefore, that the same principles expressed by the Board in the Mejie case concerning the accuser apply with equal force to the investigating officer where, as here, he has officially recorded his belief in the guilt of the accused and has recommended trial.

Because of the logical interrelation of the functions of the investigating officer and the trial judge advocate, this office has held that it is an acceptable practice to appoint the same officer to serve in both capacities (CM 282496 (1945) 4 Bull. JAG 382). It is only fair to say that both the investigating officer, who has recommended that an accused be tried, and the trial judge advocate are to be regarded as on the side of the

prosecution, as a practical matter. Their positions are compatible. It follows that when the investigating officer then takes up the side of the defense he has placed himself in an inconsistent position which is incompatible with his prior view of the matter as investigating officer. We do not mean to say that in no event is it permissible for an accused to be represented in his trial by the officer who made the formal pre-trial investigation of the case; indeed, to so hold could very well constitute an abridgement of the right of an accused person to be defended by military counsel of his own choice. What we do hold, however, as a matter of fundamental fairness, is that, in the absence of a full recorded explanation to the accused of the factors and principles involved in such a choice, it cannot be assumed to his detriment that he appreciated the full significance of that choice or realized the inconsistent position in which such defense counsel would be placed in the eyes of the court. "It is not enough that a trial goes through the forms of law" (Fisher v. U.S. (Supreme Court, June 10, 1946) 90 L. Ed. 1078).

6. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as noted above, no errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds the record of trial legally insufficient to sustain the findings of guilty and the sentence as to each accused.

Seymour W. Wurfel, Judge Advocate

T. Wayne Olive, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 315877 1st Ind

WD JAGO, Washington 25, D. C. OCT 15 1946

To: Commanding General, 2d Armored Division, Camp Hood, Texas.

1. In the case of General Prisoners Joseph A. Ellis, Orval L. Ellsworth and George A. Elrod, attention is invited to the foregoing holding by the Board of Review that the record of trial as to each accused is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the sentences be vacated.

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

(CM 315877).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAN 3 1947

JAGQ - CM 315890

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| UNITED STATES<br><br>v.<br><br>Privates First Class ARTURO CANTU (38761674), 13 Depot Supply, and ADAN A. PALACIOS (38760063), Headquarters and Headquarters Squadron, both of VII Air Service Area Command, APO 611. | ) | FIFTH AIR FORCE<br><br>Trial by G.C.M., convened at APO 925 (Tokyo, Japan), 28-29 June 1946. Dishonorable discharge and confinement for thirty (30) years. Penitentiary. |

REVIEW by the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

Private First Class Arturo Cantu:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Arturo Cantu, 13th Depot Supply VII Air Service Area Command, APO 611, did, in conjunction with Private First Class Adan A. Palacios, Headquarters and Headquarters Squadron, VII Air Service Area Command, APO 611, in the vicinity of Ottorii Station, Japan, at or near Yokohama, Japan, on or about 19 May 1946, forcibly and feloniously, against her will, have carnal knowledge of Isobe Yuki.

Private First Class Adan A. Palacios:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Adan A. Palacios, Headquarters and Headquarters Squadron, VII Air Service Area Command, APO 611, did in conjunction with Private First Class Arturo Cantu, 13th Depot Supply VII Air Service Area Command,

> APO 611, in the vicinity of Ottorii Station, Japan, at or near Yokohama, Japan, on or about 19 May 1946, forcibly and feloniously, against her will, have carnal knowledge of Isobe Yuki.

Accused pleaded not guilty to and were found guilty of the Charge and Specification. The accused were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for life. The reviewing authority approved the sentences, but reduced the period of confinement to thirty years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement for each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review adopted the statement of the evidence in the Staff Judge Advocate's Review.

4. Both accused are shown to be members of the military establishment (R 6, 17). Each was identified in open court by the victim as being her assailants (R 30). Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, page 165). Carnal knowledge is the actual contact of the sexual organs and the penetration of the sexual organ of the male through the sexual organ of the female into her body (1 Wharton's Criminal Law, page 920). Force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, page 165). The extent and the character of the resistance required of a woman to establish the lack of consent depends on the circumstances (CM 238172, Spear, 24 BR 187). Although even reluctant consent negatives rape, where the woman ceases resistance under fear of death or other great harm (such fear being guaged by her own capacity) the consummated act is rape (1 Wharton's Criminal Law, 12th Ed., p. 842; CM 236612, Tyree, 23 BR 67).

The element of carnal knowledge and penetration was adequately shown by the testimony of the medical officer who examined the victim shortly after the alleged attacks (R 41). His testimony that the victim had had sexual intercourse within the last 12-24 hour period prior to the examination was uncontraverted, and corroborates the testimony of the victim.

Considering all the circumstances as revealed by the record of trial, the rule of resistance required in cases of this nature has clearly been satisfied. The victim was an enemy national in an occupied territory and the accused were two soldiers of the occupying army. The degree of fear arising in her mind, under these conditions, would naturally be greater than if the offense had been committed under normal circumstances. Her natural fear of the soldiers, who attacked her alternately, was augmented by her being intimidated by one of the accused who displayed a knife in a threatening manner toward her as she resisted their advances, by the knife being used to

cut the belt of her mompei, and by the display and use of physical force to overcome her resistance. As previously stated ".... where the woman ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape." Also, ".... if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape" (44 Amer. Juris. 910). The above coupled with the fact the victim testified: "I lost the fight", "they then forced me to the ground", "I tried to escape", "I was trying to keep them away", "I was frightened, so I screamed", warranted the court in concluding that the acts were accomplished by force, against her will, and without her consent.

Following the establishment of the res gestae as to the particular offenses a signed confession of each accused was received in evidence. It is apparent from the testimony of the individuals who were present when the confessions were taken, that each of the two accused was fully and completely warned of his rights with regard thereto; that the statements were read to them or by them prior to signing them; and that such statements were free and voluntary, without any offers of immunity or promises of reward. Some attempt was made to impress the court with the apparent illiteracy of one or both of the accused due to the fact that they were of Latin-American descent and were not readily conversant with the English language. There was not, however, sufficient evidence in the record to justify the belief that the confessions were improperly obtained, and the court properly admitted them into evidence.

The evidence, substantiated by the confessions firmly establishes every element of the offenses as charged and amply supports the findings of guilty as to each accused.

5. The accused Cantu is 20 years of age and was inducted into the military service, 27 July 1945. He reenlisted 28 January 1946 for 13 months. He has no record of previous convictions and there is no record that his service prior to the time of the offense charged was anything but satisfactory. He was born in Raymondsville, Texas, and was raised on a nearby ranch by his parents who are of Latin-American descent. He worked on the ranch until he was 12 years old and then received some formal education. At the age of 15 he left school and returned to the ranch to aid his father, receiving $12 per month wage. He had very little opportunity during his childhood and youth.

The accused Palacios is 19 years of age and was inducted 26 June 1945. He reenlisted 27 December 1945 for 13 months. He has no record of previous convictions and there is no record that his service prior to the date of the offense charged was other than satisfactory. He is of Latin-American descent and was born in Kingsville, Texas, and was raised on a

farm owned by his father. He has completed grammar school and had some high school education, being drafted into the service prior to completing his high school education.

6. The court was legally constituted and had jurisdiction over the persons and the offenses. No errors or irregularities which injuriously affected the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences. Death or imprisonment for life as a court-martial may direct is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by death under Section 278, Criminal Code of the United States (18 U.S.C. 457).

W H Johnson Jr., Judge Advocate

Charles M. Dickson, Judge Advocate

[illegible], Judge Advocate

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



JAGK - CM 315912

22 OCT 1946

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| UNITED STATES | SEVENTH INFANTRY DIVISION |
| v. | Trial by G.C.M., convened at APO 7, Seoul, Korea, 24 July 1946. Dismissal. |
| Second Lieutenant JAMES C. TATE (O-1335355), Infantry | |

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

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

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

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

Specification: In that Second Lieutenant JAMES C. TATE, 707th Ordnance Maintenance Company, APO 7, was, at the 707th Ordnance Maint. Co. area, Seoul, Korea, on or about 2 July 46, found drunk while on duty as officer paying Korean Civilian Labor of 707th Maint. Co.

CHARGE II: Violation of the 95th Article of War

Specification 1: In that Second Lieutenant JAMES C. TATE, ***, did, at the 707th Ordnance Maintenance Company area, Seoul, Korea, on or about 2 July 46, wrongfully strike Chan Suk Jun on the face with his hands.

Specification 2: In that Second Lieutenant JAMES C. TATE, ***, did, at the 707th Ordnance Maint. Co. area, Seoul, Korea, on or about 2 July 46, wrongfully strike Sin Jun Su on the body with his fists.

He pleaded not guilty to all specifications and charges and was found guilty of the specification and Charge I; guilty of the specifications of Charge II and not guilty of Charge II but guilty of a violation of Article of War 96. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the prosecution.

Between the hours of 4:30 p.m. and 5:30 p.m., 2 July 1946, the accused, as Class "A" Agent of his finance officer, was paying Korean laborers. He was assisted by Technician Fifth Grade Lee O. Wood,

Technical Sergeant Herbert E. Copeland, Jr. and Dyo Za Young, an interpreter (R. 8,15,24). Several of the Koreans were wearing various articles of Government issue clothing. The accused ordered four of the laborers, wearing Government issue clothing, to leave the pay line and stand by the wall to his rear. The accused completed his paying of the laborers and then struck Chan Suk Jun, one of the men detained by him, on the face and struck and kicked Sin Jun Su, another of the men detained, on the body, after which he knocked the two men's heads together (R. 16, 22,28,31,32,33). Sin Jun Su testified that the accused struck him about fifteen hard blows (R. 32,33).

Technician Fifth Grade Lee O. Wood, Technical Sergeant Herbert E. Copeland, Jr., the interpreter Dyo Za Young, as well as the two laborers assaulted by the accused, testified that they detected the odor of alcohol on the breath of the accused; that his eyes appeared different from normal, his face was flushed, and that he exhibited unusual actions. Each testified that in his opinion the accused was drunk (R. 16,17,28,29, 32). Second Lieutenant Murray R. Raymond saw the accused about 5:30 p.m. 2 July 1946 in the officers' quarters and from his condition concluded that he was drunk (R. 36). The interpreter, Dyo Za Young, testified on cross-examination that it was a long established custom in Korea to strike or hit a Korean when he was caught stealing (R. 26).

4. Evidence for the defense.

After explanation of his rights as a witness, the accused elected to testify in his own behalf. He testified that part of his duties consisted of being finance officer of the 707th Ordnance Company and as such he was required to pay the Koreans and soldiers. On 2 July 1946 between 3:45 and 4:00 o'clock he was to pay the Korean laborers. At 3:00 o'clock he went over his accounts and spent the balance of his time until 4:00 o'clock in his quarters. While in his quarters he drank two beers and nothing else. Many thefts had occurred in the area and he was angry about them. The interpreter lined up the Korean laborers and he started to pay them. Two of the laborers were wearing "GI" fatigue clothing. He pulled these two men out of the pay line and had them stand behind him. He was paying the other laborers when he thought he heard one of the Koreans standing behind him say, "cocky sucky." This angered him and he slapped some of the men two or three times with his hand. He did strike Chan Suk Jun and Sin Jun Su but did not punch them or beat either of them fifteen times and did not kick them or knock their heads together. He was not drunk (R. 40,41).

5. The quality or degree of intoxication necessary for conviction under Article of War 85 is:

> "*** any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and

physical faculties ***" (MCM, 1928, par. 145, p. 160; CM ETO 5010, Glover, 14 BR ETO 71).

The evidence shows and the accused admits that at the time and place alleged he was on duty. Several witnesses testified as to the accused's condition and expressed their opinion that he was drunk. The accused denied that he was drunk. This presented a question of fact to be decided by the court and by its finding of guilty the court resolved this fact against the accused. The evidence is sufficient to justify such a finding by the court although the evidence shows only slight drunkenness. The assault and battery alleged in Specifications 1 and 2 of Charge II are proven and admitted by the accused. The court found the assaults and batteries to be in violation of Article of War 96 instead of Article of War 95. Such finding was within the power of the court.

6. The record contains a notation, filed between the recording of the findings and the sentence, which reads:

> "The President of the court announced in open court that when the court was closed to consider the sentence to be imposed, a telephone call was made by a member of the court to the Office of the Staff Judge Advocate to determine if we were still considered to be at war insofar as it affected the Articles of War and that he was informed that officially a state of war still existed."

Dismissal being mandatory in time of war upon conviction of an officer of a violation of the 85th Article of War, it appears that the court's reason for making the call in question was to determine whether or not such mandatory provision applied at the time of the violation here alleged. Such action by the court, though irregular, did not injure the substantial rights of the accused and did not amount to prejudicial error (CM 237637, Seery, 24 BR 69; CM ETO 6961, Risley, 17 BR ETO 297).

7. War Department records are not available to the Board of Review at this time. The testimony of the accused and the Staff Judge Advocate's review show that accused is thirty-three years of age, married, and the father of one six-year old child. During his four years of college he majored in philosophy. Prior to his induction into the service he lived with his family in St. Louis, Missouri, where he was employed as a United States railway mail clerk. Accused served twenty-one months as an enlisted man before being commissioned a second lieutenant, 17 May 1945, upon graduation from the Infantry Officer Candidate School. He was then assigned as a platoon leader at the Infantry Replacement Training Center, Camp Wolters, Texas. He departed 13 October 1945 for Korea where he was assigned to the 707th Ordnance Maintenance Company, 7th Infantry Division. His officer's Qualification Card, AGO Form 66-1, discloses six periods of

duty for which his efficiency rating was, in each case, "Excellent."

8. Consideration has been given to the plea for clemency signed by all members of the court and the trial judge advocate wherein the court states that in this case they considered that technically a state of war existed and accordingly adjudged mandatory dismissal. The court requested that the sentence be commuted to a fine or forfeiture commensurate with the offenses committed.

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 the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of an officer of a violation of Article of War 85 committed in time of war, and authorized upon conviction of a violation of Article of War 96.

Charles E. Gibbs, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ashford, Judge Advocate

JAGK-CM 315912 1st Ind 31 October 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 herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James C. Tate (O-1335355), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty, in violation of Article of War 85, and of assault and battery (two specifications), in violation of Article of War 96. 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 and the sentence and to warrant confirmation of the sentence.

The record shows that accused, as Class "A" Agent Finance Officer, was conducting the payment of Korean laborers on 2 July 1946, and that he was slightly drunk while so engaged. During the process of making the payments accused became angry, apparently because some of the Koreans were wearing "GI" issue clothing, and struck two of the laborers on the face and about the head with his fist and open hand without encountering any resistance from the laborers. He also knocked the heads of the same two laborers together and there is some evidence that he kicked one of them in the back. It was shown that the slapping of persons caught stealing was an ancient custom in Korea.

4. A petition recommending clemency, signed by all members of the court and the trial judge advocate, was forwarded with the record of trial. In the recommendation for clemency it was observed that since technically a state of war still existed the sentence of dismissal was mandatory. The court recommended that the sentence be commuted to a fine or forfeiture commensurate with the offenses committed.

5. The accused is 33 years of age, married and the father of one child six years of age. His home is in St. Louis, Missouri, where he was employed as a United States railway mail clerk prior to entry into the Army. He completed Infantry Officers' Candidate School and was commissioned a second lieutenant, 17 May 1945, after serving twenty-one months as an enlisted man. He has six efficiency ratings of excellent.

6. Consideration has been given to a letter in behalf of accused from Honorable John J. Cochran, House of Representatives, dated 9 September 1946, addressed to The Judge Advocate General.

7. I recommend that the sentence be confirmed but in view of the recommendation for clemency, the minor degree of drunkenness of the accused, his excellent military record and all the circumstances of the case, recommend that the execution of the sentence be suspended during good behavior.

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

C.M. 3315912

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Hon J. J. Cochran to TJAG, dated 9 Sept 1946

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 339, 12 November 1946.)

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



JAN 6 1947

JAGQ - CM 315928

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| U N I T E D S T A T E S | ) | 5TH INFANTRY DIVISION |
| v. | ) | Trial by G.C.M., convened at APO 5, Camp Campbell, Kentucky, 25 July 1946. Dismissal. |
| Second Lieutenant QUINCY L. AINSWORTH (O-2017328), Second Infantry. | ) | |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Quincy L. Ainsworth, Second Infantry, did, without proper leave, absent himself from his organization at Camp Campbell, Kentucky, from about 0700 hours 1 July 1946, to about 1130 hours 1 July 1946.

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

Specification: In that Second Lieutenant Quincy L. Ainsworth, 2d Infantry, did, at Camp Campbell, Kentucky, on or about 1 July 1946, with intent to deceive Lieutenant Colonel William H. Blakefield, Commanding Officer, 2d Infantry, officially state to the said Lieutenant Colonel Blakefield, that he could not return to Camp in time to leave with his Company because he was forcibly detained by Civilian Authorities at Chattanooga, Tennessee, which statement was known by the said Second Lieutenant Ainsworth to be untrue.

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

3. Evidence for the Prosecution.

On the first of July 1946 at 1130 hours Lieutenant Colonel William Blakefield, as commanding officer of the 2nd Infantry, the accused's organization, had a conversation with accused relative to his being absent from his organization at 0730. Accused's organization was scheduled to leave Camp Campbell that day (R 7). In response to questions accused related to him the following events:

"He told me that he left Camp Campbell on Saturday 29th of June, 1946, on a pass that he received and that he had received permission from Major White to be absent from the post on that date to go and get his automobile which was some distance south of the Camp. He said that after getting the car he decided to go to Chattanooga, Tennessee, and on his way to Chattanooga that he met with an accident near Monteagle, Tennessee, he said that he was driving his car at thirty miles an hour and while proceeding up a mountain and around a curve a motor cycle came down the mountain and crashed into his car. He said that he saw the motorcycle coming down the mountain and it swerved over onto his lane, that he didn't have time to get out of the way, but that the motorcycle did try to get out of the way and in trying to get out of the way they struck his left front fender and he said that the driver was thrown over accused's car, and that his car turned over twice and that the next thing he knew was when he woke up in a hospital. He asked the name of the motorcyclist and they told him his name was Anderson and that he was a youth about 19 or 20 years of age and that he was in the hospital too, and that he was seriously injured, that his skull was fractured. He told me that when he woke up a policeman was in his room and he asked him if he wanted to see his car, he said that he did and that he wanted to go to his car, but instead of taking him to his car they took him to the jail instead, and that it was the County Jail of Chattanooga. He said that they put him in a cell and would not let him communicate with anyone not even the MP's, that they would not let him contact anyone, that they kept him there all day Sunday and told him that they were holding him on a manslaughter charge. However, on Monday morning the authorities relented and offered to let him see a bondsman by the name of Keys and that he gave this bondsman Keys $75.00 for providing a $3000.00 bond for his release and thereby obtained his release from the jail in Chattanooga, after being told to return to Chattanooga on the 13th of July 1946 to answer to the charge of manslaughter if the man, Anderson that is, died. And that because of that he was not able to leave with his Company that morning and that was the explanation of his absence." (R 7, 8).

At the instance of Lieutenant Colonel Blakefield the Division Provost Marshal checked with the military authorities in Chattanooga, Tennessee, who were unable to find any evidence to substantiate accused's story (R 9). On 2 July 1946 the accused, on being informed by Lieutenant Colonel Blakefield of the results of the investigation, insisted the whole story was true (R 9). Upon further questioning, however, accused admitted:

> ".... My whole story wasn't true that I told you yesterday and here are the facts in the case" (R 9).

Accused then informed Lieutenant Colonel Blakefield in substance that he had been involved in an automobile collision but that the police had released him after a relatively short investigation, that he became worried about the accident and drank too much to drive back to camp, that he fell asleep at the home of some friends and did not awaken in time to return to camp for his company's departure (R 10). A statement made by accused, (Pros. Ex. 2) being in substance but in more detail than the foregoing, was introduced in evidence (R 10). The second story conformed with the investigation of the Provost Marshal (R 11).

4. Evidence for the Defense. Accused testified that he had been in the Army over nine years and had been a commissioned officer for over one year and that he had served overseas in the European Theatre twenty-seven (27) months. After leaving the camp on Saturday he proceeded to Chattanooga, Tennessee, and had a wreck with a motorcycle. A police officer investigating the happening took both parties to the Chattanooga jail for questioning and subsequently released accused (R 12). Upon release from questioning he began a round of drinking, ending up at the home of a friend where he went to sleep Sunday morning and slept through until six o'clock Monday morning (R 13). Upon awakening early Monday morning he realized he was a long distance from Camp Campbell and drove there immediately arriving "about 11 o'clock or maybe 11:30" (R 13). Upon reporting to the Regimental Commander "I did not tell the Regimental Commander the entire story, and he said that I had been absent for a period of four hours and all the time I was trying to think how I might catch the troops" (R 14).

In response to a question as to his reasons for telling Lieutenant Colonel Blakefield the first story he said:

> "A. I thought I would not be held for AWOL and could join my unit."

5. Evidence brought out by both prosecution and defense establish essentially the same fact, namely that the accused is guilty as charged. He was absent without leave for a period of about four or four and one-half

hours as a result of which he was not present for a change of station move of his organization. In an attempt to cover the offense he made a false official statement to the Regimental Commander. On these admitted facts the evidence is clear and uncontradicted.

6. Accused is twenty-eight and three-twelfths years old. He was born in Louisiana. His enlisted service amounted to 8-2/12 years with the highest rating attained that of Technical Sergeant. Commissioned Second Lieutenant, Infantry, 3 May 1945. Authorized Expert Infantryman's Badge, European Theatre Ribbon with four stars, four years overseas service bars and Victory Medal. Efficiency ratings from 19-5-45 to 24-4-46 are:

1 - Superior
1 - Excellent
4 - Very Satisfactory

He has no previous court-martials of record.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to sustain 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 and mandatory upon conviction of a violation of Article of War 95.

W. H. Johnson Jr, Judge Advocate

Charles M. Dickson, Judge Advocate

Francis J. Parker, Judge Advocate

JAGQ - CM 315928 1st Ind

WD, JAGO, Washington 25, D. C. FEB 1 1947

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 Second Lieutenant Quincy L. Ainsworth (O-2017328), Second Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his organization, in violation of Article of War 61, and of making a false official statement, in violation of Article of War 95. 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. 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.

4. The evidence shows that on 1 July 1946, accused was absent without leave for four hours, as a result of which he was not present for a change of station movement of his organization. To cover his absence accused reported to his commanding officer that he had been involved in an automobile accident, had been hospitalized, and held in the county jail of Chattanooga incommunicado until Monday morning (1 July 1946), when he was permitted to see a bondsman, who for $75, put up a $3,000 bond for his his release. He stated he was to return to Chattanooga, 13 July 1946, to answer manslaughter charges, if the other person involved in the accident, and who was injured, should die. The Provost Marshal checked accused's story and could find nothing to substantiate it. The following day, when confronted with the Provost Marshal's report, he admitted his statement was false and signed a statement as to the true facts which coincided with the facts ascertained through the Provost Marshal. He testified to the same effect.

5. War Department records show that accused is 28 and 3/12 years old, has had 8½ years enlisted service with the highest rating obtained that of Technical Sergeant. He was commissioned a second lieutenant, Infantry, on 3 May 1945; is authorized to wear the Expert Infantryman's Badge, ETO Ribbon with 4 stars; four overseas service bars and the Victory Medal. From 19 May 1945 to 24 April 1946 he has one superior rating; one excellent rating and four very satisfactory ratings. He has no previous convictions by court-martial.

6. Allied papers show that accused is presently in arrest in quarters pending investigation of charges of uttering bad checks. Charges are not being preferred, awaiting final action on this case.

7. By his misconduct the accused has 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.

CM 315928

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Report dated 16 Sept 1946 of recent misconduct

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G.C.M.O. 52, 27 February 1947.)

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

JAGH - CM 315936

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| UNITED STATES<br><br>v.<br><br>Technicians Fifth Grade FELIX BOSTON (44065911) and JOE P. GAYLES (33823326) and Private First Class HOUSTON SMITH, JR. (38774650) all of 3734th Quartermaster Truck Company | ) | CONTINENTAL BASE SECTION<br><br>Trial by G.C.M., convened at Mannheim, Germany, 18 and 19 July 1946. Each: Dismissal and confinement for life. Each: United States Penitentiary. |

REVIEW by 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 soldiers named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Joe P. Gayles, Private First Class Houston Smith, Junior, and Technician Fifth Grade Felix Boston, all of the 3734th Quartermaster Truck Company, acting jointly, and in pursuance of a common intent, did, at or near Hockenheim, Germany, on or about 8 May 1946, forcibly and feloniously, against her will, have carnal knowledge of Friedel Hildebrandt.

They pleaded not guilty to and were found guilty of the Charge and Specification. No evidence of any previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences. 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 by section 278, Criminal Code of the United States (18 USC 457).

A. H. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

[illegible], Judge Advocate

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



DEC 12 1946

JAGQ - CM 315955

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| UNITED STATES | HEADQUARTERS TACTICAL AIR COMMAND |
| v. | Trial by G.C.M., convened at Shaw Field, South Carolina, 17-18 July 1946. Dismissal and confinement for six (6) months. Midwestern Branch #2, U.S. Disciplinary Barracks. |
| First Lieutenant JOHN R. LOWE (0-702299), Air Corps. | |

OPINION of the BOARD OF REVIEW
DICKSON, OLIVER and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant John R. Lowe, 316th Army Air Forces Base Unit (Base Services), did, at Shaw Field, Sumter, South Carolina, on or about 9 June, 1946, feloniously take, steal and carry away about $140.00, lawful money of the United States, the property of First Lieutenant Leroy S. Dietrich.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. The accused was sentenced to dismissal, total forfeitures, and confinement at hard labor for six months. The reviewing authority approved the sentence, designated the Midwestern Branch #2, United States Disciplinary Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

At about three o'clock on the morning of 9 June 1946, First Lieutenant Leroy S. Dietrich, preparatory to going to bed, closed the door to his room in the Bachelor Officers' Quarters at Shaw Field, South Carolina,

placed his trousers containing his wallet with approximately $180 in the closet of his room, closed the door, threw the lock and went to bed (R 7). About nine o'clock that same morning, he went to the latrine, and after about five or ten minutes there (R 7), returned to his room and saw the accused come out of his (Dietrich's) room and then enter accused's own room (R 7). A few seconds later accused again entered Lieutenant Dietrich's room and asked him if he had any reading material, explaining that he had previously entered the room in search of reading matter (R 7). After accused left the room, Lieutenant Dietrich observed his closet door ajar and upon examination found his clothes had been disturbed, his trousers pocket pulled forward, his pocket lapel unbuttoned, and his wallet protruding (R 8, 12). He discovered approximately $140 to be missing from his wallet (R 8, 12). Lieutenant Dietrich then went to the room of Lieutenant Newton H. Harvey, informed him of the theft, and both proceeded to accused's room where Lieutenant Dietrich informed the accused that $140 was missing from his (Dietrich's) wallet. The accused acted extremely nervous but did not appear surprised (R 8, 9, 14). His conversation could not be understood. Lieutenant Dietrich stated that he hoped whoever had taken the money had a good reason for doing it and that they would put it back. The accused, following Lieutenant Dietrich to the latter's room, stated that "If you think I took the money, you are welcome to search my room". Lieutenant Dietrich declined to do so (R 9), finished dressing and went to the Officers' Club, where he remained until about 11 o'clock. On returning to his room he searched for the missing money, but did not find it (R 9).

The prosecution introduced in evidence two written statements of confession of accused, each dated 17 June 1946 (R 15-28; Pros. Exs. 1, 2). The first statement of confession was almost entirely in accused's own handwriting; the second was typewritten and substantially identical in content with the longhand statement; in both accused admitted he took $140 from Dietrich's wallet and "concealed the money in a cigar box just inside and to the right of the door (of the latrine)". The confession disclosed that accused gave $115 of the money to "a person or persons I decline to give his or their name(s) because of a desire to (not) involve anyone else in the transaction". His confession further stated: "Although I can offer no excuse for this conduct, I wish to state that pressure had been applied by the person or persons unknown and, the complications arizing from the recent birth of my child left me without sufficient funds. I desire to make restitution to Lieutenant Dietrich in full and shall do so as soon as possible".

The confession was made to a technical sergeant and a warrant officer, both of whom testified that accused was warned of his rights, made

the statements voluntarily without promises, threats, or hope of reward (R 16, 36), and that accused took an oath to the typewritten copy of the confession before a disinterested Summary Court Officer (R 15, 16, 21, 22, 24-25, 27, 29; Pros. Exs. 1, 2).

The warrant officer testified that a statement taken in shorthand had been obtained from accused on 11 June 1946, in which accused did not then acknowledge his guilt concerning the theft of $140 from Dietrich (R 25).

4. Evidence for the defense.

The accused, after his rights as a witness had been fully explained to him, elected to be sworn and to take the witness stand in his own behalf (R 28). He testified that he had been interrogated by Technical Sergeant Melvin C. Lynch of the Investigating Section from about 1:00 P.M. until 4:30 P.M., 17 June 1946. He contended that he was misled as to evidence against him, the procedure which would be followed in the event he failed to sign a confession, the probability of involvement to and embarrassment of his family, and the futility of maintaining his innocence in the face of overwhelming circumstantial evidence and almost certain conviction, including an intimation that the charges might be disposed of under the 104th Article of War if he confessed. He felt that he might be able to avoid a great part of the scandal and embarrassment to his family if he confessed. For these reasons he signed the false confessions (R 31 to 36; Def. Ex. A).

The accused further testified that he was innocent of the offense charged, that Sergeant Lynch talked him into signing the confession, and that the incriminating and untrue portions thereof were suggested by Sergeant Lynch (R 33).

A motion by defense to strike the confession from the records on the ground that it was obtained by duress was denied by the court. The defense introduced a sworn statement made by accused on 16 July 1946 (R 39; Def. Ex. A), which in essence denies the truth of accused's confession and states, inter alia, that it was made by accused to avoid embarrassing his family. His statement of 16 July 1946, supra, discloses that both on 17 June 1946 and previous thereto, he had been warned of his rights under the 24th Article of War during the investigation.

With regard to his denial of guilt and in partial explanation of his confession, accused testified as follows: "The fact is that on the night the offense took place, or the morning of 9 June, someone during the night of 8 June, had removed from my trousers pocket $15.00 in five

dollar bills, and on the morning in question, that is the 9th, I actually did enter his (Dietrich's) room, and actually did look in his closet, the door was not locked, I looked in his closet and actually examined his wallet. It was just an impulse, really. I saw him come out and thought I would investigate as this was the second time I had missed money, but the money I had lost was in five dollar bills" (R 37).

5. It is sufficiently shown by the witnesses for the prosecution that accused's confessions (Pros. Exs. 1, 2) were voluntary, and were not induced by promise, threats or hope of reward. The accused made those statements of his own free will, after first being advised of his rights under Article of War 24 (R 15, 16, 21, 22, 25, 27, 29, 38). In this connection it is noted that the confession of the accused was made to investigators both inferior in rank to the accused; one was a technical sergeant, the other a warrant officer. The record shows that accused was warned of his rights during the investigation. His sworn and signed statement introduced in evidence by the defense (R 39; Def. Ex. A) discloses that on 17 June 1946, at the time the confession was made, and at one time previous thereto, accused had been warned of his rights under the 24th Article of War during the investigation, and his own statement is convincing that he was not materially influenced by hope of release or other benefit to himself. The court was justified in excluding the probability that an officer of accused's rank and experience could have been misled by his inferiors in rank to such an extent that he would write out a detailed confession in his own handwriting, append his signature, and then the following morning sign and swear to a typewritten statement of substantially the same content. The onus of proving accused's confession to be voluntary was upon the prosecution. A prima facie showing to this effect was required and was adequately met before the confession was received in evidence.

The confession of accused appears to fall within the rule set out in Winthrop's Military Law and Precedents, 2nd Ed., 1920, Reprint, page 328, as follows:

> "A confession is, in a legal sense, 'voluntary' when it is not induced or materially influenced by hope of release or other benefit, or fear of punishment or injury, inspired by one in authority; or, more specifically, where it is not induced or influenced by words or acts, - such as promises, assurances, threats, harsh treatment, or the like, - on the part of an official or other person competent to effectuate what is promised, threatened, etc., or at least believed to be thus competent by the party confessing - * * * But the confession, though it must have been voluntary, need not have been spontaneous. It will be admissible though induced by the exhortations of a spiritual

adviser, by appeals to the accused founded upon the claims of justice, the rights of other persons whose safety or interests are involved in his declaring the truth, etc., or by any other influence 'collateral to the proceedings' and not such as to induce a substantial hope of favor or fear of punishment. So it will be admissible though elicited by questions addressed directly to the accused by a person in authority and assuming his guilt, or by means of making him partially intoxicated, or by practicing upon him some deception by which he is entrapped into confessing."

In CM 313786, Howard, et al., the Board of Review in a case involving the same contention as here raised by the accused made the following observation:

"The only direct evidence that accused fired the fatal shots was contained in his confession, which was admitted over defense counsel's objection that it had been obtained through coercion and subterfuge and was therefore involuntary. Although accused did not confess to the crime until the investigating officer falsely told him that his fingerprints had been found on the murder weapon, no force was used and no promises or threats were made to him. Held: The record is legally sufficient to support the findings and sentence. There is no direct evidence that the erroneous statement of the investigating officer caused accused to confess, and even if it be conceded that the statement was made for the sole purpose of deceiving and thereby influencing accused to make his confession, such deception would not operate to vitiate the confession. The truthfulness of the confession is the real test and the truth or falsity of any statements made to the confessor prior to obtaining the confession and not amounting to threats or promise of immunity or reward are important only insofar as they tend to render the confession involuntary and thereby possibly false."

The accused's confession is sufficiently supported by circumstantial evidence and strengthened by accused's direct testimony in open court admitting that he entered the victim's closet and opened and examined the wallet in question. All of the elements of the offense were satisfactorily established by competent evidence and amply support the court's finding of guilty.

6. War Department records show the accused is 25 years of age, single, attended Simpson College for one year, majoring in chemistry; had worked for the New Method Implement Company in Indianola, Iowa, as an

assembler and blacksmith, before undergoing pilot training in October 1943, at Blackland Army Air Force Field, Waco, Texas, which he satisfactorily completed on 4 December 1943. His last rating from 1 January 1945 to 30 June 1945 shows him to be "Very satisfactory" and he is described as "a quiet, unresponsive officer. His cooperation with superiors is mediocre. He accepts responsibility and performs his duties satisfactorily. Constant supervision should bring about improvement in this officer." His total service was about 3 years, 4 months, 14 days at the time charges were preferred against him. There was no evidence of previous convictions.

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 and the sentence, and to warrant confirmation thereof. A sentence of dismissal and confinement is authorized upon a conviction of a violation of Article of War 93.

Charles M. Dickson, Judge Advocate

H. Wayne Olive, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 315955 1st Ind DEC 12 1946

WD, JAGO, Washington 25, D. C.

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 First Lieutenant John R. Lowe (0-702299), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of $140 from a fellow officer, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the Midwestern Branch #2, United States Disciplinary Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of War may direct, 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. 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.

4. The evidence shows that on 9 June 1946, the accused was seen leaving the room of a fellow officer; the latter then found that $140 was missing from his wallet which had been left by him in the closet of his room. Almost immediately the accused reentered the room of the officer from whom the money had been taken and asked him if he had any reading material, explaining that he had previously entered the officer's room in search of reading matter. A confession of the accused, shown to have been voluntarily made after he was fully advised of his rights, was introduced in evidence; in the confession the accused admitted taking the money, and offered no excuse for his conduct except that pressure had been brought upon him by undisclosed persons and that the recent birth of a child had left him without sufficient funds. He also stated in the confession that he desired to make restitution and intended to do so. Testifying in his own defense at the trial, the accused admitted going into the brother officer's room at the time in question, and that he there examined that officer's wallet, and that his reason for doing so was that he was looking for $15 which allegedly had been taken from his own trousers the preceding night.

5. War Department records show that accused is 25 years of age and has had approximately three years, four and one-half months of service; that his last efficiency rating covering the period 1 January 1945 to

30 June 1945 is "Very satisfactory", and that he is a quiet, unresponsive officer whose cooperation with superiors is mediocre.

6. Careful consideration has been given to letters written by the accused's father to the President and to the President's Secretary, both of which were referred to this office for consideration and reply. Consideration has also been given to a letter written to the Secretary of War on behalf of the accused by the Honorable Thomas E. Martin, Member of Congress.

7. By his misconduct, fully established by the record of trial, the accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution. With maximum allowance for good conduct the sentence to confinement expires on 17 December 1946.

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

CM 315955

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 372, 13 December 1946.)

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

SEP 5 1946

JAGQ - CM 315964

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| UNITED STATES<br><br>v.<br><br>Private ARTHUR D. COHEN, JR. (32156286), Attached unassigned MP & PG Detachment, 1201st SCU, Fort Jay, New York. | FIRST ARMY<br><br>Trial by G.C.M., convened at Fort Jay, New York, 2 July 1946. Dishonorable discharge and confinement for five (5) years. Atlantic Coast Branch, Disciplinary Barracks. |

HOLDING by the BOARD OF REVIEW
WURFEL, OLIVER and MCDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Arthur D. Cohen Jr., alias Arthur Gallagher, alias Arthur (-Artie) Gallagher, attached unassigned Military Police and Prison Guard Detachment, 1201st Service Command Unit, Fort Jay, New York, formerly a member of Company "A" 44th Engineer Regiment, Fort Belvoir, Virginia, did, at 322 38th Street, Union City, New Jersey, on or about 15 March 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at New York City, New York, on or about 13 April 1946.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, designated the Atlantic Coast Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of War might direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. After arraignment the accused entered a special plea that his trial was barred by the statute of limitations, claiming that the statute had run so as to bar prosecution of the offense (R 6). Accused based his plea, not on the dates alleged in the specification of the charge, but on facts as accused claimed they actually existed (R 9). In support of the plea, defense counsel read from paragraph 4 of the pre-trial investigating officer's report:

> "The following documents have been examined, shown to the accused, and are appended: Extract copy of Morning Report, Company A, 44th Engineers, September 8, 1941 - Exhibit A * * *" (R 11).

The plea was denied (R 12).

At the trial the prosecution offered, for identification only, an extract copy of a morning report as follows:

> "Extract copy of morning report of Company 'A', 44th Engineers
> <u>September 8, 1941</u>
> Pvt (ss) Cohen duty to AWOL 6:00
> <u>Headquarters Company, 649th Engineers</u>
> <u>January 2, 1942</u>
> Pvt. Cohen AWOL to desertion" (Pros. Ex. A, R 27)

The certificate to the extract was made at Fort Belvoir, Virginia, on 20 January 1942, by the commanding officer of Headquarters Company, 649th Engineers. The prosecution then offered in evidence a duly authenticated copy of a petition for a writ of habeas corpus brought by accused on 16 May 1946 against the military authorities at his place of confinement at Fort Jay, New York, "for the purpose of showing the initial absence of the accused". The prosecution also stated "I will limit the purpose of prosecution exhibit B in evidence merely to show that the accused, while stationed at Fort Belvoir, Virginia, absented himself without leave on the 6th day of September 1941 and was returned to military control on or about the 12th of April 1946. I will limit it to that purpose". After defense objected to prosecution's use of the words "without leave", the prosecution stated that he then offered the paper "without any evaluation or possible limitation" (Pros. Ex. B, R. 28, 29, 30). In the petition it was recited:

> "* * * *
> "That on or about the 6th day of September, 1941, your petitioner while stationed at Fort Belvoir, Virginia, absented himself and was returned to military control on or about the 12th day of April, 1946.
> * * * *"

The proprietor of Larry's Wonder Bar, located at 322 - 38th Street, Union City, New Jersey (this location is specified as the spot where the desertion occurred) testified for the prosecution that he employed accused as a bar tender sometime during March, April or May 1942 (R 37). At that time accused was dressed in civilian clothes, did not have a uniform, and was known to the employer as "Artie Gallagher" (R 41, 46).

For the defense another tavern owner testified that he employed accused at Weehawken, New Jersey, during the period September to December 1941, during which period accused was dressed in civilian clothes (R 84). During the same period of time in 1941 accused's half brother saw accused employed as a bar tender and dressed in civilian clothes (R 93, 96). Accused at that time told his brother that he was discharged under regulations which permitted the discharge of men more than 28 years of age (R 93).

Accused made the following unsworn statement (R 81, 82) at the trial:

> "On June 13, 1941, I was inducted into the Army, and seven days later I was sent to Fort Belvoir, Virginia to the Engineers School down there. So every day--when we first went there there was a couple of fellows with spinal mengingitis and that quarantined us longer than we should have been quarantined. Every day we used to go on hikes, dig ditches, build bridges, and everything. I never done that kind of work before in my life. A couple of days before I went home, I think it was on a Thursday, before I went home, we went on a twenty-mile hike over night, so on the way I got sick, and there was a truck with a doctor, and the doctor took me in the truck and took me to a camp where we camped overnight. So in the morning when we started back the doctor said to me, he says, 'You can get on the truck and ride back to the camp.' So the Company captain was with us that time. He says, 'No, just put your stuff back in the truck and walk back.' So I did. I walked back. That was Friday. So we had to clean up for inspection for the next morning. The next morning we had inspection, and after inspection the Captain went home and I went in and got a pass and I went home, and I decided I wasn't going to go back any more. That was the 6th of September. I took off my uniform and I put on civilian clothes. I mean, I couldn't take that kind of digging and filling in those ditches and everything. I couldn't take that kind of work. I had put in for an over 28 discharge, but I never heard anything about it. I put it in in the early part of July for being over 28."

At the close of the case for the defense accused moved for a directed verdict of not guilty, stating as one ground in support thereof

that the statute of limitations had run against the offense. The motion was denied (R 90). The motion on the same grounds was again denied just before final arguments (R 105).

4. The question presented is whether, on a trial for desertion and in a case where an unauthorized absence began in time of peace and continued without interruption into time of war, the peacetime portion of the absence may be disregarded so as to prevent the operation of the statute of limitations.

Article of War 39 provides:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: And provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law."

Paragraph 67, Manual for Courts-Martial, provides that exemption from liability to be tried or punished by a court-martial for all but a few crimes or offenses may be claimed after two (or three) years with certain limitations. Article of War 39, supra, specifically provides that the period of limitation upon trial and punishment for desertion in time of peace shall be three years. Paragraph 67, Manual for Courts-Martial, further provides that the period of limitation begins to run on the date of the commission of the offense. The same paragraph of the Manual goes on to state that desertion is not a continuing offense but is committed on the date the person deserts.

In view of the foregoing the gravamen of the case under consideration rests on the determination of the date on which accused deserted; i.e., whether he deserted on or about 15 March 1942 as specified, or on or about 6 September 1941 as the defense contends. Should the proof show that the offense occurred on or about 15 March 1942, then accused deserted in time of war and the statute of limitations cannot be pleaded successfully. Since the date of offense is specified as being subsequent

to 3 February 1942, the date of Executive Order No. 9048 removing the limitation on punishment for desertion, it would follow that accused would be subject to the unlimited punishment of death or such other punishment as a court-martial may direct for wartime desertion. If the proof shows that the offense was committed prior to 7 December 1941, then the offense is a desertion in time of peace and subject both to the statute of limitations and to the limitation on punishment prescribed in paragraph 104c, Manual for Courts-Martial.

There are authoritative precedents for determining the date of desertion. It is stated in Winthrop's Military Law & Precedents, at page 255:

> "A desertion is, as a legal offense, committed but once, being complete and consummate on the day on which the soldier quits the service with the animus non revertendi, the 'continuing offense' thereafter committed being not the desertion but the simple minor offense of absence without leave involved in it, and which of course continues till the deserter's apprehension or voluntary return".

An illuminating discussion on the question of when the offense of desertion is actually committed in order to determine the date from which the statute of limitations begins to run is set forth in 33 Opinions of the Attorney General at page 126, where it is said:

> "The view that desertion is a continuing offense evidently confounds the act as made criminal by the Articles of War with the state of desertion, or the status of being a deserter, two entirely different things. A person who 'deserts' is a person who absents himself without leave with the specific intent of abandoning the service. This act is necessarily done and completed at the moment the person absents himself with the requisite intent, and it is at that time the offense is 'committed'. The definite act of absenting oneself without leave with a specific intent has no likeness to such continuing offenses as nuisance, conspiracy or transportation of goods or persons. In the latter cases the very things which are made an offense continue in time, thus renewing the offense at every period at which the acts are done. In the case of desertion, there is no continuance of the act, but merely a continuance of the state, and the offense in its true character and magnitude is fixed once for all at the time the original deed was done." (Emphasis added).

Proof of desertion requires proof of both absence without leave from the service of the United States accompanied by an intent not to return thereto. This intent not to return may exist either at the inception of the absence or at some time during the absence (par. 130a, MCM). Intent not to return is generally inferred from evidence presented showing circumstances in connection with the absence, such as the wearing of civilian clothes, civilian employment and prolonged absence.

In the case under discussion the evidence both for the prosecution and for the defense conclusively shows that the act of desertion occurred on or about 6 September 1941 and was fixed once and for all in its true character and magnitude at that time. The prosecution is estopped by its own adduced evidence to the effect that the unauthorized absence began on or about 6 September 1941. The evidence for both sides fairly shows that accused intended to desert when he left Fort Belvoir, Virginia, on or about 6 September 1941. The prosecution's evidence to the effect that accused was civilly employed in March 1942 is but one circumstance of his desertion. There was other and equally compelling evidence that he was also civilly employed in September, October, November and December 1941, in peacetime. We know of no authority under which the fixed date of the offense can be disregarded and another and subsequent date assumed as the date of the offense. This matter has been decided in CM 235559, Bartold, 2 Bull JAG 380, holding that a court-martial may not in its findings divide a continuous period of unauthorized absence into two separate periods, constituting thereby two separate offenses. In our opinion, by analogy to CM 235559, supra, neither the accuser nor the convening authority may divide a continuous period of unauthorized absence into two separate periods, disregard some portion thereof, and charge only that portion as to which, were it alleged as a distinct and separate offense in fact, the statute of limitations could not be interposed.

We concur in a prior opinion of this office (Letter, TJAG to Cong. Harry B. Hawes, 21 May 1924, file JAG 014.4). In that opinion the facts showed that a soldier had deserted in peacetime at some time prior to World War I. Inquiry was made as to whether the statute of limitations had entered into the matter. The opinion held:

> "The three year period in cases of peace time desertion begins to run on the date of the commission of the offense and continues to run until the date of arraignment, except that the running is suspended during the period of any absence from the jurisdiction of the United States and any period during which by reason of some manifest impediment the deserter was not amenable to military justice (Par. 149, Manual for Courts-Martial, 1921). Assuming that the man to whom your letter refers

deserted in time of peace seven or eight years ago, and assuming that the time since the commission of the offense leds the time if any during which the running of the statute has been suspended, equals or exceeds three years, he is not now subject to prosecution for desertion."

Consideration has been given to CM 199270, Andrews, 3 BR 343-346; Dig. Op. JAG 1912-40, Sec. 416(10) cited by the staff judge advocate as authority for the proposition that the intent to desert may arise at some time subsequent to the original absence, and as authority, therefore, for what was done here. The question in the Andrews case was whether or not the place of desertion was of the essence of the offense. The specification charged that the offense was committed at Fort McClellan, Alabama. There was no competent proof that Andrews deserted at Fort McClellan. In considering this lack of proof of the situs of the desertion the Board stated:

"As a matter of fact, it is usually impossible to determine or to prove the actual place where desertion became an accomplished fact."

* * * *

"* * * A soldier may, without leave, absent himself from his organization on a certain date with every intention of returning thereto at the expiration of a few days. Subsequent to so absenting himself and perhaps hundreds of miles away from his station, he may form the intent not to return. It is at the place he forms the intent that the desertion actually occurs, but it is obviously impossible to establish the fact." (emphasis supplied).

The Board held that in a normal case the failure to establish the place of the alleged desertion is not material. The question of fixing a date subsequent to the initial absence as being the time at which the accused might have acquired the intent not to return to the service was not before the Board in the Andrews case and was not considered. The case therefore is not authority on the question of the exact time when desertion occurs, much less for the proposition that the period of desertion starts only when and not until such intent is formed.

The Andrews case holds in connection with the materiality of the place of desertion that it is conceivable that in some unusual cases a material variance between the allegation and proof of place of desertion might be substantially prejudicial. In the present case the place of desertion is specified as 322 38th Street, Union City, New Jersey, which evidence for the prosecution showed to be Larry's Wonder Bar. As we have held, the intent to desert was formed at Fort Belvoir, Virginia on or about 6 September 1941. While we do not believe that it would be impossible to prove that an intent to desert could have come into existence as the time and place specified, we are of the opinion that all the

prosecution proved was that accused was civilly employed at that time and place. The evidence also shows that he was employed at other civilian establishments both before and after 15 March 1942. We are therefore of the opinion that the evidence for the prosecution does not prove that the intent to desert was first entertained at the time and place alleged. Moreover, as the authorities above quoted show the period of desertion begins with the initial unauthorized absence if either at that time or during that absence the intent is formed not to return to the service.

Statutes of limitations are designed to insure prompt prosecution and to insure that the memory of witnesses is reasonably fresh as to the facts involved. To sustain the case under consideration as legally sufficient would result in each and every peacetime deserter, regardless of the remoteness in time of the act of desertion, being subject to prosecution because his unauthorized absence extended into a wartime period. Such a situation would be intolerable and it is manifest that the Congress in enacting the 39th Article of War intended to bar such prosecutions. We are, therefore of the opinion that, more than three years having elapsed between the date of accused's desertion on or about 6 September 1941 and his arraignment on 2 July 1946, his trial was barred by the statute of limitations.

5. The charge sheet shows that accused is about 39 years of age and that he was inducted at Trenton, New Jersey, on 13 June 1941.

6. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to sustain the findings and the sentence.

Seymour W. Wenfil, Judge Advocate

N. Wayne Olive, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 315964 1st Ind

WD JAGO, Washington 25, D. C.

To: Commanding General, First Army, Governors Island, New York 4, New York.

1. In the case of Private Arthur D. Cohen, Jr. (32156286), Attached unassigned MP & PG Detachment, 1201st SCU, Fort Jay, New York, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the sentence be vacated.

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

(CM 315964).

1 Incl
Record of Trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 316037

12 DEC 1946

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| UNITED STATES | ) | ARMY AIR FORCES FLYING TRAINING COMMAND |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Las Vegas Army Air Field, Las Vegas, Nevada, 9 August 1946. Dismissal and fine of one hundred and fifty dollars ($150.00). |
| | ) | |
| Second Lieutenant OLIVER L. SLUSHER (0-2093403), Air Corps | ) | |

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OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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 Second Lieutenant Oliver L. Slusher, did at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 15 April 1946, wrongfully and unlawfully sell to R. E. Locke merchandise, property of the Las Vegas Army Air Field Post Restaurant, value of $102.89, in violation of paragraph 11L of Army Regulation 210-100.

Specification 2: In that Second Lieutenant Oliver L. Slusher, did at Las Vegas Army Air Field, Las Vegas, Nevada, on or about June 1, 1946, wrongfully and unlawfully permit Charles H. Bennett to sell to the Elks Club of Las Vegas, Nevada, merchandise, to wit: food, property of the Las Vegas Army Air Field, Post Restaurant, value of $140.00, in violation of paragraph 11L of Army Regulation 210-100.

Specification 3: In that Second Lieutenant Oliver L. Slusher, with intent to defraud the Las Vegas Army Air Field Post Restaurant, did at Las Vegas Army Air Field, Las Vegas, Nevada, on or about July 2, 1946, unlawfully pretend to Alfred F. Dailey, accountant and cashier of the Las Vegas

Army Air Field Post Restaurant that the Post Restaurant Fund owed an account of $34.20 for new automobile tires purchased to be used on the Post Restaurant vehicles, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Las Vegas Army Air Field Post Restaurant Fund $34.20 lawful money of the United States.

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

Specification 1: In that Second Lieutenant Oliver L. Slusher, did at Las Vegas Army Air Field, Las Vegas, Nevada, on or about May 1, 1946, feloniously embezzle by fraudulently converting to his own use three pair of trousers, approximate value of $9.75 each; three shirts, approximate value of $9.75 each; and one battle jacket, approximate value of $25.00; total approximate value of $83.50, property of the Las Vegas Army Air Field Post Restaurant, entrusted to him by the Las Vegas Army Air Field Post Restaurant Council.

Specification 2: In that Second Lieutenant Oliver L. Slusher, did at Las Vegas Army Air Field, Las Vegas, Nevada, on or about May 1, 1946, feloniously embezzle by fraudulently converting to his own use one Forty-Niner Bracelet, approximate value of $13.45; one Accro wrist watch, approximate value of $23.50; and one stainless steel expansion watch band, approximate value of $3.50; total approximate value of $40.45, property of the Las Vegas Army Air Field Post Restaurant, entrusted to him by the Las Vegas Army Air Field Post Restaurant Council.

He pleaded not guilty to, and except as indicated below, he was found guilty of, all Charges and Specifications thereunder. With respect to Specification 2 of Charge I, the accused was found guilty, except the words and figures "value of $140.00" substituting therefor the words and figures "value of $90.00", of the excepted words and figures not guilty, and of the substituted words, guilty. No evidence of any previous convictions was introduced. He was sentenced to pay to the United States a fine of one hundred and fifty dollars ($150.00) and 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. The evidence for the prosecution is summarized as follows:

The following facts pertinent to all Specifications and Charges

were stipulated:

The accused is a member of the armed forces and is subject to military law (R 6).

If Major John K. Swigart were present, he would testify that he was Director of Administration and Services at Las Vegas Army Air Field, Las Vegas, Nevada, from 15 February 1946 until 2 August 1946, and that he was during that period a member of the Civilian Post Restaurant Council. On or about 15 February 1946 the accused was appointed Post Restaurant Officer of the Las Vegas Army Air Field Post Restaurant. In this capacity the accused's duties were to operate the Post Restaurant in accordance with Army Regulation 210-100. At no time did the accused receive special authority to disregard Army Regulations 210-100 (R 6; Pros Ex 2).

Major Bruce W. Gillander, the Director of Supply and Maintenance, of the same air field testified that the accused was responsible for the property and funds of the Post Restaurant, and that the accused was not authorized to make any sales other than those permitted by existing regulations.

The evidence for the prosecution pertinent to each specification is summarized below:

Specification 1, Charge I: It was stipulated that if R. E. Locke of Bullhead, Arizona were present he would testify that he operates a restaurant in Bullhead, Arizona and that he was not employed by the United States Government on 15 April 1946.

On or about 15 April 1946, he purchased from the accused certain merchandise which was the property of the Las Vegas Army Air Field Post Restaurant, value of $102.89 consisting of the following: Vanilla Syrup, Crushed Strawberries, Blackberries, Westoo Chocolate Syrup, Crushed Fruit, Mustard, Catsup, Chili Beans, Pineapple Syrup, Hershey's Chocolate Syrup, Hamburger Papers and Paper Towels. Locke gave the accused a check for $103.00 (R 6; Pros Ex 1).

Specification 2, Charge I: Charles Bennett, a former employee of the Post Restaurant, testified that he was Chairman of the Food Committee of the Elks Club. He asked the accused for permission to prepare food at the Restaurant and to sell it to the Elks Club at a small profit to the Post Restaurant. This request was granted by the accused. The accused gave the witness written authority to take food off the post. On about six different occasions the witness prepared food at the Restaurant and delivered it to the Elks Club at a price of $15.00. A total of $90.00 was collected from the Elks Club.

Specification 3, Charge I: Mr. Alfred F. Dailey, bookkeeper at the Post Restaurant, testified that on or about 1 July 1946, he received

a telephone call from the Ray Dawson Service Station in Las Vegas inquiring as to where to send a bill for $33.00 for repairs on a Post Restaurant vehicle. Since a repair bill in that amount had already been paid through Charles Bennett, the witness made inquiry as to what the bill was for and questioned the accused concerning it. The accused stated that it was necessary for the Post Restaurant to buy new tires and since they were not readily available the tires were purchased on the black market. An invoice was prepared at the accused's suggestion in an odd amount, $34.20, and handed to the accused. Lieutenant Andrus approved the invoice for the accused and the accused received $34.20 from the bookkeeper for tires (R 11). The witness later examined the Post Restaurant vehicles and found that there were no new tires on either of them. The repair bill ($33.00) was actually paid on or about 5 July 1946 (R 12).

Lieutenant Andrus, Food Supervisor and Post Restaurant Officer, testified that the accused informed him that he had purchased two tires, which he could not get through legal channels, but had obtained them through the black market. The accused also stated that he paid out $34.20, and Lieutenant Andrus signed a voucher for it. The accused received $34.20 in cash. The cash voucher was introduced into evidence and marked Prosecution's Exhibit No. 3 (R 14). The witness examined the Post Restaurant vehicles shortly after this incident, and found that there were no new tires on either of the cars. The witness made further investigation in order to locate the new tires and discovered that they were on Lieutenant Slusher's personal car (R 15).

Specification 1, Charge II: First Lieutenant Anthony Majewski, Provost Marshal at the Las Vegas Army Air Field testified that the accused turned over to him three pairs of officer's wool tropical worsted trousers, size 31, which bore the accused's name on the inside of the front right-hand pocket (R 19, Pros Ex 4) and three tropical (wool) worsted shirts, size 15", sleeve length 33" (R 19-20, Pros Ex 5). The accused also handed to the witness an officer's tropical (wool) worsted battle jacket, size 40, (R 20, Pros Ex 6).

Dorothy B. Amaru, a former bookkeeper of the Las Vegas Army Air Field Post Restaurant, testified that prosecution exhibits 4 and 5 were trousers and shirts similar to those sold at the Post Exchange (R 24). However, the witness was not familiar with the markings or labels of uniforms sold by the Post Exchange for $9.75 each (R 25). Some uniforms similar to Prosecution Exhibits 4 and 5 came C.O.D. to the Post Office from the Luke Field Post Exchange. The witness made out a purchase order and gave the accused $52.50 for three pairs of trousers and three shirts (R 26). She did not see the items "until they came back from the post tailor." (R 25) The accused told the witness that the items were for resale at the Post Exchange (R 26); but on a later occasion he told her "to figure out a way to write them off the books" (R 24, 26).

With respect to the battle jacket (Pros Ex 6) the witness testified that the accused told her that the jacket was worth $22.50 (R 27).

First Lieutenant Majewski testified that he had been investigating the case and that he had all the Post Exchange employees and the accused brought to his office. At that time and place the witness' assistant, Lieutenant Gyulavics, members of the local police force, an Inspector Morrison and a representative of the FBI were present (R 18, 19). The witness read and explained the 24th Article of War to the accused (R 19). The accused then stated that he had received the uniform item described in Specification 1, Charge II, from the Luke Field Post Exchange and that he had them charged to the Post Exchange Restaurant Fund. He also stated that he did not reimburse the Post Restaurant Fund for these purchases (R 18). The above meeting took place on the date the accused was apprehended (R 22) (Apparently 12 July 1946 [R 49]). On cross examination, the witness admitted that someone present told accused, "We are trying to get a statement. We are not trying to get you, we are trying to get Mr. Bennett and if you come clean with us we will go easy with you" (R 22). The witness further stated that he gave the accused his personal advice that "the best thing for him to do was to come clean and it would go easier on him" (R 23).

Specification 2, Charge II: Lieutenant Majewski testified that at the time of the meeting mentioned above, the accused turned over to him a Ladies "Forty-Niner Expansion Bracelet" with a stainless steel back (R 20, Pros Ex 7) and a man's Accro wrist watch with a stainless steel expansion band (R 21, Pros Ex 8). With respect to Prosecution Exhibits 7 and 8, the witness testified that the accused told him that he had obtained them at the Post Exchange Sales Store and intended to pay for them, but that he actually did not pay for them (R 20, 21). Lieutenant Majewski's testimony with respect to the voluntary nature of accused's confession is identical to that summarized in the previous subparagraph.

Mrs. Rosa Lee Barrere, former employee of the Post Exchange, identified Prosecution Exhibit No. 8, as a watch which was carried in stock in the Post Exchange. The value of the watch was established at $23.50 and $3.50 for the bracelet. The accused had previously taken out a $49.50 watch, which he exchanged for the one identified as Prosecution's Exhibit No. 8. The accused stated that he would pay for it in the future, and the witness assumed that he would pay at the end of the month. She left the employ of the Post Exchange soon after the first day of the following month and the accused had not paid for any of the merchandise up to that time (R 28).

4. The evidence of the defense is summarized as follows:

The accused took the stand and was sworn for the limited purpose of testifying as to the circumstances of a confession made by the accused to Lieutenant Hughes, the Investigating Officer, which confession was excluded by the court. With respect to statements made to Lieutenant Majewski, the accused stated that Lieutenant Majewski read Article of War

24 to him and that he understood his rights thereunder. Mr. Morrison, an inspector of the local police, and an FBI agent were present. Mr. Morrison told the accused that the local police and the FBI had been after Charles Bennett for alleged illegal activities, and that anything accused might do to help in the prosecution of Bennett would be accepted, since they "didn't have anything" on accused. Lieutenant Majewski then said that accused "had better come clean and tell everything, or else". The accused stated that he understood the words "or else", to signify "That they would throw the book at me." The FBI Agent said that he had definite proof of Bennett's alleged illegal activity, and if accused would turn "states evidence", the FBI would help him "all they possibly could." (R 34-35)

On the following day, the accused appeared before Lieutenant Majewski and Lieutenant Hughes. The latter warned him properly of his rights under Article of War 24. The accused stated that he did not want to make a confession. Lieutenant Majewski, however, told him that he had made an "almost full confession yesterday in front of about six witnesses and you have to make a complete statement." On cross examination the accused stated that Lieutenant Hughes never promised him any leniency (R 35-36).

First Lieutenant W. F. Streit, the Classification and Assignment Officer of the Las Vegas Army Air Field, testified that he is the official custodian of accused's WD AGO Form 66-2. Accused's efficiency ratings appearing thereon are as follows:

| | |
|---|---|
| 20 May 1945 to 30 June 1945 | 4.3 (Excellent) |
| 1 July 1945 to 2 October 1945 | 4.1 (Excellent) |
| 3 October 1945 to 31 December 1945 | 5.4 (High Excellent) |
| 1 January 1946 to 14 February 1946 | 5.5 (Superior) (R 40-41). |

After his rights as a witness were explained to him, the accused elected to make an unsworn statement which is summarized as follows:

The accused stated that he had sold the merchandise described in Specification 1 to Mr. Locke, at a 25% or 30% mark up. The stock was greatly in excess of the needs of the restaurant and accused believed that they would have to be written off the books as wasted merchandise. In order to realize a little profit on these goods he decided to sell them. The check was written to the order of the Las Vegas Army Air Field Restaurant and was deposited to the Restaurant's account in the bank. Accused received no portion of the money (R 43).

The accused did not know Mr. Bennett was selling food to the Elks Club until two such transactions had been made. After it was brought to his attention, he approached Mr. Bennett and determined that such procedure was actually being followed (R 43). Bennett told accused that he was buying the food and making a normal profit. Bennett stated that the food was paid for before it left the Air Field (R 43-44).

In addition to his assignment as Post Restaurant Officer, the accused was Food Service Supervisor and Base Mess Officer.

With respect to the Specifications of Charge II, the accused testified that he actually bought clothes at the Post Exchange and the amount was approximately correct. He had honest intentions of paying for them when he took them. At no time did he ever have any other intentions. He didnot request the bookkepper to write them off the books. Prior to the time he took the watch from the Post Exchange, he had taken out a more expensive watch and returned the same on the day when he took out the watch in question. He told the clerk at the Post Exchange, that he would pay for the watch (R 44). He had no fraudulent intent whatever and fully intended to pay "all these transactions" (R 45).

5. Mr. Alfred F. Dailey, the bookkepper for the Post Restaurant, recalled as a witness for the court, testified that he knew nothing about the accused's purchases of uniforms through the Post Restaurant. He has received no payment for the uniforms, and he was not aware that the accused had the merchandise (R 47). Similarly the Post Restaurant books did not reflect any record pertaining to the watch, watch band or bracelet (R 47).

6. As noted above, the accused's confession made to Lieutenant Hughes, the investigating officer was excluded. On the question of the admissibility of the confession, the court was closed and upon being reopened, the law member announced that the court had voted by secret written ballot to exclude the confession (R 37). Although this was a matter for decision by the law member, and the court's procedure was irregular, it is assumed that the law member concurred in the decision of the court since he announced the court's decision and subsequently excluded all testimony with reference to accused's subsequent statements (R 39).

The record is not clear as to whether the accused's oral confession, made to Lieutenant Majewski, was excluded. However, when the accused took the stand for the limited purpose of testifying as to the voluntary nature of the confession, he testified to the promises made to him by representatives of the local police, the FBI and advice given him by Lieutenant Majewski at the time of the preliminary interrogation, concerning which Lieutenant Majewski had testified. The only irregular circumstance with respect to the confession made to Lieutenant Hughes was a statement by Lieutenant Majewski after the accused had been properly warned of his rights under Article of War 24, that the accused had made an almost full confession in front of about six witnesses and he now had to make a complete statement.

After the written confession was excluded, First Lieutenant Henry G. Steen, the Trial Judge Advocate, took the stand and attempted to

testify as to statements made to him by the accused subsequent to the execution of the written confession. In sustaining the objection by the defense, the law member ruled, "The confession, or anything with relation to the confession, will not be admitted." (R 39).

In our opinion it would have been proper for the law member to have excluded the statements made by the accused to Lieutenant Majewski (CM 152444, Dig Op JAG, 1912-40, Sec 395 /10/). Since most of the promises and implied threats which caused the court to exclude the written confession as being involuntarily made occurred during the preliminary interrogation when the statements to Lieutenant Majewski were made, we are of the opinion that it was the intention of the court and the law member to exclude the statements made to Lieutenant Majewski as well as the written confession (CM 292716, MacDonald, CM ETO 1486).

Accordingly, we have disregarded the oral confession in our consideration of the evidence.

7. Specifications 1 and 2 of Charge I aver that the accused wrongfully and unlawfully sold, or permitted others to sell, merchandise and food, the property of the Las Vegas Army Air Field Post Restaurant, to unauthorized purchasers, in violation of paragraph 11, 1, Army Regulations 210-100.

Paragraph 11, 1, AR 210-100, Post Restaurants and Nonappropriated Funds for Civilians, provides:

> "1. Sales-- Sales are authorized to be made to all military personnel, to civilian personnel employed or resident on the post, and to their guests and authorized visitors. All sales will be made for cash."

With respect to these specifications the uncontroverted evidence clearly shows that the accused sold merchandise to Mr. R. E. Locke, who was not a member of any class authorized to make purchases at the Post Restaurant, and that he permitted Charles H. Bennett to sell prepared food to the Elks Club on several occasions. Such sales were in clear violation of Army Regulations 210-100. Accordingly, the record is legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I.

8. Specification 3, Charge I, avers that the accused fraudulently obtained $34.20 from the Las Vegas Army Air Field Post Restaurant by means of false pretenses.

The evidence clearly shows that the accused represented to Mr. Alfred Dailey, that the Post Restaurant was indebted to the accused in the sum of $34.20 for tires which accused stated he purchased on the black market for a Post Restaurant vehicle. The accused executed a voucher for

the sum in question and received $34.20 in cash from Mr. Dailey. Subsequent examination of the Post Restaurant vehicles showed that no new tires had been placed on these vehicles. New tires were, however, found on accused's private car.

In our opinion the finding of guilty of this specification is amply supported by the evidence.

9. Specification 1, Charge II, avers that the accused embezzled three pairs of trousers, approximate value $9.75 each; three shirts, approximate value $9.75 each; and one battle jacket, approximate value of $25.00; total approximate value of $83.50, property of the Las Vegas Army Air Field Post Restaurant, entrusted to him by the Post Restaurant Council.

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U. S. 268)
>
> The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship." (MCM 1928, par 149 h, pp 173-174)

The elements of proof as discussed in the Manual for Courts-Martial 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." (MCM 1928, 149h, P 174).

The evidence shows that the accused ordered 3 uniform shirts and 3 pairs of trousers from the Luke Field Post Exchange. These articles were delivered C.O.D. to the Post Office at the Las Vegas Army Air Base. The accused told the Post Restaurant Bookkeeper that the articles were intended for resale and she thereupon made out a purchase order and gave the accused $52.50 to pay for the articles. Subsequently, the accused told the bookkeeper to "figure out a way to write them off the book." In his unsworn statement the accused admitted that he purchased the clothing but stated that he had honest intentions of paying for them when he took them.

The accused was Post Restaurant Officer in charge of a Post Restaurant organized under the provisions of Army Regulations 210-100. Such restaurants are operated for the benefit of civilian employees of the War Department. Under the provisions of par 10c, AR 210-100, "A post restaurant may consist of any or all of the following facilities, consistent with the needs of a particular installation:

(1) Cafeteria or restaurant.

(2) Snack bars or sales stores for the sale of soft drinks, light lunches, tobacco products, confections, and other essential articles or services.

(3) Vending machines for the sale of soft drinks, light lunches, tobacco products, confections, and other essential articles or services."

Although it does not appear that the sale of military uniforms is properly within the scope of a Post Restaurant, nevertheless, it appears that the accused, because of his official capacity as Post Restaurant Officer, caused the post restaurant to acquire title to 3 shirts and 3 pairs of trousers, and that he thereupon converted the property to his own use. His fraudulent intent was clearly demonstrated by his request that the bookkeeper "figure out a way to write them off the books", and by his failure to pay for the articles when he took them in view of the provisions of par 11, 1, AR 210-100, that all sales will be made for cash.

No competent evidence was introduced to show that the accused had embezzled the battle jacket as alleged. With respect to the battle jacket, the only evidence adduced by the prosecution was that the accused had stated that the article was worth $22.50 and that he delivered the jacket to Lieutenant Majewski at the time of the preliminary investigation.

With respect to the value of the trousers and shirts, the Post Restaurant bookkeeper testified that the Post Exchange sold similar articles for $9.75 each or a total value of $58.50. However, the C.O.D. price of the articles, which were obtained from the Luke Field Post Exchange, was $52.50.

Accordingly, we are of the opinion that the record is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge III, as involves the embezzlement of 3 pairs of trousers and 3 shirts of a total value of $52.50

10. Specification 2, Charge II, avers that the accused embezzled 1 bracelet, 1 watch and 1 watchband, property of the Las Vegas Army Air Field Post Restaurant, entrusted to the accused by the Post Restaurant Council.

Although the articles are alleged to be the property of the Post Restaurant, the evidence shows that the accused obtained the articles alleged therein from Mrs. Rosa Lee Barrere, an employee of the Post Exchange. At the time the accused took the articles from the Post Exchange Sales Store, he stated that he would pay for them later. The witness left the employ of the Post Exchange after the first day of the following month. Up to the time witness left the employ of the Post Exchange the accused had not paid for these articles. The accused admitted making the purchase and stated that he intended to pay for the articles. The post restaurant bookkeeper testified that the Post Restaurant books did not reflect any record pertaining to the watch or bracelet.

The record does not show what, if any, official relation the accused had with the Post Exchange. He testified that, in addition to his duties as Post Restaurant Officer, he was Food Service Supervisor and Base Mess Officer. Although a restaurant may be operated by a Post Exchange (par. 10, AR 210-65), a Post Restaurant organized under the provisions of AR 210-100 is entirely independent of the Post Exchange and is operated under the direction of the Post Restaurant Council not the Post Exchange Council.

Since the record does not show that the specified articles were the property of the Post Restaurant or that they were intrusted to the accused by the Post Restaurant Council, we are of the opinion that the prosecution has failed to prove the offense alleged. In the absence of any evidence that the accused occupied a fiduciary relationship with respect to the Post Exchange, or that the Post Restaurant had some interest in these articles, the finding of guilty of embezzlement as alleged is not supported by the record (CM 185882, Shawley).

There remains for consideration whether the evidence supports a finding that the accused is guilty of the lesser included offense of wrongful conversion or appropriation.

In CM 201485, Darr, first indorsement (5 BR 150), The Judge Advocate General stated:

> "It is a firmly established principle, of course, that if one is charged with stealing or embezzling the property of A and the proof is that the property belonged to B, with no evidence that A had any interest in it, the variance is fatal and a conviction cannot stand. The same principle would unquestionably apply to a case of wrongful misappropriation * * *."

In our opinion the evidence establishes no more than that the accused purchased the articles from the Post Exchange and failed to pay for them. 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 Specification 2, Charge II, nor of any lesser included offense.

11. War Department records show that the accused is 23 years of age. He is a high school graduate and attended a business college for 6 months, obtaining a certificate of proficiency in bookkeeping. He has been twice married, and was divorced from his first wife on 28 November 1945. He has a son 18 months of age by his first wife and contributes $50 per month to the support of the child. The accused entered the military service as a private on 8 August 1943. He took flight training and was commissioned a second lieutenant, Army of the United States, on 1 February 1945, as a rated pilot. The accused's efficiency ratings as a pilot were "Excellent" and as a Unit Mess Officer and Food Service Supervisor his efficiency rating was "Superior".

12. 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 findings of guilty of Charge I and the Specifications thereof, and of Charge II, but legally sufficient to support only so much of the finding of guilty of Specification 1, Charge II, as involves a finding that the accused did, at the time and place alleged, feloniously embezzle, by fraudulently converting to his own use, three pairs of trousers and three shirts, of the ownership alleged and of a total value of $52.50, entrusted to him by the Las Vagas Army Air Field Post Restaurant Council, and legally insufficient to support the finding of guilty of Specification 2, Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence to dismissal and to pay a fine is authorized upon a conviction of violations of Articles of War 93 and 96.

R. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

James J. Lanagan, Judge Advocate

JAGH - CM 316037 1st Ind

WD, JAGO, Washington 25, D. C. JAN 1947

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 Second Lieutenant Oliver L. Slusher (0-2093403), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully selling merchandise and food, the property of the Las Vegas Army Air Field Post Restaurant to unauthorized civilians in violation of Army Regulation 210-100 (Chg I, Specs 1 & 2), guilty of fraudulently obtaining $34.20 by means of false pretenses (Chg I, Spec 3) all in violation of Article of War 96; and guilty of embezzling clothing, a watch and a bracelet in violation of Article of War 93 (Chg II, Specs 1 & 2). No evidence of previous convictions was introduced. He was sentenced to dismissal and to pay to the United States a fine of $150.00. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II; legally sufficient to support only so much of the finding of guilty of Specification 1, Charge II, as involves a finding that the accused did, at the time and place alleged, feloniously embezzle by fraudulently converting to his own use, three pairs of trousers and three shirts of the ownership alleged and of a total value of $52.50, entrusted to him by the Las Vegas Army Air Field Post Restaurant Council; legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II; legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused was Post Restaurant Officer of the Las Vegas Army Air Field. On 15 April 1946, the accused without authorization sold property of the Post Restaurant to Mr. R. E. Locke of Bullhead, Arizona, for $102.89. Payment was made by check which was deposited to the credit of the restaurant fund. The accused had knowledge of, and condoned, the sale of prepared food to the Elks Club in Las Vegas by Charles Bennett, an employee of the Post Restaurant. It was represented by Bennett that the food was sold at a normal profit to the Restaurant and that payment was made therefor.

The accused received $34.20 from the Post Restaurant fund as reimbursement for two tires purchased, as he stated to the bookkeeper, for the vehicles belonging to the restaurant. The tires, however, were used by the accused on his own automobile.

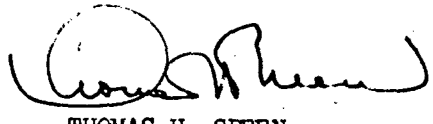
The accused ordered three uniform shirts and three pairs of trousers from the Post Exchange of another Army Air Field. These items arrived C.O.D. and accused obtained $52.50 from the post restaurant with which to pay the C.O.D. charges and stated that the uniforms were obtained for resale by the post restaurant. However, he appropriated them to his own use and later suggested to the bookkeeper that some method be found to write the articles off the books.

Accused purchased a wrist watch, steel watch band and a ladies expansion bracelet from the Post Exchange, promising to pay for them at a later date. However, he failed to make such payment. It was alleged that the watch, band and bracelet were the property of the post restaurant and that they were entrusted to the accused by the post restaurant council, but the proof showed these articles to be the property of the Post Exchange. Since no evidence appears in the record to show any fiduciary relationship between the accused and the Post Exchange, nor that the Post Restaurant had any interest in the articles, there is a complete failure of proof with respect to the offense alleged in Specification 2, Charge II, and any lesser included offense thereof.

4. I recommend that the finding of guilty of Specification 2, Charge II, be disapproved, and that only so much of the finding of guilty of Specification 1, Charge II, as involves a finding that the accused did, at the time and place alleged, feloniously embezzle by fraudulently converting to his own use, three pairs of trousers and three shirts of the ownership alleged, and of a total value of $52.50, entrusted to him by the Las Vegas Army Air Field Post Restaurant Council, be approved, that the sentence be confirmed, but that the fine be remitted. As thus modified, I recommend that the sentence be carried into execution.

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

CM 316037



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

THOMAS H. GREEN
Major General
The Judge Advocate General

( G.C.M.O. 9, 15 January 1947.)

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

JAGN-CM 316052

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| U N I T E D S T A T E S<br><br>v.<br><br>Private WAYLAND C. ELMORE (46051620), Reception Center Detachment, 1852nd Service Command Unit, Reception Center, War Department Personnel Center, Fort Bliss, Texas. | ) | ANTIAIRCRAFT ARTILLERY SCHOOL<br><br>Trial by G.C.M., convened at Fort Bliss, Texas, 18 July 1946. Dishonorable discharge and confinement for ten (10) years. Federal Reformatory. |

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HOLDING by the BOARD OF REVIEW
WHITE, McMILLAN and JOHNSON, Judge Advocates

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

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

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

Specification: In that Private Wayland C. Elmore, Reception Center Detachment, 1852d Service Command Unit, Reception Center, War Department Personnel Center, Fort Bliss, Texas, did, without proper leave, absent himself from his station at Fort Bliss, Texas, from about 5 January 1946 to about 29 January 1946.

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

Specification 1: In that * * *, in conjunction with Private Dann A. Lyon, Reception Center Detachment, 1852d Service Command Unit, Reception Center, War Department Personnel Center, Fort Bliss, Texas, did, at Fort Bliss, Texas on or about 9 January 1946, unlawfully enter the building of Post Exchange Number 16 with intent to commit a criminal offense, to wit, larceny, therein.

Specification 2: In that * * *, in conjunction with Private Dann A. Lyon, Reception Center Detachment, 1852d Service Command Unit, Reception Center, War Department Personnel Center, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 9 January 1946, feloniously take, steal and carry away sixteen (16) Helios Stainless Steel Wrist Watches, value about $24.00 each, and seventeen (17) Regent Gold-Plated Wrist Watches, value about $52,00 each, all of a total value of about $1,268.00, property of Fort Bliss Exchange, Fort Bliss, Texas.

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

Specification: In that * * *, having been duly placed in confinement in Post Stockade, Fort Bliss, Texas, on or about 29 January 1946, did, at Fort Bliss, Texas on or about 17 March 1946, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded "not guilty by reason of insanity" to all Charges and Specifications, was found guilty of all Charges and Specifications and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge II as involves a finding of

> "guilty of larceny of four (4) Regent gold-plated wrist watches, value $52.00 each, and two (2) Helios stainless-steel wrist watches, value $24.00 each, all of a total value in excess of $50.00, property of the Fort Bliss Post Exchange, Fort Bliss, Texas, at the time and place alleged,"

approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, and of Charge III and its Specification, and legally sufficient to support the sentence as approved by the reviewing authority. The only question requiring consideration here is whether or not the record of trial is legally sufficient to sustain the findings of guilty as to Charge II and its Specifications 1 and 2 as approved by the reviewing authority. Only the evidence relating to the offense alleged under the Specifications of Charge II will be hereinafter summarized.

4. The prosecution introduced evidence to show that the Fort Bliss Post Exchange No. 16 was left in an orderly condition when

closed and locked at 2030 8 January 1946, and that no one was authorized admission from that time until it was opened in the regular course of business the following morning (R. 11; Pros. Ex. E). Major Lawrence E. Jenkins, Fort Bliss Post Exchange Officer, testified:

> "* * * I was down at the Post Exchange 16 about eight o'clock in the morning * * * of the 9th of January (1946). * * * I walked in and the employees were standing around; nothing had been touched in the office; there were, I would say, between fifteen and twenty boxes that had contained wrist watches scattered on the floor; behind one of the counters we found Schick ejector blades in a case which had been ejected from the case and spilled over the floor; two beer bottles were partially consumed and left standing in the middle of the floor; there had been evidence that the entire place had been pilfered during the preceding night. * * * One square about four inches by three inches had been cut out of the door, from the upper panel of the door"; which was "provided with a long bar that extended from one door jamb to the other; the door opened inwardly and could not be pushed open." (R. 32; see also Pros. Ex. I).

He further testified that Post Exchange 16 stocked "Regent" and "Helios" wrist watches during the period 8-9 January 1946 (R. 34-35). The value of "Regent" and "Helios" wrist watches was fixed at $52.00 and $24.00, respectively, by stipulation (Pros. Ex. H).

On the night of 9 January 1946 accused approached Private Dann A. Lyon at Fort Bliss. He had with him "a sack with watches in it" which he informed Lyon he "had found * * * down by Paul's Cafe." Accused then had in his possession thirty "Regent" and "Helios" wrist watches. Between 9 and 14 January 1946 accused, in conjunction with Lyon, both using assumed names, pawned twenty-nine of these watches in loan shops in El Paso and San Antonio, Texas, and abandoned the remaining one in a hotel room because it was broken (R. 51-57, 42-47; Pros. Exs. J-O).

Captain Leslie S. Freeman, Neuropsychiatrist, William Beaumont General Hospital, testified in substance that he had thoroughly examined the accused and that in his professional opinion accused, both at the time of the alleged commission of the offense and at the time of trial, knew the difference between right and wrong and was mentally competent (R. 15-22; Pros. Ex. F).

5. The accused, after having his rights explained, was sworn as a witness, and testified only:

> "All I have to say, sir, and I would like to have it put in the record so when it goes before the reviewing authority,

that I am physically unfit and I do not wish to soldier out of a Rehabilitation Center and I am physically unfit to be restored to duy. That is all, sir."

The defense presented no other evidence.

6. The evidence establishes an illegal entry by some person or persons into Post Exchange 16 on the night of 8-9 January 1946, and that this exchange then stocked an undetermined number of unidentified (except by trade name) "Regent" and "Helios" wrist watches. It further establishes that on the night of 9 January 1946 accused possessed thirty "Regent" and "Helios" wrist watches which, with the help of another person and using an assumed name, he shortly thereafter pawned. All of the evidence is circumstantial in character (see CM 260781, Menschner, 50 BR 9-11). Construed most strongly against the accused and basing inference on inference, its cumulative effect might be said to reasonably support a conjecture or suspicion that the crimes of housebreaking and larceny were committed as alleged in Charge II; but this is not enough to legally support the findings of the court.

The rule of law governing the Board of Review in such cases was clearly and concisely set out in CM 212505, Tipton, 10 BR 244, as follows:

> "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference (citing numerous cases)."

Tested in the light of the rule thus laid down the Board is of the opinion that there is not sufficient substantial evidence in this case to support the inferences necessary to prove the corpus delicti respecting the alleged larceny (MCM, 1928, par. 149g) or to link the accused with the alleged housebreaking (MCM, 1928, par. 149e).

7. At the time of the commission of the offense set out in the Specification of Charge I the maximum punishment prescribed by MCM, 1928, par. 104c, was suspended; such table authorizes, as a maximum penalty for escape from confinement, as set out in the Specification of Charge III, dishonorable discharge, total forfeitures, and confinement at hard labor for a period not to exceed one year.

8. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge II, and of Charge II, but legally sufficient to support the findings of guilty of all other Specifications and Charges, and to support a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of ten years in a place other than a penitentiary, federal reformatory, or correctional institution.

Thomas J. White, Judge Advocate.

Robert E. McMillan, Judge Advocate.

Edwin [illegible], Judge Advocate.

JAGN-CM 316052 1st Ind
WD, JAGO, Washington, D. C.
TO: Commandant, Antiaircraft Artillery School, Fort Bliss, Texas.

1. In the case of Private Wayland C. Elmore (46051620), Reception center Detachment, 1852nd Service Command Unit, Reception Center, War Department Personnel Center, Fort Bliss, Texas, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that the findings of guilty of Charge II and Specifications 1 and 2 thereunder be disapproved, and that a place other than a penitentiary be designated as the place of confinement. Upon disapproval of the findings of guilty of Charge II and Specifications 1 and 2 thereunder, and upon designation of a place of confinement other than a penitentiary, Federal reformatory, or correctional institution, you will have authority to order the execution of the sentence.

2. In view of all the circumstances and the nature of the offenses of which accused was legally found guilty, and in order that the sentence may be brought within the standards of the post war clemency program, it is recommended that the period of confinement be reduced to five years.

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

(CM 316052).

1 Incl.
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 316053

JAN 1947

| | | |
|---|---|---|
| UNITED STATES | ) | CONTINENTAL BASE SECTION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Bremerhaven, Germany, 24 May 1946. To be hanged by the neck until dead. |
| | ) | |
| Private JOHN H. WILLIAMS (34541145), 1st Rifle Company (Provisional) 311th Infantry | ) | |

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, Judge Advocates

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

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

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

Specification: In that Private John H. Williams, 1st Rifle Co (Provisional) 311th Infantry did at or near Camp Schwanewede, Germany, on or about 4 February 1946, with malice aforethought, willfully, deliberately, unlawfully, and with premeditation kill one Fritz Sommer, Strohe No. 5 Kreis Osterholz (German Civilian), a human being by shooting him with a pistol.

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

Specification: In that Private John H. Williams, 1st Rifle Company (Provisional) 311th Infantry, did at or near Camp Schwanewede, Germany, on or about 4 February 1946, knowingly and willfully apply to his own use and benefit one truck 2½ ton GMC 6x6 of the value of about $2859.00, property of the United States, furnished and intended for the miliary service thereof.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Fritz Sommer, a German civilian was employed as a driver by the 3418 Quartermaster Truck Company, which was stationed at Schwanewede, Germany (R 6). On 4 February 1946 at about 7:30 a.m., Sommer left the company area in a 2½ ton truck, with a steel enclosed cab and an open body, bearing War Department registration number 494613 (R 7). At this time the company had only a limited number of the closed cab type truck - about six (R 7). His instructions were to report with his truck to a hospital in Bremen. Sommer did not return to the company that evening with the truck, as was usual when he was dispatched on a daily mission of this sort.

On 7 February 1946, Captain Bennie Armstrong, the Commanding Officer of the 3418 Quartermaster Truck Company, acting upon a report from one of his civilian drivers, proceeded to a field about three-quarters of a mile from Schwanewede where, at a spot about 100 yards off the main road, he found the body of Fritz Sommer (R 8). Captain Armstrong had known Sommer for about four months (R 8).

The prosecution, defense and accused stipulated that if Doctor Berthold Mueller, of Bremen were present in court he would testify as follows:

> "1. That on 9 February 1946 he performed an autopsy on the body of Fritz Sommer.
>
> "2. That the death of said Fritz Sommer on or about 4 February 1946 was the direct and proximate result of a shot entering his head on the right side thereof 7 cm behind the right upper edge of the ear and leaving the head on the left side 3 cm in front of the left upper edge of the ear.
>
> "3. That the bullet had passed thru the skull and could not be found.
>
> "4. That there were no typical signs present indicating that the shot was fired from a very short distance. Because of the absence of powder burns it is evident that the shot was fired from a distance of at least 20 cms" (R 8; Pros Ex A).

The accused, a member of the 3418 Quartermaster Truck Company, had lived in Schwanewede with Fritzi Lorenz, an Austrian widow for about

seven months (R 13). On or about 2 February 1946, the accused, with other members of his unit, was transferred from Schwanewede to Brake, Germany (R 9). On the afternoon of 4 February 1946, the accused returned to Schwanewede and met Fritzi Lorenz at her home (R 14). He told her of his unit's moving to Brake and explained that she could not go with him. She then cried and begged to go. She testified that the accused said (R 14): "Now, Fritzi, I can't take you." "I don't can take you down to Brake." Fritzi then stated that if she could not go to Brake with the accused she would leave him (R 14). She testified that the accused then replied (R 14): "I go out and see what I can do." "Get some stuff in the bags." The accused then left her house and returned at about 5:00 or 5:30 p.m. with a truck. Her luggage was placed in the truck and they drove to Brake (R 14). About 7:00 or 8:00 p.m. that night Second Lieutenant Jack E. Glassburn while crossing the Weser River on a ferry saw a Quartermaster truck with a steel enclosed cab, open top and white tail gate with the markings painted over aboard the ferry. The accused and Fritzi Lorenz were riding in the cab of the truck (R 16). The ferry was proceeding toward Brake, which was located on the west side of the river (R 38).

Private Johnnie Greenwood, a member of accused's organization, testified that on 3 February 1946 he borrowed $50.00 from the accused, in order to get his pistol out of "hock." He consented to let the accused keep it until the loan was repaid (R 9). The pistol was a German Luger, serial number 7341 and fully loaded at the time Greenwood turned it over to the accused (R 10; Pros Ex B). On the afternoon of 5 February, when Greenwood returned the $50.00 which he had borrowed from the accused and in return requested his pistol, the latter said:

> "Just as I begin to need it here you come." "Let me keep it long enough to put my notch on it." (R 10).

The accused then added:

> "I done bumped off a guy." (R 10).

After the accused had been apprehended, Fritzi Lorenz visited him and he told her "he killed the man" and that he had done it for her (R 15).

A stipulation was entered into between the prosecution and the defense, with the accused consenting, that the value of a 2½ ton GMC 6x6 truck is $2,895.00.

After having been duly warned of his rights by the investigating officer the accused made and signed the following sworn statement, which was introduced into evidence over objection by the defense:

"I am American citizen 21 years of age and I became a member of the American Army 23 of January 1943.
I went to Camp Schwanewede on or about the 3 of February for my laundry and while I was down there I went to my girl-friends house to see her and she told me she wanted to come back with me, and I told her I would see what I could do. I left to go to the Company and then made up my mind to get a truck to carry her back to Brake to the Camp. Then I found a German Man and asked him to bring me to Brake to the Camp and he said 'No'. I asked him again and he said 'No' so then I offered him some cigarettes and he again said 'no'.

"I then asked him to come with me because my jeep was 'kaput'. He went with me across the field. I then shot him in the head and left him lying in the field. Then I went to the truck and drove to the Camp, where I picked up my girl and brought her to Brake with me and I then abandoned the truck. The gun I shot the man with was Johnny Greenwood's. He gave it to me for $50, so that he could get it from the other man before leaving Camp.
"I have read the foregoing statement aloud in the presence of witnesses, and the foregoing statement has been read aloud to me in the presence of witnesses. I know the meaning of an oath, and know that it is a crime to swear to a false statement. I do swear each and every part of this statement to be the truth to the best of my knowledge and belief" (Pros Ex C).

4. The accused after having been duly warned of his rights as a witness elected to remain silent.

5. The accused was sworn as a witness for the limited purpose of testifying as to the involuntary nature of the statement (R 22).

The accused testified that Mr. Robert R. Taylor, an Army Criminal Investigation Agent visited him at the Camp Brake Stockade and asked whether he knew anything about a murder (R 23). The accused denied any knowledge of a murder and refused to make a statement. Agent Taylor then told the accused that he and his girl would hang (R 23). The agent added that it would be good for the accused to tell the truth because there was enough evidence against the accused to hang both of them. The agent left the room for about fifteen minutes and when he came back he said to the accused that there was no use lying because he (the agent) knew that the accused had committed the murder; that the accused was going to hang as there were enough witnesses against him. At this point the accused wrote out a statement but the agent at no time warned him that he could remain silent and refuse to make a statement (R 24). The agent took the statement and said he was going to headquarters and would be back later, at which time the accused could sign it. Some time later the accused signed the statement (R 24). On cross-examination the accused identified his signature on the

statement (Pros Ex C). However, the accused stated that he did not recall signing it before Captain Rowan, the investigating officer (R 25). The statement the accused signed had Agent Taylor's name on it. The accused recalled having seen Captain Rowan reading the statement and after reading it himself he signed it (R 26). He saw Captain Rowan two weeks after the CID agent called at the stockade but was still afraid he was going to be hanged (R 26).

The only threat that was made to him was by Agent Taylor who said he would be hanged if he didn't make a statement (R 27). In redirect examination the accused stated that the first time the 24th Article of War was read to him was at Agent Taylor's headquarters. On that ocassion the 24th Article of War was read by a first lieutenant who was "way over six feet, and looked like weight 200 or more" (R 27). The accused was afraid (R 27). He signed the second statement (Pros Ex C) because he was afraid they would bring Agent Taylor to the place where the statement was signed. His mental attitude was the same when he signed the second statement as when he signed the first one for Agent Taylor (R 27). Upon being questioned by the court the accused denied ever having signed any statement in the presence of the investigating officer (R 28). When the statement (Pros Ex C) was signed, Agent Taylor, Fritzi Lorenz and a lieutenant were present.

Agent Taylor testified that he talked to the accused on 2, 6, 7 and 8 March (R 30). Before having any conversation with the accused on 2 March Lieutenant Evans and Agent Taylor both read the 24th Article of War to him (R 31). This conversation took place at the Company Barracks at Brake when the agent questioned the accused about a vehicle he had driven (R 31). The accused at this time made a written statement (R 31). The next time the agent saw the accused was on the 6th of March. This meeting took place in the home of Fritzi Lorenz in Brake (R 31). The agent then took the accused to the guard house in Brake where he made another statement (R 32). Before making the statement the accused was warned of his rights by Agent Taylor, Lieutenant Evans and Lieutenant Black. Nothing was said to the accused about being hanged (R 32). That evening the accused was taken from Brake to Bremen and turned over to the Military Police. On the afternoon of the 7th of March the accused was taken by Agent Taylor to the Headquarters of the Criminal Investigation Division and Mr. Duddy, the Chief Agent of the Criminal Investigation Division read the 24th Article of War to the accused. No threats were made to the accused and at that time he signed his third statement in the presence of Agent Taylor (R 32). The statement introduced into evidence (Pros Ex C) was not the statement signed by the accused as Agent Taylor had witnessed the third statement (R 33). At no time during the interrogations of the accused did he state that he did not wish to make a statement (R 33). The accused did not appear to be afraid at any time and in fact while en route from Brake to Bremen the accused suggested that he would like to make a more complete statement

(R 33). On cross-examination Agent Taylor testified that the statement received in evidence (Pros Ex C) was a duplicate of the second statement given by the accused. The original of the second statement was written by the accused in the guard house at Brake Barracks (R 34). He signed it in the presence of four officers and two enlisted men. Before the statement was signed Lieutenant Glassburn said "Williams do you understand what you are signing?" and the accused said "Yes" (R 35). Before the accused affixed his signature Lieutenant Evans again warned accused of his rights.

Captain John B. Rowan, Jr., the investigating officer identified the accused and stated that he interviewed the accused on 26 March 1946. Captain Rowan said he copied a statement which he had obtained from the Criminal Investigation Division. The 24th Article of War was read to the accused after which the statement was handed to the accused to read. After reading the statement the accused signed his name and Captain Rowan thereupon affixed his signature (R 18). On cross-examination Captain Rowan admitted that the statement was handed to the accused in typewritten form, and that he did not know how the original statement (CID Statement) was taken from the accused. No promises or threats were made to the accused nor did the accused make an objection or take exception to any part of the statement (R 19).

The defense counsel in arguing as to the involuntary nature of the confession stated that when an original statement is involuntary a subsequent statement which is a duplicate of the first one is also involuntary even though the accused may have been warned of his rights at the time the second statement was taken. Although the proposition stated by the defense is supported by authorities, it is not applicable if the first confession is shown to be voluntary.

Agent Taylor first approached the accused on 2 March 1946, twenty-six days after the murder, and questioned him about driving a certain vehicle (R 30). Not only did Agent Taylor warn him of his rights but Lieutenant Evans, the accused's company commander, also warned him. This meeting took place in the company barracks and after being twice warned of his rights the accused signed a statement. The second statement which is the one the defense claimed was involuntary, was taken in the guard house at Brake on 5 March (R 31). Again the accused was warned of his rights by Agent Taylor, Lieutenant Black and Lieutenant Evans. After the warning the accused wrote out the statement and signed it in the presence of Agent Taylor, Lieutenants Evans, Black and Glassburn and two enlisted men who were guarding the accused. This statement is the same statement that the investigating officer had typewritten and which was introduced into evidence as Prosecution's Exhibit C. The story told by the accused on the witness stand that Agent Taylor said both his girl and the accused would hang if he did not make a statement is not borne out by the facts. The accused had signed a statement three days before and though he testified that he had been threatened by Agent

Taylor at that time, he made no mention of the threats at any time subsequent thereto; in fact when being questioned in the presence of six other persons he personally wrote out a complete confession. Again two weeks later while being interrogated by the investigating officer the accused not only made no mention of the threat of being hanged but proceeded to sign a duplicate copy of the second statement. The investigating officer asked the accused whether the statement that he had just signed was correct and the accused answered in the affirmative (R 20).

Accordingly, the Board of Review is of the opinion that the evidence establishes that the confession was voluntarily made and properly admitted into evidence.

6. Paragraph 148, Manual for Courts-Martial defines murder as:

" * * * the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. The death must take place within a year and a day of the act or omission that caused it, and the offense is committed at the place of such act or omission although the victim may have died elsewhere.

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

"Malice aforethought may exist when the act is unpremeditated. It may mean anyone or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except where death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probaly cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit a felony.

"Proof: (a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received

by him; that such injury was the result of the act of the accused; and that death took place within a year and a day of such act); (b) that such killing was with malice aforethought" (Underscoring supplied).

The testimony of Fritzi Lorenz not only establishes accused's presence in the vicinity of where the crime was committed but also shows that on 4 February he left Fritzi's home and shortly thereafter returned with a truck. While in jail the accused told Fritzi he had killed a man and then added "I done that for you." The testimony of Private Johnnie Greenwood shows that on 3 February he had given the accused a fully loaded German Luger pistol as security for a $50.00 loan and that when the accused returned the pistol on 5 February, he remarked "Let me keep it long enough to put my notch on it" and "I done bumped off a guy". Captain Bennie Armstrong of the 3418 Quartermaster Truck Company, testified that Fritz Sommer, a German civilian driver whom he had known for four months, left the camp at 0730 on 4 February in a GMC 2½ ton 6x6 truck with a steel enclosed cab and open body, on a regular commitment as driver. The truck was not returned to camp by Sommer. On 7 February Captain Armstrong identified Sommer's body which was lying in a field about 100 yards off a main road and three-quarters of a mile from the camp. Lieutenant Jack E. Glassburn saw the accused and Fritzi Lorenz seated in the cab of a truck which was then on a ferry crossing the Weser River, sometime between 7:00 and 8:00 p.m. on the "4th or 5th" of February. Lieutenant Glassburn identified the truck as a Quartermaster truck, with white tail gate, steel enclosed cab and open body.

A stipulation was properly received in evidence that if Doctor Mueller of Bremen were present in court, he would testify that on 9 February 1946 he performed an autopsy on the body of Fritz Sommer, that Fritz Sommer died on or about 4 February 1946, as a direct and proximate result of a shot through the head and that because of the absence of powder burns it was evident that the shot was fired from a distance of at least twenty centimeters from the deceased.

In his confession, the accused stated that he enticed Sommer into a field on the pretext of having Sommer help him with a jeep that was "kaput". There is nothing to indicate that the shooting was accidental or done in self-defense. The testimony raises an inescapable inference that Sommer was shot by the accused and that he took the truck and transported Fritzi Lorenz and their personal belongings to the accused's new camp at Brake.

Although there was no eyewitness to the crime, we are of the opinion that each element of the offense charged was established beyond a reasonable doubt.

The Specification of Charge II alleges that on or about 4 February 1946 the accused misappropriated a 2½ ton GMC 6x6 truck, property of the United States.

Misappropriation means devoting to an unauthorized purpose (MCM, 1928, par 150i, p 184).

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 act 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).

The evidence shows beyond a reasonable doubt that the accused was in possession of the Army truck which had been assigned to Fritz Sommer on the day alleged; that such property was furnished and intended for the military service, and that the accused wrongfully used the truck for his own purposes. It was stipulated by and between the prosecution and the defense, with the accused consenting, that the value of the 2½ ton GMC 6x6 truck was two thousand eight hundred and fifty nine ($2859) dollars.

Accordingly we are of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Specification of Charge II.

7. The accused is 22 years of age, evidently unmarried, and left school before completing the eighth grade. In an interview with the Staff Judge Advocate immediately after the trial the accused stated that he landed at Omaha Beach on D plus 13 and is entitled to wear four combat stars.

8. The Board of Review has given consideration to a communication from Representative Clare Boothe Luce dated 14 September 1946, a letter from the accused to Senator Robert F. Wagner dated 16 September 1946, which was referred to the Office of the Chief of Staff, and a communication from Senator Homer Ferguson dated 18 November 1946.

9. The court was legally constituted and had jurisdiction of the accused and the offenses charged. 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 and the sentence and to warrant confirmation of the sentence. A sentence of either death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

J. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 316053 1st Ind

WD, JAGO, Washington 25, D. C. JAN

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 John H. Williams (34541145), 1st Rifle Company (Provisional) 311th 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.

3. To obtain a motor vehicle accused murdered a German civilian truck driver employed by the Army by deliberately shooting him with a pistol, after the German had refused to take accused and his mistress from Schwanewede to Brake, Germany. In view of all the circumstances of the case, 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, that the sentence as thus commuted be carried into execution and that an appropriate United States Penitentiary be designated as the place of confinement.

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 - Draft ltr for sig of S/W
3 - Form of action

( G.C.M.O. 16, 28 January 1947.)

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

JAN 9 1947

JAGQ - CM 316059

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| UNITED STATES<br><br>v.<br><br>Sergeant CALVIN L. JULIAN (38406447) and Private EPHRIM REVELS (42128417), both of Detachment of Prisoners, Philippine Detention and Rehabilitation Center. | UNITED STATES ARMY FORCES WESTERN PACIFIC<br><br>Trial by G.C.M., convened at Replacement and Disposition Command, APO 900, Unit 2, 12 July 1946. Dishonorable discharge and confinement for five (5) years. Penitentiary. |

HOLDING by the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, 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 holding, to The Judge Advocate General.

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

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

Specification 1: In that Sergeant Calvin L. Julian, and Private Ephrim Revels, both of the Detachment of Prisoners, Philippine Detention and Rehabilitation Center, acting jointly and in pursuance of a common intent, did, in Laguna Province, P.I., on or about 25 June 1946, wrongfully and wilfully overpower and disarm Private Charles J. Kochersperger, a sentinel in the execution of his duty.

Specification 2: In that Sergeant Calvin L. Julian, and Private Ephrim Revels, both of the Detachment of Prisoners, Philippine Detention and Rehabilitation Center, acting jointly, and in pursuance of a common intent did, in Laguna Province, P.I., on or about 25 June 1946, wrongfully and wilfully, by threat and force of violence, hold in restraint Private John J. Parker, an authorized truck driver, and Private Charles J. Kochersperger, a sentinel in the execution of his duty, from about 1500 hours, 25 June 1946, to about 1900 hours, 25 June 1946.

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

Specification: In that Sergeant Calvin L. Julian, and Private Ephrim Revels, both of the Detachment of Prisoners, Philippine Detention and Rehabilitation Center, acting jointly and in pursuance of a common intent, did, in Laguna Province, P.I., on or about 25 June 1946, by force and violence, and putting him in fear, feloniously take, steal, and carry away from the presence of Private John J. Parker, the assigned driver, one GMC 6x6 Cargo body truck, the property of the United States, of a value of more than $50.00.

Accused pleaded not guilty to, and were found guilty of, the Specifications and charges. Evidence was introduced as to each accused of one previous conviction by special court-martial for escape from confinement, in violation of the 69th Article of War, for which they were sentenced to be confined at hard labor for six months. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for six years. The reviewing authority approved the sentence as to each accused but reduced the period of confinement to five years each, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War may direct, as the place of confinement for each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution.

Accused, as garrison prisoners, were members of a detail with Private Charles J. Kochersperger as guard with a carbine and engaged in hauling gravel from Los Banos, Laguna Province, Philippine Islands (R 6, 7). While enroute from the gravel pit to camp, accused were riding in the rear of the truck and the guard in the "box". At approximately 3:00 o'clock in the afternoon when the truck reached a point about five miles from the gravel pit accused overpowered the guard, disarmed him, ordered the driver to move over and accused Revels turned the truck around and drove with the guard and detail in the direction from which they had come. Thereafter they again reversed direction; drove toward Los Banos; stopped the truck; changed clothes with the guard and marched him and the driver through the rice paddies toward Tabao (R 7). The military police apprehended the group at 5:00 o'clock the same day, without resistance from accused (R 8).

4. Evidence for the defense.

Each accused having been duly advised of his rights as a witness, elected to testify under oath.

Accused Julian testified that on the day in question the four prisoners, the guard and driver, drank some beer and cocoanut whiskey together at the gravel pit. Thereafter on the next trip accused Revels "got the carbine"and handed it to him (R 15), but he did not point it at anyone, the guard changed clothes with him voluntarily and the entire group walked through the rice paddies until they were apprehended of their own free will (R 16, 18).

Accused Revels testified to the affair as follows:

"A. When I snatched the rifle, the guard yelled, 'Parker, stop'. I handed the rifle to Julian then. The truck driver stopped and I crawled down in the cab of the truck. When I got halfway in, the truck driver kept moving in. I didn't say anything to him, and he didn't say anything to me. I turned the truck around and started back in a different direction from what we were going. When we came to a bridge, he (the driver) said, 'Take it easy; this bridge is rough'. There was nothing else said until the truck was stopped. I turned off the road and drove up into a Filipino's yard. A Filipino man was standing out there in the yard. As soon as I stopped, I jumped out of the truck and told the Filipino, 'Watch the truck until we get back'. He asked, 'Where are you going', and I told him to get some pom-pom. At that time, I was close to a barbed wire fence. It had three strands of wire about one foot apart. The driver was right up on me then trying to talk to me—telling me, 'This doesn't make sense, turn around and go back, and we will forget about the whole thing'. I didn't say anything to the driver. He tried to persuade me. We came to a double railroad track and some Filipinos were looking on there. Freight cars were parked along there. Julian changed clothes with the guard. While he was changing clothes, he handed me the rifle and I laid it up against the car. After Julian and the guard changed clothes, I took off and went to one side for a mile alongside of a ditch about six feet deep and four or five feet wide. Then we crossed over the ditch. During that time, nobody was saying nothing. When we crossed over the ditch, we came to the rice paddy. We kept on until we came to the river. We went up alongside of the river and came to a barrio. We got on a road, and that is where we got picked up at. This command car and three men from P.D. and R.C., and a Filipino M.P. picked us up.

* * * *

"Q. Did you have any intention of stealing the truck?
"A. No, sir. The reason I took the truck was to get it off the road, because a lot of cars were coming along at the time.

"Q. You simply drove the truck for a short time and then parked it?
"A. Yes, sir." (R 19, 20).

5. The record of trial presents no question as to the legal sufficiency of the findings of guilty of Specifications 1 and 2 of Charge I and Charge I as the offenses alleged therein were proved beyond any reasonable doubt. The only question requiring consideration is whether the evidence adduced in support of the Specification of Charge II and Charge II is legally sufficient to establish the offense of robbery as charged.

Robbery includes larceny, and the elements of that offense must always be present, alleged in the specification and proved at the trial (par. 149f, MCM, 1928). One of the essential elements of the offense of larceny is the taking and carrying away of personal property of another, with intent to deprive the owner permanently of his property (par. 149g, MCM, 1928, italics ours). The principle that such intent normally is proved by inference based on all the circumstances of the case is too well settled to permit of argument. Consequently the only question to be decided by the Board of Review is whether from all the evidence the court was justified in inferring that accused intended to permanently deprive the United States of the truck in question. The decision on any such matter is one of degree and like all such questions is difficult of determination.

6. No detailed discussion of the evidence is deemed necessary in view of the uncontradicted testimony that the alleged offense took place on an island in the Pacific ocean from which accused could not possibly have hoped to depart with the truck; that accused had control of the vehicle for a very short period of time and the asportation if any was extremely limited; that the offense occurred in the daytime and the truck was driven into the yard of a resident who was requested to watch it; that the guard and driver were in the truck all the time accused had control of it; and that accused "took the truck" for the purpose of getting it off the road so it would not attract attention. The foregoing testimony would seem to negative any inference that accused actually intended to permanently deprive the United States of the vehicle. In arriving at this conclusion the Board of Review has not overlooked those authorities which hold that abandonment of property wrongfully taken is not a defense to the charge of larceny, but it is believed that the additional facts present in this case require that it be distinguished.

7. However, the evidence, while legally insufficient to sustain the finding of guilty of the offense of robbery is sufficient to prove beyond

a reasonable doubt the lesser included offense of taking and using without proper authority the vehicle in question (CM 235668, Udovich and Yarbrough, 22 BR 189).

8. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as noted above, no errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I and legally sufficient to support only so much of the findings of guilty of the Specification of Charge II and Charge II as involves findings that accused did at the time and place alleged take and use without proper authority the vehicle described in said specification, in violation of Article of War 96, and legally sufficient to support the sentences.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 316059 1st Ind

MAY 23 1947

WD JAGO, Washington 25, D. C.

TO: Commanding General, United States Army Forces, Western Pacific, APO 707, c/o Postmaster, San Francisco, California

1. In the case of Sergeant Calvin L. Julian (38406447) and Private Ephrim Revels (42128417), both of Detachment of Prisoners, Philippine Detention and Rehabilitation Center, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and its specification, as involves findings that accused did at the time and place alleged take and use without proper authority the vehicle described in said specification, in violation of Article of War 96, and legally sufficient to support the remaining findings of guilty and the sentences. Upon approval of only so much of the findings of guilty of Charge II and its specification as involves a finding that accused did at the time and place alleged take and use without proper authority the vehicle described in the specification, in violation of Article of War 96, you will have authority to order the execution of the sentences.

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

(CM 316059).

1 Incl
Record of Trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 316067

JAN 9 1947

| | |
|---|---|
| UNITED STATES | RYUKUS COMMAND |
| v. | Trial by G.C.M., convened at APO 331, c/o Postmaster, San Francisco, California, 16, 19-20 July 1946. To be hanged by the neck until dead. |
| Private LEWIS LONG (33949728), 4299 Quartermaster Gas Supply Company, APO 331. | |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Lewis Long did, at Kadena, Okinawa, on or about 3 April, 1946 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Private First Class George A. Herring, a human being by stabbing him with a knife.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by special court-martial for wrongfully striking a fellow soldier on the neck with a knife, in violation of Article of War 96 was introduced. All members of the court present at the time the vote was taken concurring, accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 50½. The case should be considered as being forwarded under Article of War 48.

3. Evidence for the prosecution.

At the outset of the trial the defense raised a special plea of insanity. The court, after hearing extensive medical testimony, overruled the special plea of insanity. The record of trial fully supports the court's ruling (R 6, 9, 20; Pros. Ex. "A"). A Board of Medical Officers, two of whom testified at the hearing, on 8 July 1946, made the following findings:

> "a. The diagnosis is: Emotional instability reaction, chronic, moderate; external stress; undetermined; predisposition: boderline economic and social background; incapacity: moderate impairment.
>
> "b. That the soldier at the time of the alleged offense was so far free from mental defect, disease or derangement so as to be able concerning the particular action charged to distinguish right from wrong. He was so far free from mental defects, disease or derangement so as to be able concerning the actions charged to adhere to the right. He is now so far free from mental defects, disease or derangement so as to be able to intelligently cooperate in his defense." (Pros. Ex."A")

On 3 April 1946 between 1210 and 1230 the accused and deceased engaged in an altercation in their tent which resulted in the accused, Private Lewis Long, striking deceased, Private First Class George A. Herring, with a combat boot and the deceased striking accused on the head with his first, knocking him down (R 28,33). Both men went to their respective bunks, Herring picking up a carbine and Long a bayonet (R 28, 33). Herring was disarmed by Sergeant Yancey and told to leave the tent which he did (R 28, 33). Long also left the tent, went into the company street, and was there disarmed after Yancey assured him that Herring had no carbine (R 26). Herring went to the tent of Sergeant Harold E. Jones (R 34, 35). A few minutes later, the testimony of the various witnesses varying between 3 minutes to 10 minutes, Long entered the tent (R 35, 37, 40). As to what then transpired one eyewitness testified:

> "Q. Did Long walk right past you or what did he do?
> "A. No, sir, he didn't pass me, just a little in front of me.
>
> "Q. Somewhere between you and the door?
> "A. Yes, sir.
>
> "Q. What did he do then?
> "A. He stopped there about half a second or something like that.
>
> "Q. Did he have any words to say to anybody?
> "A. No, sir.

"Q. No words?
"A. He said to Herring, 'Well, mother-fucker, I am ready to straighten it out with you now.'

"Q. Did Herring answer Long?
"A. Herring said, 'Go on, forget about it.' He wasn't going to have anything more to do with it.

"Q. Was Herring standing up when he said that?
"A. No, sir, he was sitting down on the bed.

"Q. How far was Herring from you when he said that?
"A. About 2 feet.

"Q. Describe the next actions in the tent.
"A. Just as Herring said that Long struck him--after he said that.

"Q. Could you give me a few details on that? Did Long, the accused, just make a motion with his right hand or feint with his left?
"A. He made a motion with his left hand.

"Q. He made a motion like a boxer to throw the man's guard off?
"A. Yes, sir, that's what he done.

"Q. Then he struck with his right hand which contained a knife?
"A. Yes, sir.

"Q. He buried it into the chest of Herring?
"A. Yes, sir." (R 35-36).

A second eyewitness stated:

"Q. When you came from the mess hall you saw Long and Herring arguing -- you turned around and immediately left?
"A. Yes, sir.

"Q. You went to the latrine?
"A. Yes. I stopped in tent 6. I saw Long standing aside a trash can opposite tent 6. I walked in the tent and started talking to Lee and Herring was sitting on the bed talking to Sgt. Harold Jones. Long walked in and stood there about a second and said some kind of profane language that he was going to get Herring. He faked at Herring and out came the knife. I saw the knife, and they tussled out the door. I walked out of the tent to find Sgt Yancey. He was talking to the First Sergeant and I said to Sgt Yancey that I think Long has stabbed Herring." (R 39)

A third eyewitness testified:

"Q. How far did Long walk into the tent before he stopped?
"A. Right inside the door.

"Q. Did he have any conversation with anyone then?
"A. He spoke to Herring and asked if he wanted to make something out of it or something like that.

"Q. What did Herring say?
"A. He said, 'Go on, I am through with you.'

"Q. Was Long standing up or sitting down?
"A. Standing up.

"Q. Was Herring standing up or sitting down?
"A. Sitting down.

"Q. Did Long have any weapon with him then that you could see?
"A. I couldn't see.

"Q. Did you look at him closely?
"A. I saw him pretty close. He had his hands in his pockets.

"Q. Then what did they do then?
"A. Long slapped Herring at that time and stabbed him.

"Q. Did you see the knife in Long's hand?
"A. I saw it just as it was coming up.

"Q. Did you see the knife go into Herring's chest?
"A. I saw the knife go up then they rolled out the door." (R 40-41).

After the blow was struck with the knife, accused and deceased who was bleeding struggled out the door. (R 36) They both were on the ground (R 41). "Herring looked like he raised up and fell on his back" (R 36). Both Long and Herring were "pretty high" (R 31).

T/5 Arganie Cohea together with the accused and a third person took Herring to the hospital in a jeep. Cohea testified that Herring was dead when they arrived at the hospital. He further stated that Long told the doctor that they had been fighting and that he [Long] had done it (R 24-25).

On 3 April 1946, the day of the alleged offense, Captain Andrew D. Chidsey, III, MC, 156th Station Hospital performed an autopsy upon a body tagged as Herring. The cause of death "was a clean cut wound between the 5th and 6th rib in the left chest about 6 inches in length exteriorly penetrating into the left chest narrowing as it goes in and finally ending in a perforating wound of the apex of the heart, about one quarter inch in length" (R 21).

4. Evidence for the defense:

After being advised by the President of his rights as a witness, accused elected to take the stand and testified as follows: That after finishing work about 1130 that morning he had a drink of whiskey with Sergeant Yancey in the tent of Private Eugene Lee. Yancey left to go to chow and accused remained in Lee's tent to talk with another soldier about a watch. Accused then started for his own tent, a distance of about 50 feet away. When about half way he saw Yancey leading Herring down toward their tent. Yancey told accused to keep Herring in the tent until he (Yancey) finished chow (R 43). When Yancey was bringing Herring to the tent deceased was weaving and staggering and Yancey was holding him up by the arm. Herring was intoxicated (R 44). Herring brought out a bottle of whiskey. "I turned up the bottle and Herring started out of the tent" (R 43). Accused went after him.

"Q. Why did you go out to bring him back in?
"A. I knew he was drinking and he was guarding PW's on the dump. He was talking loud and I didn't want anybody to see him and didn't want him to get into trouble because I knew he would probably get a court-martial for drinking while on guard duty. Well, I started back toward the tent with Herring and the first time he pulled away from me and he told me he didn't want to go back to the tent. So I remarked there wasn't any use in doing what he was doing, to come back into the tent and take it easy. This time when I grabbed him by the arm he snatched away and struck me. When he struck me I remember I started falling but I don't remember hitting the ground or anything.

"Q. Where did he strike you?
"A. In the region of my temple here.

"Q. With what?
"A. His fist. And the next thing I remember was that I saw Herring. I was standing up and Herring was laying on the ground bleeding.

"Q. Was this at the same place where Herring struck you?
"A. No, this was in front of the other row of tents--we have two rows of tents and the street runs between those two rows of tents.

"Q. You have heard the testimony about an argument, a carbine, and a bayonet, do you have any memory or recollection of those events?
"A. No, sir. None whatsoever.

"Q. Do you have any recollection of stabbing Herring?
"A. No, sir." (R 44-45).

Accused then testified "I have had quite a few events that happened that I couldn't account for" (R 45). He related one incident in 1943 when he was struck on the head with a pistol. He did not know why, but later found out it was a scuffle over a girl in a tavern. Another incident was at Christmas in 1943 when he was struck with a club by a policeman, and never did find out the reason (R 46.). A third incident, since he was in the Army, occurred wherein he was shooting pool, and was later told he had borrowed a motorcycle for about an hour from a friend of his. Several other similar incidences were related by accused (R 46-47). He also complained of headaches, 3 or 4 times a week, that he has had medical treatment without success, and that he gets relief from the headaches by drinking a lot of whiskey.

5. Murder is the unlawful killing of a human being with malice aforethought. Unlawful means killing without legal justification or excuse. The death must take place within a year and a day of the act that caused it (par. 148a, MCM 1928). The law presumes malice where a deadly weapon is used in a manner likely to, and does in fact, cause death. (Wharton's Criminal Law (12 Ed) Vol. 1, Sec. 426) The evidence is uncontradicted that an altercation occurred between the accused and the deceased prior to the fatal attack, and that such encounter was broken up by Sergeant Yancey. It is likewise uncontradicted that accused, sought out the deceased, found him in a tent not his own, and attacked him with a knife which resulted in deceased being mortally wounded. The deceased did not provoke the fatal attack but, on the contrary, apparently sought to avoid it. His remarks, "Go on, forget about it" (R 35), or "Go on, I am though with you" (R 40) clearly indicate his desire to consider the incident closed. Accused did not plead provocation, self defense or of legal justification of his actions but apparently relied upon an attempted showing of an "epileptic condition" and amnesia induced by prior injuries including the blow on the head he received from deceased during the original scuffle. The medical testimony which showed the psychiatric examination to be fair, impartial and complete, clearly negatives any such contention. The possibility that the crime was committed in heat of anger is not suggested by the record and the deliberate steps taken by accused leading up to the killing clearly precludes such possibility. Accused may have had a sense of humiliation and may have been angered from the blows he had received from deceased but there was nothing in deceased's conduct, judged by ordinary human standards, to excuse the homicide. Whatever provocation occurred by virtue of the first encounter was wholly inadequate, in the eyes of the law, to excite uncontrollable passion in the mind of a reasonable man, and was insufficient to remove the homicide from the category of murder (par. 148a, MCM, 1928). In addition thereto there was a considerable "cooling time", under the circumstances, between the altercation and the stabbing. The record of trial completely and fully establishes every element of the crime of murder and the court was warranted in so finding.

6. The accused, a Negro, is 26 years of age, was inducted on 20 June 1944, for the duration of the war plus six months. His basic training was received at Camp Lee, Virginia. He is single and completed the ninth grade at the age of 17. He has an IQ of 96, a MA of 13 years and 5 months and a clinical finding of average intelligence. The accused was tried and convicted by a Special Court-Martial on 4 May 1945 of a violation of Article of War 96 in that he "did wrongfully strike Private Jones on the neck with a knife". For this offense he was sentenced to be confined at hard labor for 6 months and to forfeit $33.00 per month for a like period. From his testimony it is apparent that he had been involved in a number of episodes of a violent nature both as a civilian and while serving in the Army.

The defense counsel and Trial Judge advocate recommend that the sentence be reduced to life imprisonment for the reason that "Private Long had a psychopathic inferior personality which tended to make him emotionally unstable in times of stress with the result that he did not have the reactions of a normal person in such situations. There was little or no evidence of a motive for the killing as would normally be expected."

7. The court was legally constituted and had jurisdiction of the person and 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 and the sentence, and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

W. H. Johnson Jr., Judge Advocate

Charles M. Dickson, Judge Advocate

James Drake, Judge Advocate

JAGQ - CM 316067 1st Ind

WD, JAGO, Washington 25, D. C. JAN 23 1947

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 Lewis Long (33949728), 4299 Quartermaster Gas Supply Company, APO 331.

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.

3. The evidence shows that on 3 April 1946 between 1210 and 1230 the accused and the deceased, another soldier named Herring, both of whom had been drinking, engaged in an altercation in their tent which resulted in accused striking deceased with a boot and in the deceased knocking accused down with a blow on the head with his fist. Thereupon both men armed themselves, deceased with a carbine and accused with a bayonet. They were disarmed through the intervention of a sergeant who was present. A few minutes later deceased was in another tent when accused entered. Accused stated that he was "ready to straighten it out" with deceased. The deceased, in substance, told accused to "forget it". Accused then struck deceased with a knife mortally wounding him. Herring was dead at the time he reached the hospital.

A medical board found accused sane and responsible for his acts.

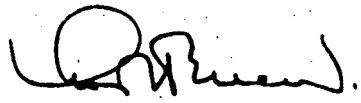
4. The War Department records show that accused is a negro soldier, 26 years of age and single and that he was inducted into the service on 20 June 1944. On 4 May 1945 accused was tried by a Special Court-Martial and sentenced to 6 months confinement for striking another soldier on the neck with a knife.

5. Consideration has been given to a letter from the sister of accused dated 16 August 1946, requesting clemency.

6. Upon consideration of all the circumstances, I am of the opinion that the execution of the death sentence is not required. 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 25 years, that a United States Penitentiary be designated as the place of confinement and that the sentence as commuted be carried into execution.

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 foregoing recommendation should such action meet with approval.

CM 316067



THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Dft ltr for sig USW
3. Form of Exec. action
4. Ltr fr Mrs. Rice, 16 Aug 1946

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( G.C.M.O. 37, 19 February 1947.)

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



JAGK - CM 316075

18 SEP 1946

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| UNITED STATES<br><br>v.<br><br>General Prisoner JAMES E. BAKER | WESTERN BASE SECTION<br>US FORCES, EUROPEAN THEATER<br><br>Trial by G.C.M., convened at Paris Detention Barracks, 21, 22 and 23 May 1946. Dishonorable discharge and confinement for thirty-five (35) years. Penitentiary. |

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REVIEW of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the general prisoner 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 General Prisoner James E. Baker, Loire Disciplinary Training Center, United States Forces, European Theater, did, in conjunction with General Prisoner George PYTLIK at Paris, France, on or about 25 December 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Paulette Durocher, Andre Lehir, and Gilberte Bauer, seven thousand (7000) france, French currency, one (1) radio set and one (1) coat, property of the said Paulette Durocher, one (1) wrist watch, property of the said Andre Lehir, and one (1) coat, property of the said Gilberte Bauer, of the total value of more than fifty dollars ($50.00).

Specification 2: In that General Prisoner James E. Baker, ***, did, in conjunction with General Prisoner George Pytlik, and Private Gomer Blackburn at Paris, France, on or about 15 January 1946, by force and violence and by putting them in fear feloniously take, steal and carry away from the persons of Eustratos Eustradiades, Jacques Meunier, Roger Boulanger, Jacques Hofman and Pierre Pignatel, twenty-seven thousand (27000) francs, French currency, and one (1) watch value of five thousand (5000) francs, French currency, the property of the said Eustratos Eustradiades, one (1) wrist watch, property of the said Jacques Meunier, twenty thousand (20000) francs, French currency property of the said Roger Boulanger, two thousand (2000) francs, French currency, property of the said

Jacques Hofman and one (1) gold watch, the property of the said Pierre Pignatel, total value of more than fifty dollars ($50.00).

Specification 3: In that General Prisoner James E. Baker, ***, did, in conjunction with General Prisoner George Pytlik, and Private Gomer Blackburn at Saint Denis, Seine, France, on or about 23 January 1946, by force and violence and but putting them in fear, feloniously take, steal and carry away from the persons of Henri Legraet and Yves Lagadec, forty-five thousand (45000) francs, French currency, property of the said Henri Legraet, and two thousand (2000) francs, French currency, property of the said Yves Lagadec, total value of more than fifty dollars ($50.00).

Specification 4: In that General Prisoner James E. Baker, ***, did, in conjunction with General Prisoner George Pytlik, Private Gomer Blackburn, Private John Lee, and Private James W. Dukes at Paris, France, on or about 1 February 1946, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Madeleine Chabrol, Guy Bourdet, Albert Renard, and Edmond Quiviger, five thousand five hundred (5500) francs, French currency, property of the said Madeleine Chabrol, three thousand four hundred francs, French currency, and one (1) wrist watch value two thousand (2000) francs, French currency, property of the said Guy Bourdet, four thousand five hundred (4500) francs, French currency, property of the said Albert Renard, and one thousand six hundred (1600) francs, French currency, property of the said Edmond Quiviger, total value of more than fifty dollars ($50.00).

Specification 5: In that General Prisoner James E. Baker, ***, did, in conjunction with General Prisoner George Pytlik, Private Gomer Blackburn, Private John Lee, and Private James W. Dukes, at Paris, France, on or about 1 February 1946, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Charles Carrin, Marguerite Duard, Achille Bianchi and Andree Bianchi fifteen thousand (15000) francs, French currency, one (1) gold wrist watch, and one (1) lighter, the property of the said Charles Carrin, one (1) gold ring, and forty thousand (40,000) francs, French currency, property of the said Marguertie Duard, sixteen thousand (16000) francs, French currency and one (1) Omega wrist watch, property of the said Achille Bianchi, and one (1) wrist watch the property of the said Andree Bianchi, total value of more than fifty dollars ($50.00).

Specification 6: In that General Prisoner James E. Baker, ***,

did, in conjunction with General Prisoner George Pytlik and Private Gomer Blackburn at Paris, France, on or about 15 February 1946, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Vera Vallent, Mercedes Uriate, Jean Lanctuit, Daniel Hureau, Marguerite Bronet, fourteen thousand (14000) francs, French currency, and one (1) gold wrist watch, and (1) lighter, property of the said Vera Vallent, nineteen thousand (19000) francs, French currency, and two (2) rings, property of the said Mercedes Uriate, eight thousand (8000) francs, French currency, one (1) wrist watch, a pen and pencil set and one (1) lighter, property of the said Jean Lanctuit, fourteen thousand five hundred (14500) francs French currency, one (1) gold wrist watch and one (1) fountain pen property of the said Daniel Hureau, six thousand (6000) francs, French currency, one (1) pen and one (1) pencil, property of Marguerite Bronet, total value of more than fifty dollars ($50.00).

Specification 7: In that General Prisoner James E. Baker, ***, did, at Paris, France, on or about 20 February 1946, with intent to do him bodily harm commit an assault upon Lieutenant William C. Deitz by willfully and feloniously shooting the said Lieutenant William C. Deitz in the right arm with a pistol.

He pleaded not guilty to all specifications and to the charge. He was found guilty of Specifications 1, 5 and 7 of the Charge and of the Charge, and guilty of Specification 2, except the words "value of five thousand francs, French currency", and except for the words "one wrist watch, property of the said Jacques Meunier," and except for the words "two thousand", substituting therefor the words "six hundred", of the excepted words, not guilty, of the substituted words, guilty; of Specification 3 guilty, except the words "forty-five thousand", substituting therefor the words "forty thousand", of the excepted words, not guilty, of the substituted words, guilty; of Specification 4, guilty, except the words "value of two thousand francs, French currency" and except the words "six hundred", substituting for the latter the words "five hundred", of the excepted words, not guilty, of the substituted words, guilty; and of Specification 6, guilty, except the words "eight thousand francs, French currency", "one wrist watch, a pen and pencil set and one lighter, property of the said Jean Lanctuit" and except the words "and one pencil", of the excepted words, not guilty. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for thirty-five years. The reviewing authority approved the findings of guilty of Specifications 1 to 6 inclusive after substitution of the words "a person unknown" for the name of each alleged accomplice in each specification, approved the sentence, 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. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 284, Criminal Code of the United States (18 USC, 463).

Chester G. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Stafford, Judge Advocate

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

JAGH - CM 316102

4 DEC 1946

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| UNITED STATES<br><br>v.<br><br>Private BYRON R. KAYSER (37176802), 222d Infantry Regiment | ) | 42nd INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Salzburg, Austria, 22 June 1946. Dishonorable discharge (suspended), confinement for two and one-half (2½) years. Disciplinary Training Center. |

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and 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 Byron R. Kayser, did, without proper leave, absent himself from his organization at Linz, Austria, from about 19 August 1945 to about 17 May 1946.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Wurzburg Disciplinary Training Center, Wurzburg, Germany, or such other place as may hereafter be designated by the Secretary of War as the place of confinement. The proceedings were published in General Court-Martial Orders No. 3, Headquarters Zone Command,

Austria, dated 20 July 1946.

3. The only question requiring consideration is whether the participation of Captain James H. McGuire, JAGD, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The court which tried the case was appointed by paragraph 2, Special Orders No. 121, Headquarters 42nd Infantry Division, 25 May 1946, as amended by paragraph 4, Special Orders No. 131, Headquarters 42nd Infantry Division, 10 June 1946. Special Orders No. 121 designated Captain Erwin R. Schmidt, 0522362, Infantry, as trial judge advocate. On 12 June 1946 the convening authority referred the case for trial to Captain Erwin R. Schmidt, trial judge advocate, appointed by Special Orders No. 121 and the case was tried on 22 June 1946 by the proper court. Captain James H. McGuire, JAGD, is listed present as trial judge advocate when the court convened, and Captain Schmidt is not listed as present or absent (R 2). No special orders are contained in the record of trial which relieve Captain Schmidt as trial judge advocate or which appoint Captain McGuire in this capacity. First Lieutenant Erwin Wesmeyer, Infantry, Assistant Trial Judge Advocate, is listed as present when the court convened for trial (R 2), but the record of trial is authenticated by Captain McGuire as Trial Judge Advocate.

5. It will be seen from the foregoing that although Captain Schmidt was, according to the record, the duly appointed trial judge advocate of the court which tried the case, he did not participate in the proceedings. It is reasonably to be inferred that Captain McGuire in fact acted as trial judge advocate in the trial of the case, although there is no showing that he was appointed to act in such capacity.

6. Article of War 11 provides in part that:

> "For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel * * *."

It is well settled that the conduct of a trial by a trial judge advocate who was not detailed by the convening authority renders the proceedings invalid (Winthrop, Reprint 1920, p 182). In CM 113341 (Dig Ops, JAG, 1918, p 144), it was held that the participation in a trial of an officer as trial judge advocate who was without authority to appear before that court in such capacity was a jurisdictional error and not a mere irregularity within the meaning of Article of War 37. In CM 200743, Burns, 5 BR 1, (Dig Op, JAG, 1912-40, Sec 368 (1), p 180), and in CM 248390, Arkward, 31 BR 241, it was held that the participation of an unauthorized trial judge advocate in a trial constituted fatal error.

In view of the foregoing authorities, the Board of Review is of the opinion that Captain McGuire's participation in the trial constitutes fatal

error.

7. 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 the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 316102 1st Ind

DEC 1 . 1946

WD, JAGO, Washington 25, D. C.

TO: The Under 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 Executive Order No. 9556, dated 26 May 1945, is the record of trial in the case of Private Byron R. Kayser (37176802), 222d Infantry Regiment.

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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

( G.C.M.O. 14, 22 January 1947.)

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



JAN 16 1947

JAGQ - CM 316121

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| UNITED STATES<br><br>v.<br><br>Private FRED T. AUSTIN (44027072), 4077th Quartermaster Service Company, APO 181. | YOKOHAMA BASE<br><br>Trial by G.C.M., convened at Yokohama Base, U. S. Army, APO 404, 21-22 June 1946. Dishonorable discharge and confinement for life. United States Disciplinary Barracks. |

REVIEW by the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

CHARGE I: Violation of Article of War 92.

Specification: In that Private Fred T. Austin, 4077 Quartermaster Service Company, did, at Asada-cho, Kawasaki, Japan, on or about 22 February 1946 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Motoko Ohtsuka, a human being by shooting her with a carbine.

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

Specification 1: In that Private Fred T. Austin, 4077 Quartermaster Service Company did, at Asada-cho, Kawasaki, Japan, on or about 22 February 1946, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Otake Taka, 20,000 yen, the property of Otake Taka.

Specification 2: In that Private Fred T. Austin, 4077 QUARTERMASTER Service Company did, at Asada-cho, Kawasaki, Japan, on or about 22 February 1946, by force and violence and by putting him in fear, feloniously, take, steal, and carry away from the presence of Hiroshi Miyajima one watch, value about 375 yen and 310 yen of a total value of 585 yen, the property of Hiroshi Miyajima.

Accused pleaded not guilty to all the Specifications and Charges. He was found guilty of the Specification of Charge I and Charge I, of Specification 1 of Charge II and of Specification 2 of Charge II, except the words "value about 375 yen" substituting therefor the words "of some value" and except the words "of a total value of 585 yen" of the excepted words, not guilty; of the substituted words, guilty, and guilty of Charge II. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence in the Staff Judge Advocate's review.

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. The death must take place within a year and a day of the act that caused it (MCM 1928, par. 148a). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (Wharton's Criminal Law (12 Ed.) Vol. 1, sec. 426). An intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose. In CM 306769, Leatherberry, 5 BR (ETO) 103, p. 113, the Board of Review stated:

> "Robbery inherently involves the element of violence upon the person and it is a probable, natural and reasonable consequence of an attempt to commit a robbery that a human life will be destroyed".

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. If the accused, by threats or menaces puts his victim in such fear that he is warranted in making no resistance the offense is robbery. The fear must be a reasonably well-founded apprehension of present or future danger, and the property taken while such apprehension exists (MCM, 1928, par. 149f).

The record of trial clearly establishes that accused armed with a carbine, left his post with the avowed intention "to get some yens" (R 12); entered the dwelling house of Hiroshi Miyajima, a Japanese national, discharged his weapon, menaced the occupants with it and took and carried away the property alleged (R 55-57). Immediately thereafter he forcibly entered the home of Yasugoro Ohtsuka, demanded "money"; and assaulted two members of the household (R 61). While one member of the family entered the room with money for him, accused fired at him with his carbine from a

hip position. The bullet missed the intended victim, penetrated a flimsy partition and struck deceased who was lying on a mat in an adjoining room (R 61, 62, 79, 80). Accused then took 20,000 yen from a bag which was thrown at his feet and departed (R 79, 87). Deceased died a few hours later from loss of blood resulting from the wound received (R 78).

Accused was positively identified by three witnesses and there is no evidence to indicate drunkenness to any material degree. Not only does the record fail to reveal any legal justification or excuse for the shooting but clearly establishes that accused, while in the commission of the crime of robbery, fired the shot which struck deceased for the sole purpose of accomplishing his unlawful mission of robbery and consequently all the elements of the offenses charged are clearly proved.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the 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 murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the Criminal Code of the United States.

CM 316121

W H Johnson Jr, Judge Advocate

Charles M Dickson, Judge Advocate

James S Taylor, Judge Advocate

( G.C.MO. 39, 21 February 1947.)

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



JAGQ - CM 316159

JAN 9 1947

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| UNITED STATES<br><br>v.<br><br>First Lieutenant JULIAN F. HAMNER (O-2042868), Infantry. | NEW YORK PORT OF EMBARKATION<br><br>Trial by G.C.M., convened at ASF, NYPE, Camp Kilmer, New Jersey, 13 August 1946. Dismissal and total forfeitures. |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, 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 61st Article of War.

Specification: In that 1st Lt. Julian F. Hamner, Inf., Replacement Officer Company, 10th Replacement Regiment, ORD, Camp Kilmer, New Jersey, did, without proper leave, absent himself from his organization and station at Camp Kilmer, New Jersey from about 26 April 1946 to about 14 May 1946.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced against the accused. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

Accused was shown to be initially absent without leave as of 26 April 1946 by M/R Co F 10th Rec & Cas Hold Regt NYPE dated 18 May 1946 (Pros. Ex. 3). He was shown returned to military control as of 14 May 1946 by M/R Co F 10th Rec & Cas Hold Regt dated 18 May 1946 (Pros. Ex. 5). Accused made a written statement (Pros. Ex. 6) wherein he admitted:

"Received orders on 24 April 1946 at Camp Pickett, Va. in Co. 'D' 8th Bn. 2nd Regt. - SO No. 111-22 April 1946 'WP Cp Kilmer, N.J. o/a 23 April 1946 xxx PCS TPA etc.' left Cp Pickett 24 April 1946. Arrived at Camp Kilmer 14 May 1946.

Cause of delay was a personal problem, a family situation, which has been completely cleaned up.

"I prefer not to furnish the details of the trouble, but feel that the time I spent was actually necessary to accomplish the result and I took no more time than necessary.

"I understand my rights under the 24th Article of War which were explained to me at the beginning of my interview, and understand that I may be charged with a violation of the 61st AW and tried by Court-Martial, also that I have the opportunity to make full explanation under oath or unsworn or remain silent, and that anything I say may be used against me. I have chosen to give only the information stated above concerning my absence.

"I asked for a Delay Enroute at Cp Pickett but was refused. I have never had any leave since I have been commissioned."

4. Evidence for the defense.

The accused having been advised of his rights as a witness elected to take the stand and testified in his own behalf as follows: That he enlisted in the Army 28 September 1939; was commissioned on the field of battle at Guadalcanal 20 April 1943; that he was at Pearl Harbor 7 December, and participated in the campaign of Guadalcanal, Balla Vala and Luzon. He has never had any prior difficulties with either the military or civil authorities. With reference to his present difficulty he stated:

"A I have been in the Army long enough, I think, as an officer on my honor that I know that there are certain things that shouldn't be done in the Army. I will grant you, AWOL is one of them.

"Now, there are other situations that arise at times, that you may have to sometimes choose between one of the two. There are also times when certain situations arise which one must not discuss, and you, as officers, should know that yourselves.

"However, after being tried by a board of officers and judged on their honor, I feel that anything that should be given shall be just and fair.

"That is all I have to say." (R 15-16).

5. The evidence, including the sworn statement of accused, is legally sufficient to support the findings of guilty. Evidence presented by the defense were matters to be considered in mitigation and were not matters of defense.

6. The accused is 29 years of age and enlisted on 28 September 1939. He is married, but makes no allotment to dependents. He completed 10 years of grade school and worked as a metal molder and as a flour miller prior to his entry into the service. He received a commission in the field in Guadalcanal as a second lieutenant on 22 April 1943 and was promoted to first lieutenant on 14 April 1945. His efficiency report from 1 July 1944 to 31 December 1944 is "excellent". He was wounded in action against the enemy on 14 January 1943 at Guadalcanal and on 1 May 1945 at Luzon. The accused, while he testified that he had never had any prior difficulty with the civilian or military authorities, had in fact been punished under Article of War 104 by Major General Stroh for an absence without leave of 12 days when he reported to Camp Pickett and was directed to forfeit $91.66 of his pay. He was also punished on 27 July 1944 under Article of War 104 by a forfeiture of $86.25 of his pay. The accused prior to his entry in the service had been charged in Atchison, Kansas with forgery, and in Ogden, Utah, and Los Angeles, California, with vagrancy. He received a five day sentence in Ogden, Utah, on or about 13 July 1938 upon the charge of vagrancy.

A recommendation for clemency is attached to the record, signed by the defense counsel, assistant defense counsel, the trial judge advocate, the assistant trial judge advocate, and two members of the court. It is pointed out that accused has an excellent combat and service record, has been wounded twice in action; and that as a skilled infantry platoon commander his services may prove valuable to the Government.

7. The court was legally 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 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.

W H Johnson Jr, Judge Advocate

Charles M. Dickson, Judge Advocate

James E. Taylor, Judge Advocate

JAGQ CM 316159 1st Ind

WD, JAGO, Washington 25, D. C. JAN 23 1947

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Julian F. Hamner (0-2042868), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from his organization and station at Camp Kilmer, New Jersey, from about 26 April 1946 to about 14 May 1946, in violation of Article of War 61. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

4. The evidence clearly shows accused to have been absent without leave from his organization from about 26 April 1946 to 14 May 1946. The admission of the accused in open court corroborated by other competent evidence adduced at the trial fully sustains all elements of the offense charged.

5. Accused was seriously injured in action on two occasions, at Guadalcanal in 1943 and at Luzon in 1945. As a result of his second wound he was hospitalized for a period of approximately five months and on 27 September 1945 a Disposition Board of Bushnell General Hospital, Brigham City, Utah, recommended that "First Lieutenant Hamner be returned to temporary limited service for six months at the expiration of which time he be returned to an appropriate medical facility to determine his physical fitness for duty". Apparently the above recommendation was never complied with. On 21 June 1946, while accused was awaiting trial on the present charge, the Commanding General, New York Port of Embarkation, recommended that accused's trial be suspended pending determination of his physical fitness for duty by an appropriate medical board. Thereafter on 16 July 1946, a Disposition Board at Halloran General Hospital recommended accused be reclassified to full military duty. He was tried on 13 August 1946.

On 20 September 1946 accused was hospitalized at Tilton General Hospital. He was in a bewildered, confused state and could not recall exactly what had occurred during the preceding few months. He was extremely anxious, perspired profusly and complained of dizziness. He was transferred to Mason General Hospital 25 September 1946 for psychiatric observation, treatment and disposition.

The report of the hospital staff conference, in part, stated:

"It is the opinion of the staff that this officer suffered a severe anxiety state attributable to his prolonged combat experience and his frequent serious medical illnesses, particularly the recurrent malaria and hepatitis. It is recommended that no disciplinary action be taken against him because of his AWOL because at the time he was suffering from anxiety of such proportions as seriously to impair his ability to adhere to the right. His prior military and civilian records indicate that he is a very well motivated personality and rendered excellent service. It is recommended that he be given a six months trial on temporary limited duty. (underscoring supplied).

Diagnosis: Anxiety reaction, chronic, severe, improved, manifested by tenseness, tremulousness, insomnia, and severe battle dreams.

External Precipitating Stress: Severe (seven years military service; three and one-half years of combat in the Pacific Theatre of Operations; wounded in right shoulder in combat; recurrent malaria and hepatitis)."

As a result of observation and treatment of the accused at Mason General Hospital, the Disposition Board of the hospital on 25 October 1946 recommended:

"1. No disciplinary action be taken against 1st Lt. JULIAN F. HAMMER (sic) for his alleged AWOL during his period of mental confusion. 2. He be returned to duty in a temporary limited status, within the continental limits of the United States for a period of six months, at the expiration of which period he be returned to an appropriate medical facility for reconsideration of his physical capacity for full military duty in accordance with the provisions of W.D. Circular 313, dated 12 October 1945." (underscoring supplied).

6. War Department records show that the accused is 29 years of age and enlisted on 28 September 1939. He is married, but makes no allotment to dependents. He completed ten years of grade school and worked as a

metal molder and as a flour miller prior to his entry into the service. He received a commission in the field in Guadalcanal as a second lieutenant on 22 April 1943 and was promoted to first lieutenant on 14 April 1945. His efficiency report from 1 July 1944 to 31 December 1944 is "excellent". He was wounded in action against the enemy on 14 January 1943 at Guadalcanal and on 1 May 1945 at Luzon. The accused was punished under Article of War 104 by Major General Stroh for an absence without leave of 12 days when he reported to Camp Pickett and was directed to forfeit $91.66 of his pay. He was also punished on 27 July 1944 under Article of War 104 by a forfeiture of $86.25 of his pay. The accused prior to his entry in the service had been charged in Atchison, Kansas, with forgery, and in Ogden, Utah, and Los Angeles, California, with vagrancy. He received a five-day sentence in Ogden, Utah, on or about 13 July 1938 upon the charge of vagrancy.

A recommendation for clemency is attached to the record, signed by the defense counsel, assistant defense counsel, the trial judge advocate, the assistant trial judge advocate, and two members of the court. It is pointed out that accused has an excellent combat and service record, has been wounded twice in action; and that as a skilled infantry platoon commander his services may prove valuable to the Government.

7. There is no adequate showing of legal irregularity and I recommend that the sentence be confirmed. In view of the report of the medical officers and all the other circumstances in the case, however, I recommend that the entire sentence be remitted.

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

CM 316159

3 Incls
1. Record of trial
2. Form of action
3. Report of Medical Board

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 53, 27 Feb 1947.)

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

JAGK - CM 316182

6 NOV 1946

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| UNITED STATES | KOBE BASE |
| v. | Trial by G.C.M., convened at Kobe, Japan, 11 July 1946. $400 fine. |
| DAVID W. DeMOSS, Master of the SS GEORGE S. COUTANT, a person serving with the Army of the United States in the field aboard the said GEORGE S. COUTANT | |

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

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

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

CHARGE I: (Finding of not guilty).

Specification 1: (Finding of not guilty).

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

Specification 1: In that David W. DeMoss, a person serving with the Army of the United States in the field aboard and as master of the SS George S. Coutant said vessel carrying cargo in connection with the military operations of the United States, did, at Kobe, Honshu, Japan, on or about 26 June 1946, through carelessness, discharge a pistol on the SS George S. Coutant.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its Specification and of Specification 2 of Charge II and was found guilty of Charge II and of Specification 1 of Charge II, except as to the words "through carelessness", substituting therefor the words "deliberately and unlawfully", of the excepted words, not guilty, of the substituted words, guilty. No evidence of previous convictions was introduced. He was sentenced to pay to the United States a fine of $400.00 and,

"if the said fine is not paid *** to be confined at hard labor at such place as the convening authority may designate one day for each $10.00 of the fine not paid." The reviewing authority approved only so much of the findings of guilty of Specification 1 of Charge II as involved a finding of guilty of "wrongfully discharge" a pistol in violation of the 96th Article of War and only so much of the sentence as provided for a fine of $400.00 and, as thus modified, ordered execution of the sentence. The results of the trial were published in General Court-Martial Orders No. 11, Headquarters, Kobe Base, APO 317, on 12 August 1946.

3. On 26 June 1946, the SS George S. Coutant, a vessel owned by the War Shipping Administration, was discharging cargo at the 7th Major Port. Japanese longshoremen were handling the actual discharge under the direction of ship's personnel (R. 6,7). Accused testified that he was master of the COUTANT and gave the following version of the events for which he had been placed on trial:

> "During the night of June 26th or early morning rather, I had occasion to be up because of my cocker pup and because I was interested in seeing if my cotton was being discharged. Previously they had been working none too hard. They were rather slow in covering up hatches and complaints would result at a later date. I watched them at frequent intervals for four hours and that morning I went out on the wing of the bridge and called down to the hatch tender in number three and told them I wanted more work and better work. They would carry out a sling of cotton and then sit and do nothing and they ignored anything I told them. I went back to my room and got out my thirty-eight and told the hatch tender to get going. I fired two shots off at an angle out of the way and that didn't cause any results so far as cargo handling was concerned. There was the same situation at number one hatch and I went there and jumped on the foreman and it was the same thing. He smiled at me in a silly sort of way and did nothing and I went and fired two shots and at number two. I fired directly into the cotton and when I fired the gun I took direct aim into the cotton and when I fire a gun I consider myself very good with one. I did a lot of hunting in Arizona and guns are no novelty to me. I went to number three hatch and gave them a lecture and got no results and went to number four and number five and did the same thing and they only sneered at me and I decided to fire two shots into that and scare them and I leaned over the hatch and fired into the center of the hatch into the bales of cotton. It was impossible for a man to be hit because there is no ricochet at all, no ricochet is possible off the cotton. There was nobody in the line of fire. I made definitely certain of that. It was an open hatch and I leaned over the combing and made certain no one was in the line of fire and as I say it would be impossible for a bullet to ricochet off the cotton.***" (R. 25,26).

4. The only question requiring consideration is the propriety of the action of the reviewing authority in finding accused guilty of "wrongfully" discharging a pistol when accused had been charged with discharging a pistol "through carelessness" and found guilty by the court of having "deliberately and unlawfully" discharged a pistol, the words "through carelessness" having been excepted with the usual finding of not guilty of the excepted words.

Under the long recognized doctrine that an accused is acquitted of all material allegations which are excepted by a court-martial in its finding, the accused herein was acquitted by the court of having discharged a pistol "through carelessness." By excepting in its finding the words "through carelessness" and leaving in the specification no other word or words indicating that the discharge of the pistol was wrongful or unlawful, the legal presumption arises that the act was lawful and innocent. However, the court thereupon substituted a finding of guilty of having "deliberately and unlawfully" discharged a pistol. This finding cannot be sustained for the obvious reason that the offense therein described is not of the same identity or lesser to and necessarily included in the offense charged, the word "deliberately" denoting a specific intent not found in the words "through carelessness" (MCM, 1928, par. 78c). Thereafter, the reviewing authority purported to approve only so much of the court's finding of guilty as involved a finding that accused "wrongfully" discharged a pistol. Since, under the 47th Article of War, the power conferred upon the reviewing authority to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense is merely coextensive with the power of the court to convict of offenses lesser to and necessarily included in those charged (MCM, 1921, par. 377), it clearly follows that the action of the reviewing authority in this case was erroneous for the reason that since there was actually no legal finding of guilty of any offense, there could be no legal approval of a finding of any lesser included offense (CM 218667, Johns, 12 BR 133,134; CM 218183, Welsh, 49 BR 111,113; CM 259669, Eckhard, 38 BR 379,391).

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

Charles L. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

(Dissent), Judge Advocate

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

JAGK - CM 316182

6 NOV 1946

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| UNITED STATES | KOBE BASE |
| v. | Trial by G.C.M., convened at Kobe, Japan, 11 July 1946. $400 fine. |
| DAVID W. DeMOSS, Master of the SS GEORGE S. COUTANT, a person serving with the Army of the United States in the field aboard the said GEORGE S. COUTANT | |

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DISSENTING OPINION
of
Gilbert G. Ackroyd, Judge Advocate

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I do not concur with the majority of the Board of Review in its opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence. As stated in the majority opinion, the only question requiring consideration is the propriety of the action of the reviewing authority in finding accused guilty of "wrongfully" discharging a pistol when accused had been charged with discharging a pistol "through carelessness" and found guilty by the court of having "deliberately and unlawfully" discharged a pistol, the words "through carelessness" having been accepted with the usual finding of not guilty of the excepted words.

In CM 218667, Johns (12 BR 133), accused was charged with assault upon a noncommissioned officer with intent to do him bodily harm with a dangerous weapon, a knife, in violation of Article of War 93, and was found guilty by the court by exceptions and substitutions of having attempted to strike a noncommissioned officer with his fist while the noncommissioned officer was in the execution of his office in violation of Article of War 65, the words charging the assault with intent to do bodily harm with a dangerous weapon being excepted with the usual finding of not guilty of the excepted words. The reviewing authority approved only so much of the findings as involved a finding that accused wrongfully attempted to strike the noncommissioned officer with his fist in violation of Article of War 96. It was held that the record of trial was legally insufficient to support the findings as approved by the reviewing authority on the ground that since the court had found accused by its exceptions not guilty of the assault with intent to do bodily harm with a dangerous weapon and since its findings of guilty of an Article of War 65 offense by substitutions was unauthorized because the substituted offense was not of the same identity or lesser than and necessarily included in the offense charged, there was no finding by the court of guilty of any offense and consequently the reviewing authority could not legally approve

a finding of a lesser offense included in the finding.

It is believed that this opinion should not be followed for the reason that although the court had no authority to find accused guilty of an Article of War 65 assault under the specification as drawn it did have authority to find accused guilty of a simple assault in violation of Article of War 96, which was lesser than and necessarily included in both the unauthorized finding and the offense charged. (CM 218883, Long, 12 BR 167,171; CM 200047, Raleigh, 4 BR 233,237. And here it may be well to point out that although there is no such offense as an attempted assault in violation of Article of War 96, CM 274869, Dixon, 47 BR 349, an attempted battery, such as an attempt to strike another, is in itself a simple assault, CM 234134, Montgomery, 20 BR 251,256.) The reviewing authority, in his action, simply approved only so much of the court's finding as was legal, just as he would have approved only so much of a sentence as was legal where the court had exceeded its authority, for example, by sentencing an accused to fifteen years confinement by a two-thirds vote of the members present (CM NATO 830, Cooke).

In CM 218183, Welsh (49 BR 111), accused was charged with having incapacitated himself for the full performance of military duty due to intemperate use of intoxicating liquor and was found guilty by the court by exceptions and substitutions of having so incapacitated himself by the use of "drugs or intoxicating liquor, or both," the words charging intemperate use of intoxicating liquor having been excepted with the usual finding of not guilty of the excepted words. It was held that these findings were fatally indefinite and that the reviewing authority had no authority to make such findings definite by approving only so much of the finding as involved a finding that accused incapacitated himself by the use of intoxicating liquor alone. However, the Board of Review said,

> "If the court in the findings had inserted the words 'and drugs' so that the findings read 'due to the use of intoxicating liquor and drugs,' the reviewing authority could properly have disapproved so much of the findings as read 'and drugs'." (underscoring supplied.)

In CM 259669, Eckhard (38 BR 379), accused was charged with having attempted to desert the service with intent permanently to absent himself and was found guilty by the court by exceptions and substitutions of an offense involving an entirely different intent, that of having attempted to desert the service in order to shirk important service. The Board of Review held that the court had intended to find accused not guilty of the offense as charged and that the reviewing authority could not correct the court's unauthorized finding of guilty of an offense separate and distinct from that charged by disapproving the substituted words in the finding charging intent to shirk important service and leaving, because of an inadvertent error in making the substitutions, the offense of desertion substantially as charged in the specification. The Board of Review pointed out that the effect of

the action of the reviewing authority would be "to find the accused guilty of the very type of desertion of which the court has found him not guilty." It is to be noticed in this case, however, that not only was the offense found by the court separate and distinct from the offense charged, but neither offense could be considered lesser than and included in the other.

In the instant case it would appear that the offenses of discharging a pistol "through carelessness" and "wrongfully" discharging a pistol are both lesser than and necessarily included in the offense of "deliberately and unlawfully" discharging a pistol. It has always been considered that among the lesser included offenses of murder, which involves the element of deliberation, are included the offenses of voluntary manslaughter and involuntary manslaughter (MCM, 1928, par. 148a; CM ETO 3614, Davis), the latter of which terms encompass the culpably negligent aspect of an act which, if done deliberately, would, other elements being present, constitute murder. So also, it has been held that involuntary manslaughter is a lesser included offense of voluntary manslaughter, voluntary manslaughter containing the element of willfullness in which is included the element of culpable negligence necessary to be proved in involuntary manslaughter (CM ETO 1317, Bentley; CM 272994, Daniels, 50 BR 267). There seems to be little logic in holding that because murder and manslaughter involve a homicide as a result of a deliberate, willful, or culpably negligent act a different rule should be applied in determining the significance of the varying degrees of culpability with which the act itself is performed, such as the deliberate, willful, or careless discharge of a firearm. There is an element of carelessness, that is, a disregard for the rights of others or a breach of duty, in every deliberately unlawful act. Thus it has been held that in actions of tort, where proof of willfullness is not required to warrant a recovery, proof may be made and recovery had for simple negligence under a complaint alleging willful misconduct on the theory that the greater includes the lesser. (Gorton v. Harmon, 152 Mich. 473, 116 N.W. 443; Furman v. A.C. Tuxbury Land, Etc., Co., 112 S.C., 71, 99 S.E. 111.) In the Furman case the court said,

> "Theoretically negligence and willfulness imply different states of mind on the part of the tort-feasor. *** But those words and words of like import are not always used to express the precise mental state of the wrongdoer. They are used as often to express different degrees of culpability in wrongdoing. *** Upon analogous reasoning, in a forum where much greater strictness in pleading is required, the defendant may be charged with murder, which requires proof of malice, and convicted of manslaughter, which requires proof of killing in sudden heat or passion, or by negligence. This is allowable on the theory that the greater offense includes the lesser, even though they grow out of different states of mind on the part of the offender."

The Gorton case employed the same analogy.

There can be little doubt that the finding of the court in this case that accused "deliberately and unlawfully" discharged a pistol when he had been charged with merely having discharged it "through carelessness" was unauthorized and exceeded the powers of the court, for the word "deliberately" denotes a specific intent not found in the words "through carelessness" and the court may not, by exceptions and substitutions, change the identity of the offense charged in the specification (MCM, 1928, par. 78c). It is apparent, however, that although unauthorized, such finding contains within its terms a legal finding of a lesser and necessarily included offense, that is, the offense of discharging a pistol through carelessness. Thus, since the accused is acquitted of all material allegations which are excepted by a court-martial in its findings and in this case the allegation that the pistol was fired through carelessness was excepted, there are resultant inconsistent findings of guilty and not guilty. But inconsistent findings of guilty and not guilty in the same criminal proceeding do not vitiate the former (CM 197115, Froelich, 3 BR 81; CM ETO 1453, Fowler). The reviewing authority, then, in approving only so much of the court's finding of guilty as involved a finding of guilty of having "wrongfully" discharged the pistol was merely paring down the finding of the court by stating an offense lesser than and included therein and bringing it within legal limits beyond which the court had no authority to go. No new element not found in the original specification was added nor was any offense of different nature or identity from that originally charged stated by the use of the word "wrongfully," for it is clear that the discharging of a pistol through carelessness under the circumstances as alleged and proved was "wrongful." It is believed that the action of the reviewing authority was proper and within the scope of the powers given him by Article of War 47.

A contrary holding would inject an unnecessary and dangerous legalism into the administration of military justice, the only effect of which would be to allow the guilty to go unpunished due to inadvertence or ignorance of legal technicalities on the part of courts-martial, many of which under field conditions are composed entirely of men unlearned in the law. A person on trial for involuntary manslaughter, for example, where the evidence presents a picture of gross carelessness and disregard for the rights of others, and who is found guilty of voluntary manslaughter and not guilty of the offense as originally charged by some error in the wording of the exceptions and substitutions in the court's finding, would go completely free under the ruling announced in the Johns case, for he could not again be tried if the finding of not guilty was to be allowed to stand in preference to the finding of guilty of involuntary manslaughter included in the unauthorized finding of the court. The dissenting member is of the opinion that such a result is neither required nor justifiable by any existing provision of law.

For the foregoing reasons I dissent from the opinion of the majority of the Board of Review. In my opinion the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority.

Gilbert E. Schroyl, Judge Advocate

(270)

JAGK - CM 316182 1st Ind NOV 14 1946

WD, JAGO, Washington 25, D. C.

TO: The Under 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 David W. DeMoss, Master of the SS GEORGE S. COUTANT, a person serving with the Army of the United States in the field aboard the said GEORGE S. COUTANT.

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. Accused was charged with carelessly discharging a pistol. The court found him not guilty of carelessness but guilty of deliberately firing the weapon. This was in accord with the proof. The offense found was not, however, lesser than and included in that charged, and the finding was invalid. The reviewing authority attempted to approve a finding of "wrongfully" firing the pistol. The wrongfulness thus found must have been of a kind other than carelessness, for accused was found not guilty of carelessness, and the wrongfulness involved in the approval by the reviewing authority was not, therefore, included in the offense charged. For the reasons stated, I recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

THOMAS H. GREEN,
Major General
The Judge Advocate General

~~(G.C.M.O.~~
( G.C.M.O. 359, 29 November 1946)

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

JAGH - CM 316193

13 FEB 1947

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| UNITED STATES | ) | SECOND ARMY |
| v. | ) | Trial by G.C.M., convened at Camp Carson, Colorado, 17 and 19 June and 15 July 1946. Dismissal |
| First Lieutenant ARDISS A. HOLSTEIN (0-2008360), Infantry | ) | |

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Ardiss A. Holstein, Company E, 38th Infantry, did, at Camp Carson, Colorado, on or about 21 May 1946, feloniously take, steal, and carry away one (1) Woodstock Typewriter, value about $75.00, the property of the United States Government.

He pleaded not guilty to the Charge and its Specification. The court found the accused guilty of the Specification, except the word "Government" and substituting therefor the words "furnished and intended for the military service;" of the excepted word not guilty, of the substituted words guilty; of the Charge not guilty, but guilty of a violation of the 94th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. Later on the same day, the court reconvened for revision of the record as to the findings in the case, and, without specifically revoking the previous findings, found the accused guilty of the Specification and Charge, and adjudged the same sentence as that previously announced. The record of trial was then forwarded

to the Commanding General, Fifth Army, who, subsequent to the appointment of the court, had assumed command over the accused's organization. He returned the record of trial to the court for further proceedings in revision, holding that the original findings were invalid, that the court lacked the power to reconvene upon its own motion for revision of the findings, and that the court's failure to specifically revoke its original findings was fatal to the second findings. On 15 July 1946, the court accordingly reconvened, revoked its previous findings and sentence, found the accused guilty of the Charge and its Specification, and again sentenced him to dismissal, total forfeitures and confinement for one year. The Commanding General, Fifth Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The Judge Advocate General returned the record with the recommendation that it be transmitted to the Commanding General, Second Army, who was the appointing authority and who referred the case for trial. This being accomplished, the Commanding General, Second Army, approved so much of the findings of guilty of the Charge and Specification as involves a finding that the accused did at the time and place alleged feloniously take, steal, and carry away one Woodstock typewriter, value about $75.00, property of the United States, in violation of the 93rd Article of War, approved the sentence, remitted the forfeitures and confinement, and forwarded the record of trial for action under Article of War 48.

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

On 23 May 1946, the accused, representing himself to be J. H. McPherson, took a Woodstock typewriter, Serial N-594568, to the Davis Typewriter Shop, Colorado Springs, Colorado, and stated that he wished to sell it (R 25, 42). He was dressed partly in military uniform, without insignia. In the absence of the owner of the shop, an employee placed a tag on the machine and requested the accused to return on the following day (R 43). On the morning of 24 May 1946, accused returned and discussed the proposed sale with Roy A. Davis, the owner of the shop, telling Davis that he had purchased the machine from a dealer in Texas, but that he did not have a bill of sale (R 25). Davis agreed to pay $48.00, which was two-thirds of the OPA ceiling price, and asked that the accused return later in the day for his money, in order that Davis might check the personal references accused had given. Discovering that the accused had given a non-existent street number as his home address and that a doctor listed as a personal reference by the accused did not know him, Davis notified the authorities at Camp Carson, and learned that a typewriter of the same make and bearing the same serial number was missing from that post (R 26). When accused returned later in the day, to collect his money, he was arrested by civilian police (R 7-8, 18).

The typewriter described in the Specification was charged to Lieutenant Ifft, Personnel Officer, 38th Infantry, on Memorandum Receipt (R 10) and was being used in Building 910 at Camp Carson. On two occasions on 21 May 1946,

accused was in Building 910 (R 14). He did not ask permission to remove the typewriter from the building (R 12). On 22 May 1946, the Sergeant Major discovered that the typewriter was missing, and reported the fact to Lieutenant Ifft (R 11). A search of the building was made, but the machine could not be located (R 15).

Davis was qualified as an expert and testified that the typewriter would bring approximately $75.00 under OPA regulations in effect at the time (R 28). According to "General Schedule of Supplies," the machine has a value of $81.33, depreciation not being considered (R 41).

Accused made a voluntary statement to the Chief of Police, Colorado Springs, in which, after having been warned of his rights, he admitted having stolen the typewriter from the personnel office, Camp Carson, and gave as an excuse the fact that his wife was in the hospital and he needed funds (R 21-22).

Having first been warned of his rights under Article of War 24, accused admitted to the investigating officer, that, on the night of 21 May 1946, while officer of the day, he removed the typewriter from the personnel office and placed it in his car. On the following day, he attempted to sell it in Pueblo, but was unsuccessful. He later tried to sell it to the Davis Typewriter Shop. He also testified that his wife was in the hospital and he needed funds to provide for her care (R 32, 34).

4. The evidence for the defense is summarized as follows:

The defense introduced a stipulation that, in accordance with instructions issued by Headquarters, Army Service Forces, all Woodstock Typewriters bearing serial numbers below 602000 would be declared surplus and transferred to a disposal agency (R 47).

A representative of the War Assets Administration testified that his agency had placed a price of $44.73 on the machine (R 49).

The defense introduced in evidence copies of orders awarding the accused the Silver Star (R 53; Def Ex B), the Purple Heart (R 53; Def Ex C), and the Combat Infantryman's Badge (R 53; Def Ex D).

Also received in evidence was a statement of Dr. E. J. O'Brien, wherein it is stated that on the night of 22 May 1946, he examined the wife of the accused and discovered that she was extremely ill, suffering with bronchial pneumonia, and that it was the policy of the hospital in which she was treated to receive cash settlement before releasing a patient (Def Ex E).

A brother officer testified that the accused repaid a $10.00 loan to him (R 55), and two enlisted men who had served with the accused testified to his superior manner of performance as an enlisted man in combat (R 55, 57).

Accused having been informed of his rights to testify, elected to remain silent (R 58).

5. There is sufficient competent evidence in the record from which to conclude that at the time and place alleged in the specification the accused feloniously took, stole and carried away a Woodstock typewriter, value about $75.000, the property of the United States.

That the typewriter was property of the United States is established by the testimony of Lieutenant Ifft who was the officer charged with responsibility for it and who signed a memorandum receipt for it. While Lieutenant Ifft did not expressly state that the typewriter was the property of the United States, the court could properly infer from the fact that the typewriter was used in the military service and that Lieutenant Ifft signed a memorandum receipt for it, that the typewriter was property of the United States.

There is no direct evidence that the accused took the typewriter, but the circumstantial evidence is so persuasive as to admit of no other reasonable conclusion. The accused had an opportunity to take the typewriter on the night of 21 May 1946 while he was Officer of the Day. There is direct evidence that he was in possession of the typewriter when he brought it to the Davis Typewriter Shop on 23 May 1946. That the accused intended permanently to deprive the Government of the possession of the typewriter is established by the testimony of Mr. Davis and Miss Smith of the Davis Typewriter Shop to the effect that the accused claimed to own the typewriter and offered to sell it. In addition the accused, after being informed of his rights under Article of War 24 in each instance, admitted first to the Chief of Police and later to the investigating officer that he stole the typewriter from the personnel office on 21 May 1946. The evidence establishes beyond any reasonable doubt that the accused took and carried away the typewriter with larcenous intent.

With respect to proof as to value it was shown that the Government list price of the typewriter is $81.33, the OPA ceiling price is approximately $75.00, and the War Assets Administration price as surplus property is $44.73. Inasmuch as the typewriter was not a distinctive article of Government issue and in view of the fact that the machine was approximately five years old, the Government list price is not controlling as to value (Dig Op, JAG 1912-40, Par 451 (42)). The value of the typewriter is the market value at the time of the theft. The market value is established by the testimony of Mr. Davis, who was sufficiently qualified as an expert, that he was willing to pay the accused "$48.00 and some cents" for the typewriter and that he expected to realize the OPA ceiling price, "slightly in excess of $75.00," when he sold it at retail. It appears that the OPA retail ceiling price more closely approximates the market value of the typewriter than the War Assets Administration valuation of the typewriter as surplus property because of the limited market available to the War Assets Administration.

6. The court was appointed by the Commanding General, Second Army, on 3 June 1946, and consisted entirely of members of the 38th Regimental Combat Team, which was then under his command. On 11 June 1946, pursuant to War Department Circular No. 138, 14 May 1946, the combat team was relieved of assignment to Second Army and assigned to Fifth Army. Second Army, however, remained in existence, and the Commanding General, Fifth Army did not succeed to the command functions of Commanding General, Second Army. It therefore follows that the power to act upon the record of trial lay in the Commanding General, Second Army, who appointed the court (CM 312720, Hansell (5 Bull JAG 64)).

Since the revision of the findings accomplished on 15 July 1946 was ordered by an authority which had no jurisdiction in the case, that revision is a nullity.

It was held in CM 251451, Monaghan, 33 BR 243 (4 Bull JAG 5), that:

> "* * * the court may not, upon its own motion, reconsider any finding after it has once announced its findings, or after it has received evidence of previous convictions."

It is therefore apparent that the first revision of the findings was also void, being made after the original findings and sentence had been announced. Consequently, the case must stand or fall on the basis of the original findings.

It was clearly improper for the court, by exception and substitutions, to add the words "furnished and intended for the military service," for, by so doing, it added to the Specification an element not included in the offense of simple larceny, with which the accused was charged. It is well settled that larceny of United States property, furnished and intended for the military service, is not an offense lesser than and included in larceny as denounced by Article of War 93 (CM 186919, Sweat; CM 191809, Price, 1 BR 301). Thus, both the finding of guilty of the words added to the Specification and the finding of guilty of a violation of the 94th Article of War were improper.

The question remaining is, therefore, whether the conviction and sentence can be supported by the court's finding or whether the findings were such as to render void any sentence adjudged thereon.

The words added to the specification by the court in its original findings were properly disapproved by the reviewing authority. The approved findings as to the specification does not support a finding of guilty of a violation of Article of War 94 and the reviewing authority approved only so much of the court's finding as to the Charge as involves a violation of Article of War 93.

There remains for consideration whether the court's findings:

> "Of the Charge: Not Guilty, but guilty of a violation of the 94th Article of War"

amounts to an acquittal of any violation of Article of War 93.

Larceny in violation of Article of War 94 is not a lesser included offense of larceny under Article of War 93, because the larceny denounced under Article of War 94 includes an added element, namely that the stolen property must be "property of the United States furnished or intended for the military service thereof." It is, however, still larceny and necessarily includes each element of larceny under Article of War 93.

Therefore larceny of property of the United States in violation of the 93rd Article of War is included in the offense of larceny in violation of Article of War 94. In our opinion the court's finding with respect to the Charge does not amount to an acquittal of a violation of Article of War 93.

Accordingly it was proper for the reviewing authority to approve only so much of the finding of guilty of the Charge as involves a violation of Article of War 93 (CM 317316, Polster).

This view is supported by CM 191638, Giles, 1 BR 269. In that case, the Specification alleged that shoes stolen by the accused were the property of Private George Patterson. The court found that they were the property of the United States, furnished and intended for the military service, and issued to Private Patterson. The Board of Review there held:

> "Accused was found guilty of the offense substantially as charged, for the finding that the shoes had been 'issued to Private George Patterson' is equivalent in substance to the allegation that they were 'property of Private George Patterson.' The finding that the shoes were property of the United States, furnished and intended for use in the military service may be disregarded as surplusage, since there remains the offense substantially as charged. The court erroneously substituted, under the charge, the 94th Article of War for the 93rd, but this may also be disregarded (C.M. 147387, Sys)."

Accordingly it is our opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority.

7. Attached to the record of trial is a recommendation addressed to the reviewing authority by the president of the court dated 15 July 1946 wherein it is stated that the general court, all members present concurring, recommends to the reviewing authority that leniency be shown the accused

because of his war record and the service he has rendered his country. A plea for clemency signed by the accused's individual defense counsel is also attached to the record.

8. The accused is 21 years of age, married and completed three years of high school before starting work as a hoist operator. War Department records show that he was inducted in August 1943, and after two years of outstanding service, during which he was awarded the Silver Star for gallantry in action, and the Combat Infantry Badge for service in action, he was given a battlefield appointment as second lieutenant, Army of United States on 19 March 1945. He was promoted to first lieutenant on 3 July 1945. He was awarded the Purple Heart for a wound received in action on 27 August 1944. For the period from 1 January to 30 June 1945, he was rated 5.3 (excellent). His record shows no prior offenses, civilian or military, other than that of attempting to transmit live ammunition through the mail; as an enlisted man, for which he was tried and convicted by summary court-martial.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. 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 the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

A. Gottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 316193 1st Ind

WD, JAGO, Washington 25, D. C. FEB 28 1947

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 First Lieutenant Ardiss A. Holstein (0-2008360), Infantry.

2. Upon trial by general court-martial this officer was found guilty of larceny of a typewriter, property of the United States, in violation of Article of War 94. He was sentenced to dismissal, total forfietures and confinement at hard labor for one year. The reviewing authority approved only so much of the findings of guilty as involved a finding that the accused did, at the time and place alleged, feloniously take, steal, and carry away the typewriter described, in violation of Article of War 93, approved the sentence, remitted the forfeitures and the 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. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion.

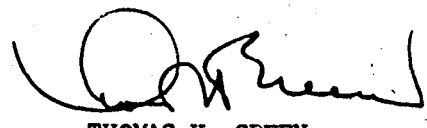
On 21 May 1946, the accused removed from the personnel office at Camp Carson, Colorado, and attempted to sell a Woodstock typewriter, property of the United States, at a typewriter shop in Colorado Springs, but when he could produce no bill of sale, the prospective purchaser asked for personal references and upon investigation of the references given by the accused, found that they were false, and called Camp Carson, where he was informed that the typewriter had been stolen. Prior to the trial, accused admitted the theft and explained that his wife needed money for a hospital bill.

4. Attached to the record of trial is a recommendation addressed to the reviewing authority by the President of the court dated 15 July 1946 wherein it is stated that the general court, all members present concurring, recommends to the reviewing authority that leniency be shown the accused because of his war record and the service he has rendered his country. A plea for clemency signed by the accused's individual defense counsel is also attached to the record.

The accused is 21 years of age, married and completed three years of high school before starting work as a hoist operator. War Department records show that he was inducted in August 1943, and after two years of service, during which he was awarded the Silver Star Medal for gallantry in action and the Combat Infantry Badge, he was given a battlefield appointment as second lieutenant in the Army of the United States on 19 March 1945. He was promoted to first lieutenant on 3 July 1945. He was awarded the Purple Heart for a wound received in action on 27 August 1944. For the period from 1 January 1945 to 30 June 1945, his efficiency rating was excellent. His record shows no prior offenses, civilian or military, other than that of attempting to transmit live ammunition through the mail for which he was tried and convicted by summary court-martial as an enlisted man.

I recommend that the sentence as modified by the reviewing authority be confirmed and carried into execution. All possible leniency appears already to have been extended.

5. 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

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( G.C.M.O. 70, 10 March 1947)

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



JAGK - CM 316199

31 OCT 1946

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|---|---|---|
| UNITED STATES | ) | FIFTEENTH AIR FORCE |
| v. | ) | Trial by G.C.M., convened at Salina, Kansas, 31 July 1946. Dismissal and total forfeitures |
| Second Lieutenant HOWARD ROY SEWELL (0-2094127), Air Corps | ) | |

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

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

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

CHARGE I: Violation of the 90th Article of War.

Specification: In that Second Lieutenant Howard R. Sewell, 829th Bombardment Squadron, 485th Bombardment Group, did, at Smoky Hill Army Air Field, Salina, Kansas, on or about 9 June 1946, wrongfully use provoking speech, to wit: I can whip both your asses, or words to that effect, against Captain Robert E. Williams, Courtesy Officer, and First Lieutenant Gerald Fall, Officer of the Day.

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

Specification 1: In that Second Lieutenant Howard R. Sewell, ***, was at Smoky Hill Army Air Field, Salina, Kansas, on or about 9 June 1946 drunk and disorderly in station.

Specification 2: (Finding of not guilty).

He pleaded not guilty to Charge I and its Specification, guilty of Specification 1, Charge II, except the words "and disorderly" of the excepted words not guilty, of the substituted words, guilty, not guilty of Specification 2, Charge II, and Charge II. He was found guilty of Charge I and its Specification, guilty of Charge II and Specification 1 thereunder, not guilty of Specification 2, Charge II. Evidence of one previous conviction by a general court-martial of being drunk and disorderly in uniform, on or about 1 May 1945, in a public place in violation of Article of War 96 was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of

48 with a recommendation that the sentence be commuted.

3. For the prosecution.

On the evening of 8 June 1946 accused attended the regular Saturday night dance at the Officers' Club (R. 7,11,19,24,25; Pros. Ex. 1). Accused was in the party of his airplane commander, First Lieutenant Rupert W. Koch, and several other officers (R. 23; Pros. Ex. 1).

At about 0100 hours, 9 June, First Lieutenant Richard H. Lemmon sat talking with another officer in the lounge of the officers' club when accused approached with a bottle in his hand and interrupted them. He appeared drunk but was not riotous, violent or disorderly. He used obscene language and made derogatory remarks, but no civilians were present. Lieutenant Lemmon asked accused to leave and took his courtesy card from him (R. 7-11).

Captain Robert E. Williams, courtesy patrol officer, was at the dance and talked to accused about 2300 - 2330 hours and told him he was getting out of line (R. 19). About 2400 he again saw accused, who had his tie off and his trousers tucked into his cowboy boots (R. 19; Pros. Ex. 1).

First Lieutenant Gerald G. Fall, Officer of the Day, closed the Officers' Club at about 0200-0230 and saw accused leaving the club. At that time he appeared to be drunk (R. 12,15). Between 0230 and 0300 Lieutenant Fall and Captain Williams observed that accused was involved in a disturbance outside the club. Lieutenant Fall requested accused to leave the area and go home. He refused to go and said that he wanted to be left alone and if not left alone he would "whip both their asses" (R. 12,14,19). Accused got into a cab and started home. On the way to the main gate the cab picked up a woman and when the cab reached the gate accused attempted to have the woman searched (R. 13). Captain Williams and Lieutenant Fall proceeded to the main gate where accused used abusive language to both in the presence of civilians and the Military Police (R. 13,19,20). Accused was drunk and, in the opinion of Lieutenant Fall, disorderly but not violent or riotous (R. 15,16,17,21). Captain Williams related that accused on this occasion said that he would "whip both your asses," but he did not think accused directed his remarks at him, nor did he think accused was disorderly (R. 20,21).

The Officer of the Day attempted to have a sobriety test of accused made and requested that he be placed in arrest in the hospital where guards were available but the Medical Officer of the Day refused to accept accused (R. 17,20).

About 0330 accused was placed in arrest in his room in the Bachelor Officers' Quarters by Lieutenant Fall, the officer of the day, and told that he could not leave except for meals at the Officers' Mess (R. 13,17,18,20, 21). Accused said he would not stay there and had no intention of doing

so (R. 13,17). Shortly thereafter he left the base and went home to his wife in Salina, Kansas (R. 14; Pros. Ex. 1). Upon learning that accused had broken restriction Lieutenant Fell called Lieutenant Koch, accused's airplane commander, and informed him of accused's conduct. Lieutenant Koch drove to Salina and returned accused to the base at 0500-0600 hours. Accused was sober and regretful (R. 24). Lieutenant Koch testified that accused was always cooperative and respectful as a crew member.

Without objection on the part of the defense there was read in evidence a sworn written statement made by accused to the investigating officer, Captain Broomhall (R. 28). Accused stated that he attended the dance on the night in question. Before leaving home he called the club by phone and was informed that the dance was "come as you like." He wore his suntan uniform and cowboy boots, but upon reaching the club he found that it was not "come as you like." He had come alone, so he joined some friends, had several drinks and became intoxicated. He did not remember any of the events which led to his arrest. He got home and when Lieutenant Koch came for him he realized the serious nature of the situation and returned to the base with him and remained in the office of the Bachelor Officers' Quarters until released from arrest (Pros, Ex. 1).

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

Accused, after an explanation of his rights as a witness, elected to make a sworn statement. He gave a summary of his military experience and testified to the statement of facts previously given by him to the investigating officer. He had no recollection of the time when he left the club, nor could he remember any of the incidents referred to by the witnesses for the prosecution. He had once before had a similar lapse of memory (R. 31).

The defense moved the court to strike the name of Captain Williams from the Specification of Charge I (R. 29,33) after the captain had testified that he was not sure that the obscene language of accused was directed toward him (R. 20). The court properly denied the motion. The testimony of Lieutenant Fall was to the effect that accused had used this language toward him and Captain Williams when they asked accused to leave the Officers' Club area (R. 12,13). There was ample evidence therefore upon which the court could determine, as a factual question, whether or not the objectional language was directed to both parties.

5. By his plea of guilty to being drunk at the time and place alleged, and the undisputed proof of his belligerent conduct and insulting language toward, and in the presence of, other officers, the evidence clearly establishes both drunk and disorderly conduct on the part of accused. The contention of defense counsel that the pleading violated the rule against duplicity (par. 20, p. 17, MCM, 1928) loses all force when it was shown that the provoking language, alleged in the Specification, Charge I, was only a part of the "disorderly conduct" referred to in Specification 1,

Charge II. Accused contended that after he became drunk he remembered nothing until 1st Lt. Koch came to his home and returned him to the post.

It is the undisputed rule of law that voluntary drunkenness is not an excuse for an offense not requiring specific intent committed while in that condition (par. 126b, MCM, 1928, p. 136).

6. War Department records show that accused is 26-7/12 years of age and is married. He is a high school graduate. He was inducted 30 December 1941 and served as an enlisted man until 23 February 1945 when he was discharged to receive a commission as second lieutenant, Air Corps. He served in the Aleutian Islands from 11 May 1942 to 30 October 1943. The only efficiency rating of accused available is that of very satisfactory for the period 24 February 1945 - 30 June 1945. During this period he was found guilty by a general court-martial of being drunk and disorderly in uniform in a public place on 1 May 1945. He was sentenced to restriction to his post for three (3) months, to forfeit $50 per month for six (6) months and to be reprimanded.

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 upon conviction of an officer of a violation of the 90th or 96th Article of War.

Charles E. Silberg, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert B. Kraft, Judge Advocate

JAGK - CM 316199 1st Ind

WD, JAGO, Washington 25, D. C. Nov 8 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 Second Lieutenant Howard Roy Sewell (0-2094127), Air Corps.

2. Upon trial by general court-martial the accused was found guilty of wrongfully using provoking speech to officers in violation of Article of War 90 and of being drunk and disorderly in station in violation of Article of War 96. Evidence of one previous conviction by general court-martial of being drunk and disorderly in uniform, on or about 1 May 1945, in a public place in violation of Article of War 96 was introduced. Accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, with a recommendation that the sentence be commuted.

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 sentence.

Lieutenant Sewell attended the regular Saturday night dance at the Officers' Club, Smoky Hill Army Air Field, Salina, Kansas, on the evening of 8 June 1946. He had several drinks with fellow officers and became intoxicated. Captain Williams, Courtesy Officer of the Post, spoke to accused at the club about 2300-2330 hours and told him he was getting out of line. At about 0100, 9 June 1946, accused interrupted the conversation of two officers and used obscene language and directed derogatory remarks at them. At this time his courtesy card to the club was taken from him and he was asked to leave the club. The Officer of the Day closed the club at about 0200-0230 and saw accused leave the club. He appeared to be drunk at the time. Captain Williams and the Officer of the Day observed accused shortly thereafter engaged in a commotion just outside the club. They told him to go home, to which accused replied that all he wanted was to be left alone and if not left alone he would "whip both their asses." They put accused in a cab and started him home. On the way to the main gate the cab picked up a woman passenger and at the gate accused attempted to have her searched. Captain Williams and the Officer of the Day proceeded to the gate where accused used abusive language in the presence of civilians and the Military Police. The Officer of the Day attempted to place him in arrest and confine him in the hospital

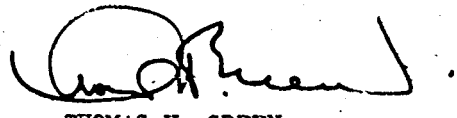
where guards were on duty but the Medical Officer of the Day refused to accept him. About 0330 accused was placed in arrest in a room in the Bachelor Officers' Quarters. Shortly thereafter he left the base and went to his home in Salina, Kansas. His airplane commander went for him and returned him to the Bachelor Officers' Quarters at about 0500-0600 hours, 9 June 1946. He was then sober and regretful.

After explanation of his rights as a witness accused made a sworn statement. He gave a summary of his military experience and stated that he was at the weekly dance in question. Before going, he called from his home and was advised that it was "come as you like." He went alone and wore his suntan uniform and cowboy boots. He joined some friends and had several drinks, becoming intoxicated. He did not remember any of the incidents which led to his arrest or the time when he left the club. He reached home and when his airplane commander came for him accused realized the serious nature of the situation and returned to the base with him.

4. The officer is a high school graduate. He was inducted 30 December 1941 and served as an enlisted man until he was discharged on 23 February 1945 to accept a commission. He was commissioned 24 February 1945 a second lieutenant in the Air Corps. As an enlisted man he served from 11 May 1942 until 30 October 1943 in the Aleutian Islands.

The record shows that on 1 June 1945 the accused was found guilty by general court-martial of being drunk and disorderly in a public place and sentenced to be restricted to the limits of his post for three months, to forfeit $50 per month for six months and to be reprimanded. The Staff Judge Advocate's pre-trial recommendation states that he has another previous conviction which was not admissible. The reviewing authority recommended commutation but accused has repeatedly exhibited qualities unbecoming an officer. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

5. Inclosed is a form of action designed to carry into effect 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

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( G.C.M.O. 351, 15 November 1946)

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

7 OCT 1946

JAGK-CM 316254

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| UNITED STATES | ) | RYUKYUS COMMAND |
| v. | ) | Trial by G.C.M., convened at APO 331, c/o Postmaster, San Francisco, California, 14 August 1946. Dishonorable discharge and confinement for life. Penitentiary. |
| Technician 5 WILLIAM J. PRESLEY (34929655), 3255th Quartermaster Service Company. | ) | |

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REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 Technician Fifth Grade Willie J. Presley, 3255th Quartermaster Service Company, did, at Naha, Okinawa, Ryukyus Islands, on or about 13 June 1946, forcibly and feloniously, against her will, have carnal knowledge of Kamashiro Hatsuko.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. This is a trial upon rehearing. The Staff Judge Advocate was of the opinion that prejudicial error resulted at the first trial upon

refusal of the court-martial to hear further evidence as to the admissibility of accused's confession, it being contended by counsel that the confession was obtained under duress. The reviewing authority thereupon ordered the rehearing.

The Board of Review adopts the statement of evidence and the law contained in the Staff Judge Advocate's review upon rehearing.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence. 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, paragraph 2601, of the District of Columbia Code.

Christy L. Silvers, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert E. Hegyl, Judge Advocate

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

JAN 30 1947

JAGQ - CM 316277

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| UNITED STATES | ) | AIR MATERIEL COMMAND |
| v. | ) | Trial by G.C.M., convened at Army Air Forces Technical Base, Dayton, Ohio, 31 July 1946. Dismissal, total forfeitures and confinement for two (2) years. |
| First Lieutenant DOLPHA N. HULL (O-779145), Air Corps. | ) | |

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

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

Specification: (Finding of Not Guilty).

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

Specification 1: In that First Lieutenant Dolpha N. Hull, Air Corps, did, at Florence, Arizona, on or about 11 February 1946, unlawfully, and bigamously marry Betty E. Northington, having at the time of said marriage to Betty E. Northington, a lawful wife then living, to wit: Florence June Hull, nee Florence June Day.

Specification 2: In that First Lieutenant Dolpha N. Hull, Air Corps, did, at Wright Field, Dayton, Ohio, on or about 21 March 1946 wrongfully and unlawfully make and utter to the Winters National Bank and Trust Company a certain check in words and figures as follows, to wit:

21 March 1946

EASTLAND NATIONAL BANK
Eastland, Texas

Pay to the
order of Cash $100.00

One hundred and no/100- - - - - - - - - - - - - - - - - DOLLARS

Area A TSPRO
Ph 61375
54217

Lt. Dolpha N. Hull
0-779145

and by means thereof did obtain $100 in lawful currency of the United States from said Winters National Bank and Trust Company, which check, upon being presented to the said bank upon which it was drawn for payment, was not honored or paid by it because he, the said First Lieutenant Dolpha N. Hull, did not have on deposit with said bank sufficient funds for payment thereof.

Specification 3: In that First Lieutenant Dolpha N. Hull, Air Corps, did, at Vandalia, Ohio, on or about 10 April 1946, register at the Yendes Motel, Vandalia, Ohio, a woman, as his wife, knowing the said woman was not his wife, this to the prejudice of good order and military discipline.

Specification 4: (Finding of Not Guilty).

Specification 5: (Finding of Not Guilty).

Accused pleaded not guilty to all Specifications and Charges. He was found not guilty of the Specification and Charge I, Specifications 4 and 5, Charge II, but guilty of the other Specifications 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, and to be confined at hard labor at such place as the reviewing authority may direct for a period of two (2) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Accused and Florence June Day were married at Las Vegas, Nevada, on 25 June 1944 (R 11 Pros. Exs. D, E). On 11 February 1946, accused married

Betty E. Northington at Phoenix, Arizona (R 12; Pros. Exs. F, G). Accused obtained a decree of divorce from Florence June Hull at Las Vegas, Nevada on 20 February 1946 (R 12; Pros. Ex. H), and remarried Betty E. Northington on 24 February 1946 at Florence, Arizona (R 12; Pros. Ex. I). Deposition of Betty E. Northington was admitted in evidence (R 13) in which she testified to her marriage with accused on 11 February 1946; her remarriage to him on 24 February, after he had obtained a divorce from Florence June Hull and that she obtained an annulment of her marriage to accused on 13 May 1946. She was not at the Yendes Motel in Vandalia, Ohio on 10 April 1946 (Pros. Ex. J).

On 21 March 1946, accused presented to the Air Materiel Command Bank Facility, a check signed by him in the amount of $100.00 drawn on the Eastland National Bank, Eastland, Texas, for which he received $100.00 in cash (R 7). The check was presented to the drawee bank three times for payment and was returned each time marked "not sufficient funds" (R 8). Accused made restitution on the check about six weeks after it was cashed (R 9).

Clarence Carpenter, clerk at Yendes Motel, Vandalia, Ohio, identified Prosecution's Exhibit K as a motel registry card and testified that the words, "Lt. and Mrs. Don Hull" were written in his presence on 10 April 1946 by an officer who was accompanied by a lady. He assigned the couple an apartment with two bedrooms (R 13-15).

4. Evidence for the Defense.

Florence June (Day) Hull, former wife of accused, testified that in December 1944 while he was overseas, she wrote him that she was "contemplating divorce" (R 35). After his return to this country she left him because he was drinking, later wrote him that "we were divorced" knowing that such was untrue (R 36, 42), but did not remember the date of such letter (R 36). Accused called her on 12 February, advised her of his remarriage and she then told him "we were not divorced" (R 37). Accused came to California to see her on 15 February and she signed a "divorce paper" (R 37), and they were divorced on 19 February 1946 (R 40). Thereafter on 10 April 1946 she came to Vandalia, Ohio, where accused met her at the train, took her and their baby to the Yendes Motel, registered as man and wife and they lived at that address although they occupied separate bedrooms (R 38, 39). She was not married on 10 April 1946 and has never remarried accused.

She has drawn checks on accused's bank account in Eastland, Texas, as it was a joint account but drew none on it during the month of March 1946 (R 36).

Accused, after being duly advised of his rights as a witness (R 43) elected to testify under oath that Florence June Hull left him because of

his drinking and he met Betty Northington about 20 January 1946. Soon thereafter Florence June Hull wrote him that "the divorce was final" so he married Betty Northington, describing his action as follows:

"* * * On the evening we got married, I was at the station having the car fixed and when I got back to the field, she called and asked if I was there and then asked if I would marry her at her house. I thought she was joking, but when I got to the house she had all of her friends there and it seemed to be their understanding that we were really going to be married, and we were married that night and later I phoned June that I had gotten married and she made the statement that I had better not be married because we were not divorced.

"Q. When did you telephone your second wife?
"A. The morning after the marriage.

"Q. What did you do when you discovered that you were not a single man as you supposed?
"A. I thought the safest thing for me to do was not say anything but go to the legal officer at Williams Field and get advice as to what to do."

* * *

"Q. Will you state to the court exactly what you did?
"A. I tried to keep the thing from Betty, but when I went back that afternoon, she asked me about the whole thing and at first it had me stopped a few minutes because I did not know how she found out about it, and she threatened then and there to have the police come and get me, and I started to go and she said, 'You are not going without me'. So we discussed it and decided to wait until the next morning and leave for Las Vegas where I would see my lawyer and get a divorce. He drew up the papers and then asked me to establish a residence of which I did, and then he finished drawing up the papers for her to make it final. I had to take the bus out to California where she was then living, and she signed the papers there and I arrived back the next morning to see my lawyer. He said it would be approximately two or three days to going through the court, and so Betty insisted that I take her back to Phoenix which I did. I then returned to Las Vegas and stayed there until I obtained the divorce and I then went back to Phoenix and saw my Commanding Officer and got a six-day leave. Then Betty and I were married in Phoenix, Arizona on the 24th day of February 1946, and the

next evening we left for Dayton." (R 43-44).

In March 1946 Betty Northington Hull left accused, taking his car and driving to Phoenix, Arizona. Accused immediately left for Phoenix to recover the car and while there he was apprehended by the civil authorities, imprisoned and charged with bigamy on the complaint of Betty Northington Hull. Three days later he was released to the Military Police and remained in Phoenix until the consummation of the annulment proceeding; returning to Dayton, Ohio, 9 April 1946 (R 45). He sent Florence Day Hull money to come to Dayton and on her arrival took her to the Yendes Motel in Vandalia where he secured a two-room apartment with bath. He stayed at the apartment overnight to help her with the baby (R 46).

5. The evidence establishes the bigamous marriage of accused to Betty E. Northington at Phoenix, Arizona, on 11 February 1946; that accused made, presented and received $100.00 for a check drawn on the Eastland National Bank wherein there were insufficient funds on deposit to meet the check; and that accused registered Florence Day Hull at the Yendes Motel, Vandalia, Ohio, on 10 April 1946 as "Mrs Don Hull" when in fact she was not his wife.

Bigamy has long been recognized as an offense under Article of War 96 without reference to state laws (CM 245278, Yagel, 29 BR 153; CM 256886, Wilber, 36 BR 373). It is committed when one party enters into a contract of marriage while a former marriage of that party still exists undissolved and the spouse of that marriage remains alive (Dig. Op. JAG 1912-40, sec. 454 (18); Wilber case, supra). The evidence here fully establishes the essential elements of the offense alleged and the only question is whether or not accused has presented a valid defense thereto.

In a majority of the civil jurisdictions in this country it is no defense to a charge of bigamy that the individual had an honest but erroneous belief, based on reasonable grounds, that the first marriage had been dissolved. A minority of the jurisdictions, however, recognize such a defense. It appears that the minority view, most advantageous to an accused, has been adopted by The Judge Advocate General at least when the second marriage is performed in a jurisdiction where such a defense is recognized (Dig. Op. JAG, 1912-40, sec. 454 (18); CM 245510, Carusone, 29 BR 195).

To support such a defense accused testified that his former wife, wrote him that "the divorce was final". She admitted she wrote such a letter but that the statement was false. The letter was not produced and the date it was alleged to have been written was indefinite. However, even if such were the true facts of the case they are insufficient as a matter of law to establish the defense, assuming, without deciding, that the minority rule is here applicable. A mere belief that the prior marriage has been terminated by divorce is no defense unless it is an honest belief

based on reasonable grounds or unless accused has exercised "reasonable diligence to ascertain the truth" of the facts on which his belief is founded (Dig. Op. JAG 1912-40, sec. 454 (18); CM 245510, Carusone, 29 BR 195). Accused's belief was based solely upon a letter from his former wife which she admitted was wholly false. Without obtaining any verification from the court supposedly awarding the decree, accused promptly entered upon his second marriage. In our opinion the court was justified in determining that accused neither honestly believed he had been divorced nor used reasonable diligence to ascertain the true facts. In reaching this conclusion, the Board of Review is not overlooking the decision in CM 260611, Wilkinson, 39 BR 309, where a contrary result was reached on different evidence. In that case accused was actually served with process in the divorce action and later advised by the attorney of record that the divorce had been granted. Here, accused made no inquiry of any kind and did not even answer the letter which informed him of the divorce. No papers were served on him and in fact no suit was instituted at the time of his bigamous marriage. He had been divorced before and was acquainted with the necessary procedure.

The evidence clearly proves that accused cashed his check with insufficient funds in the drawee bank to cover the amount. His statement made at the time that he "thought it was good" clearly indicated that he was not positive of his balance but consummated the transaction regardless. That restitution is no defense is too well settled to permit of argument.

The accused and Florence June Hull both admit the allegations of Specification 3 of Charge II that accused did register her as his wife at the Yendes Motel, Vandalia, Ohio, on 10 April 1946 and live at that address although they were not married, and at the time accused was the lawful husband of Betty Northington Hull. Such actions clearly constitute an offense in violation of the 96th Article of War as prejudicial to good order and military discipline.

It is noted that Specification 1, of Charge II alleges the bigamous marriage to have been consummated "at Florence, Arizona, on or about 11 February 1946" when in fact it occurred at Phoenix, Arizona, on 11 February 1946. The remarriage of accused to the same person at Florence, Arizona, on 24 February 1946 occurred after he had obtained a divorce from his former wife and consequently was not bigamous. However, the record clearly discloses that accused was not in the least misled by the error and as the place of the bigamous marriage is not material, in the view we take of the case, such did not injuriously affect his substantial rights under the 37th Article of War.

6. The records of the War Department disclose that accused was 26 years of age on 1 August 1946. He is divorced and has one child. He has had four

civilian jobs after completing four years of high school and 3 months of trade school in 1939. He enlisted 5 April 1943 and was appointed air cadet 14 May 1943. He entered active service as a Second Lieutenant 23 May 1944 and was promoted to First Lieutenant 7 May 1945. He is qualified as a 4-engine pilot (1024) and an adjutant (2110). Serving overseas in Italy from 13 November 1944 to 20 June 1945 he completed 22 combat missions for a total of 156 combat hours. He has been awarded the Air Medal with one Oak Leaf Cluster and is authorized to wear the EAME ribbon with bronze battle stars for air combat Ballsans, Germany, Northern Appenines and Po Valley campaigns. His efficiency ratings have been uniformly "excellent".

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

(Sick in Hospital)
_____, Judge Advocate

Charles M. Dickson, Judge Advocate

Francis S. Taylor, Judge Advocate

JAGQ - CM 316277 1st Ind

WD, JAGO, Washington 25, D. C. FEB 21 1947

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 First Lieutenant Dolpha N. Hull (0-779145), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the offense of bigamy (Spec. 1, Chg II); of wrongfully making and uttering a check in the amount of $100 with insufficient funds in the bank for payment thereof (Spec. 2, Chg II), and of registering a woman as his wife at a hotel, knowing she was not his wife (Spec. 3, Chg II), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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.

4. The evidence shows that accused married one Betty E. Northington, at Phoenix, Arizona, on 11 February 1946, while he had a lawful wife living. His first wife had written him that they were divorced but he did not make any reasonable effort to verify his status before remarrying. The evidence further shows that accused signed and cashed a check in the amount of $100.00 and drawn on the Eastland National Bank wherein there were insufficient funds to meet the check when it was thereafter presented for payment on three occasions. Accused refunded the money obtained on this check approximately six weeks later. He admitted registering his first wife, Florence Day Hull at the Yendes Motel, in Vandalia, Ohio as "Mrs. Don Hull" after she had been divorced from him, and he was the lawful husband of Betty Northington Hull.

5. While his record as a civilian appears clear, it has not been good since he entered upon active military duty. There is contained in the file evidence of issuance by accused of other checks with insufficient funds and failure to meet several financial obligations.

6. I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

7. 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

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( G.C.M.O. 50, 27 February 1947)

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

JAGH - CM 316291

21 NOV 1946

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| UNITED STATES<br><br>v.<br><br>First Lieutenant LOWELL W. CAMPBELL (0-1108533), Corps of Engineers | ARMY AIR FORCES TECHNICAL TRAINING COMMAND<br><br>Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 7 August 1946. Dismissal, total forfeitures and confinement for one (1) year. |

OPINION OF THE BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Lowell W. Campbell, Corps of Engineers Unassigned, Attached Squadron B, 3705th Army Air Forces Base Unit (Technical School), did, at Lowry Field, Denver, Colorado, on or about 31 May 1946, feloniously take, steal, and carry away 1 Argus Camera in brown leather case, value about $60.00, 1 Dejur Exposure Meter, Model 5-B in leather case number 17102, value about $16.91, and 1 pair of green lensed sun glasses with brown leather case, value about $7.50, of a total value about $84.41, the property of First Lieutenant Robert E. Derrington.

Specification 2: In that First Lieutenant Lowell W. Campbell, Corps of Engineers Unassigned, Attached Squadron B, 3705th Army Air Forces Base Unit (Technical School), did, at Lowry Field, Denver, Colorado, on or about 3 June 1946, feloniously take, steal, and carry away 1 Agfa Chief Camera, PB20, value about $3.50, 1 Bakelight Flashlight, value about $3.50, of a total value of about $7.00, the property of Second Lieutenant Maurice W. Smith.

Specification 3: In that First Lieutenant Lowell W. Campbell, Corps of Engineers Unassigned, Attached Squadron B, 3705th Army Air Forces Base Unit (Technical School), did, at Lowry Field, Denver, Colorado, on or about 5 July 1946, feloniously take, steal, and carry away 1 German made Voightlander Brilliant Camera, size 120 reflex, No. 716, value about $60.00 and 2 Camera Light Filters with adapter ring and sun-shade, value about $5.00, of a total value of about $65.00, the property of First Lieutenant Albert D. Byrne.

He pleaded guilty to the charge and each specification thereunder with minor exceptions and substitutions to Specification 2. He was found guilty of the charge and guilty of Specification 1, except the figures "$60.00, $16.91, $7.50 and $84.41" substituting therefor respectively the figures and words "$38.50, $12.00, of some value and $50.50," of the excepted figures not guilty, of the substituted figures and words, guilty; guilty of Specification 2, except the figures "$3.50, $3.50 and $7.00" substituting therefor respectively the figures and words "$2.00, of some value and $2.00", of the excepted figures not guilty, of the substituted figures and words guilty and guilty of Specification 3, except the figures "$60.00, $5.00 and $65.00" substituting therefor respectively the figures "$45.00, $4.75 and $49.75," of the excepted figures not guilty of the substituted figures guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. 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 is summarized as follows:

The accused is in the military service of the United States and was assigned to the Engineer Section, Headquarters, Fourth Air Force (R 25, 28).

Specification 1: An Argoflex camera (R 15; Pros Ex B), an exposure meter (R 16; Pros Ex C), and a pair of sun glasses (R. 18; Pros Ex D) were missing from the glove compartment of Lieutenant Derrington's automobile at Lowry Field on 30 or 31 May 1946. On 12 July 1946 the exposure meter was found in the pocket of a pair of trousers hanging in the accused's closet in the Bachelors Officers' Quarters (R 17). The camera was pledged by accused on 10 July 1946 at a pawn shop in Denver, Colorado where accused received $20.00 in consideration for the pledge (R 7; Pros Ex A). The sun glasses were found in accused's B-4 bag (R 18). The value of the camera was $33.50, plus approximately ten per cent due to price increases. The case was worth $5.00 to $10.00 (R 9). The exposure meter was worth $10.00 to $12.00 (R 13).

Specification 2: An AGFA Chief camera and flashlight were stolen from

Lieutenant Smith's automobile sometime between the last of May and 3 June 1946 ( Pros Ex G). The camera was worth $3.00 to $4.00 new (R 10) and the used price would be seventy-five per cent of the price new (R 12). It was stipulated that the flashlight was of some value (R 26).

Specification 3: On 5 July 1946 a Voightlander camera and case, two filters, a filter case and a sun shade were stolen from Lieutenant Byrne's automobile (R 20). The camera and filters were found in a search of the possessions of the accused on 12 July 1946 (R 24). The market value of the camera was between $45.00 and $75.00 (R 12). The sunshade was worth $5.00 and the filters were worth $1.50 (R 14).

On 12 July 1946 the accused was informed that he was suspected of having stolen the items described in the specifications, and after having been advised of his rights under the 24th Article of War, admitted that he had stolen them (R 22, 24-25).

4. The evidence for the defense is summarized as follows:

The accused's WD, AGO Form 66-2, Army Air Forces Officers Qualification Record was introduced in evidence for the purpose of showing the manner of performance of his duties in the service (R 26-27; Def Ex 1,). A copy of the exhibit attached to the record of trial shows that accused's manner of performance of his duties has been rated excellent from February 1945 to June 1946. It was stipulated that prior to the offenses alleged herein, the character of the accused has been excellent (R 27).

After having been properly advised of his rights as a witness the accused elected to make an unsworn statement which was in substance as follows: He enlisted in February 1942 and attended the Air Mechanic's School at Buffalo, New York. He was graduated from the Engineer Officers' Training School at Fort Belvoir, Virginia and after graduation was assigned to the 878th Airborne Aviation Engineer Battalion in which he served for two and a half years. He served as platoon leader and battalion motor officer. The battalion trained in the United States for one year and thereafter was stationed overseas for twenty-two months. It was never committed in combat but was involved in numerous training missions. Accused returned to the United States in December 1945. During his overseas service it was customary for the men of his organization to pick up property which was not authorized to be carried on property records. While overseas he did a great deal of drinking to relieve the tension involved in glider work. At the time of the alleged offenses he was under the influence of alcohol to the extent that he was unable to distinguish between right and wrong. He is married and has one child but is separated from his wife, to whom he allots $200.00 of his pay per month. He has worried considerably over his child as a result of this separation (R 27-30; Def Ex 2).

5. The accused pleaded guilty to the charge and specifications

except as to the date of the offense alleged in Specification 2 and was found guilty as charged with certain exceptions as to the value of articles listed in the specifications. In explaining to the accused the effect of his plea of guilty, the law member informed the accused that the maximum sentence which could be adjudged as a result of such plea was dismissal, total forfeitures and confinement for ten years and six months. In response to a question by the defense counsel, the President of the court stated that the table of maximum punishments applies in the case of an officer. This was erroneous, but since the sentence adjudged was far less than that which the law member stated was the maximum in this case, the substantial rights of the accused were not prejudiced thereby.

Notwithstanding the accused's plea of guilty, the prosecution proved a prima facie case as to Specifications 1 and 3. As to Specification 2, it was shown that the property listed therein was missing but there was no showing that it was found in the possession of the accused. By his plea of guilty, the accused admitted having stolen the property described in Specification 2 on 31 May 1946. The court found that he stole it "on or about 3 June 1946." A variance of three days may be considered as being permissible within the meaning of the phrase "on or about." It would have been proper for the court to have corrected the date in accordance with the plea of the accused, by exception and substitution, but since there was no evidence to indicate that the crime was committed on any other specific date, the finding as made is not erroneous.

In an unsworn statement the accused stated that at the time he committed the offenses in question, he was so far under the influence of intoxicating liquor that he was unable to distinguish right from wrong. This contention appears to have been offered in mitigation rather than as an affirmative defense. Had it been offered to show that there was no specific intent, it still could not have affected the legal sufficiency of the recrod. Although it is the general rule that where the evidence shows the accused to have been so drunk as to have been unable to form a specific intent, a conviction of larceny cannot stand (CM 151742, Dig Op 1912-40, page 325), it has been held that the wrongful taking and the intent need not be simultaneous. The fact that the accused, after returning to sobriety, did not return the property, is indicative of an intent to deprive the owner permanently of his property (CM 228274, Small, II Bull JAG 12). Since drunkenness at the time of the wrongful taking does not constitute a complete defense to larceny, the accused's unsworn statement that he was drunk at that time, cannot be considered as being inconsistent with his plea of guilty.

The Board of Review is of the opinion that the evidence, together with accused's pleas of guilty is legally sufficient to support the findings of guilty.

6. War Department records show that the accused is 26 years of age, married and a high school graduate. Prior to enlistment he was a student at the University of Illinois for three and a half years. He enlisted on 8 February 1942 and attended the Engineer Officers' Candidate School, Fort Belvoir, Virginia. He was commissioned a second lieutenant, Army of the United States, on 6 January 1943 and was promoted to first lieutenant on 11 December 1943. His efficiency ratings from February 1945 to June 1946 were excellent except for short periods when he was not rated.

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

[signature], Judge Advocate

[signature], Judge Advocate

[signature], Judge Advocate

JAGH-CM 316291 1st Ind

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

TO: The Under Secretary of War

1. Pursuant to Executive Order 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 Lowell W. Campbell, O-1108533, Corps of Engineers.

2. Upon trial by general court-martial, this officer was found guilty of three specifications of larceny, in violation of Article of War 93. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On or about 31 May 1946, the accused stole an Argoflex camera, exposure meter and a pair of sun glasses from the glove compartment of an automobile belonging to a Lieutenant Derrington. He pledged the camera at a pawn shop, receiving $20 therefor. On or about the same date, accused stole an Agfa Chief camera and a flashlight from the automobile of a Lieutenant Smith. On or about 5 July 1946, accused stole a Voightlander camera, two filters and a sun shade from the automobile of a Lieutenant Byrne. The accused admitted all of the offenses and pleaded guilty to all three specifications.

4. I recommend that the sentence be confirmed, that a United States Disciplinary Barracks be designed as the place of confinement and that the sentence be carried into execution.

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

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(G.C.M.O. 370, 11 Dec. 1946)

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



JAGK - CM 316347

21 OCT 1946

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| UNITED STATES<br><br>v.<br><br>First Lieutenant VERNON C. FEVER (0-1321902), Infantry. | NEW YORK PORT OF EMBARKATION<br><br>Trial by G.C.M., convened at Camp Kilmer, New Jersey, 23 August 1946. Dismissal, total forfeitures and confinement at hard labor for one (1) year. |

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

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

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

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

Specification: In that First Lieutenant Vernon C. Fever, 5th Regiment, Overseas Replacement Depot, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 18 June 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 12 July 1946.

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

Specification: In that First Lieutenant Vernon C. Fever, ***, being at the time Class "A" Agent Finance Officer, did, at Camp Kilmer, New Jersey, between about 1 June 1946 and 15 June 1946, feloniously embezzle by fraudulently converting to his own use lawful currency of the United States in the sum of Five Hundred Forty Three Dollars, the property of the United States furnished and intended for the military service thereof, intrusted to him the said First Lieutenant Vernon C. Fever by Major F. S. Stratton, FD.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous convictions was introduced. He was sentenced to be 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 one year. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under

Article of War 48.

3. Evidence for the prosecution.

Pursuant to Special Orders No. 16, Overseas Replacement Depot, Camp Kilmer, New Jersey, dated 27 April 1946, accused was detailed as Class "A" Agent Finance Officer to the Disbursing Officer, Camp Kilmer, for an indefinite period of time for the purpose of paying regular, supplemental and partial pay rolls and travel and ration reimbursements to enlisted personnel of the organization indicated (R. 4; Pros. Ex. A). On 1 June 1946 accused received from Major F. S. Stratton, Finance Department, Disbursing Officer, Camp Kilmer, pay roll 5-526 in the amount of $3904.04 to pay the men of the 5th Regiment, Overseas Replacement Depot (R. 6; Pros. Ex. D). Of this sum $543.80 was not paid to the men, nor was it returned to the disbursing officer (R. 6: Pros. Ex. E,F). On 15 June 1946 accused had outstanding against him three pay rolls. That day he came to the office of Major Stratton, the disbursing officer to whom accused was immediately responsible in his official capacity as Class "A" Agent Finance Officer, to make returns of the pay rolls and moneys entrusted to him. He cleared two pay rolls but was unable to make clearance on the one in question due to a shortage of what was considered to be about $400 of the amount which was to be turned back. Major Stratton asked accused where the approximately $400 was and accused replied that he did not have it. No official return was made at that time, but accused promised to try to make his return and clear his account on 17 June. On 17 June he again went to Major Stratton's office but did not have the money. He left the payroll but no clearance was given him. He stated that he expected to have the money the next day (R. 5; Pros. Ex. B).

The accused was absent without leave from his organization and station from 18 June 1946 to 12 July 1946 as shown by the testimony of Captain Phillip C. Kroon, commanding officer of accused's organization, and by extract copy of morning report of "9201 TSU-TC 5th Regt ORD NYPE Cp Kilmer, NJ" (R. 8, Pros. Exs. G, and H). He was returned to military control on 12 July 1946 when he was apprehended in uniform at Chicago, Illinois (Pros. Ex. I).

4. Evidence for the defense.

After his rights as a witness were explained to him, accused elected to remain silent. Captain Phillip C. Kroon, Commanding, Company K. 5th Regiment, testified that accused was, on the day of his departure from his station, executive officer of Company K, that the manner of performance of his duties was superior and that he would be glad to have him again as a member of his organization (R. 9).

5. The specification of Charge I alleges desertion from on or about 18 June 1946, terminated by apprehension at Chicago, Illinois, on or about 12 July 1946.

The intent requisite to constitute desertion may be inferred from the fact that the inception of accused's absence without leave coincided with his inability to account for the shortage of Government funds for which he was responsible, and the further fact that he was apprehended after a considerably prolonged absence at a distance several hundred miles from his proper station (par. 130a, MCM, 1928).

The specification of Charge II alleges embezzlement of the sum of $543.80, property of the United States, furnished and intended for the military service, entrusted to accused by Major Stratton, the disbursing officer, Camp Kilmer, New Jersey. The receipt by accused of the sum of $3904.04 was shown by Major Stratton's deposition and by accused's receipt for this sum (R. 6; Pros. Exs. B,D). Evidence of the conversations between Major Stratton and accused indicate that accused was short about $400, however, Major Stratton's deposition (Pros. Ex. B) and his acknowledgment of return of funds and statement of balance (Pros. Ex. E) show conclusively that the shortage was in the amount of $543.80. This money was entrusted to accused for a definite military purpose, to pay the troops who were at the replacement depot awaiting movement overseas.

Paragraph 10, AR 35-320, 5 February 1945, requires Class A agent officers to make necessary returns to the accountable disbursing officer within 24 hours after completion of the particular payments for which designated. This includes amounts not paid to enlisted personnel whose names are red-lined on pay rolls.

Accused received the money in question and when the pay roll had been paid he failed to return the balance on hand to the proper authority. When demand was made therefor he could not deliver the money because, as he stated, he did not have it. According to the evidence, he never made restitution of the shortage. The proof offered by the prosecution therefore established a prima facie case of embezzlement. The specific facts constituting the actual conversion to his own use are peculiarly within accused's own knowledge and it was his duty, upon the establishment of a prima facie case by the prosecution, to go forward with the evidence. Failing to make an explanation, a conviction of guilt may rest upon the facts of possession, absence of accounting or delivery and the presumption arising from same (CM ETO 1302, Splain; CM 205621, Curtis, 8 BR 207, 227).

6. Confinement in a Federal penal or correctional institution is not authorized unless accused has received a sentence of more than one year and for an offense punishable by confinement in a penitentiary under existing provisions of law (par. 5d, AR 600-375, 17 May 1943; AW 42). Confinement in a Federal reformatory is therefore not authorized in this case wherein the accused received a sentence of one year.

7. War Department records show that accused is 26 years of age and is single. From 23 November 1940 until 6 July 1943 accused served as an

enlisted man in the Regular Army and attained the grade of staff sergeant. He graduated at the Infantry Officer Candidate School, Fort Benning, and was commissioned a second lieutenant, Army of the United States, on 7 July 1943. He was promoted to first lieutenant, 30 December 1944. He went overseas in June 1944 and saw service in the Normandy campaign. He was a rifle and weapons platoon leader during combat in France, Belgium, Luxembourg and Germany and received the Purple Heart for wounds received in action on 9 August 1944. He was awarded the combat infantryman's badge, the Bronze Star Medal with Oak Leaf Cluster thereto and the Silver Star Medal. His efficiency ratings average excellent or better. During the period of his combat service from July 1944 to the cessation of hostilities in Europe his efficiency ratings were all superior. Accused attended high school for two and one-half years. His occupational experience in civilian life consisted of two years of work at farming and mechanical work.

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 violation of Article of War 58 or 94. Confinement in a Federal reformatory is not authorized under the sentence adjudged in this case.

Charles L. Gilbert, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert S. Stroyd, Judge Advocate

JAGK-CM 316347 1st Ind 31 October 1946

WD, JAGO, Washington 25, D. C.

TO: Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant Vernon C. Fever, O-1321902, Infantry.

2. Upon trial by general court-martial this officer was found guilty of desertion on 18 June 1946 terminated by apprehension on 12 July 1946, in violation of Article of War 58, and embezzlement of the sum of $543.80, property of the United States intended for the military service, in violation of Article of War 94. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence, designated a federal reformatory as the place of confinement, and forwarded the record for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence but that confinement in a reformatory is not legally authorized.

Lieutenant Fever was designated Class A agent officer to make payment of payrolls to enlisted personnel at the Overseas Replacement Depot, Camp Kilmer, New Jersey. On 1 June 1946 he received from Major F. S. Stratton, FD, Disbursing Officer, Camp Kilmer, payroll 5-526 in the sum of $3904.04. On 15 June 1946 he appeared at the office of Major Stratton to clear three payrolls which he had, including the one under discussion. He cleared two of the payrolls but could not clear payroll 5-526 because he was about $400 short of the amount he should have on hand. 15 June fell on a Saturday. He requested until 17 June to make good the shortage. On 17 June he again went to Major Stratton's office but did not have the money and requested more time. On the morning of 18 June he called one of Major Stratton's deputies and reported that he would have the money and would clear up the matter that day. The amount of the shortage was shown to be $543.80. Accused did not again appear at his organization and was apprehended in uniform about 24 days later in Chicago, Illinois.

The prosecution's case consisted entirely of documentary evidence and stipulation, with the exception of one witness who appeared and testified for both the prosecution and the accused. After his rights as a witness were explained to him, the accused elected to remain silent.

4. This 26-year old officer achieved a creditable combat record as leader of weapons and rifle platoons. During a period from 18 July 1944 to V-E Day he was in the 83d Infantry Division and participated in

the Normandy, Northern France, and Rhineland Campaigns. He was wounded in action 9 August 1944, was awarded the Purple Heart, the Combat Infantryman's Badge, the Bronze Star with Oak Leaf Cluster, and the Silver Star. His efficiency ratings for this period and all ratings received since the cessation of hostilities have been superior. His last rating of superior covered the period 18 April to 17 June 1946 at Camp Kilmer, New Jersey.

5. Irrespective of the fact that accused had a creditable combat record, the nature of his offenses leaves no alternative but to recommend that the sentence be confirmed and carried into execution. I also recommend that a United States disciplinary barracks be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( G.C.M.O. 346, 14 November 1946)

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

JAGN-CM 316407

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| U N I T E D S T A T E S | ) | HEADQUARTERS KOBE BASE |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Kobe, Japan, 10-11 June 1946. |
| Private JOHN H. McDONALD | ) | Dishonorable discharge and |
| (35829972), 35th Station | ) | confinement for life. |
| Hospital, APO 713. | ) | Penitentiary. |

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REVIEW by the BOARD OF REVIEW
HARDY, JOHNSON and TAYLOR, Judge Advocates

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

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

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

Specification: In that Private John H. McDonald, 35th Station Hospital, did, at Nagoya, Honshu, Japan, on or about 17 March 1946, forcibly and feloniously, against her will, have carnal knowledge of Michiko Kato.

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

Specification 1: In that Private John H. McDonald, 35th Station Hospital, did, at Nagoya, Honshu, Japan, on or about 17 March 1946, unlawfully enter the dwelling of Kinjoro Ito, with intent to commit a criminal offense, to-wit, rape, therein.

Specification 2: (Withdrawn by order of convening authority, R. 4).

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life." The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of 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, paragraph 2601, of the District of Columbia Code.

Chas. W. Hardy, Judge Advocate.

Edward T. Comson, Judge Advocate.

Edward R Taylor, Judge Advocate.

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



JAGK - CM 316497

31 OCT 1946

| | | |
|---|---|---|
| UNITED STATES | ) | FIFTEENTH AIR FORCE |
| v. | ) | Trial by G.C.M., convened at MacDill Field, Florida, 12 August 1946. Dismissal and total forfeitures. |
| Captain JOSEPH P. DOHR (O-677996), Air Corps | ) | |

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

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

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

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

Specification 1: In that Captain Joseph P. Dohr, Air Corps, Squadron "O", 326th Army Air Forces Base Unit, MacDill Field, Florida, did, at Tampa, Florida, on or about 24 May 1946, with intent to deceive, wrongfully and unlawfully make and utter to Mister F. M. Chiles, Junior, 4901 Bay Shore Boulevard, Tampa, Florida, a certain check, in words and figures as follows, to wit:

Central National Bank
Name of Bank

MacDill Field, Fla., May 24 19 46

Yonkers New York
Address

Pay to Cash ---------- $ 10.00

Ten and no cents ---------- Dollars

/s/ Joseph P. Dohr
Signature

| Capt. | 0677996 | Sqn O |
|---|---|---|
| Rank | A.S.N. | Organization |

and by means thereof did fraudulently obtain from said Mister

F. M. Chiles, Junior, $10.00 in lawful money of the United States, he, the said Captain Joseph P. Dohr, then well knowing he did not have, and not intending that he should have, sufficient funds in the Central National Bank, Yonkers, New York, for payment of said check.

NOTE: Specifications 2 and 3 vary materially from Specification 1 only with respect to date of offense, person receiving check, and the amount of the checks as follows:

| Spec. | Date of offense | Person receiving check | Amount of check |
|---|---|---|---|
| 2 | 25 May 1946 | F. M. Chiles, Jr. | $25.00 |
| 3 | 1 June 1946 | Evelyn Bacha | $19.35 |

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

Specifications 1 through 9: (Finding of guilty disapproved by reviewing authority).

Specification 10: In that Captain Joseph P. Dohr, ***, having made and uttered to the Officers Club, MacDill Field, Florida, on or about 18 May 1946, a certain check, in words and figures as follows, to wit:

Central National Bank
Name of Bank

Yonkers New York
Address

MacDill Field, Fla., May 18 1946

Pay to MacDill Field Officers Club $ 15.00

Fifteen no cents - - - - - - - - - - - - - Dollars

/s/ Joseph P. Dohr
Signature

| Capt. | 0677996 | Sqn. O. |
|---|---|---|
| Rank | A.S.N. | Organization |

and by means thereof having received the sum of $15.00 in lawful money of the United States, did wrongfully fail to maintain a sufficient balance in the said Central National Bank, Yonkers, New York, or to arrange sufficient credit, for the payment of said check.

Specification 11: Differs materially from Specification 10 only with respect to the date of the check, it being dated 19 May 1946.

CHARGE III: Violation of the 61st Article of War

Specification: In that Captain Joseph P. Dohr, ***, did without proper leave, absent himself from his organization and station at MacDill Field, Florida, from about 10 June 1946, to about 27 June 1946.

He pleaded not guilty to the Specifications of Charges I and II and not guilty to Charges I and II; guilty of the Specification of Charge III and Charge III. He was found guilty of Specifications 1, 2 and 3 of Charge I except the words in each Specification, "with intent to deceive", "fraudulently", and "and not intending that he should have", of the excepted words not guilty, and not guilty of Charge I but guilty of a violation of Article of War 96; guilty of all Specifications of Charges II and III and guilty of Charges II and III. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years and six months. The reviewing authority disapproved the findings of guilty of Specifications 1,2,3,4,5,6,7,8, and 9 of Charge II, approved the sentence, and remitted that portion thereof adjudging confinement at hard labor for two years and six months and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Specifications 1 and 2 of Charge I.

On 24 May 1946 the accused made and uttered to F. M. Chiles, Jr. a check in the sum of $10.00. This check was not paid by the bank and was returned marked "Account Closed" (R. 20, Pros. Ex. 1). On 25 May 1946 accused made and uttered to F. M. Chiles, Jr. a check in the sum of $25.00. This check was not paid by the bank but returned marked "Account Closed" (R. 20, Pros. Ex. 2). These checks were paid by a friend of the accused about 31 May 1946.

Specification 3 of Charge I.

On 1 June 1946 the accused was present at Porky's Fun Club. In order to pay his bill he secured from the secretary of the manager of Porky's Fun Club, Miss Evelyn Bacha, a blank check. He then made a check for the sum of $19.35 and delivered it to Miss Bacha who in turn delivered the check to the cashier of the club. This check was returned by the bank marked "Insufficient Funds" (R. 23,24; Pros. Ex. 13).

Specifications 10 and 11, Charge II.

On 24 May 1946 Captain Johnson, adjutant of accused's organization, ordered the accused to report to Major Leland J. Rath, the club officer, concerning a returned check (R. 18). About noon, 24 May 1946, the accused reported to Major Rath and explained that he was having trouble at home and said his father maintained a checking account for him; that his allotment would go to his father, who put it in a savings account for him and as he needed it his father would transfer funds from the savings account to his checking account, and further explained that his father was evidently away from home and had failed to put any money into the checking account (R. 14). Major Rath then explained to accused the seriousness of writing checks on a closed account. The accused replied that he was fully aware of the situation, but felt that if he could contact his father he could clear it up immediately. He promised to contact his father and stated that after his account was straightened up he would come in and redeem his checks (R. 15). Major Rath then identified eleven checks written by accused and returned by the bank, these checks being those mentioned in Specifications 1 to 11 inclusive of Charge II (R. 14, 15).

On 18 May 1946 the accused made and uttered a check in the sum of $10.00 to the MacDill Field Officers' Club (R. 15,16; Pros. Ex. 14; Spec. 10, Chg. II).

On 19 May 1946 the accused made and uttered a check in the sum of $15.00 to the MacDill Field Officers' Club (R. 15,16; Pros. Ex. 12; Spec. 11, Chg. II). Both of these checks were returned by the bank marked "Account Closed." Checks amounting to a total of $375.00 were issued by the accused to MacDill Field Officers' Club and were returned by the bank unpaid. At the time of trial $175.00 had been paid, leaving a balance of $200.00 due the club on returned checks (R. 17).

It was stipulated that all checks introduced by the prosecution in support of the specifications of Charges I and II were the original instruments made and uttered by the accused (R. 13). By stipulation it was proven that the accused did on the dates alleged make and utter to the persons or organizations all of the checks alleged in all of the Specifications of Charges I and II, and that lawful money of the United States or equivalent value in goods or services were received by the accused from said persons or organizations in exchange for said checks; that all checks were drawn on the Central National Bank, Yonkers, New York, and returned by said bank unpaid (R. 13).

It was also shown by stipulation that the checking account of the accused with the Central National Bank, Yonkers, New York, was closed by the bank on 15 May 1946 because of overdrafts and on 15 May 1946 the bank

notified the accused of its action by letter addressed to the accused at Box 1753, 73rd Wing, MacDill Field, Florida, which was the address furnished to the bank by the accused. On 6 May 1946 the accused was transferred to Squadron "O", 326th Army Air Forces Base Unit, MacDill Field, Florida (R. 24,25).

Specification of Charge III.

The prosecution introduced into evidence an extract copy of the morning report of Squadron "O", 326th Army Air Forces Base Unit, showing the accused "dy to AWOL eff 0800 10 June 46" (R. 25, Pros. Ex. 15). The prosecution introduced into evidence another extract copy of a morning report from the same organization showing the accused "AWOL (10 June 0800) to dy 0845 27 June 46" (R. 25, Pros. Ex. 16).

4. For the defense.

After being warned of his rights as a witness the accused elected to be sworn as a witness in his own behalf. He testified that he went overseas on 2 February 1944. On 1 February 1945 he made an allotment of $150.00 to his father. This allotment was continued in effect until November 1945. This $150.00 allotted to his father was to be deposited in a savings account in his father's name. His father was to draw money from this savings account and deposit it in a checking account in the name of accused (R. 27,28). Until the time of the checks involved in this case his father had always maintained a balance of between $150.00 and $200.00 in the accused's checking account which was sufficient for normal needs (R. 29). His father went to Boston on business and did not notify him of his bank balance. His father was in Boston for about thirty days (R. 31). Checks drawn by the accused went through the bank and then to his father who in turn sometimes sent them to the accused (R. 27). He did not know the amount of money in his bank account during May 1946 (R. 30). About 24 May 1946 Captain Johnson, the Squadron Adjutant, ordered him to go to the Officers' Club and see Major Rath, the club officer. One of the cashiers notified him that his checks amounting to $165.00 had been returned for insufficient funds. He did not report to the club officer because he was waiting to see if he could get some money from home to make the checks good (R. 32). He was paid on Monday, 3 June 1946, and on 4 June 1946 he sent $100.00 to his mother with instructions to deposit it in the bank, but his mother deposited it in a savings account instead of his checking account (R. 29). He never received the letter from the bank notifying him of the closing of his account (R. 35). His June pay amounted to $330.00, out of which he sent $100.00 home and paid $175.00 to the officers' Club. About 1 July he received pay of more than $200.00 and paid personal debts not involved in this action. On 1 August 1946 he drew $200.00 and paid the check to Chiles and to Porky's Fun Club and other debts. He had not straightened out his account with the officers' club as he was counting on his father paying it as his father had his money (R. 37).

It was stipulated that if Paul G. Dohr, the father of the accused, were present he would testify that he received more than $1000.00 through an allotment from the accused; that an arrangement existed between Paul G. Dohr and the accused whereby the money would be placed in the accused's checking account in the Central National Bank, Yonkers, New York, at such times as the account was running low or in danger of being overdrawn; that as chemical engineer for Standard Brands of New York he made frequent business trips and during one of these trips his son's account was overdrawn and subsequently closed by the bank without his (Paul G. Dohr's) knowledge (R. 27).

5. The accused was found guilty of three specifications of wrongfully and unlawfully making and uttering three separate checks dated 24, 25 May 1946 and 1 June 1946, and of obtaining money thereby, knowing that he did not have sufficient funds in the drawee bank to pay said checks, in violation of Article of War 96. He was also found guilty of making and uttering two checks dated 18, 19 May 1946 and of obtaining money thereby and wrongfully failing to maintain sufficient balance in the drawee bank, or to arrange credit, for the payment of such checks in violation of Article of War 96. All of these checks were drawn upon the Central National Bank, Yonkers, New York. The evidence discloses that the accused had a checking account with the Central National Bank, Yonkers, New York, but this account had been closed by the bank on 15 May 1946 because of overdrafts. The bank notified the accused of its action by letter. It was further shown that the accused was notified about noon on 24 May 1946 that checks written by him were returned from the bank marked "Account Closed." The checks dated 24, 25 May 1946 and 1 June 1946 were issued after the accused was informed that his checks were being returned marked "Account Closed."

An accused is properly chargeable with knowledge as to the status of his bank account. This rule applies in those cases where the status of the account results from acts of the accused, such as making deposits or drawing checks (CM 236070, Wanner, 22 BR 279; CM 258314, Reeser, 37 BR 367, 378; CM 259005, Poteet, 38 BR 197,206). The evidence sustains the finding of guilty of wrongfully and unlawfully issuing checks knowing that he did not have sufficient funds in the bank to pay the same as alleged in Specifications 1, 2 and 3 of Charge I in violation of Article of War 96. The evidence likewise sustains the finding of guilty of issuing checks and then wrongfully failing to maintain a sufficient balance to pay the checks upon presentation as alleged in Specifications 10 and 11, Charge II. The fact that the accused relied upon his father to keep sufficient money on deposit in his checking account to cover any checks written by him does not relieve the accused from knowing the status of his checking account.

The accused was also found guilty of absence without leave from 10 June 1946 to 27 June 1946 in violation of Article of War 61. He pleaded guilty to this specification and charge. The initial absence of accused and his return to military control was shown by duly authenticated copies of the morning reports of the accused's organization.

6. War Department records show the accused to be 24-4/12 years of age and single. He completed eleven years of school but did not graduate from high school. Prior to his entry into the service he was a service manager for a garage earning $35.00 per week. He enlisted in the Army 16 April 1942 and upon completion of aviation cadet training he was appointed and commissioned a temporary second lieutenant, Air Corps, Army of the United States, 22 April 1943. He received a temporary promotion to first lieutenant, 12 October 1943, and a temporary promotion to captain, 21 August 1945. He is entitled to three service bars for 21 months of overseas service, having served in the New Guinea Area. One efficiency rating appears for the period 1 January 1945 to 30 June 1945 and is "Excellent."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Stokesbury, Judge Advocate

JAGK - CM 316497 1st Ind

NOV 8 1946

WD, JAGO, Washington 25, D. C.

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 Captain Joseph P. Dohr (O-677996), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of making and uttering three checks knowing that he did not have sufficient funds to pay the same (Specifications 1,2,3, Charge I) and of making and uttering eleven checks and thereafter wrongfully failing to maintain a sufficient balance in the bank to pay the same (Specifications 1-11, Charge II), all in violation of Article of War 96. He was also found guilty of absence without leave from 10 June 1946 to 27 June 1946 in violation of Article of War 61 (Charge III 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 for two years and six months. The reviewing authority disapproved the findings of guilty as to nine specifications (Specifications 1,2,3,4,5,6,7,8,9) of Charge II, approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

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

On 18 and 19 May 1946 accused wrote two checks to an officers' club for the sum of $15.00 each and failed to maintain a sufficient balance in the bank to pay the same. Between 24 May 1946 and 1 June 1946 accused made and uttered three checks totaling $54.35. At the time of issuing these checks accused knew he did not have sufficient funds in the bank to pay them upon presentation. The accused was absent without leave from 10 June 1946 to 27 June 1946.

The evidence shows that beginning in February 1945 accused made an allotment of $150.00 to his father. This allotment continued until November 1945. An arrangement had been made by accused and his father whereby his father was to use this allotment to maintain a checking account in the name of accused. This arrangement was carried out for a number of months. About the time of these offenses accused's father

permitted the checking account to be closed by the bank. Accused knew the account had been closed when the three checks were issued late in May 1946.

4. Accused wrote five checks knowing that he did not have sufficient funds to pay three of them upon presentation and failed to maintain a sufficient bank balance to pay the other two and thereafter went absent without leave for 17 days. In view of the previous good record of accused, his overseas service, the small amounts involved, and all the circumstances of the case, I recommend that the sentence be approved but that the execution thereof be suspended during good behavior.

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

CM 316497.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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(G.C.M.O. 352, 19 November 1946)

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



APR 17 1947

JAGQ - CM 316510

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| UNITED STATES<br><br>v.<br><br>First Lieutenant FRANK S. FLORIAN (0-587746), Headquarters United States Army Military Government in Korea, Seoul Korea, APO 235. | UNITED STATES ARMY MILITARY GOVERNMENT IN KOREA<br><br>Trial by G.C.M., convened at APO 235, 19-20 August 1946. Dismissal and confinement for three (3) years. |

OPINION of the BOARD OF REVIEW
HICKEY, SCHENKEN and PARSONS, Judge Advocates

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

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

CHARGE I: Violation of the 80th Article of War.

Specification: In that First Lieutenant Frank S. Florian, Air Corps, Headquarters, United States Army Military Government In Korea, did, at Pusan, Korea, on or about May 1946, unlawfully deal in the following captured property of the United States, namely: 250 parachutes, of the value of about 550,000 yen, 245 flying suits, of the value of about 49,000 yen, 223 flying suit liners of the value of about 22,300 yen, 145 overcoats of the value of about 21,750 yen, and 95 pairs of boots, of the value of about 22,800 yen, thereby receiving as profit to himself the sum of 175,000 yen.

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

Specification 1: In that First Lieutenant Frank S. Florian, Air Corps, Headquarters, United States Army Military Government In Korea, did, at Korea, from about November 1945 to about February 1946, feloniously embezzle by fraudulently converting to his own use about 28,373 yen, the property of The Military Government Of Korea, entrusted to him as General Manager of The Chosen Air Guard Material Company, Ltd.

Specification 2: In that First Lieutenant Frank S. Florian, Air Corps, Headquarters, United States Army Military Government In Korea, did, at Korea, on or about January 1946, with intent to defraud, falsely alter a certain receipt in the following words and figures, to wit:

Chinju, Korea 16 January 1946

Received of Lt. F.S. Florian, Fire Section, Police Affairs, Seoul, Korea, the sum of Y 2900 as payment in full of unfinished contract with Chosen Air Guard Material Co., Seoul, Korea, for 14 small pumps, which were never delivered.

This payment releases all claims against the said Chosen Air Guard Material Co., now or in future.

Y 4900.00
Received duly the above
Y 4,989.60
Mentioned Sum from Y 4,989.60
paid for fire equipments.

Chief of Home Affairs Sec
Chinju Municipality
Cho Hak No
Signed (Seal)

Witness
Chief of Fire Dept, M.G.
/S/ N. S. Lee

which said receipt was a writing of a public nature, which might operate to the prejudice of another.

Specifications 3-6 same as Specification 2, except as follows:

| | Place | Amount | Date |
|---|---|---|---|
| (3) | Kwang-ju, Korea | Y 1,000 | 17 Jan 46 |
| (4) | Kunsan, Korea | Y 4,000 | 18 Jan 46 |
| (5) | (Taijun) Taiden, Korea | Y 4,800 | 19 Jan 46 |
| (6) | Kaesong, Korea | Y 5,000 | 22 Jan 46 |

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

Specification: In that First Lieutenant Frank S. Florian, Air Corps, Headquarters, United States Army Military Government In Korea, did, at Seoul, Korea, on or about 31 January 1946, with intent to deceive Major James B. Juliusson, then Chief, Fire Division, Bureau of Police, United States Army Military Government In Korea, officially report to the said Major James B. Juliusson that a statement of expenditures of

The Chosen Air Guard Material Company Ltd. amounted to 74,418.20 yen, which report was known by the said First Lieutenant Frank S. Florian to be untrue.

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

Specification 1: (Withdrawn).

Specifications 2-6: (Findings of not guilty).

The accused pleaded not guilty to all Charges and specifications and was found guilty of Charges I, II, and III and the specifications thereunder. Specification 1, Charge IV was withdrawn during trial and accused was found not guilty of the remaining specifications under Charge IV and Charge IV. No evidence of previous convictions was received. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three (3) years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

The evidence relating to the specifications of the charges will be summarized in chronological order of events.

Specifications 1, 2, 3, 4, 5 and 6, Charge II and Specification of Charge III.

On 21 November 1945 the Property Custodian of the Military Government of Korea requisitioned and took over control of the property of The Chosen Air Guard Material Co., Ltd., Seoul, Korea (R 15 and Pros. Ex. 9A). On 5 December 1945, accused was appointed "General Manager" of this company (R 15 and Ex. 9B) and as such had authority to draw on ¥129,114.50 deposited in the Bank of Chosen in a special account entitled "Korean Military Govt. Property Custodian in trust for Chosen Air Guard Co., Ltd." (R 15 and Ex. 9C).

In pursuance of his officially assigned duties, accused was authorized to distribute a portion of the aforementioned funds to cities and towns to aid them in purchasing fire equipment. Just prior to being reassigned to other duties at Yusan, accused was required to submit an accounting of the Company's funds (R 22-25). His report dated 31 January 1946 showed total disbursements of ¥74418.20 and itemized certain refunds to various cities (Pros. Ex. 15). Officials from these municipalities

testified that they received certain refunds from accused but when shown the receipts that had been given to accused, each official stated that his receipt had been altered as follows (R 16-22 and Pros. Exs. 10-14 incl):

| Name of town | Actual Amount of Refund | Altered Amount shown on receipt |
|---|---|---|
| Chin Ju | ¥ 2,900 | ¥ 4,900 |
| Kwang Ju | 1,000 | 2,000 |
| Kunsan | 4,000 | 6,000 |
| Tai Jun | 4,800 | 6,800 |
| Kaesong | 6,000 | 8,000 |
| | ¥ 18,700 | ¥ 27,700 |

When accused was first questioned by Criminal Investigation Department representatives on 22 June 1946, he stated under oath (after being advised of his rights under Article of War 24) that his report to Captain Lawler correctly reflected his expenditures from the funds of the Chosen Air Guard Material Co., Ltd., and that he had receipts to support his disbursements (p. 4; Pros. Ex. 16). In a later statement dated 2 July 1946, accused admitted that he had altered the receipts as shown above and that he used the ¥9,000 difference for his "personal use." In this statement, he also admitted other underpayments which amounted altogether to approximately ¥28,000. He further stated that he was transferred from Seoul before "having a chance to cover up" and that he intended to return the ¥28,000 to this fund when he returned to Seoul about 20 June 1946 but found that the account had been turned over to a general fund (Pros. Ex. 17).

Specification of Charge I.

During the months of May and June 1946, accused was assigned at Pusan, Korea, and in his official capacity, he was authorized to purchase the following captured and abandoned Jap materials on behalf of the Kyong Sang Namdo Fire Department (Pros. Exs. 1, 2 and 3).

| Invoice | Date | Description | Quantity | Unit Price | Amount |
|---|---|---|---|---|---|
| 2-6-76 | 10 June 46 | Jap parachutes | 250 | ¥2200 | ¥550,000 |
| 2-6-86 | 13 June 46 | Overcoats | 140 | 150 | 21,000 |
| | | Flying Suits | 246 | 200 | 49,200 |
| | | Flying Suit Liners | 223 | 100 | 22,300 |
| | | Boots | 92 pr. | 240 | 22,080 |
| | | | | | 664,580 |

The above invoices were paid in full by accused. There was originally some uncertainty as to the prices to be charged in reselling these items (Pros. Ex. 1) but it was cleared up the same day (R 6-9). The accused proceeded to dispose of these items as follows (R 9-13, 14, 15):

| | Unit Price | Total Price |
|---|---|---|
| 248 parachutes | ¥ 2300 | 570,400 |
| 140 overcoats | 250 | 35,000 |
| 146 flying suits | 660 | 96,360 |
| 100 " " | 600 | 60,000 |
| 223 " " liners | 250 | 55,750 |
| 92 prs. boots | 400 | 36,800 |
| | | ¥ 854,410 |

The money received from these sales was collected by the Chief of the Accounts Section, Pusan Fire Department, and ¥834,400 was turned over to accused, the balance being retained in the Fire Department Welfare Fund (R 9-13 and Pros. Ex. 6).

In a voluntary sworn statement, accused admitted that he sold the above items at the prices indicated; that these prices were those originally fixed by MCC and had been circulated before he was told of the correct, lower prices; that he did not change the prices but kept the overcharge in his possession; that he "considered this a business deal inasmuch as it was the merchants who were affected and not the Fire Department"; that no one knew of this action but himself (Ex. 16).

In this same statement, accused explained that he was sending home as much money as he could from his pay, that he was engaging in other transactions to obtain money for his own expenses; that he used money so obtained to buy materials that had a good resale value in the states; that he had sent numerous boxes home containing all the goods he had purchased except ¥1300 in Korean currency and various pieces of jewelry costing approximately ¥70,000; that he wanted to build up a reserve so that he could buy a home to replace the one he sold before he entered the Army (Ex. 16).

4. For the defense.

Accused was placed under medical examination on the day after charges were preferred. The report of the Board of Officers (Def. Ex. 1) concluded that accused was sane, capable of distinguishing between right and wrong and of adhering to the right; however,

"as a result of neurotic tendencies which have existed since childhood and have been aggravated by recent stresses, he has developed a self-depreciatory, self-punitive attitude which causes him to cooperate poorly with his defense council. This is a handicap which should be taken into consideration by the court but does not constitute a lack of sufficient mental capacity 'intelligently to conduct or cooperate in his own defense' such as would exempt him from trial."

Prior to arraignment, defense counsel requested that accused be re-examined because of his lack of cooperation in his defense. This resulted in a second finding dated 9 August 1946 (Def. Ex. 2), showing "no defects", "fit for duty", with condition diagnosed as follows:

"Neurotic depressive reaction, moderate, manifested by self punitive tendencies, stress severe, consisting of serious charges, predisposition moderate, impairment minimal."

A further indication of accused's condition occurred during the court's session of 20 August 1946 when the court adjourned "in view of the emotional condition of the accused" (R 41).

It was stipulated that three officers, if present, would testify to accused's excellent moral character, his reputation for his extreme consideration of his military duties and their personal knowledge of his good reputation (R 33). It was further stipulated that another officer assigned to the Chosen Coal Company, 98 Military Government Group, Pusan, would testify if present that accused has "always been very frank, honest and his character has been excellent. He was extremely conscientious in his work, pursuing details to extreme lengths in order to complete his assignments. Of late, I have had occasion to observe that Lt. Florian has been very moody and depressed although he didn't confide in me as to the source of his worry. I do know that he has mentioned his wife's illness and its affect on his family."

After being advised of his rights, accused elected to take the stand as a witness in his own behalf (R 34). He testified that his present wife is almost an invalid, has had rheumatic fever which is recurrent and has left her with a heart murmur; that if the fever occurred again it might be fatal. In August 1944 he applied for, and was denied, a discharge on account of hardship (R 36). After he arrived in Korea he kept receiving letters from his wife telling him of her increasing difficulty to meet expenses with rents and commodity prices increasing. The little money he was able to send her was a source of constant worry to him, and he kept only approximately $10 a month for himself (R 35). [Pay data showed $350 monthly allotment to dependents (R 48).]

With regard to the refunds to the various municipalities, accused testified that his interpreter told him that it was not customary to pay back the full amount, so he paid out only about two-thirds of the amounts due; that he shared the expenses of several parties during this trip and found that he was ¥5,000 short when he arrived back in Seoul; that within a week he was transferred to Pusan and he did not have sufficient time to replace the shortage so "I placed the balance of the money which I had not paid to the municipalities in my footlocker, intending to make up the shortage and at a later date by returning to these towns to pay the full amount as I had stated in my report to Major Juliusson". Accused admitted that his report was false but he considered it "in the light of a post-dated check or certificate to be accomplished at a later date"; however, he was "so busy" that he had no opportunity to carry out these intentions (R 36-37).

Accused further testified that during his being questioned by CID agents, he was asked whether he had receipts to support his disbursements of "Takahasi Company" money; that these receipts were in his footlocker which he had mailed home on 20 June; that at first he did not want to give up these receipts and asked for counsel but was told that counsel would not help, that they had authority to obtain the receipts regardless of counsel. Accused then authorized them to stop his footlocker; that he consulted Major Scott who had already been asked by accused to be his counsel, that Major Scott advised accused to turn over the certificates to the CID. Accused went with the CID agent to the Post Office and took the receipts back to his quarters; that "if I had known they were as incriminating as they turned out to be I had over an hour in which to destroy these certificates" but he kept his promise and turned these receipts over to the CID agents. He explained that he altered these receipts after he made his report to Major Juliusson "for my own protection if someone asked me about it and off-hand the certificates appeared genuine" (R 38). Accused explained that he did not intend to embezzle the funds and blamed his laxity about the law upon his abnormal childhood, lack of early home training, and the fact that he had to take care of himself from the time he was 14 years of age. In connection with the question of intent, he testified that "I didn't consider any of that transaction as being outside of the law or being considered as embezzlement. I simply intended to return the money to these different towns the first opportunity I had and the opportunity never occurred" (R 39). He excused his actions by saying he had been under a strain for two years and had spent two months in the Fort Ord Hospital for a nervous condition. He has two sons in the Navy, one of whom was at one time in danger of losing a leg from an injury. His worry about these problems warped his judgment (R 44).

On cross-examination he identified the various items of jewelry taken from him by the CID and the funds from which he purchased them (R 41, 42).

Over the objection of defense counsel on grounds of irrelevancy, immateriality and prejudice, the prosecution introduced in evidence the following items: 1 pearl necklace, 1 Chinese bracelet, 1 pearl ring, 2 opal rings, 1 ruby ring, 1 opal ring, 5 opal stones, 4 jade stones and 1,391 Korean yen, which accounted for the approximate 28,373 yen of the Chosen Air Guard Materials Company (R 43, 44 and Pros. Ex. 18). Likewise, over the same objection of defense counsel, there was admitted into evidence 1 amber necklace, 1 diamond and jade ring, and 1 .80 diamond ring (R 46; Pros. Ex. 19), stipulated as having been purchased by accused with funds derived from sale of abandoned and captured Japanese property alleged in Specification of Charge I.

5. The specification of Charge I - dealing in captured property - was clearly established. Invoices were received in evidence showing the various items of "captured and abandoned Jap materials" sold to the Kyong Sang Namdo Fire Department which was under accused's supervision. Oral testimony was introduced showing that accused was advised as to resale prices to be charged for this merchandise. In spite of these instructions, witnesses testified (and accused admitted) that higher prices were charged and receipts showed that accused received ¥834,400 for merchandise which should have been sold for ¥664,580. By accused's own admission, the "balance" was kept in his own possession (p. 1; Pros. Ex. 16). All elements of the specification were established by competent evidence.

All specifications of Charges II and III are interrelated and will be considered as a single unit. It was established by properly identified and admitted written records that the Property Custodian of the Military Government of Korea had requisitioned and assumed responsibility for the property of The Chosen Air Guard Material Co., Ltd., Seoul, Korea; that accused was appointed general manager and as such, had control of the company bank account. Various municipal officials testified that they had received certain funds from accused and had given him receipts therefor. These receipts were not made a part of the company records but were retained in accused's personal possession. Having spent some of the company funds for parties, accused found himself short ¥5,000. When called upon for a report, he listed refund payments ¥9,000 in excess of actual payments and altered the receipts for his own "protection". The evidence clearly established that accused converted certain funds entrusted to him as manager of the Chosen Air Guard Material Company to his own use (Spec. 1, Charge II), that he knowingly submitted a false report to Major Juliusson (Charge III), and that he altered five receipts to support that false report (Specs. 2-6, Charge II).

Specification 1, Charge II, alleges an embezzlement of ¥28,373; however, the direct testimony (prior to receiving accused's confession into evidence) showed an embezzlement of only ¥9,000. The balance of the

amount involved was covered in accused's confession. There may be some question as to whether the court should have considered the confession as establishing the embezzlement as charged or in the lesser amount of ¥9,000; however, either finding supports the same punishment and the question becomes an academic one which need not be further discussed in this opinion.

Defense counsel asked the court to strike out the evidence relating to Specifications 2, 3, 4, 5 and 6 of Charge II (R 39). The receipts in question were originally received in evidence without objection (R 16-22) and the record is not clear as to whether they were offered by accused to support the truth of his report to Major Juliusson or whether they were released after they were known to be false (Pros. Exs. 16-17). In testifying about giving up these receipts (R 38), accused stated:

> "At first, I did not want to. I asked for counsel and they told me that counsel would not help me because the case was only in the investigating stage and that they still had the authority to obtain these receipts whether counsel was obtained or not. *** I told them I didn't want to turn them over. ***"

Accused then consulted private counsel who advised him to turn the certificates over to the CID. Although this testimony shows that accused at first protested, he finally surrendered the receipts. There was no indication that he was mistreated or otherwise threatened into taking this action, and there appears to have been no error in receiving these recepits in evidence.

The two confessions which were received in evidence contain many statements which were not material to the specifications and charges. The court was directed by the Law Member to disregard the irrelevant material and the findings of not guilty on the specifications of Charge IV and Charge IV show that they faithfully followed this admonition.

Considerable effort was expended by the accused and his counsel in stressing the mental condition of the accused, occasioned by worry over his wife, his finances, and an injured son. However, a Board of Medical Officers found accused to be able to distinguish right from wrong, and able to adhere to the right; both at the time of the offenses and at the time of the trial. He was also found to be mentally able to cooperate in his defense, and there is insufficient evidence in the record to warrant the Board to do other than to accept the finding of the Board of Medical Officers as to the mental responsibility of accused.

6. a. Accused is 46 years old and was born in Louisiana. He does not remember when his father died but his mother died when he was 14.

For some years prior to his last tour of duty he had been a civil service employee of the Fire Department, City of Los Angeles. He is a member of the American Legion, the Elks, and Veterans of Foreign Wars. His first marriage lasted seven years and there were two children of that marriage, both of whom served in the Navy during this war and one of whom was injured. He married again six or seven years later and has two children by his second wife.

b. His military record and his testimony shows that he enlisted in the New York National Guard on 30 March 1917 and was drafted into Federal service on the following day (Def. Exs. 7a and 7b). He served in major operations at the Dickebush Lake and Scherpenberg Sector (Belgium), Ypres - Lys offense (Belgium) and the Somme offense (France) (R 34; Def. Ex. 6). He received a machine-gun bullet in the leg, was gassed (R 35) and was honorably discharged as a Private First Class, in 1919, with a character rating of excellent (R 34; Def. Ex. 7(b)). He reenlisted in the Regular Army on 10 July 1919; was promoted to corporal on 6 April 1920 and to staff sergeant on 7 December 21 (Def. Exs. 7c, d and e). In 1922 he received a certificate of proficiency in bombing, gunnery and radio (R 34; Def. Ex. 7(f)) and was honorably discharged on 7 September 1922 with an excellent character rating (R 34; Def. Ex. 7(e)). He served two terms in the California National Guard (15 Aug. 1926 to 14 Feb. 31) with a character rating of excellent (R 34; Def. Ex. 7(h) and (i)). In November 1942 he again enlisted in the United States Army and was honorably discharged as a staff sergeant in 1944 in order to attend the Army Air Forces Officer's Candidate School, Miami Beach, Florida (R 34; Def. Ex. 7(f)), being commissioned a second lieutenant in the Air Corps in 1944. He was an assistant chief, Military Personnel Section at Orlando, Florida, for a month with an efficiency rating of very satisfactory and served about three months at Lemoore Army Air Field, California, as a supply officer with rating of excellent. He graduated from the Navy School of Military Government at Princeton University in February 1945 and remained at Presidio of Monterey in the Civil Affairs Staging Area until August 1945 when he was sent to Korea. While in Korea he was a Civil Affairs officer with efficiency ratings of excellent. He is entitled to wear World War Ribbons I and II, Victory Medals, the American and Asiatic Pacific Theater Ribbons, the Occupational Medal and Ribbon, and the Good Conduct Medal (R 34; Def. Ex. 7k). There is no record of his being in any difficulty while a civilian or in the military service until the present case.

c. The Board of Review has given careful consideration to the following:

(1) A letter from General H. H. Arnold, then Commanding General, Army Air Forces, who wrote accused while he was an enlisted man and applicant for Officers' Candidate School, wishing him all good fortune (R 33; Def. Ex. 4); and

(2) A recommendation for clemency in behalf of accused, based on his record of service in both world wars and the condition of his home life and family, made on 26 August 1946 by the President of the Court, the law member, five of the remaining nine members of the court, the Trial Judge Advocate and defense counsel.

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 during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95, and authorized upon conviction of a violation of Articles of War 80 and 93.

Albert D. Hamey, Judge Advocate

Carlton E. Schenken, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 316510 1st Ind

WD, JAGO, Washington 25, D. C. APR 25 1947

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 First Lieutenant Frank S. Florian (O-587746), Headquarters United States Army Military Government in Korea, Seoul Korea, APO 235.

2. Upon trial by general court-martial, this officer was found guilty of unlawfully dealing in captured Jap materials and receiving a profit to himself of ¥175,000 (Spec., Charge I), in violation of Article of War 80; of embezzlement of ¥28,373 belonging to the Chosen Air Guard Material Co. and forgery by altering five receipts showing disbursements of said company's funds (Specs. 1-6, Charge II), in violation of Article of War 93; and making a false report regarding these funds (Spec., Charge III), in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

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

4. Accused is married and has four children. He is 46 years old. During his tour of duty in Korea he took advantage of opportunities for personal profit. By his confession, he used these funds to purchase articles in Korea which would have a good resale value in the United States, shipping home numerous boxes of such merchandise. The record of trial shows that he profited to the extent of 175,000 yen in the resale of captured and abandoned Jap materials, that he embezzled from 9,000 to 28,000 yen belonging to the Chosen Air Guard Material Company and forged receipts to cover part of the embezzlements.

The accused has a clear civilian record and was employed in the Los Angeles Fire Department prior to the war. He served in three major operations in World War I but did not engage in combat in World War II.

5. The President and six members of the court that tried the case recommended clemency on behalf of accused, based on his record of service in both World Wars and the condition of his wife and family.

Consideration has also been given to a letter written by accused to the Board of Review.

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

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

CM 316510

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of Trial
2. Form of action
3. Ltr from accused

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( G.C.M.O. 150, 2 May 1947)

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

JAGN-CM 316556

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| U N I T E D S T A T E S | ) | SECOND ARMY |
| v. | ) | Trial by G.C.M., convened at Camp Lee, Virginia, 22 August 1946. Dismissal and total forfeitures. |
| First Lieutenant Lloyd L. Sandsness (0-2037096), Infantry. | ) | |

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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 I: Violation of the 61st Article of War.

Specification: In that 1st Lieutenant Lloyd L. Sandsness, AUS, attached unassigned Prisoner Detachment, 1326 Area Service Unit, Military Police Stockade, Camp Lee, Virginia, formerly Army Ground Forces Replacement Depot Number One, did, without proper leave absent himself from his station at Camp Pickett, Virginia, from on or about 21 March 1946 to on or about 10 July 1946.

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

Specification 1: In that 1st Lieutenant Lloyd L. Sandsness, AUS, attached unassigned Prisoner Detachment, 1326 Area Service Unit, Military Police Stockade, Camp Lee, Virginia, formerly Army Ground Forces Replacement Depot Number One, did, at Blackstone, Virginia, on or about the first week in May 1946, wrongfully borrow the sum of ten ($10.00)

dollars from an enlisted man to wit: Sergeant Daniel J. Maddrea, Jr.

Specification 2: In that * * *, did, at Blackstone, Virginia, on or about the last week in May 1946, wrongfully borrow the sum of twenty ($20.00) dollars from an enlisted man to wit: Technical Sergeant Howard Detrick.

Specification 3: In that * * *, did, at Blackstone, Virginia, on or about the last week in May 1946, wrongfully borrow the sum of five ($5.00) dollars from an enlisted man to wit: Technical Sergeant Howard Detrick.

Specification 4: In that * * *, did, at Blackstone, Virginia, on or about 12 June 1946 wrongfully borrow the sum of five ($5.00) dollars from an enlisted man to wit: Staff Sergeant Edward L. McRoberts.

He pleaded guilty to all Charges and Specifications. He was found guilty and sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence in support of Charge I and the Specification thereunder consisted of Prosecution's Exhibits A, B and C comprising an extract copy of the morning report of the IORP, Camp Roberts, California, a copy of paragraph 6, Special Orders No. 63, Infantry Replacement Training Center, Camp Roberts, California, 16 March 1946, directing the accused to proceed to the Army Ground Force Replacement Depot No. 1, Camp Pickett, Virginia, so as to arrive thereat and report prior to 1200, 21 March 1946, and an extract copy of the morning report of Company A, 9th Battalion, 5th Regiment, Army Ground Forces Replacement Depot No. 1, Camp Pickett, Virginia, showing the accused absent without leave since 1200, 21 March 1946. Prosecution's Exhibit D, an extract copy of the morning report, Prisoner's Detachment, 1326 ASU, Camp Lee, Virginia, shows the accused from AWOL to confinement 10 July 1946.

Evidence in support of Specifications 1, 2, 3, and 4, Charge II, all pertaining to the offense of wrongfully borrowing money from enlisted men was established by stipulations as to testimony which would be given if the witnesses were present in court. In each instance under the four Specifications the stipulated testimony pertained to the named enlisted men from whom money had been borrowed by the accused.

The defense offered no testimony and accused, having been informed as to his rights, elected to remain silent.

4. The evidence introduced amply supports the findings of the court and is consistent with the plea of guilty duly entered as to each of the Charges and Specifications thereunder.

5. In the pre-trial investigation the accused gave as a reason for his failure to report to Camp Pickett, Virginia that "the only thing I can say is that I was just drinking too much. Big party." The pre-trial statement of the accused further discloses that he was married on 9 April 1946 during the period of his unauthorized absence. It further appears from his statement that during the entire period of his absence he was at all times in full uniform and wore the insignia of his office.

6. The record and background of the accused shows that he is 29 years of age and was born at Big Timber, Montana, and has three brothers, one older and two younger than himself. His mother died when he was ten years of age. His father is still living. He started attending school just before he was six years of age and quit school in 1934 after two years of high school and was then fifteen years of age. In civil life his occupation was a bar tender and his secondary occupation a bull-dozer operator with a construction crew. He enlisted in the military service on 14 September 1940 and was discharged 26 September 1944 when he was commissioned a second lieutenant at the Officers' Candidate School in Australia. He was promoted to first lieutenant on 3 April 1945. He had forty-four months of overseas service and is entitled to wear the following ribbons: Good Conduct Ribbon, American Defense Ribbon, Asiatic-Pacific Ribbon with three stars, Philippine Liberation Ribbon with two stars, Combat Infantryman's Badge, American Theater Ribbon, and World War II Victory Ribbon. He has one hundred seventeen points toward discharge and his efficiency ratings have been excellent or better during his commissioned service. He volunteered to return overseas because he was dissatisfied with his position at Camp Roberts. There is no evidence of prior convictions or disciplinary action.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96 and the Specifications thereunder.

Thomas J. White, Judge Advocate.

Robert E. McMillan, Judge Advocate.

Edward J. Foreman, Judge Advocate.

(340)

JAGN-CM 316556 1st Ind
WD, JAGO, Washington, D. C. OCT 1 3 1946
TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1946, 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 Lloyd L. Sandsness (0-2037096), Infantry.

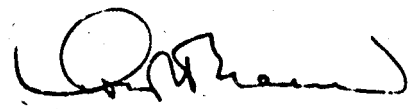
2. Upon trial by general court-martial convened at Camp Lee, Virginia, 22 August 1946, this officer pleaded guilty to and was found guilty of absence without leave, in violation of Article of War 61, from 21 March 1946 to 10 July 1946. He also pleaded guilty to and was found guilty, under four Specifications in violation of Article of War 96, of wrongfully borrowing money from enlisted men, the amounts borrowed being $10.00, $20.00, $5.00, and $5.00. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

During the period of his unauthorized absence accused traveled rather extensively with his wife. He spent considerable time at Blackstone, Virginia, only a short distance from Camp Lee where he was required to report on or before 21 March 1946. During his stay in Blackstone, Virginia, he ran out of funds and borrowed approximately $40.00 in small amounts and at various times from four enlisted men. The sums so borrowed were apparently never repaid. The accused, according to pre-trial investigation, incurred only two or three small obligations for lodging and food which were not paid. Accused stated that he had been drinking rather heavily during the period of his unauthorized absence and after exhausting his savings borrowed from the enlisted men in order to maintain himself. His wife returned to California to seek employment about the 7th or 8th of May 1946. It was about, or shortly after, her departure that the various sums were borrowed. The accused made efforts to borrow additional sums from his relatives in order that he could return to military service "looking decent."

Accused served overseas for about forty-four months. He has demonstrated his unfitness to be an officer. I recommend that the sentence 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.



THOMAS H. GREEN
Major General
The Judge Advocate General

CM 316556
2 Incls
1 - Record of trial
2 - Form of action

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( G.C.M.O. 325, 30 October 1946)

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

JAGH - CM 316558

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| UNITED STATES | ) | FIRST ARMY |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Jay, New York, 26 July, |
| First Lieutenant JOSEPH D. | ) | 2 and 13 August 1946. Dis- |
| SUMMERS (0-1174162), Field | ) | missal, total forfeitures and |
| Artillery. | ) | confinement for one (1) year. |

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SMITH, 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 Joseph D. Summers, Attached unassigned, Military Police and Prison Guard Detachment, 1201st Service Command Unit, Fort Jay, New York, did, at New York, N. Y., on or about 29 December 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Pennsylvania Hotel, 7th Avenue and 33rd Street, New York City, New York, a certain check, in words and figures as follows, to wit:

No. No acct. Date Dec. 29 1945

Name of Bank Lansing National Bank

Branch Capital Ave. City & State Lansing, Mich.

Pay to Order of Pennsylvania Hotel $25 00/100

Twenty Five and no/100

Address:

Street 520 East Jefferson
City
& State Grand Ledge, Mich Signature Joseph D. Summers

For value received I represent that the above amount is on deposit in said bank in my name, subject to this check and is hereby assigned to payee or holders thereof.

and by means thereof, did fraudulently obtain from the Pennsylvania Hotel, 7th Avenue and 33rd Street, New York City, New York, twenty five dollars and no cents ($25.00) in lawful money of the United States, he the said Captain Summers, then well knowing that he did not have and not intending that he should have any account with the Lansing National Bank, Lansing, Michigan for the payment of said check.

Specification 2 through 6, inclusive, are identical in form with Specification 1 except as to dates, amounts and persons or organizations defrauded. The variations are as follows:

| Spec | Date | Amount | Organization or Person Defrauded |
|---|---|---|---|
| 2 | 31 Dec 45 | $20.00 | Hotel Claridge, Broadway and 44th Streets, N. Y. |
| 3 | 1 Jan 46 | 20.00 | Hotel Astor, Broadway and 44th Streets, N. Y. |
| 4 | 2 Jan 46 | 25.00 | Hotel Pennsylvania, New York City |
| 5 | 3 Jan 46 | 25.00 | Hotel New Yorker, 8th Avenue and 34th Street, N.Y. |
| 6 | 4 Jan 46 | 100.00 | Mr. Dave Jacobs, 160 East 45th Street, N. Y. |

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

Specifications 1, 2, 3, 4, 5 and 6 are identical with Specifications 1, 2, 3, 4, 5 and 6, respectively, of Charge I.

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 five (5) years. The reviewing authority approved the sentence, but remitted four years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced, as to each Specification under both Charges I and II, a stipulation that the accused presented the check described to the person named, and received the amount specified in each Specification, that each check was returned marked "no account" by the Michigan National Bank, which had consolidated with the Lansing National Bank, and that the accused had subsequently reimbursed the payees by reimbursing in full the amount of each check (R 6-11). These checks, which were also received in evidence without objection (R 7-11), are more particularly described and identified in the following tabulation:

| Spec of both Charges I & II | Date | Amount | Payee | Stipulation Pros Ex No | Check Pros Ex No |
|---|---|---|---|---|---|
| 1 | 29 Dec 45 | $25.00 | Pennsylvania Hotel | 1 | 2 |
| 2 | 31 Dec 45 | 20.00 | Hotel Claridge | 3 | 4 |
| 3 | 1 Jan 46 | 20.00 | Hotel Astor | 5 | 6 |
| 4 | 2 Jan 46 | 25.00 | Hotel Pennsylvania | 7 | 8 |
| 5 | 3 Jan 46 | 25.00 | Hotel New Yorker | 9 | 10 |
| 6 | 4 Jan 46 | 100.00 | Cash (Mr. Dave Jacobs) | 11 | 12 |

The deposition of George Wyatt, assistant cashier of the Michigan National Bank, Lansing, Michigan (Pros Ex 13) was received in evidence without objection (R 12). It showed that the Lansing National Bank, on which all the checks were drawn, went out of existence on 1 January 1941, and that its records are now in possession of the Michigan National Bank; that the records show no account in either bank; that several checks drawn by accused were processed by witness between 29 December 1945 and 25 January 1946, and returned unpaid because accused had no account.

4. After having been warned of his rights by his counsel, accused elected to be sworn and testified that he returned to the United States on 20 December 1945, after some 38 months in the European and Pacific Theaters (R 17-18). After leaving Fort Sheridan, Illinois (on terminal leave), he went to New York, where he cashed several checks (R 18). He had a joint account with his sister in the Loan and Deposit State Bank, Grand Ledge, Michigan, which was a part of a chain of banks, one of which was the Lansing National Bank. Previous checks drawn by him on the Lansing National Bank had been honored (R 19). At the time he wrote the checks in question, he did not know that his account had been closed, and believed there was money in the account to cover them. After he was notified of the return of the checks, he made restitution to the payees (R 19-20). On cross-examination, accused testified that he did not receive mail from his sister while he was overseas, and that a letter received after his return did not mention the bank account. He had not asked her about the account because he had not thought it necessary (R 20-21). He thought there was about $9,000 in the account (R 22) although his sister could draw on it if she needed money,

and did draw $500 in 1943 (R 23). The last check he had drawn on his account, prior to the checks in question, was before he went overseas in May or June of 1941, and that it was honored (R 25-26). He had an allotment to the Lansing National Bank, Capital Avenue Branch, now the Loan and Deposit State Bank (R 27). He had received an acknowledgement of his first allotment check in 1941, and that was the only thing he ever got from the bank.(R 28). He further testified that he had written only three previous checks in his life, and those were drawn on the Lansing National Bank, Capital Avenue Branch, and were honored (R 29). His allotment for $250.00 per month (R 33) was made out in 1941, was never changed (R 30) and remained in effect until five months prior to the trial when he cancelled it (R 31). The joint account with his sister was closed in November 1945, by accused's sister (R 34) and accused does not know what happened to the money (R 35). He stated that he was disgusted with his sister (R 40) because she had used up his money bit by bit (R 41). He first learned that a check had been returned when he was contacted by the Military Police (R 43) and he wrote to the hotels and made restitution as soon as possible thereafter (R 44). He never asked his sister about the status of the account (R 51) because he trusted her (R 61). He was separated from the service in December 1945 and had his terminal leave check mailed to the bank (R 61).

A letter to the accused dated 8 June 1946 from the Loan and Deposit State Bank (Def Ex A) advising accused of the closing of his account on 7 November 1945, was offered in evidence and received without objections (R 69).

A deposition of Rutgers Alexander, cashier of the Loan and Deposit State Bank (Def Ex B) was received in evidence (R 70), wherein the witness deposed that the joint account of accused and his sister was a savings account. The Loan and Deposit State Bank had a correspondent relationship with the Lansing National Bank and either bank would honor a check drawn on an account in the other, subject to final payment by the bank on which the check was drawn.

5. At the instance of the court, the following depositions were received in evidence:

Deposition of Rutgers Alexander, cashier of Loan and Deposit State Bank (R 95; Pros Ex 14) who deposed that the Loan and Deposit State Bank has been in existence since 1872, and has carried its present name since 1908. It was never a branch of the Lansing National Bank or the Michigan National Bank. Accused's allotment checks were received by the Loan and Deposit Bank and were payable to it, not to the Lansing National Bank. The allotment was for $150 for two months and $200 for fifteen months, or a total of $3,300 from February 1944 to June 1945, both inclusive. No allotment checks were received subsequent to June 1945. The accused and his sister had a joint savings account, but checks drawn on that account would be honored.

Deposition of Florence Summers, sister of accused (R 95; Pros. Ex 15) who deposed that she closed the account in the Loan and Deposit State Bank on 7 November 1945, after the accused had asked her by telephone for the money whereupon she sent it to him by Western Union Telegraph. She further stated that the accused had opened the account about 4 February 1944.

6. At the conclusion of the prosecution's case, the defense moved for a finding of not guilty of all Charges and Specifications, on the grounds that no specific intent to defraud had been shown.

The prosecution proved that the accused made and uttered the checks and that they were drawn on a bank in which the accused had no account.

> "Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect" (CM 249232, Norren, 32 BR 95, 103, 3 Bull JAG, 290).

The defense motion was, therefore, properly denied.

7. The evidence clearly establishes the guilt of the accused. It was stipulated that the checks were cashed by the accused and returned to the various payees by the bank upon which they were drawn because the accused had no account in that bank. The accused attempted to show that he had formerly maintained a joint account in that bank, that his sister, the co-depositor, had misappropriated the money and that she had closed the account without his knowledge or authority. The complicated and confusing testimony by which he sought to show a connection between the Lansing National Bank, on which the checks were drawn, and the Loan and Deposit State Bank, in which he and his sister had maintained their joint account, was thoroughly and unmistakably refuted by the depositions of officials of both banks. The sister of the accused, moreover, testified by deposition that the accused knew of her action in closing the account, that the account was closed at his request on 7 November 1945, and that she sent him the proceeds of the account. Accordingly it is our opinion that the findings of guilty are supported by clear and compelling evidence.

The findings that, by cashing six checks drawn on a bank in which he had no account, the accused violated both the 95th and 96th Articles of War are supported by the evidence and are not improper or a multiplicity of charges. It has been held that a conviction upon identical specifications laid under both Article of War 96 and under Article of War 95 did not constitute double jeopardy and was not otherwise improper (McRae v. Henkes, 273 Fed 108, cert. den. 258 US 624, cited in MCM, 1928, p. 224; CM 230222, Daly, 17 BR 331; CM 248104, Porter, 31 BR 137).

8. Numerous errors were committed during the course of the trial. The question presented by the record is whether these errors affect the legal sufficiency of the record in spite of the compelling evidence of guilt. The most serious errors are enumerated and discussed below:

During the course of the trial the President, who was also the Law Member, engaged in lengthy arguments with the defense counsel and the accused, discussed the merits of the case in open court and disclosed his opinion on the merits of the case as a whole on numerous occasions (R 45-46, 60-61, 64-65, 67-68, 84, 86-89, 92, 101-103). In examining the accused the President assumed facts which were not in evidence and were predicated upon a misstatement of the evidence contained in the deposition of Mr. Wyatt (R 27-29; Pros Ex 13). The following examples of the President's improper questions and comments are cited:

a. In examination by the court after the accused had elected to be sworn and testify in his own behalf the President assumed facts which were not in evidence. The accused had stated that he had an allotment to his account in the "Lansing National Bank, Capital Avenue Branch, now the Loan and Deposit State Bank."

At this point the President asked:

> "Q Well then how do you explain this statement by the cashier of the Michigan National Bank? The question is 'What is the relationship, if any between the Loan and Deposit State Bank, Grand Ledge, Michigan, and the Lansing National Bank, Lansing, Michigan, and/or the Michigan National Bank, Lansing, Michigan?' The answer is 'No relationship.' If that statement is true, I can't see how checks made out to one bank which had been consolidated to form the Michigan National Bank could find their way to a bank which had absolutely no relationship, according to the cashier of it?" (R 27).

The deposition of Mr. George Wyatt, the assistant cashier of the Michigan National Bank (Pros Ex 13) does not show any interrogatory or answer such as that assumed by the President. However he persisted in the same line of argumentative questions and further commented improperly on accused's testimony:

> "Q I realize that the Michigan banks got in a heck of a mess in 1941, but I can't believe, if there was no relationship between the Lansing National Bank and the Loan and Deposit State Bank of Grand Ledge that a check made payable to the Lansing National Bank would some-how find its way to the Loan and Deposit State Bank. It just doesn't make sense. Banks don't do business that way. You have

got to give some better explanation of that, Summers, and that is all there is to it, because we have a statement here signed by the cashier of the Michigan National Bank which says 'What is the relationship, if any between the Loan and Deposit State Bank, Grand Ledge, Michigan, and the Lansing National Bank, Lansing, Michigan, and/or the Michigan National Bank, Lansing, Michigan?' and the answer is 'No relationship'" (R 28-29).

b. On another occasion he commented:

"Q Pardon me for saying so, Summers, but you don't seem to be showing a very human interest in a matter, it seems to me, that any man would that has a eight-thousand-dollar-account in a bank, and over a three-year absence make no attempt whatsoever to find out whether that money was there or what condition the account was in or anything. It just doesn't seem natural for a man who is responsible enough to save that money not to be interested enough to inquire whether it is still there or not" (R 45).

c. After the accused had stated that he had written no checks against his account between 1941 and 1945 the record shows the following colloquy between the President and the accused:

"Q Almost five years. To start writing checks on a bank, any bank, whether you thought you had an account in it or not, to start writing checks on that bank after a five-year lapse without once checking to see that there was any money there or that your account was straightened out, and not having had any statement from the bank during that entire period of time that you had money there, to start writing checks on a bank--you haven't explained to me satisfactorily why you did it. They don't appear to be the acts of a reasonable and responsible person.

"A Well, sir, I see the Colonel's point.

"Q All these officers, I believe, practically every one of them, have been overseas. The last thing you do before you go overseas is get your financial affairs straightened out. I know, in my own case, the first thing I did when I got back home was to check and make sure that my bank account was straight.

"A Sir, it never entered my head. I thought I had made all of the arrangements necessary when I left. Apparently I did, and I don't know what happened, sir.

"Q In addition to that, all the time I was overseas I required my bank to send me a monthly statement, even though I wasn't writing a check. I didn't write one check in six months.

"A I never wrote a check overseas.

"Q But, you can still require a statement from them as to how much money you had in your bank.

"A Well, sir, being a joint account, I suppose my sister got a monthly bank statement from the bank. I don't know" (R 46-47).

d. The accused testified that he made no effort to check on the status of his account because he trusted his sister. Thereupon the President commented:

"I trusted my wife too, but I still want to know what was happening * * *" (R 61).

e. The President directed the prosecution to determine whether the accused's allotment checks were actually paid, and to whom they were paid (R 61-62). In the course of the argument which followed the President commented:

"I am trying to arrive at a decision as to whether, in my mind, the accused used reasonable care in avoiding a mistake, and I will say, that to this point, his knowledge of his affairs is, in my mind, very hazy. He thought he had an account in a bank, but he had no positive evidence of that presented to him since sometime in 1941, which is a long time" (R 64).

f. After the defense rested, the prosecution moved for the continuance in order to prepare rebuttal. The defense counsel objected to the continuance. Thereupon the President announced:

"I will withhold my ruling on the granting of a continuance. It is contingent upon the accused's taking the stand for a couple of more questions. Will you take the stand again?" (R 70).

The accused agreed to resume the stand (R 71) and after several questions designed to determine what arrangement the accused had made with respect to his terminal leave pay the President allowed the prosecution's motion for a continuance (R 73). He thereupon recapitulated his impression of the conflict in the evidence and again misquoted the substance of Mr. Wyatt's testimony by deposition with respect to the relationship between the Loan and Deposit State Bank and the Michigan National Bank (R 74).

He then continued his examination of the accused (R 75) during the course of which examination he commented:

"* * * according to Summers, and his memory is not very good, apparently there was some allotment deducted from November 1945, which was unaccounted for * * *" (R 84)and,

"* * * the accused has shown more than ordinary negligence in not checking up on his account and seeing what the status was * * *" (R 84).

At this point the defense urged the court to determine its findings based on the evidence in the record as it stood at that time (R 84-86). In arguing this matter with the defense counsel the following colloquy took place:

"PRESIDENT: And under the present testimony as presented, the Court can only, in my opinion, arrive at a finding of guilty, at least, of the 96th Article of War, because here is an account that was actually closed two months prior to the accused's writing checks which were returned unpaid and the accused didn't know about it. I tried to point out that it is beholden to any army officer to keep closer account of his financial affairs than to allow an account to be closed two months without knowing a thing about it and then writing checks on it. If he conducts his affairs that way then he is liable to the consequences, and if there is anything that we can find that would justify the accused in assuming that there was an account in that bank, then it is up to us to try to find it.

"DEFENSE: This is my feeling. He had a right to assume that if he had been making allotments for four years and had no trouble with his account—evidently his sister was watching his affairs and putting the allotments through each month—I feel that the man has a right in assuming that money was there.

"PRESIDENT: I definitely don't feel that a lapse of almost five years and failing to check up on his financial status is reasonable in any man, Captain. It just isn't natural for a man to go on and fail to make any check whatsoever on his account in a term of five years and to start writing checks and assume that the money is going to be there, especially when someone else has access to his account" (R 86-87).

He further stated:

"I say, on the present testimony, the only thing the Court could logically arrive at would be a violation of the 96th Article of War in that the accused showed more than ordinary negligence in failing to check into the status of his affairs prior to writing checks on a bank. I don't think any member of the Court believes that the man deliberately tried to defraud the hotels of their money, because that is almost impossible for an army officer to do" (R 88).

At this point in the trial the accused stated that he was willing to plead guilty to the charges and specifications (R 90). The President, however, refused to accept the plea of guilty and overruled defense's objection to the continuance without stating that his ruling was subject to the objection of any member of the court (R 93).

g. After the prosecution had introduced the depositions of Rutgers Alexander (Pros Ex 14) and that of the accused's sister, Miss Florence Summers (Pros Ex 15) as rebuttal evidence, the President asked:

"Does the accused wish to take the stand and explain anything in explanation of the rather damning testimony which was given in the two depositions" (R 96).

h. Thereafter the President announced that evidence of the actual payment made under accused's allotments could only be secured from the stored records of the Office of Dependency Benefits and asked if the defense desired a continuance in order to secure those records (R 100). He commented that these records might explain the "tremendous discrepancies between the statements of the accused" and those of the bank, and that the missing records "have a great bearing in that they could cast some doubt as to the credibility of the accused in his own behalf" (R 101-102).

i. The prosecution suggested that Mr. Jacobs be called as a witness in order that he might clarify any doubt with respect to Specification 6 under both charges. At this point the President stated:

"PRESIDENT: I believe that the person that can give the best explanation is sitting right here in the witness stand right now. If he is willing to tell the facts and the straight facts I am willing to listen to them. From the evidence presented here, which has been read over to us, as far as I can see someone is making wrong statements because the statements are all diametrically opposite. Somebody is wrong.

"DEFENSE: As I stated, sir, the accused is the one who will have to make the final decision.

"PRESIDENT: We can continue to ask him questions. The purpose of rereading that testimony was for him to hear himself what he did state and compare it with the statements that were made in the depositions today, and in view of those statements, I can ask him, does he wish to change or amend any of his testimony?" (R 102-103).

It is obvious that the above remarks were not motivated by any hostility, bias or prejudice against the accused, but rather that the President attempted to give the accused every possible opportunity to overcome the prima facie case established by the prosecution and to reconcile the numerous contradictions between the accused's obviously false testimony and the evidence adduced by the prosecution. But in his misdirected zeal he injected into the presentation of the case comments on the evidence and on the credibility of the accused which would be deemed improper had they been made by the trial judge advocate. These remarks, on the part of the member charged with the dual responsibility of maintaining the court's dignity, as its president, and its legality, as law member, constitute irregularities of the most serious nature. The harm done is not cured by the inadvertence of the irregularities or the laudable motives which prompted them.

In Williams v. United States, 93 Fed (2d) 685, (CCA California 935), the Circuit Court of Appeals held that the harm done when the trial judge departs from the attitude of disinterestness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence, and where the trial judge is not intentionally unfair. The court stated that the lengthy and inquisitional cross-examination of the defendant conveyed to the jury, although, inadvertently, the impression that the court was insisting upon a conviction. The Circuit Court of Appeals held that such errors required a new trial where there is a substantial conflict in the evidence.

In Egan v. United States, 287 Fed 958, (App D.C.), the court stated that a trial judge should be so impartial in the trial of a criminal case that the jury are unable to detect his personal conviction as to guilt or innocence of the accused. Where he departs from such a standard of conduct, his conduct and demeanor may be such as to deprive the accused of a fair and impartial trial, even though no single instance involved error so prejudicial as to warrant reversal.

The question for consideration is whether the conviction should be set aside because of the numerous serious errors committed by the president and law member.

Article of War 37 provides in relevant part:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused" (Underscoring supplied).

In CM 116012, Willis, cited in 1 BR 105 the acting judge advocate, American Expeditionary Forces, France, commented with respect to a similar improper remark by a member of the court as follows:

"After the Judge Advocate had concluded his cross examination of the accused a member of the court, addressing the accused, said:

'This defense of yours that you don't remember what happened inside though you know a good deal of what happened outside seems shaky. Don't you remember anything of what happened inside?'

As indicated by the reviewing authority * * * the remark in open court of a member of the court that the defense of the accused seemed 'shaky' was highly improper. The irregularity is so grave that it must have been held to invalidate the findings and sentence if the record proof of the commission of the acts charged were not quite clear. See page 24, Bulletin 72, War Department, 1917. However, in this case, in view of the very direct evidence to prove the disrespect and disobedience alleged, I am of the opinion that it cannot be held that the substantial rights of the accused were injuriously affected by the improper remark."

Bulletin 72 (p 24), War Department, 1917, contains the following with respect to a court-martial case in which the president of the court made comments adverse to accused:

"After the trial judge advocate had concluded his remarks and just before the court was closed for findings in the trial of a soldier charged with desertion and found guilty of absence without leave, the president of the court made the following statement:

'To my mind it is an aggravated case of overindulgence in whisky in a young man whose future, I fear, is very black.'

"This irregularity was of such a grave nature that had not the accused freely admitted his absence without leave on the witness stand the finding and sentence of the court must have been set aside. The president of the court, or any member thereof, has no right to comment in open court upon the evidence adduced at the trial."

In CM 267639, Tressler, 44 BR 31, the Board of Review stated:

"While questioning the accused on the stand, the president stated to him, without any justification apparent on the face of the record, 'I don't want an argument or a speech. If you can't answer say so' (R. 104). Later, when accused, in answer to a question posed by the president, stated that at the race track they placed their bets 'on the nose', an expression he learned at the track that day, the president offered the observation. 'You learned quite a lot the first day' (R. 113). These remarks by the president were improper although they do not affect the validity of the trial. Members of a court-martial should be dignified. (MCM 1928, par. 38). For a member of a court-martial to belittle an accused while he is exercising his statutory privilege to testify in his own defense hardly comports with the dignity expected of the members of such a court. It is most inappropriate for any member of the court to use such an opportunity to offer gratuitous, sarcastic remarks to an accused."

In CM 187894, Washak, 1 BR 105, an accused was charged with and convicted of larceny of three hams. He testified that he found the hams in a boiler room sufficiently lighted to enable him to see the hams and that he was in the act of taking the hams to his superior when he was accosted by an officer.

Whether the room was lighted or dark became a material and important issue bearing upon the sufficiency of accused's explanation of his possession of the stolen property.

During the testimony of the accused one of the members of the court directed a series of questions at him, largely argumentative in nature and apparently for the purpose of testing his veracity, in part as follows:

"Q Any light burning in there?

"A No, sir.

"Q Any electric light burning in there?

"A None that I noticed.

"Q No light burning in there that you noticed?

"A No, sir.

"Q But there was plenty of light in the room?

"A Yes, sir.

"Q It is dark as hell in there — I have no further questions.

"By the defense: I arise to a point — I object to the question, or the statement, when the members said 'Dark as hell in there.' That simply has a wrong bearing on the other members of the court, and I would like for that to appear in the record.

"By a member: May it please the court, the member who made that remark would also like to have the court take judicial cognizance of the fact, or take judicial notice of the fact, that the room this man is referring to ought to be inspected by the court, or somebody ought to be brought here to testify to the fact it is one of the darkest places around there; it is kept full of coke, where this man said he found this stuff * * *."

Previously during the examination of the accused a member had referred to accused's testimony as his "tale."

The Board of Review stated:

"The court member's positive and emphatic statement that the room was 'dark as hell' in contradiction of the accused on this material point amounted to a declaration unwarranted by the evidence before the court, that the accused's testimony explanatory of his possession and as to how he came into possession of the stolen property was false. In effect <u>the member made himself an unsworn witness for the prosecution</u> on a material point of which the court could not take judicial notice, and the court failed

to reject his statement or indicate in any manner that it was not accepted as evidence of the fact in issue. No witness was called to testify to the fact stated by the member. The members's conduct and his subsequent participation in the findings and sentence was * * * unmistakably erroneous." (Underscoring supplied).

The board held the record legally insufficient to support the findings of guilty stating:

"Inasmuch as the evidence adduced by the prosecution in the present case did not include direct proof of the larceny, but was purely circumstantial in its essentials and by no means of a compelling or of even strongly convincing nature, and since accused's testimony offered in explanation of his possession of the property in question, if believed, would very probably have resulted in acquittal, it is the opinion of the Board of Review, after examination of the entire proceedings, that the error injuriously affected the substantial rights of accused within the meaning of the 37th Article of War. * * *" (Underscoring supplied).

In CM 194300, Sanderson, 2 BR 125, CM 200989, Osman (1st Ind), 5 BR 28 and CM 210404, Cameron, 9 BR 271-274, it was held that convictions should be set aside because of numerous errors, no one of which alone was held to be fatal, where the evidence as a whole is not clear and compelling.

It follows from the foregoing authorities that the prejudicial effect of improper remarks by members of a court-martial is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which evidence for the prosecution is contradicted or explained consistently with innocence by evidence on behalf of the accused. A conviction should not be set aside where the evidence is of compelling effect and the errors committed could not reasonably have affected the result. A similar rule is followed by the Federal courts, (Williams v. United States, 93 Fed (2nd) 685 (CCA Cal 935); Pasqua v. United States, 146 Fed (2nd) 522).

In the leading case of Adler v. U.S. (CCA 5), 182 Fed 464, 472-473, the court said:

"The impartiality of the judge - his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury - is a fundamental and

essential rule of special importance in criminal cases. * * * While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of witnesses we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses * * * and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved * * *.

"The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified, in interfering with the judgment on this account alone. But in a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of the appellate court, on this ground alone, to grant a new trial" (Underscoring supplied).

The Federal rule, as expressed in Adler v. U.S., that the prejudicial effect of improper remarks or cross-examination on the part of a judge is to be measured by a consideration as to whether the evidence of guilt is compelling, or whether there is a substantial conflict in the evidence is significant when it is remembered that the relation of a judge to the jury, of necessity, requires an even more exacting standard of judicial demeanor than is required of a law member or president of a court-martial. A jury may be far more readily influenced by an impression, gained in open court, of the judge's opinion of the case on its merits, than a court-martial would be by an impression of the law member's opinion. Since full and free discussion of the merits of the case is authorized in closed sessions of a court-martial during its deliberations on the findings, a comment on the evidence by a member in open court can not be as seriously prejudicial to the rights of an accused as a similar comment by a judge who has no further contact with the jury after it retires to deliberate upon its verdict.

In the light of all the evidence introduced in this case it would be inconceivable that the inexcusable and irresponsible remarks made by the president and law member could affect the findings of the court. Since the evidence of guilt of the offenses alleged seems to us to be compelling, the improper conduct of the President and law member did not prejudice the substantial rights of the accused.

In our consideration of the questions presented by the improper conduct of the president and law member, we have considered CM 309362, Richter, 29 BR (ETO)173, and CM 313222, Ahrens, 30 BR (ETO) 275.

In the Richter case the law member surreptitiously obtained possession of the prosecution's file including the allied papers which were attached to the charge sheet, and introduced it for the consideration of the court in a closed session of the court while deliberating on its findings. The file contained damaging written statements by the accused and other inculpatory statements not introduced into evidence. The Board of Review sitting in the European Theater of Operations held that the accused's right had been seriously prejudiced by the law member's action.

In the Ahrens case the accused entered a special plea on the grounds that the case was not investigated in compliance with Article of War 70. The president of the court, who was also its law member, adjourned the court "for the purpose of permitting the law member to meet with the Division Judge Advocate." When the court was reconvened the law member overruled the special plea of the defense and declared:

> "As to the special plea in abatement, investigation of the records in this case discloses that this set of charges has been investigated four times. Once by the military police, twice by the authorities of the French Army, and once more by our own military authorities. In the case of the last investigation, the investigating officer certified over his own signature that the accused was present and had a full opportunity to cross-examine every witness. For that reason it is obvious that the accused had made false statements to his counsel or that counsel has tolerated fraud in the conduct of the case. Because of the fact that the record shows that the accused was present during an investigation and had a full opportunity to cross-examine the witness, the plea in abatement is not sustained." (Underscoring supplied).

The Board of Review sitting in the European Theater of Operations held that action of the law member constituted prejudicial error for two reasons:

> "First, the adjournment of court for the purpose of permitting the law member to consult with the Division Staff Judge Advocate and his obvious examination of the file not admitted in evidence was prejudicial to accused's substantial rights * * *. As in the Richter trial the file contained information which was prejudicial to accused * * *. The accused offered to testify concerning the investigation but was denied this right. The law member determined from the file that he was present

because 'the investigating officer certified over his own signature that accused was present'.
"By this announcement alone, he indicated a disbelief of accused's testimony and indicated a clear choice in believing information found in the file. His disregard for his oath as a member of the court * * * to truly try and determine according to the evidence * * * is apparent. * * *

Secondly: The law member's statement:

> 'it is obvious that the accused has made false statements to his counsel or that counsel tolerated fraud in the conduct of the case.'

not only communicated his conclusion derived from examination of the file to other members of the court but also in effect, impeached, in his own mind and the other member's minds, the credibility of accused as to any testimony he might have elected to give. It also clearly disclosed his own prejudice and his remarks were such as were calculated to influence the minds of other voting members * * * the conduct of the law member not only constituted an error, but also it was an error which prejudiced the substantial rights of accused * * * it is therefore the opinion of the Board of Review that accused has been denied a fair trial irrespective to the substantiality of the evidence."

In both the Richter and the Ahrens cases the errors of the law members affected the honesty of the proceedings and the integrity of the court to the extent that the trials were manifestly unfair. The elements of wilfull impropriety bordering on fraud on the part of a member of the court which were apparent in the Richter and Ahrens cases is not present in the instant case. Although we do not consider the president and law member's improper conduct fatal to the proceedings, his unjudicial demeanor throughout the proceedings should not be condoned.

9. There remains for consideration whether error was committed by the president and law member in asking the accused to take the stand in surrebuttal apart from the injudicious manner used.

As incidated above, after the prosecution had introduced the depositions of Mr. Alexander and Florence Summers in rebuttal, the president asked:

> "Does the accused wish to take the stand and explain anything in explanation of the rather damning testimony which was given in the two depositions?"

Thereafter, when the trial judge advocate asked the court if it desired to have Mr. Jacobs called as a witness to testify as to the circumstances of the offense alleged in Specification 6, the president commented:

> "I believe that the person (the accused) that can give the best explanation is sitting right here in the witness stand right now. If he is willing to tell the facts and the straight facts I am willing to listen to them."

In CM 312517, Kosydar et al, the Board of Review held that the prosecution's demand that an accused take the stand as a witness for the prosecution, without his consent, seriously prejudiced the accused's rights against self-incrimination as provided by the Fifth Amendment and Article of War 24, and that such rights are so fundamental that their infringement amounts to a lack of due process which cannot be cured by clear and compelling evidence of guilt.

It is a fundamental corollary of the right against self-incrimination that where an accused declines to avail himself of his right to testify, no inference may be drawn against him for electing to remain silent, and it is regarded as error in most jurisdictions for the court or the prosecution to comment on the accused's failure to take the stand on his own behalf to explain inculpatory facts adduced by the evidence (United States ex rel Vajtauer v. Commissioner of Immigration, 273 U.S. 103).

Nevertheless, when an accused voluntarily offers himself as a witness he waives his constitutional privilege against self-incrimination, and when he takes the stand his privilege is waived in its entirety (Brown v. Walker, 161 U. S. 591, 597; Sawyer v. United States, 202 U. S. 150, 165; Power v. United States, 223, U. S. 303; Burrell v. Montana, 194 U. S. 572; Diggs v. United States, 242 U. S. 470; Le More v. United States (CCA 5th) 253 Fed 887, cert. den. 248 U. S. 556). He may, accordingly be asked questions on cross-examination which tend to incriminate him, so long as they are material and relevant to the issue (Powers v. United States, supra; Burrell v. Montana, supra). His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will whenever cross-examination becomes inconvenient or embarrassing. The failure of an accused who takes the stand to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of an adverse inference and the jury may be so instructed (Raffel v. United States, 271 U. S. 494; Grantello v. United States, 3 Fed (2nd) 117), and the prosecution may comment on such failure (Diggs v. United States, supra; State v. English, 308 Mo. 695).

An accused may be recalled for additional cross-examination after he voluntarily elects to testify on the merits of the case, and wide latitude in the cross-examination of the accused may normally be permitted (MCM, 1928, par. 121b, p. 127). The President' and Law Member's questions as to whether the accused desired to offer any explanation of the inculpatory evidence adduced by the prosecution is considered by us to be additional cross-examination, and as such is not, per se, error, although as indicated above, the manner in which the questions were asked was clearly improper and erroneous.

For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty.

10. There was considerable confusion in the record as to the rank of the accused at the time of trial. The accused was tried as a captain and stated that he had received a one rank promotion from the rank of first lieutenant when he was processed through a separation center (R. 104). However, the records of the War Department show that on 23 December 1945 the accused was placed on terminal leave as a first lieutenant (SO 160, WD Personnel Center, Ft Sheridan Illinois, 23 Dec 1945). The records further show that the accused was not eligible for a one rank promotion under existing regulations, since he had not attained an efficiency index of 40 (excellent) (WD Circular No. 10, 11 January 1946).

11. The accused is 38 years of age, unmarried, and a high school graduate. He attended college for two years. The records of the War Department show his civilian occupation as a civil engineer. He was an enlisted man in the Michigan National Guard from 10 January 1926 to 6 April 1941 when he was inducted into the Federal Service with the 119th Field Artillery. He served as an enlisted man at Fort Leonard Wood, Missouri, until he entered the Field Artillery Officers Candidate School, Fort Sill, Oklahoma in September 1942. He was commissioned a second lieutenant, Army of the United States on 26 November 1942 and promoted to the rank of first lieutenant on 10 July 1944. He departed the United States for foreign service in the Mediterranean Theater in January 1944 and is entitled to campaign stars for the Rome-Arno, Northern Appenine, and Po Valley campaigns. His overall efficiency index is 31.1 (very satisfactory). His War Department WD AGO 201 file shows that the accused was reprimanded under Article of War 104 on 11 December 1943 for absence without leave. In April and June 1944 communications were received by The Adjutant General wherein complaint was made of several checks drawn by accused on banks in which he had no accounts. On other occasions similar complaints were received by his unit commander. In April 1945 the accused was punished under Article of War 104 for presenting pay vouchers which failed to disclose partial payments he had received. On 30 July 1945, his commanding officer recommended that he be reclassified. On 31 July 1945, he tendered his resignation in lieu of reclassification,

and on 9 October 1945 the Secretary of War's Separation Board recommended the acceptance of the resignation. The commanding officer of the Indiantown Gap Separation Center was instructed to separate the accused without certificate of service and without leave. However, the accused was processed at the Separation Center at Fort Sheridan, Illinois, and placed on terminal leave. He was to have reverted to inactive status on 23 March 1946. On 16 March 1946, the orders were revoked, and accused was attached unassigned to Fort Jay, New York, where he was awaiting trial on the above charges.

12. 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 findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War and authorized upon conviction of a violation of the 96th Article of War.

M. Gottenstein, Judge Advocate.

Waldemar A. Solf, Judge Advocate.

Philip R. Kniffin, Judge Advocate.

JAGH - CM 316558 1st Ind

WD, JAGO, Washington 25, D. C. MAR 3 1947

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 First Lieutenant Joseph D. Summers (0-1174162), Field Artillery.

2. Upon trial by general court-martial, this officer was found guilty of fraudulently making and uttering six checks drawn on a bank in which he had no account, in violation of Articles of War 95 and 96. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, but remitted four years of the 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. 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.

Between 29 December 1945 and 4 January 1946, the accused, while on terminal leave, signed and cashed six checks, totaling $215.00, drawn on the Lansing National Bank. All of the checks were returned marked "No Account" by the Michigan National Bank, successor of the Lansing National Bank, which had gone out of existence in January 1941. Accused had no account in the Michigan National Bank, and had never had an account in the Lansing National Bank. He testified that the Loan and Deposit State Bank, Grand Ledge, Michigan, had been consolidated with the Lansing National Bank, and that a joint account of accused and his sister in the Loan and Deposit State Bank had been closed by the sister without his authority or knowledge. Depositions from officials of both banks, however, disclosed that, aside from the ordinary correspondent relationship, there had been no connection between the two banks, and his sister testified by deposition that she had not only closed the account with the knowledge of the accused but at his request, and had sent him the proceeds. Shortly after his apprehension, accused made restitution in full of the six checks in question.

War Department records show that the accused was reprimanded under Article of War 104 on 11 December 1943 for absence without leave. In April and June 1944 communications were received by The Adjutant General complaining of checks drawn by accused on banks in which he no longer had an account. Similar complaints were received by his unit commander. In April 1945 the accused was punished under Article of War 104 for presenting pay vouchers which failed to list partial payments which he had received.

On 31 July 1945, he tendered his resignation in lieu of reclassification, and the Secretary of War's Separation Board, on 9 October 1945, recommended the acceptance of the resignation. The commanding officer of the Indiantown Gap Separation Center was accordingly instructed to separate accused without certificate of service and without granting terminal leave, but the accused was processed at Fort Sheridan, Illinois, placed on terminal leave and was to have reverted to inactive status on 23 March 1946. On 16 March 1946, those orders were revoked and accused was held for trial on the above charges.

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

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

CM 316558

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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( G.C.M.O. 71, 10 March 1947).

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



8 APR 1947

JAGQ - CM 316639

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| UNITED STATES | ) | FOURTH ARMY |
| v. | ) | Trial by G.C.M., convened at Fort Sam Houston, Texas, 12 September 1946. Dismissal. |
| First Lieutenant RICHARD S. BAKER (O-1542879), Medical Administrative Corps. | ) | |

OPINION of the BOARD OF REVIEW
HICKEY, SCHENKEN and PARSONS, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Richard S. Baker, Headquarters and Headquarters Detachment, First Training Battalion (Medical), Medical Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, on or about 9 August 1946, was drunk in command, to-wit: the Orderly Room, Company D, First Training Battalion (Medical), Medical Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas.

Specification 2: In that First Lieutenant Richard S. Baker, Headquarters and Headquarters Detachment, First Training Battalion (Medical), Medical Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, was, on or about 9 August 1946, while in a public place, to-wit, Company Area, Company D, First Training Battalion (Medical), Medical Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, drunk.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specifications. No evidence of previous convictions was introduced. He

was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution. When the accused entered the orderly room, Company D, First Training Battalion, Brooke Army Medical Center, Fort Sam Houston, Texas, shortly after midnight, 9 August 1946, his actions and speech indicated that he was drunk. He leaned against a desk for support, his speech was thick, he asked how he had gotten back to Camp, and he could not walk straight. He slept in the orderly room with the CQ; awakened about 0600, drank about one-fourth of a pint of liquor that he had brought with him, and then went out into the street in front of the orderly room (R 9-14). At this point, he approached his company commander and two other officers, interrupted their conversation with irrelevant remarks, talked in a "sagging and slurring" tone, was weaving from side to side, and in the opinion of his company commander, accused was drunk. He was told to get some sleep and prepare himself for his assigned class schedule but at 0830, his condition was such that he was relieved from this assignment and ordered not to take the class (R 17-20). The battalion commander and a medical officer also testified that accused was drunk on the morning in question (R 28-30, 34).

4. Evidence for the Defense.

After being advised of his rights as a witness by the President, accused elected to remain silent.

5. From the evidence in the record of trial it is apparent that the guilt of accused as to each specification was proved beyond a reasonable doubt.

Drunkenness is defined in the Manual for Courts-Martial, 1928, paragraph 145, as follows:

> ".... any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness * * *".

That accused was drunk at the orderly room, Company D, is satisfactorily shown by the testimony of Major Carter, Captain French and Sergeant Biggerstaff. Their testimony was uncontradicted. That accused was drunk on the streets in Company D area in front of the orderly room was established by the testimony of Captain French. The company area is a public place within the commonly accepted meaning of that term (CM 216707, Hester, 11 BR. 145, 154). The allegation that accused was drunk was further established by competent medical testimony.

The ruling of the court disallowing the defense's plea of multiplication of charges was proper. It is the opinion of the Board of Review that the procedure followed does not constitute an unreasonable and unnecessary multiplication of charges in contravention of the policy set forth in paragraph 27, page 17, Manual for Courts-Martial, 1928.

6. War Department records show that accused is 29½ years of age, married, and has two children. He completed 3 years at Millerville State Teachers College, Pennsylvania, and has a teacher's certificate for that state. He taught in the schools of Perry County 1937-1941. He served as an enlisted man from March 1942 until commissioned as a second lieutenant upon completion of MAC OCS, Camp Barkeley, 19 December 1942. He was promoted to first lieutenant 2 September 1943, separated 18 January 1946, and recalled to active duty 7 May 1946. He was punished on 3 June 1946 under Article of War 104 for absence without leave, drunkenness and fighting with an enlisted man. He was further admonished on 14 June 1946 as a consequence of complaints concerning his language in the Officers Club, Fort Sam Houston. At that time he was fully warned that his continued intemperate use of alcohol would lead him into further disciplinary difficulties.

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

Albert D. Hamer, Judge Advocate

Carlton E. Johnson, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 316639 1st Ind

WD, JAGO, Washington, D. C. APR 25 1947

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 First Lieutenant Richard S. Baker (O-1542879), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk on the streets in the company area and in the orderly room of Company D, First Training Battalion (Medical), Medical Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, on 9 August 1946, in violation of Article of War 96. 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 and the sentence and to warrant confirmation of the sentence.

Accused was recalled to active duty on 7 May 1946. On 3 June 1946, he was punished under the 104th Article of War for absence without leave, drunkenness, and fighting with an enlisted man. On 14 June 1946 he was admonished as a result of complaints concerning his language at the Officers' Club.

4. Accused served creditably during the war. I recommend that the sentence be confirmed but, in view of all the circumstances, that it be suspended during good behavior.

5. 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

(G.C.M.O. 148, 2 May 1947)

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



JAGK - CM 316657

14 OCT 1946

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| UNITED STATES<br><br>v.<br><br>First Lieutenant HERBERT H. SHELDON, JR. (0-1583664), Ordnance Department | ARMY AIR FORCES<br>FLYING TRAINING COMMAND<br><br>Trial by G.C.M., convened at Randolph Field, Texas, 17 September 1946. Dismissal, total forfeitures. |

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

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1. The record of trial in the case of the above named officer 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 58th Article of War.

Specification: In that First Lieutenant Herbert H. Sheldon, Jr., Ordnance Department, did, at Hondo Army Air Field, Hondo, Texas, on or about 29 July 1944, desert the service of the United States and did remain absent in desertion until he was returned to military control on or about 21 August 1946, at Fort Douglas, Utah.

He pleaded guilty to the Specification, except the words "desert", "in desertion" and "returned to military control", substituting therefor respectively, the words "absent himself without leave from", "without leave" and "surrendsred himself" of the excepted words not guilty, of the substituted words guilty; not guilty to the Charge but guilty of a violation of Article of War 61, and was found guilty of the Charge and Specification. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

It was stipulated that from and after 13 November 1942 the accused was a member of the Army of the UnitedStates and subject to military law (Pros. Ex. 1).

The prosecution introduced in evidence an extract copy of the morning report of Section C, 2523rd Army Air Force Base Unit, Hondo Army Air Field, Hondo, Texas, for 1 August 1944, which showed the accused absent without leave at 0001, 29 July 1944 (R. 6, Pros. Ex. 2). The prosecution introduced in evidence an extract copy of a morning report of the Post Operating Company Guardhouse, Fort Douglas, Utah, which shows the accused in confinement as of 21 August 1946 (R. 7, Pros. Ex. 3). First Lieutenant Charles D. Harrison identified a voluntary statement made by accused which statement was introduced into evidence without objection by the defense. The confession of the accused stated that about 11 July 1944 he had received 20 days leave. At this time he was heavily in debt from gambling. He was unable to obtain money and did not return to the Army. During and prior to October 1944 he wrote bad checks amounting to approximately $1800.00. He then went to California and secured employment in agricultural work where it was unnecessary to give a name or show a Social Security card. This work was considered essential. He was employed about nineteen months. He decided that he was unable to make enough money to pay his debts and then turned himself in to the Federal Bureau of Investigation at Reno, Nevada, on 13 August 1946. He was held in the county jail for seven days and then sent to Fort Douglas where he remained a week, after which he was sent to Randolph Field. In May 1946 he had discarded his uniform and begun wearing civilian clothes. During his absence he always had it in his mind to return to the service (R. 8, Pros. Ex. 4).

4. For the defense.

The defense offered no evidence. The accused was advised of his rights as a witness and elected to remain silent.

5. The evidence discloses that the accused was absent without leave from his station from 29 July 1944 to 21 August 1946. This fact was admitted by the accused by his plea of guilty to absence without leave in violation of the 61st Article of War.

The long period of unexplained absence, and the fact that the accused wore civilian clothes and engaged in a civilian occupation where his name or Social Security card would not be required, together with the fact that he traveled a long distance from his station and that during this time he was near military establishments without returning to military control are all circumstances from which the court could properly infer the intent of the accused to desert the service of the United States. The evidence establishes desertion (MCM, 1928, par. 130a; CM 238485, Rideau, 24 BR 271; CM 266918, Freeman, 43 BR 319).

6. War Department records show that the accused is 34-10/12 years of age and married. He completed one year of high school. Prior to his enlistment in the Army he was employed as a motor maintenance foreman earning $35.00 per week. He enlisted in the Army on 4 June 1940 and attained the rank of sergeant, before being selected for officers' candidate school. He

was appointed and commissioned a temporary second lieutenant, Ordnance Department, Army of the United States, 13 November 1942. From 28 June 1943 to 7 August 1943 he attended the Ordnance School and received a very satisfactory rating. He received a temporary promotion to first lieutenant, 24 August 1943. His 201 file discloses numerous letters to the War Department mentioning unpaid checks and requesting the address of the accused.

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 58.

Chester D. Gilbert, Judge Advocate

Carlos E. McElfresh, Judge Advocate

Gilbert G. DeBrayd, Judge Advocate

(372)

JAGK-CM 316657 1st Ind 31 October 1946

WD, JAGO, Washington 25, D. C.

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 First Lieutenant Herbert H. Sheldon, Jr. (O-1583664), Ordnance Department.

2. Upon trial by general court-martial this officer was found guilty of desertion, in violation of Article of War 58. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused absented himself without leave from his organization and station from 29 July 1944 to 21 August 1946. When he went absent without leave he was heavily in debt due to gambling. During his absence he traveled to California where he secured employment in agricultural work. In this work it was unnecessary to give a name or produce a Social Security card. He wore civilian clothes part of the time while absent. After nineteen months of this work and after the end of the war he surrendered to the Federal Bureau of Investigation.

4. I recommend that the sentence 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

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( G.C.M.O. 348, 15 November 1946).

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



JAGK - CM 316705

4 DEC 1946

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| UNITED STATES<br><br>v.<br><br>Private First Class GERALD N. HAYES (42151338), and Technician Fifth Grade MARION R. BROWN (44054098), both Headquarters Battery, 11th Airborne Division Artillery. | 11TH AIRBORNE DIVISION<br><br>Trial by G.C.M., convened at Yamagata, Honshu, Japan, 30 July 1946. EACH: To be hanged by the neck until dead. |

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Technician Fifth Grade Marion R. Brown and Private First Class Gerald N. Hayes, both Headquarters Battery, 11th Airborne Division Artillery, acting jointly and pursuant to a common intent, did, at or near Tsuyama-Mura, Kita-Muryama County, Honshu, Japan, on or about 16 June 1946, forcibly and feloniously, against her will, have carnal knowledge of Iku-ko Takeda.

Each accused pleaded not guilty, and two-thirds of the members present when the vote was taken concurring, each was found guilty of the charge and specification. No evidence of any previous convictions was introduced against either accused. All the members of the court-martial present when the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each accused, designated the U.S. Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War might direct, as the place for the execution of the sentence and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the prosecution.

a. That the alleged offenses were committed upon the person alleged.

During all the times hereinafter mentioned, the 11th Airborne Division Artillery, of which the accused were members, had its headquarters in the City of Yamagata, Honshu, Japan (R. 32). At about 1900 hours on the evening of 16 June 1946 there was held at the public meeting house of a village near Yamagata a lesson in flower arrangement and among the young women attending this lecture was Iku-ko Takeda, whom the record shows to be a 21-year old Japanese farm girl residing in or near Yamagata (R. 7, Pros. Ex. 10). At about 2100 hours the lecture was completed and a committee was appointed to escort the teacher to her home in the reclaimed land district northeast of the city. The committee was composed of the following Japanese people, Iku-ko Takeda, Fumi Takeda, Toyo Takeda, Tokairin Kura, Ota Kie and their male escort, Uno Toshio (R. 7). As these people, in company with the teacher, made their way toward the reclaimed land district it was necessary that they cross a bridge known as the Mamiga-saki Bridge, and as they crossed this bridge the witness Iku-ko Takeda testified through the interpreter that the following occurred:

"First we met the jeep coming our way. *** Jeep, after meeting us went to the farther end of the bridge and then returned to us. *** So we all of us closed ourselves on the left side of the bridge. *** Then jeep steered so that it was parked diagonally across the bridge. *** I didn't know which way to go - forward or backward. Then the rest of the girls ran away in the front toward the park. Only Toshio Uno they left with me. Then before the jeep started, I succeeded in getting off three times. *** Uno tried to hold the soldier who tried to catch me, but he was unsuccessful. *** He took hold of me. *** There were two (2). I pinched him with my fingers and I tried to kick with my legs. Then jeep started toward Tendo way. *** I was cruelly treated on the jeep, sir. *** I was beaten on my face. Also the clothing was stripped off me. *** The soldiers were feeling all over my body. *** It took about 40 minutes. *** I was forced to get off the jeep, sir. *** I was taken hold of then brought down. *** I tried to run away but I was again caught and I pinched the soldier again, but was of no avail. *** And then a blanket was spread on the street right behind the jeep, sir. *** I was - he tried to force me to lay down on it, sir. I tried to lie sideways and tried to kick but I was laid down again. *** Then in the meantime, he came out and was holding me in the front part of my body. *** And then other one held my legs apart. *** Then before I knew it, he was on me and pressing his whole body on my body, and while, in spite of my pinching and trying to kick with legs, he got on me. *** Then he had me and he satisfied his desire." (R. 8,9; statements are the witness' answers to pertinent questions.)

The witness further testified that each of the soldiers, in turn, raped her, the one holding her while the other satisfied his desire. In response

to specific questions she stated that each, in turn, inserted his penis into her private parts and that the first occurrence lasted three minutes and the second two minutes. At no time did she consent to any of these acts (R. 10,11). Continuing, Iku-ko Takeda testified that after the foregoing took place she was given her torn clothing, forced to get back into the jeep and that they drove for about ten minutes toward the City of Yamagata. The soldiers then put her out on the road and she walked until she came to a house where the inhabitants, seeing her distress, gave her shelter for the night (R. 11). The next morning she returned to Yamagata by train and reported the incident to both Japanese and American police officers who had a doctor examine her (R. 12). As a result of leading questions, permitted by the court over objection of defense when it appeared that Iku-ko Takeda was confused, she was allowed to testify that on the morning of 17 June she identified each of the accused herein as the soldiers who took her away in the jeep the night before and raped her (R. 12). The following pertinent questions and the answers thereto by Iku-ko Takeda relating to identity are set forth as transcribed by the court reporter:

"Q. Was there any doubt at that time that they were the soldiers that raped you?

"A. Some doubt - I was not quite positive but I did as possible persons.

"Q. I ask you to look around in this room and see if those same two soldiers are now present. Let us know when you see the soldiers.

"A. (Witness looking about room) They do not seem to be here, sir.

"Q. Look at everyone closely. Look around the entire room - turn around - completely turn all the way around.

"A. There are two.

"Q. Will you walk over to where you see these men and point to them directly?

"A. (Witness pointing to the accused Hayes)

"Q. Point to the second one.

"A. (No response from witness)

"Q. Point to the second soldier.

"A. (Pointing to the accused Brown)" (R. 13).

A piece of clothing, identified by Iku-ko as being part of the lining of her coat which she stated was ripped from her body on the night of the assault and which she had brought to the office of the Provost Marshal on the morning of 17 June 1946 was received in evidence without objection and marked Prosecution Exhibit 1 (R. 13). Iku-ko stated that she was also told that a part of this cloth was found in the jeep (R. 14).

The witness was shown another remnant of cloth marked Prosecution

Exhibit 2 which she identified as being a part of the same piece of cloth introduced in evidence as Prosecution Exhibit 1. Iku-ko Takeda identified a third piece of cloth as being a part of her underwear worn on the night in question, stating that she brought this remnant of her underwear to the Provost Marshal, but further in her testimony she stated that this portion of her underwear was already at the Provost Marshal's office when she arrived there (R. 14).

The testimony of Iku-ko Takeda heretofore set forth asserted that on the night she was assaulted a blanket was spread upon the ground upon which she was forced to lie. Iku-ko was shown a blanket at the trial and asked by the prosecution if it resembled the one which the soldiers spread upon the ground on the night she was assaulted. She replied, "I did not pay any attention to the blanket, sir" (R. 15). Upon direct examination, the witness Iku-ko Takeda did not state specifically the time of the alleged assault, however, she undertook to describe the clothing worn by her assailants. Her testimony in this regard is best exemplified by the following questions and answers upon her examination by defense counsel:

"Q. Ask the witness to tell the court, to the best of her knowledge, the exact time that the act of picking her up on the bridge occurred.

"A. It must have been about 9:15.

"Q. What time did the alleged offense of rape occur?

"A. It must be near 11 o'clock - near 11 o'clock.

"Q. Can you identify the uniform of the driver of the vehicle?

"A. It appeared to my eyes, a whitish one. Other than that I don't know.

"Q. The uniform of the soldier was rather whitish - can you identify the uniform of the other man not the driver?

"A. That appeared to be as a more greenish color, sir. That's all I saw." (R. 15).

Members of the court questioned Iku-ko Takeda as to whether in the course of the alleged offenses she made any attempt to cry out, to which she replied in the affirmative. She was then asked if she was positive the two soldiers whom she pointed to in the court room were the men who raped her. She replied, "I do think it now, sir" (R. 16).

Uno Toshio, factory operative of the City of Yamagata, testified that at about the hour of 9 o'clock on 16 June 1946 the order came to him to accompany the teacher of the flower arrangement lesson (Miss Tokairin) to her home in the City of Yamagata. Others in the escorting party were the girls, Ota Kie, Toyo Takeda, Fumi Takeda, and Iku-ko Takeda. When they came to the Mamiga-saki Bridge a jeep pulled up, turned around and stopped. All the girls fled but Iku-ko Takeda who came behind him. Two soldiers were in the jeep. One, wearing a "whitish" uniform alighted from the jeep and came

toward him and Iku-ko. The soldier tried to get hold of Iku-ko and Uno stated that he held out his arms to intercede but then both soldiers kicked him in his left thigh and he was overpowered and fell back. The second soldier had on a greenish uniform. Iku-ko made a piercing cry but to no avail, she was carried into the jeep. At least twice, if not three times, she succeeded in getting off the "car" but finally she was forced into the jeep which started toward "Yamagata way" (R. 18-20).

Ota Kie (in English Kie Ota), a farm girl living at Shimoyambe, City of Yamagata, testified that she attended the village community meeting house on the evening of 16 June 1946 and that she was in the party including Iku-ko Takeda, Fumi Takeda, Tayo Takeda, teacher Kura Tokairin, and Toshio Uno, which left the meeting about 9 o'clock going toward the City of Yamagata, city proper (R. 16). Her testimony concerning the occurrence on the Namiga-saki Bridge is summarized as follows:

> "When we came to about the center of the bridge a jeep came. *** First the jeep was bound to Shizuku way--the other side. Then it returned--turned around and came toward Yamagata way again, and then came near us. *** Jeep parked. *** I ran. *** To the memorial monument. *** Five meters--about 5 meters from the bridge. *** I ran into the latrine closeby. *** In about 5 minutes or so after I entered the latrine I heard a loud voice. *** It was sounding 'Kiatt' meaning great surprise and frightened voice. *** That must have been along about half past 9, sir" (R. 17,18; statements are the witness' answers to pertinent questions).

Saki Okuyama, a Japanese farmer living at Yamadera, about 12 kilometers from Yamagata, testified that on the night of 16 June 1946 a tired looking girl with hair unattended and torn clothing, whom he identified in court as Iku-ko Takeda, appeared at his home and was given lodging for the night. Statements of this witness that Iku-ko had been "assaulted upon" were ordered stricken from the record by the president of the court (R. 21).

Dr. Kenshi Yokoyama, a practicing physician of the City of Yamagata, and whom the record shows to be a graduate of the Imperial University of Tokyo, specializing in gynecology, testified that on 17 June 1946 at the request of the military police across the street from his office, he made a physical examination of Iku-ko Takeda (R. 42). This witness identified Prosecution Exhibit 10 as being the report of his examination and as bearing his seal. Defense counsel was present when this report was translated into English and stated that he had no objection to its being introduced into evidence (R. 43). The results of Dr. Yokoyama's examination were as follows:

> "Name and Age: Iku-ko Takeda, aged 21:
> "Name of Disease: Wound in Vagina.
> "Note: The patient came on foot by herself to my consultation

office for first consultation on June 17, 1946.

"On the outside (of the womb) a little quantity of gore was found; over the overhead cover of the vagina (posterior part) on the right side of the vagina a new fresh wound (cut), of about 1.5 centimetres in length, and there a little bleeding was found; in the mouth of the vagina there was no new wound (cut); other than the above, there were ecchemosis, about three centimetres in length and about two centimetres in width in front (side) of the right knee; also an abrasion, about one centimetre in width, and three centimetres in length on the front side of the left knee, was found.

"On microscopic examination of the (inside of) vagina, no gonoccocin or other pathogenic bacteria were found, other than epidermal mucous membrane.

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"The above is hereby certified this eighteenth day of June, 1946.

(Printed Name:) KENSHI YOKOYAMA (SEAL)
/s/ Dr. K. Yokoyama
Practicing Physician,
Toka-Machi, City of Yamagata." (R. 43,Pros.Ex.10)

Based on his examination of Iku-ko, the doctor expressed the following opinion as to the cause of her condition:

"According to the books, the knowledge obtained by the books, such wounds are often as a result of violent intercourse. That is, such as rape. But it also teaches us that it is not the only cause" (R. 43).

On 20 June 1946 Dr. Masataka Matsuo, another Japanese physician of Yamagata, Japan, made a physical examination of Iku-ko and since his findings and conclusions are substantially the same as those of Dr. Yokoyama, no detailed review of his testimony is deemed essential except to note that from his examination he formed the following opinion:

"*** Even by the sexual intercourse under mutual consent, such an abrasion as found at the mouth of the vagina is possible to result; but the cut on the right side wall of the vagina is considered to have been caused by the resistance of the victim, and brutal force of the assaulter. Furthermore in several places of her lower thigh, abrasions and bruises of slight degree are noticed" (R. 46, Pros. Ex. 11).

Captain Louis F. Garben, Jr., MC, 11th Airborne Division Artillery surgeon, a witness for the prosecution, testified that he examined the Japanese woman, Iku-ko Takeda (the report shows the date of such examination to have been 20 June 1946). His report of examination is as follows:

"20 June 1946

"I certify that on 20 June 1946 I examined Iku Takeda, a 21 year old Japanese woman.

"The findings were as follows: There were multiple contusions and abrasions of both lower extremities. One contusion above the right knee, on the anterior surface, was about 3x2 cms. in diameter. A contusion-abrasion on the left knee anteriorly was 4x2 cms. There were smaller abrasions on both legs and the left foot. All of these lesions appeared to be a few days old.

"Inspection of the external genitalia revealed a minimum of gaping of the labia majora. There was some fresh blood noted in the region of the posterior commissure and on sponging this away a jagged tear of the commissure was noted, extending up into the frenulum labiorum pudendi in the region of the fossa navicularis. This was about 1x1 cm. There was also a small tear of the hymen in a posterior direction. The introitus appeared nulliparous.

"Bimanual palpation was done with some discomfort to the patient and she complained of pain especially on palpation of the right side of the vagina. There was a 1½ finger introitus, fairly tight. Palpation of the right wall of the vagina revealed an irregularity.

"Examination of the vaginal canal was next performed with the aid of specula and revealed a large laceration of the right wall of the vagina, V shaped, with its base in the vaginal fornix, right beside the cervix, and extending from there down the vaginal canal for a distance of 4-5 cms. This was a deep mucosal tear and was 2½ cms. in width for most of its length when examined with the aid of a speculum. The wound surfaces were not bleeding but had a very raw appearance. During the course of the examination some granulation tissue at the apex of the wound broke down resulting in more gaping of the wound.

"The cervix had superficial erosions on both the anterior and posterior lips. There was no bleeding from these.

"The patient stated that her menstrual period had begun on 6 June and ended on 10 June.

"Lacerations of the type noted at the introitus may result fairly often even in normal intercourse and the appearance of the cervix was not at all unusual either.

"However, the lacertaion of the right wall of the vagina was of such a nature and of such an extent that it is my belief that it could only have been the result of direct trauma exerted on that wall and neighboring structures by some structure placed in the vaginal canal with considerable voilent force. Such a wound would not have resulted from a normal sexual intercourse.

/s/ Louis F. Garben, Jr.
LOUIS F. GARBEN JR.
Captain, M.C." (R.46-48, Pros.Ex.

b. Concerning primarily the identity of the person or persons committing the alleged offenses.

T/4 Dorant L. Steffenson, Headquarters Battery, 11th Airborne Division Artillery, testified that he was stationed at Yamagata, Honshu, Japan; that he knew each of the accused, Brown and Hayes, and that "from 1530 hours on" on 16 June 1946 he was the dispatcher of vehicles from the motor pool of Headquarters Battery. Steffenson identified Prosecution Exhibit 8 as the driver's trip ticket which he testified that he gave to the accused Brown at approximately 1645 hours on 16 June 1946. Brown was the driver of the "alert jeep" on that evening and the ticket shows that the jeep was numbered 20575735 and checked out at 1700 hours. Without objection on the part of the defense the trip ticket was received in evidence (R. 37, Pros. Ex. 8). T/4 Steffenson testified further that the standing operational procedure on the use of vehicles was substantially as follows: The Charge of Quarters at the orderly room had charge of the jeep. When a call came in the Charge of Quarters sent an alert jeep and in order for the jeep to leave the Yamagata area it was required that an officer of the Battery sign the dispatch or trip ticket (R. 37).

First Lieutenant Charles B. Latter, Provost Marshal, 11th Airborne Division Artillery, testified that at about 2200 hours on 16 June 1946, as a result of a report he had received from the Japanese police, he sent a patrol to the northern part of Yamagata City and took another patrol himself and proceeded by way of Mamaga-saki Bridge northeast to Yamadera. While traveling on the road to Yamadera, following tracks in the dust, he encountered a jeep headed back toward Yamagata. Lieutenant Latter stated that he stopped the jeep and found that it was being driven by T/5 Brown and with Private First Class Hayes riding therein. He thereupon made an inspection of the jeep and the occupants. The results of this inspection are more graphically described in the language of the officer himself as revealed in the following excerpts from the evidence:

"Q. What did your inspection of the jeep reveal at that time?

"A. At that time I found the right hood of the dashlight was out and found two Japanese blankets rolled in a ball between the front seats and the back seats. On these blankets were spots of a red, moist substance that might have been blood, and also bits of gravel.

"Q. Did you notice anything else peculiar about the dashboard?

"A. On the dashboard, between the parking lever and the dashlight, there were several footprints--dust footprints on the dashboard.

"Q. Did you discover anything else as you inspected the jeep?

"A. On the rear seat, approximately in the center, there was a spot of red, moist substance which looked like blood approximately 1/2-inch wide and two inches long parallel to the long axis of the jeep.

"Q. What did your inspection of the men, the occupants of the jeep, reveal?

"A. The driver, Brown, was wearing fatigues which were rather dirty. Hayes was sitting on the right front seat. He was wearing khakies. There were spots of a red substance on his shirt. There were red spots, still moist, on the outside of his fly and on this fly there was a large smear of a red substance which could have been blood.

"Q. Did you notice anything else?

"A. There was also a rather mucous-like secretion there.

"Q. Would you describe the fly--what type of fly was it?

"A. It was a regular GI, gas-proof fly.

"Q. Is that the type that comes up in a 'V'?

"A. True.

"Q. Was this substance that you found still moist?

"A. It was.

"Q. What did you do after you inspected the men?

"A. I took over the jeep--put Hayes in the rear seat, turned around and went back toward Yamadera, left to find the woman--there was a woman involved. We travelled back down the road about two miles and couldn't find any woman so we came back to the Provost Marshal's Office.

"Q. What did you do when you got to the Provost Marshal's Office?

"A. I took the Div Arty jeep which we picked up from Hayes and Brown, parked it, and told the sergeant to let no one go near it. I took the two men inside, and after informing them of their rights under the 24th Article of War, I asked them of their activities during the night.

"Q. Did you get an explanation of their activities?

"A. I got an explanation of their activities.

"Q. What was the explanation?

"A. I asked them several questions. I asked them why these red spots were on his pants. Brown said he had picked up a man in the RTO--a man with a cut finger. He said he had intercourse with a Japanese woman three days prior to this. That was the reason he had blood, or these red--this red substance on the trousers and on the shirt.

"Q. Did you make a further inspection of the jeep?

"A. After I took their statements I went out and inspected the jeep thoroughly.

"Q. Did the inspection of the jeep reveal anything new that you did not find before?

"A. Red stain two inches long, and a piece of cloth.

"Q. I show you what has been marked Prosecution Exhibit #2 for identification and ask you if you have ever seen it before.

"A. That appears to be the piece of cotton fabric I found in the rear seat of the jeep." (R. 23-24)

Without objection, the cloth previously marked Prosecution Exhibit 2, identified by the Japanese girl Iku-ko as being a portion of her clothing worn on the night of the assault (R. 14), and which Lieutenant Latter testified

he found in the rear seat of the jeep, was received in evidence (R. 24). Prosecution Exhibit 3, identified by Iku-ko as a portion of her underwear, was also identified by Lieutenant Latter who stated it was brought to him by Private First Class Kenton who stated that he picked it up about one mile short of Yamagata (R. 25). The Provost Marshal (Lieutenant Latter) took the accused Brown and Hayes to his office for questioning concerning their activities and upon suddenly turning toward Hayes he noticed Hayes trying to wipe some substance off the fly of his trousers. The officer immediately took from Hayes his shirt and trousers. These items of clothing were exhibited to the court and received in evidence as Prosecution Exhibits 4 and 5, respectively (R. 25,26). There were also identified by Lieutenant Latter two blankets which he testified were found in the jeep, one of which had on it smears of red substance which resembled blood. These blankets were received in evidence as Prosecution Exhibit 6 (R. 26). The prosecution thereupon exhibited in open court a map of Arata, Northern Honshu, scale 1:50,000 prepared by the Army Map Service and which showed the Cities of Yamagata, Yamadera and their environs. Lieutenant Latter identified the map as a true reproduction of the area and the same was received in evidence as Prosecution Exhibit 7. With the aid of a red pencil Lieutenant Latter traced the movements of his patrol on the evening of 16 June 1946 and marked the location of the place where he apprehended the accused (R. 27).

The prosecution, directing Lieutenant Latter's attention to the 17th of June 1946, asked him to state whether an identification lineup of men was held at his office and if so to state how it was conducted. The witness thereupon related that on the date in question he placed the victim, Iku-ko Takeda in a small room adjacent to a larger one. He then had each of the accused dressed in the clothing they were wearing the night before, placed them in the adjoining room with 7 or 8 other men dressed in khakies, then he opened the door and "took her out in the next room, and after a few moment's hesitation, pointed out the two men, Brown and Hayes" (R. 28). On cross-examination Lieutenant Latter stated that the personnel in the room with the accused were part of the 472nd, the sergeant of the guard and the corporal of the guard. He had the men formed in a semi-circle and the accused, Brown and Hayes, were standing together "a little to the right of the center of the group." Upon motion of the defense a diagram prepared by Lieutenant Latter while a witness before the court, and showing the relative position of the men in the identification lineup was received in evidence and marked for identification Defense Exhibit A (R. 30).

Captain Oliver F. Barr, FA, Headquarters Battery, 11th Airborne Division Artillery, the battery commander of both accused and the investigating officer in this case identified Prosecution Exhibits 1 to 6 inclusive and stated that by agreement with Lieutenant Colonel Hoska the exhibits had been kept in a safe at the Artillery Command Post (R. 33). This testimony was corroborated by Lieutenant Colonel Lukas E. Hoska, Jr., the Artillery executive officer, who stated that he carried the key to the locker and who further stated that

prior to the trial he had allowed the defense counsel and trial judge advocate to examine the exhibits (R. 36).

First Sergeant Raymond Lamar, Headquarters Battery Division Artillery, stationed at Yamagata, Honshu, testified that, acting on orders from his Battery commander, he took a "blood type" from the accused Brown, and a pair of khaki pants with stain on the fly (Pros. Ex. 5, Hayes' trousers) to the laboratory of the station hospital at Sendai and brought the items back, together with "a letter from the captain out there", which was identified by Lamar as Prosecution Exhibit 9 (R. 40).

T/5 Harry W. Brant, laboratory clerk in the 172nd Station Hospital, Sendai, Honshu, Japan, identified Prosecution Exhibit 9 as a laboratory report prepared by him and signed in his presence by Captain Graham who was head of the laboratory. Without objection, this report, Prosecution Exhibit 9, was received in evidence and is set forth below:

"THE LABORATORY
172 Station Hospital
APO 547

24 June 1946

"SUBJECT: Blood Typing.

"TO: COMMANDING OFFICER, Division Artillery, 11th A/B Division APO 468.

"1. Spots on the blanket submitted, resembling blood, failed to give presumptive test for blood.

"2. Spots on the submitted shirt gave the presumptive test for blood, but no red corpuscles were obtainable. Hence blood typing was impossible.

"3. Blood sample submitted, said to have been obtained from T/5 Marion R. Brown ASN 44054098, is classified as International Type 'O'.

/s/ John B. Graham
JOHN B. GRAHAM
Capt MC
Lab Officer" (R. 41, Pros. Ex. 9)

4. For the defense.

After accused had been duly warned of their testimonial rights each elected to remain silent (R. 57).

The defense called as its first witness Private First Class Robert A. Rogers, 3rd Military Railroad Service, Yamagata, who testified that he knew both of the accused; that on 16 June 1946 he was on duty at the "RTO",

Yamagata, and at approximately 1830 hours -

"*** I was sitting in the waiting room there at the RTO and Brown comes up to the window and asked me what time the train would arrive from Akita, carrying the Akita Courier, and I looked up, looked at the schedule, and told him it was 20 minutes late. And he said, 'Thank you', and turned away and walked off" (R. 49).

On cross-examination the witness stated that he did not see Brown after 1830 hours (R. 49).

T/4 Harry N. Gillis, Division Artillery Headquarters, 11th Airborne Division, testified that he was Charge of Quarters, Artillery Headquarters, on the evening of 16 June 1946, that the accused, Brown, was the alert driver, reporting for duty at 1700 on said date. His testimony concerning accused's activities are set forth in the following questions by the defense and his answers thereto:

"Q. Approximately how many calls did he have that evening, to the best of your knowledge?
"A. I don't know, sir.
"Q. What was the longest period of time that he was absent on calls during the evening in the orderly room?
"A. 20 minutes.
"Q. Approximately 20 minutes?
"A. Yes, sir.
"Q. When was the last time you saw T/5 Brown that evening?
"A. 2200.
"Q. At 2200?
"A. Yes, sir.
"Q. At this time did T/5 Brown make any statement to you?
"A. Yes, sir, he said he was going swimming.
"Q. Repeat the question again. At what time did you last see the accused T/5 Brown?
"A. 2200.
"Q. At that time what statement did he make to you?
"A. That he was going swimming." (R. 51)

On cross-examination Gillis stated that he did not know where one could go swimming "maybe up to this pool" but that he knew it was 2200 hours because he looked at a clock (R. 52). He further stated that at "8:30" Brown left in the jeep for the courier mail, came back about "9 o'clock" and between "9 and 10" kept asking him if any calls came in. At 10 o'clock Brown, who was alone, left in the jeep and Gillis never saw him again until three days later (R. 53).

Private First Class George E. Kempt, Headquarters Battery, 11th Airborne Division Artillery, testified that he knew the accused, that on the evening of 16 June 1946 he was in the enlisted men's bar and that the following

occurred:

"A. I saw them both, sir. At 2130 Pfc Hayes came in, went to the bar, had a drink, and engaged in a conversation. And at 2200 T/5 Brown came in and asked if we wanted to go swimming. I said no. Hayes said yes, and they went out together." (R. 55)

On cross-examination Kemp stated that he did not look at any watch but judged "as a sense of approximately what time it was." When asked if he was guessing he replied, "I guess so" (R. 56).

5. Examination by the court.

The court recalled First Lieutenant Charles B. Latter, the provost marshal, and interrogated him with regard to the time and nature of the call he had received from the Japanese. In response to questions by the court, Lieutenant Latter stated that he received the call at about "5 minutes to 10" or 2155 and that "The Japanese police reported that two American soldiers had picked up a Japanese woman on the bridge and headed northeast" (R. 57). He also stated that at about "10:20 - 2220" he met the accused in the jeep and took them into custody. On his way out to meet the accused Lieutenant Latter stated that he stopped at the Mamiga-saki Bridge to establish a road block and asked a passing soldier if he had seen a woman in a jeep. The soldier replied that he heard a woman scream and a jeep turn around and take off." There were tracks of other vehicles on the bridge but only one which had turned around. The lieutenant stated that they picked up this track and followed it to the place where they apprehended the accused (R. 58-59).

6. On 15 October 1946 the Board of Review heard oral arguments in this case by Judge T. C. Almon and Judge Newton B. Powell, both of the Decatur, Alabama, bar, who appeared as special counsel for the accused. After a thorough study of the record, counsel filed an exhaustive brief to which the Board has given appropriate consideration. Matters discussed therein not relating to the legal sufficiency of the record need not be commented upon here.

The accused were charged with "*** forcibly and feloniously against her will, have carnal knowledge of Iku-ko Takeda." The wording of the specification follows in minute detail the form prescribed in the 1928 Manual for Courts-Martial denouncing common law rape. It has been suggested that the specification does not allege that Iku-ko Takeda is a woman nor does it state her age. It will be noted however that the personal pronoun "her" is used as descriptive of Iku-ko Takeda and the evidence clearly establishes her sex. The age of the woman is immaterial in alleging common law rape. We are not concerned here with so-called statutory rape with its

various definitions and penalties as denounced by the numerous state statutes. The following generally accepted principles, springing from the common law and universally applied under the military code define rape:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> "The offense may be committed on a woman of any age.
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent." (MCM, 1928, par.149a, p. 165.)

The specification alleged that the offenses were committed "at or near Tsuyama-Mura, Kita-Muryama County, Honshu, Japan." The proof shows that the woman was accosted on a bridge at the outskirts of Yamagata, Honshu, Japan, and carried some unknown distance northeast of this city in the direction of Yamadera. Although no witness identified Tsuyama-Mura, Kita-Muryama County, as the place of the offenses the court had before it a map of the entire area showing highways, towns and counties and such slight variance, if any there was, as to the exact place of the commission of the offenses would not operate to the prejudice of accused's substantial rights. Court-martial jurisdiction does not, in general, depend on where the offense was committed (MCM, 1928, par. 7, p. 7). It will be observed therefore that a failure of proof as to place in a military trial does not have the same significance as it does in the civil courts where the jurisdiction of the court is dependent upon the situs of an offense (Winthrop's Mil. Law & Prec., 1920 Reprint, secs. 105,197, pp. 81,138; CM ETO 14095, Bijeaux, 27 BR ETO 203). At common law it was necessary that the indictment allege the precise place where the offense was committed, and that the place so alleged be within the venue of the court (Com. v. Wheeler, 162 Mass. 429). But at common law, unless the place was an essential element of the crime charged, it was never necessary to prove the place as alleged. Proof that the crime was committed at any place within the jurisdiction of the court was sufficient (Com. v. Snell, 189 Mass. 12,17).

Although the accused did not object to being tried jointly, it has been suggested that failure to advise them of their rights in this regard was prejudicial error. A motion for severance, if desired, should be regularly made at the arraignment. But there is no absolute right to severance in a military court. Such a motion should be granted if good

cause is shown, the more common grounds being that the mover desires to avail himself on his trial of the testimony of one or more of his co-accused, or of the testimony of the wife of one; or that a defense of the other accused is antagonistic to his own; or that the evidence as to them will in some manner prejudice his defense. Without deciding whether it is too late to raise the question for the first time upon review of the record, we are of the opinion that considering all the facts and circumstances in this case, trial of the accused jointly on the charge and specification as drawn did not in any manner operate to the prejudice of either accused (MCM, 1928, par. 71b, p. 55).

The record shows that the accused were convicted upon the concurrence of two-thirds of the members present at the time the vote was taken and sentenced upon concurrence of all the members. Conviction and sentence are two separate steps in a court-martial proceeding and after conviction has been voted in a prosecution for murder or rape, the only punishment permissible is death or life imprisonment. The propriety, or legality of the procedure whereby, under Article of War 43 two-thirds of the court could convict although concurrence of all the members present is required to impose the death sentence is thoroughly discussed, and approved in the case of Stout v. Hancock (C.C.A. 4, (20 Dec. 1944), 146 Fed. 2d 741; certiorari denied by U.S. Supreme Court, 30 April 1945). Reference to the Stout case will show the history of the article and the amendments thereto. The procedure in the present case was therefore proper and in accord with the mandates of Article of War 43.

All of the Japanese witnesses in this case were affirmed through the interpreters, one of whom was an American soldier of Japanese descent and the other a Japanese civilian, and the witnesses testified through these interpreters. Counsel contend that there is no assurance in the record that the Japanese witnesses, being considered as atheists, emperor worshipers or infidels, understand the nature of the affirmation or the importance of telling the truth. This question was not raised at the trial and the religious belief of the witnesses is not revealed. However, a person is not disqualified as a witness by reason of birthplace, race, color, sex, or theological or religious profession of belief (Wigmore on Evidence, secs. 516-518, Brook v. Stratton, 176 N.Y. 150, 68 N.E. 148, 63 L.R.A. 182). An adult person of Japanese nationality is, therefore, prima facie competent to take an oath or affirmation in a criminal prosecution. (See Wharton's Criminal Evidence, Vol. 3, sec. 1164, p. 2002, and cases cited therein.)

It is argued that the accused's constitutional rights were adversely affected by virtue of the fact that the president of the court-martial was also the law member, and the accused were therefore denied the right to peremptorily challenge the president of the court. Article of War 8 directs that the appointing authority of a general court-martial detail as one of the members thereof a law member, and Article of War 18 provides that the law member shall not be challenged except for cause. But the president of a court-martial is the senior in rank among the members present, and is the presiding officer (MCM, 1928, par. 39, p. 28). The order appointing a

general court-martial does not and should not designate a president. There is no objection to the senior member being designated law member, and we cannot conceive of any prejudice to accused's rights by virtue of such fact. The prohibition in Article of War 18 would apply, irrespective of who may have been designated law member.

We come now to the consideration of an evidentiary question concerning which there is sharp disagreement in the state and Federal courts as well as some conflict in the opinions of the Boards of Review. The first question concerns the propriety of allowing the victim, Iku-ko Takeda, to testify that on the morning after the alleged crime, and at an identification parade or lineup of soldiers, she pointed out and identified the accused as her assailants. The competency of such evidence was thoroughly considered by the Board of Review (sitting in the European Theater of Operations) in CM ETO 3837, Smith, 10 BR ETO 367, decided in December 1944. In foreign lands the question of identity is always of paramount importance and the similarity of the apparel of soldiers renders identity more difficult. We quote from the opinion in the Smith case, supra:

> "The question as to the admissibility of extra-judicial identification of a defendant in a criminal case is the subject of an exhaustive annotation in 70 ALR 910. Reference is made to said annotation for the citation of authorities. The comment of the editor is informatory:
>
> > 'There is a wide split of authority on the question of the competency of evidence of extra-judicial identification in a trial where the identity of the accused as the person guilty of the crime is in dispute. Formerly the rule excluding such testimony was applied by far the greater number of courts. In recent years, however, the tendency has been towards the admission of such testimony, both as substantive and corroborative evidence, so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission' (70 ALR 911).
>
> > * *
>
> > "'"The trustworthiness of the identification is of first importance. An identification of an accused, made publicly for the first time by a witness in court, when there presumably have been many opportunities for the witness to have seen the accused and to have heard him spoken of by a given name, may be open to question; but, if it be shown that the witness identified the accused previously and the first time after his arrest or incarceration and under circumstances which removed the suspicion of unfairness or unreliability, the prior identification, together with the circumstances surrounding its making, will

be of utmost aid in determining the trustworthiness of the identification made in the court room. Mr. Wigmore puts the reasons for the admission of the prior identification with unanswerable force: 'Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness's act of pointing out then and there the accused (or other person) is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him... To corroborate the witness, therefore, it is entirely proper ... to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness's mind, he recognized and declared the present accused to be the person.' ... We are not unmindful of the number and character of the courts of the states which take a contrary view, nor of the reasons they give for the exclusion of this evidence. Giving due heed to these, we can but think that their adherence to a technical rule deprived the courts of their jurisdictions of the benefit of a class of evidence which has strong testimonial value when weighed in the scales of the common sense of mankind."' (State v. Frost, 105 Conn. 326; 135 Atl. 446, quoted in 70 ALR, pp.911-912).

"It appears to the Board of Review not only do reason and logic support the rule permitting the admission of such evidence, but also practical necessity dictates its use. This is particularly true under the circumstances so frequently revealed in records of trial coming before the Board of Review where the issue of the identification of accused is sharply contested. The evidence in support of identification of accused as the malefactor is in the majority of instances dependent upon the testimony of civilian witnesses who are nationals of the country in which the Army of the United States is engaged. These witnesses in a great number of instances are unfamiliar with the English language and must give their testimony through interpreters. They also experience difficulty in distinguishing the physiognomy of the American soldier - both white and colored - after the lapse of time between the incident giving rise to the charge and the date of trial. Under these circumstances evidence of their identification of accused within a few hours or days after the incident is perhaps the most satisfactory evidence available. While the argument of necessity cannot be used to support the admissibility of evidence which by a fixed and undisputed rule of law is not admissible, it is a relevant and highly important factor

when a forum upon appellate judicial review is required to elect between two conflicting rules of law, each of which is supported by respectable authority."

The foregoing holding is supported by the following cases from the European Theater of Operations: CM ETO 7209, Williams, 18 BR ETO 7; CM ETO 8270, Cook, 19 BR ETO 161.

For purposes of this discussion let it be assumed that the victim had failed to identify the accused at the identification parade but did identify them as her assailants in the court room. Would there be any doubt about the propriety of the defense cross-examining her and bringing to light her failure toward identification in the first instance? The answer is obvious. The credibility of her testimony concerning identity would be sharply put in issue.

We therefore subscribe to the reasoning and conclusions in the foregoing opinions and follow what is undoubtedly the majority rule in holding such evidence admissible.

We now consider the admissibility of the testimony of Lieutenant Latter heretofore set forth wherein he stated, "When I opened the door I took her out in the next room, and after a few moments hesitation, pointed out the two men, Brown and Hayes" (R. 28). There is apparently a typographical error in the above quoted sentence, the word "she" having been omitted after the word "hesitation" in transcribing the record. We believe justified in assuming this because both the defense counsel, who cross-examined Lieutenant Latter, and the trial judge advocate appear to assume that the witness referred to Iku-ko Takeda as the person pointing out the accused. Lieutenant Latter therefore told what he saw, not what the girl told him. While it may be argued that this is in substance hearsay, which we do not concede, it amounts to no more than corroboration of what the Japanese girl had already related in court.

This case is readily distinguishable from CM 270871, Shirley, 45 BR 351. In the Shirley case, involving manslaughter, the victim died before trial of the accused and the only evidence of the identity of accused as the culprit was the testimony of a military policeman that subsequent to the crime, the victim pointed out the accused, who was in custody, as her assailant. It was held that such evidence was hearsay and since accused was in custody and not required to speak, his silence could not be construed as an admission against interest, a recognized exception to the hearsay rule. See also McCarthy v. United States (25 Fed 2d 298). In the present case Iku-ko Takeda identified the accused in court as being the persons who assaulted her, and the testimony of Lieutenant Latter concerning her identification at the parade held the morning after the crime tended merely to corroborate her story. The Smith, Williams and Cook cases above cited

all hold such corroborative evidence admissible. The Board of Review (sitting in the Mediterranean Theater of Operations) has held that it is improper, as being hearsay, for a witness to testify that a certain person out of court and through an interpreter, identified the accused as the culprit, but the Board also concluded that such evidence was not prejudicial where the victim, in the court room, identified the accused as being the party committing the offense (CM NATO 1069, Scott, 2 BR 327; NATO 423, Stroud; NATO 460, Trevino). In CM 232790, Brandon, 19 BR 193, where the victim identified the accused in court the Board of Review followed the majority rule permitting corroborating evidence by third parties regarding the extrajudicial identification of accused where it was shown that the test was impartially conducted. We believe that rule to be sound, based on reason and common sense. No prejudicial error resulted therefore in admitting the testimony of Lieutenant Latter concerning the Japanese girl's identification of accused at the parade.

Professor Wigmore, in his monumental work on the law of evidence, makes the following observation in contending that the prior identification was a fact which could be testified to,

> "This is a simple dictate of common sense, and was never doubted in orthodox practice. That some modern courts are on record for rejecting such evidence is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning." (Sec. 1130, Vol. IV, Wigmore on Evidence, 3rd Ed.)

The offenses alleged are of the most serious nature and should require the most compelling testimony to convict. There is some evidence in this record, particularly that of Private First Class George E. Kemp, although vague and uncertain, which might indicate that the accused were at a place or places other than the scene of the crime, at the time during which the offenses are shown to have been committed, but the evidence in this case, circumstantial and direct, not only of Japanese witnesses but our own military personnel and belonging to the accused's organization, is such that any conflict in the testimony of the witnesses, if any there be, was a matter for the court-martial, in weighing the evidence, to decide.

The uncontradicted testimony of the Japanese witnesses shows that on the night in question the Japanese people, including Iku-ko Takeda, were accosted on the bridge by two American soldiers, one in a "whitish" and the other "greenish" uniform. Iku-ko was carried off to the northeast, her clothing torn, and the record leaves no doubt but that she was raped. Well within the orbit of the time and place of these occurrences the accused Brown, dressed in fatigues and Hayes dressed in khaki were apprehended by the provost marshal in a jeep and upon examination of the jeep part of the woman's torn clothing was found therein, together with two blankets.

Iku-ko testified that a blanket was used to accomplish the foul purpose. The dress and appearance of accused, the soiled parts of their clothes and the blood on Hayes' shirt all produce a chain of circumstances which point most conclusively to accused as the guilty parties. It is noted that the Battalion surgeon, Captain Garben, was more certain and definite in his opinion that the girl had been raped than were the Japanese doctors.

There is some hearsay testimony in the record which should have properly been excluded. The witness, Iku-ko Takeda, stated, not in response to a direct question however, that she had been told that a piece of her clothing had been found in the jeep. Also, the court recalled Lieutenant Latter and by direct questioning drew from him the substance of statements made to him by the soldier at the bridge. He was also required to state the substance of what had been told him by the Japanese police. But the competent evidence, eliminating such hearsay as it appears crept into the record, is not only consistent with the hypothesis of guilt but such that reasonable men, weighing such evidence, could exclude every other reasonable theory or hypothesis except guilt.

Article of War 37 provides in part as follows:

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: ***."

We find no prejudicial error in the record.

Whether or not Iku-ko Takeda was raped on the night in question, and whether the accused were the soldiers who forcibly and feloniously, against her will, had carnal knowledge of her were questions peculiarly within the province of the members of the court-martial. Fulfilling its duty to weigh the direct and circumstantial evidence and to resolve all questions of fact, giving the accused however the benefit of every reasonable doubt, the court found them guilty of the offenses charged. As there was competent, substantial evidence to sustain the findings of guilty, they will not be disturbed upon appellate review.

7. The record discloses that the accused Marion R. Brown was 19-7/12 years of age at the time of the alleged offense and that the accused Gerald N. Hayes was 20-1/2 years of age at said time. Brown was inducted 28 January 1945 at Fort McClellan, Alabama, for the duration of the emergency plus six months. Hayes was inducted at Newark, New Jersey, on 23 March 1945 for the duration plus six months. Neither soldier had any prior service. Both appear to have acceptable records, civilian and military,

prior to the offenses for which they stand convicted herein.

8. The court was legally constituted and had jurisdiction over each of the accused and of 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 and the sentences and to warrant confirmation of the sentences. Death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Chester D. Silvers, Judge Advocate

(On Leave), Judge Advocate

Gilbert G. Asboy, Judge Advocate

JAGK - CM 316705 1st Ind DEC 1 6 1946

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556 dated May 25, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Private First Class Gerald N. Hayes (42151338) and Technician Fifth Grade Marion R. Brown (44054098), both of Headquarters Battery, 11th Airborne Division Artillery.

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 were convicted of rape upon a 21-year old Japanese girl named Iku-ko Takeda. In view of the age of the accused, 19 and 20 years, the absence of any previous convictions, and all the circumstances, I recommend that the sentences be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of fifteen years and that a U. S. penitentiary be designated as the place of confinement.

3. Consideration has been given to the following communications received in my office on behalf of the accused Brown: Letter of 24 August 1946 from Honorable Theodore G. Bilbo, U. S. Senate, addressed to The Adjutant General and containing inclosure from Mrs. Pearl Slater, who alleges she lost her son in the war with Japan; letter of 14 September 1946 from Honorable Chauncy Sparkes, Governor of Alabama, addressed to The Judge Advocate General; letter of 21 October with inclosure from Honorable Frank W. Boykin, Member of Congress from Alabama; letter of 3 September 1946 from the Senior High School Boys of Danville, Alabama, to the President; letters and communications from the Honorable John Sparkman, Member of Congress from Alabama; letter of 4 November 1946 from the Metal Trades Department, A.F.L., Washington, D. C., addressed to the President; letter of 17 November 1946 from Mr. T. O. Kraabel, Director of the National Rehabilitation Committee, The American Legion, to The Adjutant General; a petition signed by the girls of the senior high school of Danville, Alabama, attesting to the previous excellent character of accused Brown, dated 30 October 1946 and addressed to the Board of Review; and twenty affidavits of prominent persons in Alabama. Consideration has also been given to the following letters and communications concerning the accused Hayes and addressed to the President, The Adjutant General and this office: Letter of 22 August 1946 from the Honorable Albert W. Hawkes, U. S. Senator from New Jersey; letter of 11 September 1946 from the Honorable Theodore G. Bilbo, U. S. Senate, with inclosure thereto; communication of 13 September 1946 from the Honorable Alexander Smith, U.S. Senate; communication of 13 September 1946 from the

Honorable James C. Auchincloss, House of Representatives; and numerous letters from various individuals in New York and New Jersey requesting clemency for the accused Hayes.

4. On 15 October 1946 a hearing was held by the Board of Review at which the Honorable T. C. Almon and Newton Powell, both of the Decatur, Alabama, Bar appeared as special counsel and made oral arguments in behalf of the accused. Brief was filed by these counsel and has been given appropriate consideration.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

9 Incls
1. Record of trial
2. Drft ltr sig USW
3. Form of Ex action
4. Ltr Sen Bilbo 24 Aug 46 w/incl
5. Ltr fr Gov Sparks, 14 Sep 46
6. Ltr fr Mr. Boykin, MC, 21 Oct 46
7. Ltr fr girls of Danville High School to Pres., 30 Aug 46
8. Affidavits to Pres.
9. Ltr fr Sen Hawkes, 22 Aug 46

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(G.C.M.O. 17, 28 Jan 1947).

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



APR 18 1947

JAGQ - CM 316709

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| UNITED STATES<br><br>v.<br><br>Technician Fifth Grade JOSEPH C. THOMPSON (44029941), 3800th Quartermaster Truck Company. | CONTINENTAL BASE SECTION<br>US FORCES, EUROPEAN THEATER<br><br>Trial by G.C.M., convened at Mannheim, Germany, 19 and 26 July 1946. Dishonorable discharge and confinement for life. Penitentiary. |

REVIEW by the BOARD OF REVIEW
HICKEY, SCHENKEN and PARSONS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Joseph C. Thompson, 3800th Quartermaster Truck Company, did at Wetzlar, Germany, on or about 18 March 1946, with malice, aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Private First Class Vincent J. Reynolds, 4251 Quartermaster Truck Company, a human being by shooting him with a pistol.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. With three-fourths of the members of the court present at the time the vote was taken concurring, the accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence in the Staff Judge Advocate's review.

4. Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse.

The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (Wharton's Criminal Law (12th Ed.), Vol. 1, sec. 426).

The record of trial clearly establishes that the accused was dead drunk when he arrived at Mrs. Schumann's house around 2300, 18 March 1946. His pistol was taken from him and placed in a cupboard for safe-keeping. Unable to arouse him from his sleep that followed, deceased and another soldier carried him bodily downstairs. Sometime later - exactly how long is not clear - accused came back upstairs, recovered his pistol from the cupboard, loaded it, menaced one soldier with the gun and then pointed it at deceased, ordered him to take his hands out of his pocket, and shot, the bullet piercing both lungs and the left ventricle of the heart. Accused's only defense was that he could not remember anything that happened - that he was too drunk to remember. There can be no doubt but that accused was very drunk when he first entered the house and when he was carried out bodily and even though he knew enough to go to the cupboard to recover his pistol, it would appear that he was probably still quite intoxicated when he returned upstairs. The great weight of authority is that intoxication will not reduce a homicide from murder to manslaughter (Crim. Law from American Jurisprudence, p. 237). Whether accused was too drunk to entertain a specific intent was a question for the court (2 Bull. JAG, p. 427). Accused was sufficiently in possession of his faculties to resent the other soldier's carrying him downstairs and to remember where his pistol had been placed. This conduct did not indicate a mind bereft of reason.

5. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence of 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, recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the Criminal Code of the United States.

Albert D. Hirne, Judge Advocate

Carlton G. Schumann, Judge Advocate

Thomas L. Parsons, Judge Advocate

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



JAGQ - CM 314314

AUG 7 1947

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| UNITED STATES | ) | 6TH INFANTRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Pusan, Korea, 8 and 9 May 1946. Dishonorable discharge (suspended) and confinement for five (5) years. Philippine Detention and Rehabilitation Center. |
| Technician Fifth Grade EUGENE E. JENNINGS (42128348), 71st Station Hospital. | ) | |

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Technician Fifth Grade Eugene E. Jennings, 71st Station Hospital, did, at Pusan, Korea, on or about 11 March 1946, wrongfully and knowingly sell six (6) drums of gasoline of the value of about $94.80, 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. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence and ordered it executed, but suspended the dishonorable discharge until the soldier's release from confinement. The Philippine Detention and Rehabilitation Center, APO 75, was designated as the place of confinement. The result of trial was promulgated in General Court Martial Order No. 18, Headquarters 6th Infantry Division, dated 20 May 1946.

3. Agent William A. Rockey, Criminal Investigation Section, 6th Military Police Platoon, APO 6, testified that on 11 March 1946, a visitor at the Military Police Station at Pusan, Korea, reported, through the

Military Police interpreter, that he was Lee Bong Ho and that six drums of gasoline had been stolen from his home (R. 7, 10). These drums were recovered at the home of Kam Tan Soo; the drums were property of the United States and from the markings on the drums, they contained 80 octane red gasoline (R. 8, 10).

Lee Bong Ho was questioned three times by Agent Rockey, apparently through an interpreter (R. 11). When asked on 11 March if he knew the soldier that sold him the gasoline, Lee Bong Ho answered in the negative but said he "would get it." On 13 March, he delivered a slip of paper with the name "Jennings" on it and a notebook to Agent Rockey (R. 8, 17). Rockey testified that Lee Bong Ho made a written statement to the effect that "Jennings had sold him the gasoline" for 24,000 Yen, that Jennings delivered it in a large Army truck, and that he paid Jennings 20,000 Yen and he still owed Jennings 4,000 Yen (R. 12). Rockey did not keep the notebook when it was first shown to him but on 26 March, he went to Lee Bong Ho's home, found that he had died, and thereupon located the notebook and took custody of it (R. 17).

This notebook was received in evidence (R. 15, Ex 1). An interpreter testified it was written in Korean and that one page therein contained the following words:

> "February 17th Gasoline 6, Jennings the morning, 1030.
> Price, 20,000 Yen, February 23rd, afternoon one o'clock
> Paid in the bed room of Jennings" (R. 15).

The receipt of this notebook in evidence was objected to by defense counsel on the ground that it had not been "properly authenticated." Rockey was recalled to the witness stand and testified that although he had not seen Lee Bong Ho write in this book, the latter had told him it was his book (R. 17) and the interpreter pointed out that Lee Bong Ho's name was written in it (R. 15).

The accused was in charge of utilities at the 71st Station Hospital (R. 47) and Lee Bong Ho was employed there as a carpenter (R. 53).

Kim Tal Won testified that he acted as interpreter between Jennings and Lee Bong Ho; that the latter told him that he had bought six drums of gasoline from Jennings at 4,000 Yen per drum; that Ho paid Jennings 20,000 Yen; that he thought the price was too high and asked witness to see if he could get Jennings to "do something about it" (R. 36-39). A part of Won's testimony was based on information furnished to him by Lee Bong Ho at times when accused was not present but some portion of his information was obtained in accused's presence while he was acting as interpreter between accused and Ho (R. 38-39). Witness also testified that Ho was drunk, that he did not know whether what he said was true, and that he did not believe him and that Ho had died due to excessive drinking (R. 37).

Technician Fifth Grade Virgil W. Seals testified that he was a mechanic in the motor pool at the 71st Station Hospital, that he did not know that gasoline had been sold out of the motor pool at any time (R. 21). When confronted with a contradictory affidavit he had made on 25 March 1946, witness testified that the affidavit had been forced out of him and that it was untrue (R. 24, 27). He further testified that although he did not know that gasoline had been sold, he knew that some had been stolen (R. 26). He also testified that accused gave him 300 Yen to mail some packages and get some PX supplies for him (R. 25).

Private First Class Dale T. Hofmann testified that he was a truck driver for the 71st Station Hospital and that he did not know of any gasoline out of the motor pool being sold to Koreans (R. 29). An affidavit of Hofmann's was received in evidence (R. 30, Ex. 3) wherein witness stated he knew of gasoline sales by one Cicale, but accused was not involved therein. Witness explained that this affidavit was obtained by threats and that its contents were false (R. 31-33). He knew of only one incident when gasoline was missing, when it was stolen by some Koreans about 18 March (R. 35). On one occasion, Jennings gave witness 500 Yen to mail some packages for him and he thought he gave accused some change (R. 33).

The court received in evidence a statement of petroleum prices in Korea as of 30 December 1945 (R. 39, Ex 4). Gasoline in 53 gallon drums was quoted at $0.299 per gallon or $15.847 per drum.

Accused departed from Pusan, Korea, on 12 March 1946, enroute to the United States (R. 9). After reviewing Lee Bong Ho's statement, the Provost Marshal sent Military Police to Seoul where accused was removed from a ship and returned under guard to Pusan. Included in accused's personal belongings was $785.00 in American currency. He was interrogated three or four times and stated that "he wanted to talk to a man from the FBI" before giving a statement. Efforts to get an FBI agent were unsuccessful and accused declined to make a statement (R. 19, 20).

4. First Lieutenant Lester F. Murphy testified for the defense that he was commanding officer at the 71st Station Hospital (R. 40). A gasoline inventory was made about the middle of each month; there were no shortages until about 16 or 17 March when Technician Fifth Grade Seals reported to witness that two drums of oil and six drums of gasoline were missing (R. 40, 72). Witness did not make a report of this loss; he "figured" that the gasoline had been stolen, that the same persons might try it again and that he "might catch the thieves and recover the other gasoline which I did" (R. 81). He testified that he made a 100% recovery, that he himself did not return the gasoline to the hospital but same was returned by "CIS" (R. 73).

By direction of the court, Lieutenant Murphy produced his money order files which showed that accused applied for money orders as follows (R. 44-45, 75-77):

| DATE | NET PAY PER MO. | AMOUNT OF MONEY ORDER | SOURCE OF FUNDS |
|---|---|---|---|
| — | $ 19.50 | $ 100.00 | Accumulation of Jan., Feb., and March pay. |
| 1 March 1946 | 21.10 | 20.00 | No reason given. |
| 12 March 1946 | 25.00 | 100.00 | Accumulation of pay. |
| — | 22.00 | 550.00 | American currency turned in for PX supplies for detachment. |

Witness felt that he had exercised due diligence in approving accused's money order applications and it did not occur to him that the funds might have been money illegally obtained (R. 77).

Witness testified that accused had access to gasoline in the motor pool area (R. 47) but that "ordinary soldiers of the 71st Station Hospital" had equal access (R. 48).

Four soldiers testified that accused lived in the room next to theirs, that about November, 1945, accused had a roll of United States bills amounting to $1800 to $2000; that they neither saw nor heard any Korean visitors in accused's room (R. 51-67).

Defense also called Kim Yong Tan, a translator, who translated Lee Bong Ho's notebook (Ex 1) the same as the prosecution's translator except that the word "Jennings" was omitted from line one (R. 68). No effort was made to reconcile these two translations.

The Provost Marshal, recalled as a witness for the court, denied threatening witnesses Seals and Hofmann, and under cross examination, he admitted that he had gone to the 71st Station Hospital on the previous day to see these two men. When asked why he had done so, the law member of the court stated, "The witness was under orders of the Division Commander to question these two witnesses * * * the questioning is irrelevant", and witness was not required to answer this question. Witness did state, however, that he had asked "Seals and Hofmann if they had been advised by anyone as to what to say before the court" (R. 78-79).

5. The sufficiency of the evidence in this case depends upon the admissibility of Lee Bong Ho's notebook and the admissibility of Agent Rockey's and Interpreter Won's recitation of what Ho told them before he died.

The notebook in question was not translated in its entirety but it does not appear to be a book kept in the regular course of business nor does there appear any other basis for its admissibility. The Board is therefore of the opinion that this notebook was improperly received in evidence and its contents should be disregarded in determining the legal sufficiency of the record of trial.

The testimony of Agent Rockey as to statements made by Lee Bong Ho was pure hearsay. If Ho's statements to Rockey were admissible at all, they should have been offered by the interpreter and not by Agent Rockey (CM 154245, Dig Ops JAG 1912-1940, par 395 (24)).

The testimony of Kim Tal Won is uncertain and it is not clear from the record just how much information he secured in the presence of the accused and how much was obtained from Ho when accused was not present. Consequently, it is impossible to determine which statements of Kim Tal Won were and which were not admissible. Obviously some were inadmissible and their admission in evidence injuriously affected the substantial rights of the accused.

There still remains the question as to the admissibility of Ho's statements to Won as statements made by a conspirator in furtherance of the common design (par 114c, MCM). The Board is unable to find any evidence to support the theory of conspiracy between accused and Lee Bong Ho. It is true that if Ho was unable to dispose of the stolen gasoline at a profit, he would not be interested in further transactions and accused would have to find another outlet. Such a "design" is common to all commercial transactions but this does not mean that all manufacturers and their outlets are conspirators, in the legal usage of this word. It is also noted that the record contains no evidence of a conspiracy except the declarations of one of the conspirators and the general rule is that such testimony is not admissible to prove the existence of the conspiracy (par 1675, Wharton's Criminal Law, 12th Edition, page 1947).

The Board of Review is of the opinion that the notebook and the statements of Lee Bong Ho were inadmissible and that without such evidence, there is insufficient evidence to connect the accused with the sale of the government gasoline found in Ho's possession.

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

W. H. Johnson, Judge Advocate

C. G. Scherman, Judge Advocate

Andrew T. Kane, Judge Advocate

JAGQ - CM 314314 1st Ind

WD, JAGO, Washington 25, D. C. AUG 11 1947

TO: The Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act of Congress of August 20, 1937 (50 Stat. 724, 10 U.S.C. 1522), is the record of trial in the case of Technician Fifth Grade Eugene E. Jennings (42128348).

2. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in the opinion of the Board of Review, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

vol 65 Army JAG Bd. Rev

vol 65 Army JAG Bd. Rev

TITLE

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