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

JAGH - CM 316750

3 JAN 1947

UNITED STATES	)	HEADQUARTERS ANTILLES DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 851, c/o Postmaster, Miami,
Captain PEDRO ORTIZ-APONTE	)	Florida, 2 August 1946. Dis-
(0-413585), Quartermaster	)	missal and forfeiture of
Corps	)	$550.00

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 94th Article of War.

Specification: In that Captain Pedro Ortiz-Aponte, Quartermaster Corps, Headquarters and Headquarters Company, APO 853, U.S. Army, did, at Camp O'Reilly, Puerto Rico, on or about 15 May 1946, knowingly and willfully apply to his own use and benefit a one and one-half (1½) ton truck, of a value of more than Fifty Dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain Pedro Ortiz-Aponte, Quartermaster Corps, Headquarters and Headquarters Company, APO 853, U.S. Army, did, at Camp O'Reilly, Puerto Rico, on or about 0930, 15 May 1946, with intent to deceive Captain James W. Peyton, Adjutant of Camp O'Reilly, Puerto Rico, officially state to the said Captain James W. Peyton, that he, Captain Pedro Ortiz-Aponte, was going to Fort Buchanan, Puerto Rico, on official business and would stay at Fort Buchanan, Puerto Rico, until 1200, 15 May 1946, which statement was known by the said Captain Pedro Ortiz-Aponte to be untrue in that he did not intend to go to Fort Buchanan, Puerto Rico.

Specification 2: In that Captain Pedro Ortiz-Aponte, Quartermaster Corps, Headquarters and Headquarters Company, APO 853, U. S. Army, did, at Camp O'Reilly, Puerto Rico, on or about 0930, 15 May 1946, with intent to deceive his superior officers, officially make the following written entry in the column headed "Destination" of the Officers' Register of Camp O'Reilly, Puerto Rico: "Ft. Buchanan after 1200 Toa Alta, P.R.", which entry was known by the said Captain Pedro Ortiz-Aponte to be untrue in that he did not intend to go to Fort Buchanan, Puerto Rico.

Specification 3: In that Captain Pedro Ortiz-Aponte, Quartermaster Corps, Headquarters and Headquarters Company, APO 853, U. S. Army, did, at Camp O'Reilly, Puerto Rico, on or about 15 May 1946, wrongfully and without authority, alter the trip ticket of an Army vehicle by adding thereto the words "To/Toa Alta, P.R.", indicating thereby that a trip of the said Army vehicle to Toa Alta, Puerto Rico, was authorized by competent authority.

The accused 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 and to forfeit five hundred fifty dollars ($550) of his pay. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that so much of the sentence as adjudges dismissal from the service be commuted to a reprimand.

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

On 15 May 1946 at about 0750, the accused, Sales Officer at Camp O'Reilly, whose residence was in Toa Alta, Puerto Rico, called Major Racek, Post Quartermaster, his immediate superior, to request permission to take the afternoon off. During the conversation, Major Racek mentioned that 15 May 1946 was the closing date of the commissary at that station. The accused replied that he was aware of the closing of the commissary and had made a purchase there. The accused requested permission to leave the post a little early in order to take care of some business. Major Racek stated that he had no objection. The accused further stated that there was a truck going to Fort Buchanan from Camp O'Reilly at 0930 that date, and asked whether it was "all right if he rode in on it." To this Major Racek also agreed (R 7). The accused did not request permission to take a truck to Toa Alta, Puerto Rico and even if such request were made Major Racek was not authorized to grant such permission (R 8). Toa Alta, Puerto Rico is not on the highway between Camp O'Reilly and Fort Buchanan, but rather it is 15 or 20 kilometers beyond Fort Buchanan. To reach Toa Alta, the truck would turn left upon reaching the military highway whereas it would have to turn right to go to Fort Buchanan (R 19).

Captain John B. Otero, a witness for the prosecution, stated that he was present at Post Headquarters, Camp O'Reilly, on 15 May 1946 and saw the accused signing the register in that headquarters (R 15). A certified true extract copy of the officers' register was admitted in evidence without objection (R 16; Pros Ex 1). The register shows the following entries:

"DATE	NAME	RANK	TIME OUT	DESTINATION	TIME IN	DATE	REMARKS
15 May	Pedro Ortiz Aponte	Capt.	0930	Ft. Buchanan after 1200 Toa Alta, P.R.	0830	20 May 46	V.O.C.O"

The witness was investigating officer and claims officer in this case. He testified that after the accused was warned of his rights against self-incrimination, the accused admitted altering the trip ticket after the driver of the vehicle informed him that Toa Alta was not shown on the trip ticket as the destination of the truck (R 16).

Captain James W. Peyton, Jr., who was Post Adjutant at Camp O'Reilly, on 15 May 1946, testified that the accused requested permission of him on that day to go to Fort Buchanan on official business until noon and to take the afternoon off to visit Toa Alta in the afternoon. The request was granted. He stated that the accused would have had to have told him that he was leaving the post on official business in order to get the witness's permission to leave the post at that time (R 22). It was required that an officer obtain the permission of the post executive officer or the adjutant before leaving the post on V.O.C.O. (R 20). The accused did not request permission to ride to either Toa Alta or Fort Buchanan in a military vehicle and the witness had no authority to grant such request (R 19). The procedure at Camp O'Reilly with respect to changing the destination on a trip ticket is, that any alteration as to destination must be authorized at post headquarters by the post executive officer or the adjutant. After an alteration is authorized the driver is instructed to return to the motor pool and have the trip ticket and the dispatch records changed (R 20). The only persons authorized to dispatch government vehicles for personal business are the post commander and the post executive officer (R 22).

Mr. Canino, Chief Clerk at the Sales Store at Camp O'Reilly, on 15 May 1946, testified that he usually requested transportation necessary for the Sales Store but that he was not authorized to request transportation for personal business (R 23). He testified that a truck had been requested that day to go to Fort Buchanan and Santurce "to pick up" milk for issue to troops, and that the truck had reported to the Sales Store. On this day, the accused, who, as Sales Officer, was his immediate superior, told Mr. Canino that he (the accused) was going to Toa Alta in that truck. The witness notified the driver of the truck of the

destination ordered by the accused (R 24). The witness told the driver to "Get Ready" to go to Toa Alta (R 26) by which he meant that the driver was to check the gasoline and oil and to change the trip ticket (R 29).

Lieutenant Leonardo T. Davila, who was Motor Transport Officer at Camp O'Reilly, on 15 May 1946, testified that the adjutant's approval should be obtained whenever it is desired to change the destination of a vehicle which had already been dispatched (R 30). The witness identified the Daily Dispatching Record of Motor Vehicles for 15 May 1946 which was admitted in evidence as Prosecution's Exhibit 2 (R 31). Pertinent portions of the Dispatch Records show the following entry (Pros Ex 2):

"DRIVER'S NAME	USA REGIS-TRATION NO.	REPORT TO	ADDRESS	DESTINATION	TIME	ACCIDENT
D. Flores	41393128	Mr.Canino	Commissary	Santurce & Ft Buchanan	0730	Yes"

The witness testified that the truck in question was a 1½ ton truck of an approximate value of $2000 (R 31). He further testified that the truck was dispatched on 15 May to report to Mr. Canino at the commissary (R 31). The trip ticket was signed by the accused who subsequently told the witness that he had altered the trip ticket to read Toa Alta (R 32).

Dolores Flores-Lopez, a civilian truck driver at the Quartermaster Motor Pool at Camp O'Reilly, testified that on 15 May 1946, he was dispatched as a driver of a 1½ ton truck to go to Fort Buchanan and Santurce "to pick up milk." He left Camp O'Reilly accompanied by the accused and was proceeding to Toa Alta, when an accident occurred (R 33). The witness had intended to go to Fort Buchanan, but when the truck reached the intersection to Toa Alta in Bayomon Road, the accused directed him to turn left toward Toa Alta, instead of right toward Fort Buchanan. The witness identified a trip ticket which was introduced into evidence as Prosecution's Exhibit 3 (R 33). The trip ticket shows the following entry in the space provided for "Kind of Work (or Route)": "Santurce and APO 146 - Milk." The words "to Toa Alta, P.R." are written in a different handwriting in the line entitled "Department or Address" which is immediately above the line entitled "Kind of Work" (Pros Ex 3).

On cross-examination Flores testified that when he reported at the commissary, Mr. Canino told him that he would have to go to Toa Alta with the accused. He noticed that Toa Alta was not shown on the trip ticket and gave the trip ticket to Mr. Canino for correction. Mr. Canino did not instruct the witness to take the trip ticket back to the motor pool to have it changed (R 34), but instead he told the witness that he did not have to have it changed because the accused would be riding in the truck. Lieutenant Davila had previously instructed the witness that if an officer was riding in the truck, he would follow the officers directions as to route even if it were contrary to the instructions on the

trip ticket. On several occasions drivers had been suspended for failing to follow such instructions from officers (R 35). Among the individuals who had directed him to go to places not shown on the trip ticket in the past were Major Racek and Mr. Canino (R 36). The witness did not see anyone change the destination on the trip ticket (R 37) and had not noticed such change until after the accident (R 38). The purpose of going to Toa Alta was to deliver foodstuff to the accused's home (R 37).

A memorandum for All Officers Station Complement, APO 853, U. S. Army, Post Headquarters, APO 853, dated 13 May 1946 was introduced into evidence as Prosecution's Exhibit 4 (R 59). The memorandum provided:

> "Effective immediately, all officers of the Station Complement desiring to leave the Post during duty hours, whether on official business or Recreational VOCO, will report to the Adjutant for clearance before signing out."

4. The evidence for the defense is summarized as follows:

Mr. Juan Aponte Alicea, a civilian employee of the Post Commissary, testified that he heard the accused tell Mr. Canino to have the driver go to the motor pool to have the trip ticket filled out directing the truck to Toa Alta. After Mr. Canino gave the driver those instructions the latter told the witness that it was not necessary to have the trip ticket changed inasmuch as he was driving with an officer. The witness loaded the accused's groceries on the truck (R 42).

Mr. Caesar A. Collazo, who had been the Post Garden Officer, on 15 May 1946, testified that he was looking for the accused on the morning of that day and found him at post headquarters (R 47). The accused went into Captain Peyton's office and the witness waited for him outside the door where he heard a conversation between the accused and Captain Peyton. He heard the accused say, "Major Racek has authorized me to have the rest of the day off and he has also authorized me to take some groceries to Toa Alta in an Army truck that is making an official trip to Fort Buchanan." The accused did not mention the words "official business." Captain Peyton replied, "If it's okay with Major Racek it's okay with me" (R 48). The accused then signed the officers' register. The witness further testified that Captain Otero was not in the vicinity of the officers' register (R 49). On cross-examination the witness testified that he was not more than five feet from Captain Peyton's desk during the conversation (R 50).

After his rights as a witness were explained to him the accused elected to be sworn and testified in his own behalf. He stated that Major Racek had authorized him to be absent from duty for the remainder of the day and to use an Army truck to carry some groceries to Toa Alta (R 53). He wanted to get home because his wife was sick (R 55). The accused reported these facts to Captain Peyton, who indicated his assent thereto (R 53). The accused then signed the officers' register at 0815 as of

0930 but he did not see Captain Otero in the vicinity of the register (R 53-54). After that he returned to the commissary, placed an order for groceries which amounted to five or six bags (R 57), and told Mr. Canino of the arrangements that had been made for taking the day off and riding in the truck which was to be dispatched on that day. He told Mr. Canino to tell the driver to check the trip ticket because he was going to Toa Alta. Mr. Canino instructed the driver accordingly and told him to have the trip ticket changed (R 54-55). With respect to the entry in the column entitled DESTINATION "Fort Buchanan after 1200 Toa Alta, P.R." in the officers' register (Pros Ex 1), the accused testified that he first wrote "Toa Alta, P.R." on the line of the appropriate space. Thereafter he wrote the words "Fort Buchanan after 1200" above the words "Toa Alta" because he planned to go to Fort Buchanan, after he had delivered the groceries at his home, He wanted to buy clothing at the Fort Buchanan Clothing Store and to see a Captain Medina who commanded a Quartermaster Bakery Company, concerning the Bakery Detachment at Camp O'Reilly (R 56). On cross-examination he testified that he amended the trip ticket on the road to Toa Alta near Fort Buchanan (R 56-57).

Major Racek, recalled as a witness for the defense, testified that the accused served as Sales Officer under the witness from April 1946 to 15 July 1946. During this period he received a rating of a high excellent. The witness found him to be very efficient in his work, conscientious and of good moral character (R 63).

On motion of the defense a written statement made by Major Racek to the investigating officer was introduced into evidence without objection as Prosecution's Exhibit 5 (R 63). The statement is similar to Major Racek's testimony with respect to his conversation with the accused on the morning of 15 May with the exception of the following explanation as to a possible misunderstanding on accused's part which is included in the statement:

> "* * * there is some doubt in my mind as to if Capt Ortiz Aponte meant to imply that it was alright if he took the truck to Toa Alta. Although Toa Alta was not mentioned as the destination and I did not believe that he was implying that the truck was to go to Toa Alta, my giving permission to Capt Ortiz Aponte to travel on the truck may have been taken by him to mean that it was approved for the destination of Toa Alta."

5. In rebuttal, the prosecution recalled Captain Peyton, who testified that he did not see Mr. Collazo (then Lt. Collazo), at post headquarters at the time the accused was there on 15 May 1946. However, he stated that he did not see Captain Otero either. On cross-examination he testified that he would not have been able to see anyone from his desk, who was standing at the side of the door, where Mr. Collazo had testified he was standing (R 64).

6. The Specification of Charge I avers that on or about 15 May, the accused knowingly and wilfully applied to his own use a 1½ ton truck, of a value of more than $50.00, property of the United States, furnished and intended for the military service in violation of Article of War 94.

The ninth sub-paragraph of Article of War 94 denounces in pertinent part:

> "Who steals, * * * knowingly and wilfully misappropriates, applies to his own use or benefit * * * any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money or other property of the United States furnished or intended for the military service thereof; * * *."

Misapplication means devoting to an unauthorized purpose for the party's own use or benefit (MCM, 1928, par 150i, p 184).

The elements of proof as stated in the Manual for Courts-Martial are:

> "(a) That the accused * * * applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and was furnished or intended for the military service as alleged; (c) the facts and circumstances of the case indicate that the acts of the accused were wrongfully or knowingly done, as alleged; and (d) the value of the property, as specified" (MCM, 1928, par 150i, p 185).

The evidence clearly shows that the accused diverted an Army 1½ ton truck from its authorized route and destination for the purpose of delivering groceries to his home at Toa Alta. It was further shown that the use of military transportation for personal business was unauthorized except as permitted by the post commander or the post executive officer. The defense did not attempt to show that such authority had been requested or obtained. However, it did attempt to show that the accused was under the impression that Major Racek, the Post Quartermaster and Captain Peyton, the Post Adjutant, had authorized the use of the truck, and that consequently the misapplication was not wrongfully and knowingly done. But the testimony of Major Racek and Captain Peyton is contradictory to the evidence for the defense and shows that the accused could not have reasonably believed that he had such authority. The conflict in the evidence created an issue of facts which the court resolved against the accused. The findings of the court, which weighed the evidence in the light of all the circumstances before it and after observing the witnesses, are supported by competent evidence and should not be disturbed. It is not reasonable to assume that a sales officer knowing that the delivery of groceries to private quarters was unauthorized, should assume that he had authority to deliver groceries to his own quarters.

It was shown by competent evidence that the vehicle was the property of the United States, that it was furnished and intended for the military service thereof, and that the value of the vehicle was more than $50.00.

Accordingly the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge I.

7. Specification 1 of Charge II avers that the accused on 15 May 1946 made a false official statement to Captain Peyton with intent to deceive him, by stating that he was going to Fort Buchanan, Puerto Rico on official business until 1200, which statement was untrue, in that he did not intend to go to Fort Buchanan and Specification 2 of Charge II avers that, at the same time, the accused with intent to deceive his superior officer made a false official entry in the column headed "Destination" of the Officers' Register, to wit: "Fort Buchanan after 1200 Toa Alta, P.R." which entry was untrue in that the accused did not intend to go to Fort Buchanan.

Before a conviction of the offenses alleged can be sustained, there must be evidence which is legally sufficient to prove beyond a reasonable doubt, that the statements are both false and made with intent to deceive (CM 262366, Campbell, 41 BR 58).

The evidence for the prosecution shows that at 0745 on 15 May 1946, the accused asked his immediate superior officer, Major Racek, for permission to take the rest of the day off and received Major Racek's permission to do so. On 13 May 1946 a post memorandum had been issued which required all officers leaving the post during duty hours to report to the adjutant for clearance. In accordance with this memorandum the accused reported to Captain Peyton, who testified that the accused requested permission to go to Fort Buchanan on official business until noon and to take the afternoon off to visit Toa Alta, Puerto Rico. This request was granted; and the accused then signed the officers' register and made the following entry in the column headed "Destination": "Fort Buchanan after 1200 Toa Alta, P.R."

Thereafter the accused purchased five or six bags of groceries at the commissary, caused them to be loaded on a truck which was to be dispatched to Fort Buchanan at 0930, and directed the driver to drive him to Toa Alta, which was a diversion from the route to Fort Buchanan. En route to Toa Alta the vehicle had an accident and neither the vehicle nor the accused reached Fort Buchanan.

The defense introduced evidence that the accused had stated to Captain Peyton that "Major Racek has authorized me to have the rest of the day off and he has also authorized me to take some groceries to Toa Alta in an army truck that is making an official trip to Fort Buchanan." The adjutant replied, "If it's okay with Major Racek, it's okay with me." With respect

to the entry on the officers' register the accused explained that he first wrote "Toa Alta, P.R." in the indicated column, and then remembering that he had some official business at Fort Buchanan with the commanding officer of the bakery company with respect to the bakery detachment at Camp O'Reilly, he added above the words "Toa Alta, P.R." the words "Fort Buchanan after 1200". He also stated that he wished to purchase clothing at Fort Buchanan. It was his intention to go to Fort Buchanan after he left his groceries at his home in Toa Alta.

With respect to both specifications, the conflict in the evidence presented an issue of fact which the court resolved against the accused. It is clear that the accused intended to go to Toa Alta directly from Camp O'Reilly without stopping at Fort Buchanan. The accused's testimony that he intended to leave the groceries off at his home at Toa Alta and then return to Fort Buchanan might have been convincing had he not, as a witness in his own behalf, denied that he said anything to Captain Peyton about going to Fort Buchanan on official business. In view of all the circumstances in the record, the circumstantial evidence is more consistent with Captain Peyton's testimony than with that of the witnesses for the defense. It may be reasonably inferred that the accused's acts were done with intent to deceive, for the purpose of obtaining the adjutant's permission to leave the post.

Since there is sufficient competent evidence to support the finding of guilty we are of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge II.

8. Specification 3, Charge II, avers that the accused wrongfully and without authority altered a trip ticket by adding thereto the words "To Toa Alta, P.R."

The uncontradicted evidence shows that the accused altered the trip ticket of an Army truck dispatched to Santurce and Fort Buchanan on official business, by adding the words "To Toa Alta, P.R." thereto. The prosecution showed that the local regulations for changing a destination on a trip ticket required that the permission of the adjutant or post executive officer be obtained therefor. It was further required that the actual alteration of the trip ticket be made by the dispatcher at the motor pool and that the dispatch records be amended accordingly.

However, one of the prosecution's witnesses, the driver Flores, testified that it was common practice for officers to direct drivers to destinations not shown on trip tickets. The customary disregard of Post Regulations with respect to the destination recorded on a trip ticket might be considered as a mitigating circumstance had the alteration been made for official business. But in the instant case it was shown that the alteration was for purely personal business and that only the post commander or the post executive was authorized to dispatch military vehicles for such personal business. Accordingly it is clear that the accused neither had

authority to alter the trip ticket, nor did he have any reasonable reason for believing that he had such authority.

Therefore we are of the opinion that the record of trial is legally sufficient to support the finding of guilty of Specification 3, Charge II.

9. The accused is 30 years of age and is a native of Puerto Rico. He is married and lives with his wife at Toa Alta, Puerto Rico. War Department records show that the accused attended grade school and high school in Aibonito, Puerto Rico. He then attended the University of Puerto Rico and had completed two years towards a Bachelor of Arts degree by 1940. He joined the Puerto Rico National Guard in 1933 and served until 1936. He re-enlisted in 1938, and served until 1940. He was inducted as a second lieutenant with the Puerto Rico National Guard on 15 October 1940. After induction, he served with the 296th Infantry in Puerto Rico as a company officer. In July 1942 he was injured in a training accident and spent about two months in the hospital and on sick leave. In October 1942, he was transferred to the 65th Infantry and departed with the unit for Panama in January 1943. In December 1943, he was relieved from the 65th Infantry when that unit was preparing to leave Panama for overseas service. The accused remained in Panama until August 1944, when he returned to Puerto Rico. After service with various training units, he was assigned to command the 522d Quartermaster Truck Company and departed from Puerto Rico with that unit in June 1945. He arrived in Hawaii in August 1945. In September 1945 he was evacuted from Hawaii with a diagnosis of hysteria-conversion, severe. In October 1945, a disposition board at Finney General Hospital, Thomasville, Georgia, recommended that he be returned to full military duty. The diagnosis at that time was:

> "Anxiety state with hysteria-conversion features, mild, chronic, precipitated by injury 2 July 1942, Salina, Puerto Rico, where 80 mm Mortar Shell exploded accidentally in his vicinity, puncturing his intestine, no predisposition evident, no impairment."

He was returned to Puerto Rico in April 1946 and was assigned as Sales Officer at Camp O'Reilly, remaining there until 16 July 1946. He was then assigned as Sales Officer at Losey Field, Puerto Rico.

All of his efficiency ratings since 1 July 1941 have been excellent with the exception of the period from 24 June 1943 until 18 July 1943, when he was rated superior as an infantry company commander.

10. Attached to the record of trial is a recommendation for clemency, signed by Captain Antonio Medina, the defense counsel, wherein it is stated:

> "(a) The record of this officer shows that he had an Excellent rating and no previous convictions, not even punishment under the 104th AW.

"(b) The evidence offered to the Court revealed that he committed offenses punishable under the 94th and 96th AW, but the facts and circumstances surrounding them do not warrant the conclusion that he is guilty of moral depravation or mental turpitude. He was probably induced to commit them by a misinterpretation of a conversation with his immediate commanding officer.

"(c) His retention in the service as an officer is justified by his character and record."

As indicated above, in his action the reviewing authority recommended the sentence to dismissal be commuted to a reprimand "because of the excellent record of service of the accused in the Army."

11. 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. A sentence to dismissal and to forfeit $550.00 of his pay is authorized upon a conviction of a violation of Articles of War 94 and 96.

A. Hottenstein, Judge Advocate

Walthmar A. Solf, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 316750 1st Ind

WD, JAGO, Washington 25, D. C. JAN 22 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 Pedro Ortiz-Aponte (0-413585), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of misapplying to his own use and benefit a United States Army truck in violation of Article of War 94 (Spec, Chg I); of making a false official statement and a false official entry in an officers' register (Specs 1 and 2, Chg II); and of wrongfully altering a trip ticket without authority (Spec 3, Chg II), in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit $550.00 of his pay. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that so much of the sentence as adjudges dismissal be commuted to a reprimand.

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 accused was Sales Officer at Camp O'Reilly, Puerto Rico. On the morning of 15 May 1946 he obtained the permission of his immediate superior officer, Major Racek, to take the day off in order to visit his home in Toa Alta, Puerto Rico. Major Racek also authorized the accused to ride on a truck which was to be dispatched to Fort Buchanan, Puerto Rico and Santurce to pick up milk. The post commissary was to be closed on that date and the accused made a large purchase there.

Post regulations required that officers leaving the post during duty hours must obtain the permission of the Post Adjutant. In compliance with that regulation the accused reported to the adjutant but requested and secured permission to go to Fort Buchanan on official business until noon and then to take the afternoon off. The accused signed the officers' register and indicated in the column headed "Destination" that his destination was "Fort Buchanan after 1200 Toa Alta, P.R." The accused then caused the groceries, which he had purchased, to be placed on a 1½ ton Army truck which had been dispatched at the motor pool for Santurce and Fort Buchanan to pick up milk. Thereafter the accused directed the driver to take him to Toa Alta and thus diverted the vehicle from its official route. Enroute he altered the trip ticket by adding the words "To Toa Alta, Puerto Rico." Post regulations required that the permission of post headquarters be obtained whenever the destination on a trip

ticket was to be changed, and that the alteration be done at the motor pool. It was further shown that the use of government transportation for personal business could be authorized only by the Post Commander or the Post Executive Officer, and that such authorization had not been obtained by the accused.

The government truck which the accused had applied to his own use was involved in a collision which resulted in the death of a civilian employee of the Army who was riding in the rear thereof, injury to the accused and the driver, and the total destruction of the truck.

4. Attached to the record of trial is a recommendation for clemency, signed by Captain Antonio Medina, the defense counsel, wherein it is stated:

> "(a) The record of this officer shows that he had an Excellent rating and no previous convictions, not even punishment under the 104th AW.
>
> "(b) The evidence offered to the Court revealed that he committed offenses punishable under the 94th and 96th AW, but the facts and circumstances surrounding them do not warrant the conclusion that he is guilty of moral depravation or mental turpitude. He was probably induced to commit them by a misinterpretation of a conversation with his immediate commanding officer.
>
> "(c) His retention in the service as an officer is justified by his character and record."

As indicated above, in his action the reviewing authority recommended the sentence to dismissal be commuted to a reprimand "because of the excellent record of service of the accused in the Army."

5. The accused is 30 years of age and is a native of Puerto Rico. He is married and lives with his wife at Toa Alta, Puerto Rico. War Department records show that the accused attended grade school and high school in Aibonito, Puerto Rico. He then attended the University of Puerto Rico and had completed two years towards a Bachelor of Arts degree by 1940. He joined the Puerto Rico National Guard in 1933 and served until 1936. He re-enlisted in 1938, and served until 1940. He was inducted as a second lieutenant with the Puerto Rico National Guard on 15 October 1940. After induction, he served with the 296th Infantry in Puerto Rico as a company officer. In July 1942 he was injured in a training accident and spend about two months in the hospital and on sick leave. In October 1942, he was transferred to the 65th Infantry and departed with the unit for Panama in January 1943. In December 1943, he was relieved from the 65th Infantry when that unit was preparing to leave Panama for overseas service. The accused remained in Panama until August 1944, when he returned to Puerto Rico. After service with various training units,

he was assigned to command the 522d Quartermaster Truck Company and departed from Puerto Rico with that unit in June 1945. He arrived in Hawaii in August 1945. In September 1945 he was evacuated from Hawaii with a diagnosis of hysteria-conversion, severe. In October 1945, a disposition board at Finney General Hospital, Thomasville, Georgia, recommended that he be returned to full military duty. The diagnosis at that time was:

> "Anxiety state with hysteria-conversion features, mild, chronic, precipitated by injury 2 July 1942, Salina, Puerto Rico, where 80 mm Mortar Shell exploded accidentally in his vicinity, puncturing his intestine, no predisposition evident, no impairment."

He was returned to Puerto Rico in April 1946 and was assigned as Sales Officer at Camp O'Reilly, remaining there until 16 July 1946. He was then assigned as Sales Officer at Losey Field, Puerto Rico.

All of his efficiency ratings since 1 July 1941 have been excellent with the exception of the period from 24 June 1943 until 18 July 1943, when he was rated superior as an infantry company commander.

6. In view of all the circumstances in the case, including the accused's excellent record and the reviewing authority's recommendation for clemency, I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence, as thus modified, be suspended during good behavior.

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

CM 316750

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 24, 3 Frbruary 1947).
(G.C.M.O. 184, 23 May 1947)

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

JAGK - CM 316752

27 JAN 1947

UNITED STATES v. Private CHESTER HORNE, JR. (33997160), Sergeant JOHN H. WOODS (34642211), Private First Class JOHN SESSION (42060517), Private First Class MATHEW S. JONES (RA 37629301), and Private JAMES C. HATCHER (44110499), all of the 3555th Quartermaster Truck Company.	THIRD UNITED STATES ARMY Trial by G.C.M., convened at Heidelberg, Germany, 23,24,27 and 28 May 1946. HORNE, WOODS and SESSION: To be hanged by the neck until dead. HATCHER: Dishonorable discharge and confinement for life. Federal Reformatory. JONES: Dishonorable discharge and confinement for fifteen years. Penitentiary.

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 soldiers 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 were jointly tried upon the following charges and specifications:

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

Specification: In that Sergeant John H. Woods, Private First Class Mathew S. Jones, Private First Class John Session, Private Chester Horne Junior, Private James C. Hatcher, Private Willie D. Johnson, Private Louis Johnson, 3555th Quartermaster Truck Company and Corporal Henry W. Hawkins, Private Jim T. Herrod of 3453 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Asperg, Germany, on or about 15 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Technician Fifth Grade Floyd D. Hudson, Battery D, 68th Anti-Aircraft Artillery Gun Battalion, a human being, by shooting him with one or more carbines.

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

Specification: In that Sergeant John H. Woods, Private First Class Mathew S. Jones, Private First Class John Session, Private Chester Horne Junior, Private James C. Hatcher, Private Willie D. Johnson, Private Louis Johnson, of 3555th Quartermaster Truck Company and Corporal Henry W. Hawkins, Private Jim T. Herrod of 3453 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Asperg, Germany, on or about 15

February 1946, with intent to commit murder, commit an assault upon Private First Class Posey Duncan, Battery D, 68th Anti-Aircraft Artillery Gun Battalion, Technician Fifth Grade Charles Carroll, Battery D, 68th Anti-Aircraft Artillery Gun Battalion, and Private First Class Willard E. Woodyard, Battery D, 68th Anti-Aircraft Artillery Gun Battalion, by feloniously, and willfully shooting them with one or more carbines.

Each accused pleaded not guilty to all charges and specifications. The accused Private Willie D. Johnson, Private Louis Johnson, Private Jim T. Herrod, and Corporal Henry W. Hawkins were each found not guilty of all charges and specifications. The accused Sergeant John H. Woods, Private First Class Mathew S. Jones, Private First Class John Sessions, Private Chester Horne, Jr. and Private James C. Hatcher were each found guilty of each specification except the words "Private Willie D. Johnson, Private Louis Johnson of 3555th Quartermaster Truck Company and Corporal Henry W. Hawkins, Private Jim T. Herrod of 3453 Quartermaster Truck Company", of the excepted words not guilty and guilty of each charge. No evidence of any previous convictions was introduced as to any of the accused. The accused Sergeant John H. Woods, Private First Class John Session and Private Chester Horne, Jr., were each separately sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on each sentence. The accused Private First Class Mathew S. Jones and Private James C. Hatcher were each separately sentenced to be confined at hard labor for the term of their natural lives, three-fourths of the members present at the time the vote was taken concurring in the vote on each sentence. The reviewing authority approved the sentence as to each accused but in the case of Private First Class Mathew S. Jones reduced the period of confinement to fifteen years, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to the accused Private First Class Mathew S. Jones, and the Federal Reformatory, Chillicothe, Ohio, as the place of confinement as to the accused Private James C. Hatcher and forwarded the record of trial for action under Article of War 48 as to the accused Sergeant John H. Woods, Private First Class John Session, and Private Chester Horne, Jr. and for action under Article of War 50½ as to the accused Private First Class Mathew S. Jones and Private James C. Hatcher.

3. Evidence for the prosecution.

On 15 February 1946 the 4223 Quartermaster Truck Company maintained an enlisted men's club for colored troops and Battery "D", 68th AAA Gun Battalion, maintained an enlisted men's club for white troops at Asperg, Germany (R. 32). These two clubs were situated across a street from each other on opposite corners of an intersection (R9, 38). On this date, Private First Class Edward Woodyard, Private First Class Posey Duncan and Technician 5th Grade Floyd D. Hudson had been drinking champagne and

cognac while at their organization and at about 10:15 P.M. left their Battery area and proceeded to the enlisted men's club, maintained by the 68th AAA Gun Battalion, arriving there about 10:15 P.M. While at the club they were joined by Technician 5th Grade Charles Carroll. About 10:30 P.M. the four men decided to return to their Battalion area. Hudson left the club followed by Duncan and Woodyard. While the three men were waiting for Carroll to join them outside the club, Hudson threw a beer bottle across the street in the direction of the club maintained for the colored troops. The bottle struck either the building or sidewalk (R 38,39). About this time Carroll came out of the club and the four men proceeded along the street towards their Battalion area. Hudson was rather drunk and was helped along the street by Carroll (R 44,46). As they were walking along the street a truck occupied by colored soldiers drove up and opened fire on them. Hudson was killed and the others wounded (R 40,41).

About 1030 P.M. 15 February 1946 the accused Mathew Jones accompanied by Private Walter Moore left the colored enlisted men's club and proceeded to the motor pool of the 3453 Quartermaster Truck Company where they procured a 6x6 truck which they parked in front of the colored enlisted men's club. Private Moore entered the club for the purpose of telling some girl that Jones was ready to go. Private Moore then started back to the truck and when he came out of the club door he observed the accused Sergeant John Woods sitting in the cab of the truck. The accused Mathew Jones was sitting behind the steering wheel (R 10,13). Several other soldiers boarded the truck while it was parked in front of the club, one of whom was the accused Chester Horne, Jr. When the accused Horne mounted the truck he was carrying a carbine (R 28). According to the confession made by Sergeant John Woods, after being warned of his rights, he, Sergeant John Woods, was helping at the bar of the colored enlisted men's club on 15 February 1946. About 10:30 P.M. someone threw a bottle in the hallway of the club. Woods went outside the entrance of the club but was unable to see anyone. Woods returned to the club and then went to his company. At the company someone asked him what the trouble was and he replied that someone had thrown a bottle into the club. Woods then returned to the club, at which time he saw a truck standing in front of the club. About this time he heard voices from up the street and concluded that the people whose voices he heard had thrown the bottle into the club. Woods asked another man to take him up the street, after which this man mounted the truck in the driver's position and Woods entered the cab opposite the driver. Other men were on the back of the truck. The truck was driven up the street about a block and three quarters when he observed three white soldiers walking on the right side of the street. Before the truck reached the white soldiers someone shouted "there they are" and when the truck was about twenty feet from the white soldiers someone in the back of the truck

started firing. When the firing stopped he got out of the cab and saw people getting off the truck and running towards the club. Two of them were carrying carbines. One white soldier was lying on the ground and two others were in a kneeling position. One of the white soldiers was "hollering for help." He then left and returned to the company and went to bed (R 69, Pros. Ex. 7).

According to the confession of the accused Private Chester Horne, Jr., which confession was made after a proper warning as to his rights, he was on guard at the command post of his organization on 15 February 1946. About ten minutes after ten he received a telephone call from the club "telling me to get a couple of fellows and come over to the club as there was a little trouble over there." He then went upstairs to try to find a man by the name of Mitchell but was unable to find him. Someone (name deleted from the statement) came into the barracks and went upstairs and upon his return he was followed by three or four soldiers. This person asked for the "other carbine" and then went into the orderly room and came out with a carbine. As this unidentified person started towards the club he told the accused Horne to tell some of the fellows to come to the club as some white fellow had thrown a bottle into the club. Horne then went to a large room on the ground floor of the barracks and so informed the men who were playing cards in this room. Some of the men left the barracks and Horne followed them to the club. A 6x6 truck was in front of the door and he (Horne) mounted the right side of the truck. At this time he was carrying a carbine. Someone then said, "If you don't want to drive, I'll drive." One person standing up in the back of the truck had a carbine and another person in the truck had a pistol. Horne asked one of the men "what the trouble was" and was told that someone had thrown a bottle into the club and when the person "got after them" they called him a "black son a bitch." The truck started up the street and just before reaching a large hill he (Horne) saw three or four white soldiers walking along the street on the right hand side. When the truck was about twenty-five to thirty feet from the white soldiers the shooting started. Just before the shooting started Horne heard someone say, "there they are." The truck stopped and he then dismounted and walked in front of the truck and fired his carbine over the heads of the white soldiers. The four white soldiers were unable to stand and were on the ground. Horne then returned to his guard post after which he tried to clean his carbine by blowing cigarette smoke down the barrel (R 94, Pros. Ex. 13).

According to the confession of the accused Private First Class John Session, which confession was made after a proper warning as to his rights, he was in the barracks when someone said that some "white fellows were trying to tear the club up." This person then ran down the stairs. Session then went to his bed and secured a clip of ammunition, after which he took a carbine from the desk of the First Sergeant. He then went to the club where he saw a truck with the motor running and people in it. He mounted the truck. The truck started up the street and when it stopped he saw three white soldiers walking on the right of the street. One of the men on the

truck started to fire at the white soldiers. When the firing started he (Session) also fired at the white soldiers holding his carbine at the hip. He jumped from the truck and ran towards his company. About half way down an alley and near a stone wall and wire fence he threw the carbine over the wall, after which he returned to the company and went to bed (R 97, Pros. Ex. 15).

According to the confession of the accused Private First Class Mathew S. Jones, made after he was warned of his rights, on 15 February 1946, he went to the motor pool to secure a truck in order to take two girls home. When he returned to the club some one (name deleted from the statement) said to him, "Run us up the street as some fellows threw a brick or bottle into the club and I want to get them." Jones said that he had to take the girls home but this person told him "that if I would not drive the truck he would." He then drove up the street. He did not know anyone was on the back of the truck. Someone standing on the running board said, "There they are," at which time he saw three or four white soldiers standing on the corner. He stopped the truck and a colored soldier jumped off the truck, walked in front of the truck and started firing. He saw one white soldier fall. He then started his truck and went back to the club. At the club Walter Moore brought two girls out and they took them and the truck to the motor pool (R 101, Pros. Ex. 16).

According to the confession of the accused Private James C. Hatcher, made after a proper warning of his rights, he was in his room when someone came in and said to him and other soldiers present that there was some trouble at the club. He went to the club and a truck was parked in front of it. Some soldiers went to the club ahead of him and others followed. A person in the cab of the truck stated "that some white soldiers threw a bottle in the club and that he was going after them, and if anyone was afraid do not get on the truck." He climbed into the truck as did other soldiers. Some soldiers had carbines but he was without a weapon. The truck started up the street and on the right hand side he saw five white soldiers with bottles in their hands. The truck stopped. Nothing was said to the white soldiers by anyone on the truck and the white soldiers did not say anything to the men on the truck. About that time the shooting started. He heard one of the white soldiers "grunt". He dismounted from the truck and ran back to the barracks (R 74, Pros. Ex. 9).

Mechthilde Lipps, a civilian, saw four white American soldiers standing on a corner near her home on 15 February 1946. She also saw a truck with colored soldiers arrive at the corner and open fire upon the white soldiers. One soldier was shot in the leg and he jumped, the other three fell down (R 48,49, 50).

At the time the colored soldiers arrived in the truck and fired upon the white soldiers nothing was said by either the white soldiers or the colored soldiers (R 40,44). Private First Class William Woodyard was shot through the right thigh; Private First Class Posey Duncan was shot in the left thigh and received a compound fracture of the patella from which wounds

it was necessary to amputate his leg; Technician Fifth Grade Charles Carroll was shot in the right ankle; and Technician Fifth Grade Floyd D. Hudson was killed by the shots (R 41,43,45; Pros. Exs. 2, 3, 4, 5, 6,17). The dead and wounded were placed on a truck and taken to a German doctor for treatment and then to the 216 General Hospital (R 46). An autopsy performed on the body of Floyd D. Hudson at 1300 hours 16 February 1946 at the 216th General Hospital (now the 387th Station Hospital) disclosed that Hudson was dead upon arrival at the hospital and the cause of death was a gunshot wound which caused the perforation of the abdominal aorta (R 58, 104, Pros. Exs. 5, 17).

Immediately after the shooting First Lieutenant Donald F. Diekman searched the area where the shooting occurred and found four expended cartridge cases (R 79). Lieutenant Diekman also searched a truck in the motor pool of the 4223 Quartermaster Truck Company and found eight expended cartridge cases (R 80). A United States carbine 30-caliber was found near the stone wall where the accused Session said that he threw the carbine he was carrying (R 86, Pros. Ex. 15). Ballistic tests disclosed that six of the cartridge cases found by Lieutenant Diekman had been fired by the carbine found near the stone wall (R. 90).

4. For the defense.

The court explained to each accused his rights as a witness and the accused, Private Chester Horne, Jr. and Sergeant John H. Woods, each elected to remain silent.

Private First Class Mathew S. Jones elected to make an unsworn statement to the effect that about 1830 hours 15 February 1946 he was at the club drinking and dancing until some girls wanted to go home. He went to the motor pool with Walter Moore and got a 6x6 truck and returned to the club. He started into the club when someone asked who was driving the truck, to which he replied that he was driving. This person then said, "run me up the street as some fellows threw a brick or bottle into the club and I want to talk to them." Jones then said that he wanted to take the girls home.. This person then told him, "He told me if I would not drive the truck up the street, he would." He did not like this as he was due to be redeployed and he had the truck without permission and was afraid he would be reported if he did not drive the truck. He got into the truck and this person got into the truck beside him and he (Jones) drove up the street. At this time he did not know anyone was on the back of the truck but after they started someone jumped on the running board. They started up a hill and he saw three or four white soldiers standing on the corner. He heard someone say, "There they are," and some shooting started. He put the brakes on and killed his motor. Someone ran around the truck and fired a carbine. One white soldier fell. he turned the truck around and went back to the club. He was afraid to leave town because of the shooting so he took the truck to the motor pool and the girls to the barracks (R 123,Def. Ex. 1).

The accused Private James C. Hatcher elected to make an unsworn statement wherein he stated that on 15 February 1946 he was playing cards in his room when someone came in and said that there was some trouble at the club. He had a 32-caliber Belgian automatic and five rounds of ammunition. He took the pistol and went to the club alone. Some soldiers preceded him to the club and others arrived at the club after he arrived. There was a truck at the club. Someone in the cab of the truck said that someone threw a bottle in the club and he was going to talk to them. He climbed into the back of the truck with two other soldiers, one of which had a carbine. The truck left the club and went toward the camp. He saw five white soldiers with bottles in their hands. The trucks stopped and without anything being said by either the colored or white soldiers shooting began and he heard one of the white soldiers grunt. He did not fire any shots. He then ran to the barracks and went to bed (R 124, Def. Ex. 2).

The accused Private John Session elected to make an unsworn statement wherein he stated that about 2200 hours on 15 February 1946 he was in his room reading when someone came upstairs to his room. He asked this person, "What is the matter?" and received the reply that there had been some trouble at the club. This person then ran down the stairs. He took a clip of ammunition and went to the orderly room and secured a carbine from the First Sergeant's desk. He went to the club. A 6x6 truck with the motor running was standing in front of the club. He mounted the truck and found two other soldiers there, one of which had a carbine. The truck started up the street and when it stopped he saw three white soldiers walking along the street. One of the soldiers on the truck started firing his carbine at the white soldiers. He then fired his carbine from the hip. He did not see any of the white soldiers fall. He jumped from the truck and as he jumped he heard someone "holler, 'Oh'". He ran down an alley toward the company and near a stone and wire fence he threw his carbine over the wall. He returned to his battery and went to bed. His reason for going to the club was that someone told him there was trouble at the club and he went to see what the trouble was (R. 124, Def. Ex. 3).

5. Murder is defined in the Manual for Courts-Martial, 1928, paragraph 148a, page 162, as "the unlawful killing of a human being with malice aforethought." In discussing the term "malice" the Manual (pp. 163, 164) lays down the following principles:

> "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 existed at the time the act was 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; intent to commit any felony. * * *"

Thus it has been held that where a deadly weapon is used in a manner likely to cause death and death actually results from such use, the law will presume malice from this act of using a deadly weapon (MCM 1928, par. 112a; CM 314939, Greene; 5 Bull. JAG 281).

The common law distinctions between aiders and abettors have been abolished and all persons joining together to do an unlawful act, which, although not amounting to a felony, is of so desperate a character that it must ordinarily be attended with great hazard of life, and death occurs as a result of anything done in prosecution of the unlawful design, then all who take part therein are guilty of murder, or any other criminal offense so committed, as principles (CM 266724, McDonald, 43 BR 291; CM 314939, Greene; 5 Bull JAG 281)

Assault with intent to murder is an assault aggravated by the concurrence of a specific intent to murder; or, in other words, it is an attempt to murder (MCM, 1928, par. 1491).

From the foregoing discussion of the law, the conclusion is inescapable that the accused Sergeant John H. Woods, Privates First Class John Session, Mathew S. Jones and Privates Chester Horne, Jr. and James C. Hatcher are each guilty of murder and assault with intent to murder as alleged in the specifications. The proof shows that these accused, together with other persons unknown, some of them being armed with carbines, started to administer some kind of reprisal upon other soldiers for having thrown a beer bottle into an enlisted man's club. When they came into contact with four soldiers the men carrying carbines opened fire, killing one and seriously wounding the other three. The evidence shows that the accused Sergeant John H. Woods was the leader of the party, that Private First Class Mathew S. Jones drove the truck used by the group, that Private First Class John Session and Private Chester Horne, Jr. each carried carbines and that each of them fired their weapons at the deceased and the other people who were seriously wounded,

andthat Private James C. Hatcher joined the party before the shooting, knowing that his companions were armed with carbines, and after he had been informed that the party was starting after persons who had thrown a beer bottle into the club. Under such circumstances they are all guilty of the offenses committed and it is immaterial who actually fired the shots which resulted in the death of Hudson and seriously injured the other men.

6. The charge sheet shows the following:

Sergeant John H. Woods is 21-11/12 years of age, He was inducted into the Army 9 January 1943 at Fort Jackson, South Carolina, without prior service.

Private First Class Mathew S. Jones is 26-5/12 years of age. He enlisted in the regular Army for three years on 25 January 1946 after serving in the Army of the United States from 20 November 1943 to 24 January 1946.

Private First Class John Session is 24-5/12 years of age. He was inducted into the service 17 December 1943 at New York without prior service.

Private Chester Horne, Jr. is 19-9/12 years of age. He was inducted into service 29 May 1945 at Baltimore, Maryland, without prior service.

Private James C. Hatcher is 19-6/12 years of age. He was inducted into service 8 May 1945 at Camp Blanding, Florida, without prior service.

7. 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 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 and to warrant confirmation of the sentences. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. The maximum confinement which can be adjudged for the offense of assault with intent to commit murder in violation of Article of War 93 is twenty years.

Chester D. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stroyd, Judge Advocate

JAGK - CM 316752 1st Ind

WD, JAGO, Washington 25, D. C. FEB 13 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 Sergeant John H. Woods (34642211), Private John Session (42060517) and Private Chester Horne, Jr. (33997160), all of the 3555th Quartermaster Truck Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused and to warrant confirmation thereof. Under all the circumstances of the case, I am of the opinion that the death penalty is not required. I recommend that the sentence as to each accused be confirmed but that each sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifteen years, that the sentences as thus commutel be carried into execution and that the U. S. Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

3. Consideration has been given to the following communications indicating interest in this case and which are forwarded with the record of trial: Honorable Herbert R. O'Conor, Governor of Maryland; Albert N. Brooks, Veterans Civic Organization, Charleston, South Carolina; Franklin H. Williams, Attorney for the National Association for the Advancement of Colored People; Mrs. Lula Mae Peterson, New York City; Elizabeth Session, mother of John Session; John Session, an accused; Chester Horne, Jr., an accused; John H. Woods, an accused. The following members of the United States Senate: Honorable Robert A. Taft, Honorable Arthur H. Vandenberg, Honorable James M. Mead, Honorable Thomas C. Hart, Honorable George L. Radcliffe, Honorable Millard E. Tydings, Honorable Robert F. Wagner, Honorable C. Homer Ferguson, Honorable Wayne Morse, Honorable Owen Brewster. The following members of the House of Representatives: Honorable Clayton Powell, Jr., Honorable Clare Boothe Luce, Honorable Emily Taft Douglas, Honorable John W. McCormack, Honorable John Phillips, Honorable Edith Nourse Rogers, Honorable John L. McMillan, and Honorable Helen Gahagan Douglas.

4. 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 recommendations heretofore made, should such action meet with approval.

4 Incls
1. Record of trial
2. Drft ltr sig USW
3. Form of action
4. Ltrs mentioned in par 3 above

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O.82, 13 March 1947).

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

DEC 10 1946

JAGQ - CM 316765

U N I T E D S T A T E S	)	HEADQUARTERS FORD ORD, CALIFORNIA
v.	)	Trial by G.C.M., convened at Fort MacArthur, California, 15 August 1946. Dishonorable discharge (suspended) and confinement for six (6) months. Post Stockade, Fort MacArthur, California.
Private MANUEL BENAVIDEZ (39709624), Attached Unassigned, Headquarters Detachment, Post Operating Company, Fort MacArthur, California.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Manuel Benavidez, Attached Unassigned, Headquarters Detachment, Post Operating Company, Fort MacArthur, San Pedro, California, (formerly Company D, 87th Infantry (Hq) Training Battalion, Infantry, Camp Roberts, California), did, at Camp Roberts, California, on or about 7 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angeles, California, on or about 27 May 1946.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "desert" and "in desertion" substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, 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 special court-martial for absence without leave from 8 January 1944 to 25 January 1944, in violation of the 61st Article of War, for

which he was sentenced to two months hard labor without confinement and to forfeit $10 of his pay for two months. 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 six months. The reviewing authority approved the sentence and ordered it executed, suspended execution of the dishonorable discharge, and designated the Post Stockade, Fort MacArthur, California, 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. 16, Headquarters, Fort Ord, California, 13 September 1946.

3. As previously stated accused was found not guilty of desertion, but, by exceptions and substitutions was found guilty of absence without leave (R 30). The evidence is ample to support this finding but the record shows that the unauthorized absence occurred 7 February 1944 (Pros. Ex. 1) and that accused was not arraigned until 15 August 1946 (R 2). There is no indication that the statute of limitation (A.W. 39) had been tolled and the record fails to disclose that the accused was cognizant of his rights to plead the statute. The failure of the court to advise the accused of his rights in the premises is fatal error voiding the conviction of absence without leave (MCM, 1928, par. 67; AW 39; CM 313593, Sawyer).

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.

Charles M. Dickson, Judge Advocate

H. Hayne Davis, Judge Advocate

James S. Fisher, Judge Advocate

JAGQ - CM 316765 1st Ind DEC 12 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 Manuel Benavidez (39709624), Attached Unassigned, Headquarters Detachment, Post Operating Company, Fort MacArthur, California.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 3, 2 Jan 1947)

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

JAGK - CM 316767

19 NOV 1946

UNITED STATES)	FORT BRAGG, NORTH CAROLINA
)	
v.)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 13 September 1946. Dismissal and total forfeitures
)	
First Lieutenant RALPH THOMAS JONES (O-1319285), Infantry.)	

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. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Ralph Thomas Jones, 1449 Area Service Unit, War Department Personnel Center, but then a member of 325th Glider Infantry, did, without proper leave, absent himself from his organization and station at Fort Bragg, North Carolina from about 22 March 1946 to about 9 May 1946.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction by general court-martial for absence without leave from 12 November 1945 to 18 November 1945 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.

The prosecution offered in evidence extract copy of morning report of Company I, 325th Glider Infantry, dated 25 March 1946 showing accused absent without leave effective 0100, 22 March 1946. The extract copy was received in evidence without objection as Prosecution's Exhibit A (R. 7; Pros. Ex.A). First Lieutenant Robert A. Wagner who was Commanding Officer, Company I, 325th Glider Infantry, for the period from about 13 March to 14 April 1946, testified that accused was absent on a "VOCO" pass granted by the battalion commander and was due to return to the company at 1200 hours, 21 March 1946.

Accused did not return and he was shown AWOL on the morning report (R. 10,11).

Extract copy of the morning reports of Company I, 325 Glider Infantry, for 23 April 1946 and 10 May 1946 was introduced in evidence as Prosecution's Exhibit B (R. 7, Pros. Ex. B). This exhibit showed accused dropped from the rolls of his organization on 23 April 1946, and from AWOL to duty effective 9 May 1946.

Evidence for the defense.

After his rights as a witness were explained to him, accused elected to remain silent (R. 18). First Lieutenant James J. Mahan, regular company commander of Company I, 325th Glider Infantry, except for the period from about 13 March to 14 April 1946, testified that he had given accused an efficiency rating equivalent to satisfadtory for the period ending 30 June 1946 (R. 13; Def. Ex. A); that accused was highly attentive to his duties as an officer (R. 14), and witness would have given him a higher rating had it not been for his absence without leave (R. 15). Lieutenant Mahan further testified that since accused's return to duty until 26 August accused had been on special duty in the regimental S-2 office, and that from 9 May to 2 July accused had been placed under restrictions by the regimental commander (R. 14,15,16). Under these restrictions accused was required to report, after duty hours, to the regimental duty officer every hour on the hour and was allowed no "VOCO" passes (R. 14,16,17). After 2 July 1946 these restrictions were lifted and accused was granted at least three week-end passes by the regimental commander (R. 14,16). On 26 August accused was assigned to the Seventh Army (R. 15).

The defense introduced in evidence that part of accused's 66-1 card pertaining to his efficiency ratings (R. 17, Pros. Ex. A).

At the time of arraignment and prior to pleading to the general issue accused offered a plea in bar to trial on the grounds that (a) accused had been punished for the offense by being placed under restrictions from 9 May to 2 July 1946, and (b) the offense had been constructively condoned by his being fully restored to duty (R. 6). The court overruled this plea, whereupon accused pleaded not guilty to the charge and specification. During the arguments on the motion the defense requested the court to take notice of the restrictions which had been imposed on accused and that it be considered as mitigation, in the event the plea was denied (R. 6).

The court, over the objection of the defense, directed the prosecution to produce the regimental commander for explanation as to the cause of the delay in bringing accused to trial for his offense, and why accused was held under restraint for such a long time during the interval between his return to duty and trial. As an alternative the prosecution offered to stipulate, to which the defense agreed, maintaining its objection, however, that if Colonel Charles Billingsby, Commanding Officer, 325th Glider Infantry Regiment, was present he would testify that the delay in bringing accused to

trial was due to the fact that accused was tried by a general court-martial on 18 February 1946 and sentenced to be dismissed the service, that on 24 August 1946 an opinion of the Office of The Judge Advocate General was received holding the record of trial legally insufficient to support the findings and sentence and that accused had been restricted pending review of the general court-martial record (R. 19,20).

4. The ruling of the court upon the plea in bar of trial on the ground of former punishment and constructive condonation was proper. The evidence fails to show that the restriction was intended as punishment, indeed, it appears that it was imposed merely as an administrative measure to secure the presence of accused. There is no showing that any preliminary investigation was made, written notification of intention to impose punishment given, written record made, or other steps taken such as are enumerated by the Manual for Courts-Martial for punishments under Article of War 104 (CM 273060, Carrillo, 46 BR 365, 368). Also, the facts would not warrant a finding by the court that accused's restoration to duty constituted constructive condonation, for even if constructive condonation were applicable to crimes other than desertion, only the authority competent to order trial, in this case the division commander, has the power to condone an offense. Since accused was assigned to duty in the regimental S-2 office by his regimental commander, no condonation was effected (CM ETO 11401, Schultz; CM 270941, Boruski, 45 BR 381,390).

Accused's initial absence without leave was established by properly authenticated extract copy of morning report of 26 March 1946 showing accused from duty to absence without leave effective 0100, 22 March 1946. Although the morning report entry was made several days subsequent to the effective date thereof the testimony of the commanding officer established the fact that the entry was based on his personal knowledge. The initial absence having been established the presumption prevails that it continues until a change in accused's status is shown.

The court in inquiring into the cause of the long delay in bringing accused to trial and his being under restrictions for a long period of time caused the prosecution to enter into the record evidence of a previous trial by general court-martial. This action of the court did not adversely affect the substantial rights of the accused, the proof of his absence without leave being clear and convincing. The knowledge of the previous trial was only incidentally brought to the notice of the court to show why accused was in a status of restriction (CM 254809, Pavlus, 35 BR 365,367).

5. War Department records show that accused is 32 years of age and married. From 4 June 1941 to 11 May 1943 accused served as an enlisted man and attained the grade of corporal. He graduated from the Infantry Officer Candidate School, Fort Benning, Georgia, and was appointed and commissioned a second lieutenant, Army of the United States, on 12 May 1943. He was promoted to the grade of first lieutenant on 25 May 1944. Accused served

overseas in the European Theater of Operations and was slightly injured in action in France on 27 December 1944. On 1 December 1944 accused was found guilty of absence without leave from his organization from on or about 6 November 1944 to on or about 13 November 1944 and on 8 December 1945 he was found guilty of absence without leave from his command and station from on or about 5 November 1945 to on or about 8 November 1945 and from on or about 12 November 1945 to on or about 18 November 1945. On each occasion he was sentenced to restrictions and small forfeitures and the sentences were approved and ordered executed. Accused attended high school for 3-1/2 years and also attended Benjamin Franklin College for one year. In civilian life he was engaged as grocery clerk and manager by the Safeway Stores, Washington, D.C., for about four years and as building custodian, District of Columbia Public School System, from 1938 to 1940.

6. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for violation of the 61st Article of War by an officer.

Chester D. Silva, Judge Advocate

On Leave, Judge Advocate

Gilbert E. Lefevre, Judge Advocate

JAGK - CM 316767 1st Ind

WD, JAGO, Washington 25, D. C. NOV 29 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 First Lieutenant Ralph Thomas Jones (0-1319285), Infantry.

2. Upon trial by general court-martial accused was found guilty of absence without leave from about 22 March 1946 to about 9 May 1946. Evidence of one previous conviction by general court-martial for absence without leave from 12 November 1945 to 18 November 1945 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 of guilty and the sentence and to warrant confirmation of the sentence.

From an extract copy of a morning report of accused's organization, properly admitted in evidence, and from the testimony of accused's immediate commanding officer, it appears that accused failed to return to his station at Fort Bragg upon the expiration, on 22 March 1946, of a pass given him by his battalion commander. Accused remained absent from his station without authority until his return thereto on 9 May 1946.

4. Accused is 32 years of age and is married. He attended high school for 3-1/2 years and Benjamin Franklin College for one year. From 4 June 1941 to 11 May 1943 accused served as an enlisted man and attained the grade of corporal. He graduated from the Infantry Officer Candidate School at Fort Benning and was appointed and commissioned a second lieutenant in the Army of the United States on 12 May 1943. He was promoted to the temporary grade of first lieutenant on 25 May 1944. Accused served overseas in the European Theater and was slightly injured in action in France on 27 December 1944. His efficiency ratings for the period 1 July 1944 to 31 December 1945 were "Excellent."

On 1 December 1944 accused was found guilty of absence without leave from his organization from on or about 6 November 1944 to on or about 13 November 1944 and on 8 December 1945 he was found guilty of absence without leave from his command and station from on or about 5 November 1945 to on or about 8 November 1945 and from on or about 12 November 1945 to on or about 18 November 1945. On each occasion he was sentenced to restriction

and forfeitures, and the sentences were approved and ordered executed. On 19 February 1946 accused was found guilty of wrongfully and dishonorably failing to pay the Fort Bragg Post Exchange the sum of $250, which sum represented worthless checks cashed by the Exchange for accused, and of wrongfully and dishonorably failing to pay an indebtedness of $660.68, which sum accused as an agent finance officer owed the 13th Airborne Division Finance Officer, in violation of Article of War 95. For this offense 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. The Board of Review in the Office of The Judge Advocate General held the record of trial legally insufficient to support the findings of guilty and the sentence on the ground that accused's failure to pay the debts mentioned was not, under the circumstances revealed by the evidence adduced at the trial, of such a wrongful and dishonorable nature as to constitute a violation of the 95th Article of War. The Judge Advocate General concurred in the holding of the Board of Review and the findings of guilty and the sentence were vacated by the reviewing authority on 30 August 1946.

5. Due to the fact that accused has twice before been convicted of the offense of absence without leave and in view of his apparent inability to appreciate his responsibilities as an officer in the Army, I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

CM316767

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 367, 9 Dec. 1946).

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

APR 28 1947

JAGQ - CM 316770

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Headquarters XII Tactical Air Command, APO 62, US Army, 30-31 August and 3 September 1946. Dismissal and fine of $500.00.
Second Lieutenant HARVEY G. SOLANDER (0-2015465), Air Corps.	)	

OPINION of the BOARD OF REVIEW
STERN, 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 83rd Article of War.

Specification: In that Second Lieutenant Harvey G. Solander, 29th Tow Target Squadron, 441st Air Service Group, did at Nortum, Germany, on or about 24 July 1946, through neglect suffer a Government Vehicle; To wit; Jeep, ¼ Ton, U.S. Army Vehicle number 20391441, of the value of more than $ 50.00, to be damaged.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant Harvey G. Solander, 29th Tow Target Squadron, 441st Air Service Group, did, at Nortum, Germany, on or about 24 July 1946, wrongfully and unlawfully drive a motor vehicle while under the influence of intoxicating liquor.

The accused pleaded not guilty to all Charges and specifications and was found guilty of Charge I and its specification, and Charge II and Specification 2 thereunder. He was acquitted of the remaining specification. Evidence of one previous conviction by General Court-Martial of being

absent without leave, in violation of Article of War 61 and being drunk and disorderly, in violation of Article of War 96 was introduced. Accused was sentenced to be dismissed the service and to be fined $500. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. At about 2100, 24 July 1946, Sergeant John E. Hagan, of the MP Detachment at Nordholz, Germany, was called out to investigate a vehicle accident. Near the town of Midlumd, he observed a tree which had been broken off about two feet above the ground. Proceeding on toward Bremerhaven he overtook a jeep which pulled over to the side of the road and stopped when witness blew his horn. The accused was identified as being the driver of this jeep, and when he stepped out of the vehicle his speech was rambling and hard to understand, his gait was unsteady and his breath smelled of liquor (R. 6, 7, 9, 13).

Accused's jeep showed signs of having been in an accident — a piece of fresh green wood from a tree was lodged in the spring on the right front side, the part of the frame which projects to the front on the right, supporting the right end of the bumper, was bent and twisted, the fan belt pulley was bent and the fan was scraping on the radiator (R. 11 and Ex. 6). Accused told the MP in a rambling vague way that he had swerved off the road and had hit something (R. 9).

A blood alcohol test showed 2.8 milligrams per cubic centimeter of blood, indicating that he was definitely intoxicated (R. 43).

4. Accused's commanding officer testified that accused was a conscientious worker and did his work very satisfactorily.

After being advised of his rights, accused elected to remain silent.

5. The direct evidence establishes the fact that accused was drunk, that he was driving a vehicle while in that condition, and that the Government vehicle he was driving was damaged and showed signs of having been in an accident.

The record of trial does not show how the Government car was damaged except accused's own statement that he had swerved off the road and hit something (R. 9). There is considerable evidence that accused was driving while drunk sometime after the accident but there is no evidence as to the interval between the time the car was damaged and the time accused was observed driving while drunk nor is there any evidence as to how far accused was from the scene of the accident when he was stopped by Sergeant Hagan.

Negligence on the part of accused in the operation of the jeep cannot be presumed. The special rule stated in paragraph 144b, Manual for Courts-Martial, permitting a presumption of negligence in the injury or loss of property issued to an accused is limited to the particular class of property described in the rule and may not with legal propriety be extended to establish an offense with respect to property received and possessed by an accused under other and basically divergent circumstances as in the present case (CM 221336, Tucker, 13 BR 159) (CM CBI 54 Presley).

The evidence is legally insufficient to support the findings of guilty of Charge I and its specification.

The record of trial shows (R. 37) that the court closed and requested the reporter to remain in the closed session. This was improper but not prejudicial to the rights of the accused (CM 244523, Bennett, 28 BR 345).

The court in this case imposed a sentence of fine and dismissal. A fine is specifically authorized under Article of War 83 (Spec., Charge I). It is not specifically authorized under Article of War 96 but has been held to be proper thereunder (JAG Bull. Vol. III, p. 281). The opinion as to legal insufficiency of the Specification, Charge I does not therefore affect the legality of the sentence imposed by the court.

6. War Department records show that accused was born 29 April 1922. He completed three years of high school and did not graduate. He is unmarried. He enlisted as an aviation cadet on 27 March 1943, was appointed a Flight Officer on 23 May 1944, and a second lieutenant, AUS, on 9 April 1945. He was reprimanded under Article of War 104 on 21 December 1944 for speeding and operating a car in a reckless manner on a public street in Shreveport, Louisiana. He was convicted by a general court-martial on 7 January 1946 for five days' AWOL and being drunk and disorderly at Etwashausen, Germany, and sentenced to restriction to post for 6 months and forfeiture of $100 per month for a like period. His efficiency index is not known but his Commanding Officer testified at the trial that accused performed his work very satisfactorily. He was awarded the Air Medal on 2 May 1945 for having completed the required number of operational sorties against the enemy.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors 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 insufficient to support the findings of guilty of Charge I and its specification, but legally sufficient to support the finding of guilty of Charge II and Specification 2 thereunder and the sentence, and to warrant confirmation thereof. A sentence to dismissal is authorized upon conviction of a violation by an officer of Article of War 96.

Joseph J. Stern, Judge Advocate

Carlton G. Schenck, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 316770 1st Ind

WD, JAGO, Washington 25, D. C. MAY 2 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 Harvey G. Solander (0-2015465), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of suffering a Government vehicle to be damaged through neglect (Spec., Charge I), in violation of Article of War 83, and of wrongfully and unlawfully driving a motor vehicle while under the influence of intoxicating liquor (Spec. 2, Charge II), in violation of Article of War 96. He was sentenced to be dismissed the service and to be fined $500. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

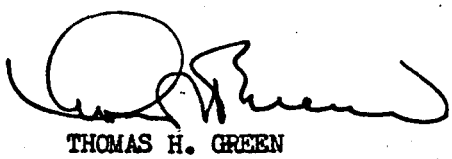
4. The evidence shows that in Germany accused was overtaken driving a jeep while in an intoxicated condition. A blood alcohol test showed that he was definitely intoxicated.

5. War Department records show that accused was born 29 April 1922. He served as a Flight Officer from 23 May 1944 to 9 April 1945, when he was appointed a second lieutenant. On 2 May 1945, he was awarded the Air Medal. He was reprimanded under Article of War 104 on 21 December 1944 for speeding and reckless driving, and was convicted by a general court-martial on 7 January 1946, of absence without leave and of being drunk and disorderly in public.

6. In view of all the circumstances, I recommend that the sentence be confirmed but that the fine of $500 be commuted to a reprimand and a fine of $100, and that the sentence as thus modified be carried into execution but that the execution of the dismissal be suspended during good behavior.

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

CM316770



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O.173, 20 May 1947

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

DEC 26 1946

JAGQ - CM 316780

UNITED STATES v. Private First Class CARL D. LEECH (43032384), Company H, Infantry Regiment, School Troops, Infantry School, Fort Benning, Georgia.	HEADQUARTERS FORT BENNING Trial by G.C.M., convened at Fort Benning, Georgia, 9 August 1946. Dishonorable discharge and confinement for two (2) years. United States Disciplinary Barracks.

HOLDING by 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 soldier named above and submits this, its holding, 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 Private Carl D. Leech, Company H, Infantry Regiment, School Troops, The Infantry School, Fort Benning, Georgia, on or about 22 June 1946, did at Columbus, Georgia with intent to defraud, falsely make an an indorsement in the words "Pfc Clarence H. Carlson" on a certain check in substantially the following words and figures:

(SEAL) "THE FIRST NATIONAL BANK 76-131/10
WAYNE, NEBRASKA June 10, 1946 No.2636

PAY TO THE ORDER OF Pfc. Clarence H. Carlson $100.00
THE 1ST NAT'L
-BANK- 100 DOLS OOCTS
TO LIVE STOCK NATIONAL BANK
27-11 Omaha, Nebraska

Mable J. Hurstad
~~President~~ Cashier
Asst "

indorsed on the back thereof:

"Pfc Clarence H. Carlson
37762236
Co G, 2nd Inf Btn, Inf Regt
Fort Benning, Ga."

and other indorsements that are unintelligible, which said indorsement was a writing of a private nature which might operate to the prejudice of another.

Accused pleaded not guilty to, and was found guilty of, the Specification and Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks at Camp Gordon, Georgia, 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, it is unnecessary to discuss or consider any of the evidence except such as bears upon the question of whether the check in question was actually personally indorsed by the accused as alleged.

Evidence for the Prosecution: One Harvey N. Robbins, a clerk in the Gem Whiskey Store of Columbus, Georgia, testified that on 22 June 1946 the accused entered the store and asked him to cash a check (identified by the witness as Prosecution Exhibit A) for $100.00; and that accused stated he owned some cattle and received a check every month (R 7); that he consented to cash the check and gave accused his fountain pen for the purpose of indorsing it; that he then watched the accused write the name "Pfc. Clarence H. Carlson" and the designation of a military organization on the back of the check (R 8, 21); that no one except himself and accused was present; that, not having enough money in the till to cash the check, he went to a theatre located three doors away and got the money (R 8); that he did not ask accused for any identification, but that accused voluntarily showed him a pass made out to Pfc Clarence H. Carlson and said "let's make it legal" (R 9, 10, 18, 21, 22); that he was in the Army himself over three years (R 19); that he knows that the only authentic pass is one signed by the individual to whom it was issued (R 19, 20, 21); that he doesn't remember whether the pass presented by accused was signed or whether he looked to see if it was signed, and only remembers the typewritten name Clarence H. Carlson (R 19, 20, 21); that he looked at the pass and the check and both names corresponded, but he made no comparison of the signatures (R 20); and that he did not look at the place for signature

on the pass (R 21); that he cashed the check by giving accused $100.00 (R 7, 9, 11); that accused then bought some liquor and paid for it (R 11, 14) and also paid for two bottles previously bought on credit (R 14); and that he didn't know the accused by name at the time the check was cashed (R 15, 23), nor at the times he had sold accused liquor on credit (R 17).

Pfc. Clarence H. Carlson testified that he had sent to his bank for some money, was notified by the bank that a draft (or check) was being sent by air mail; that he never received the check, and then advised the bank to stop payment (R 31, 32); that he had a Class A pass on 22 June 1946 and never authorized anyone to use it; that passes were kept in a small box in the custody of the Charge of Quarters when not in use (R 26); that his pass was missing when he called for it between the 20th and 25th of June, neither he nor the Charge of Quarters being able to find it in the box; and that it was found in the customary box a night or two later when he needed it again (R 27, 28).

Evidence for the Defense. After explanation of his rights as a witness, the accused testified under oath that he had previously been to the Gem Liquor Store with other soldiers (R 51), and on the first such visit to the store he was introduced by name to Harvey (witness Robbins), and from then on purchased liquor there four or five times on credit (R 52); that on 22 June he started drinking about 12:30 and went by bus to Columbus about 1:00 o'clock (R 54); that he and a friend bought and consumed nearly all of a pint of whiskey; that the friend left him and he continued to sit alone in the bar; that a soldier whom he did not know came in and sat down with him (R 55); this soldier said his name was Clarence H. Carlson and had on a combat badge and a School Troops patch — "One thing I remember in particular, he blinked his eyes a good bit. I don't know whether he was nervous - but he blinks his eyes a good bit. He had kind of perforated scars - I don't know if you would call it a perforated face but he had a few scars on his face and he had blond temples. His cap was on and I couldn't see his hair - I don't know whether his hair was bleached or whether his hair was black but his temples were bleached. I would say he was around 5' 10" and weighed between 140 and 147 pounds" (R 58); that he and the soldier consumed the remainder of accused's liquor; that the soldier asked him if he knew where accused could purchase liquor with a check (R 55); that the soldier produced a check saying it "was already signed" and asked accused to buy him a fifth of liquor, and also told accused to pay his own previously-made liquor bill; that he took the check to the Gem Liquor Store and asked Harvey (Robbins) to cash it and pay for a fifth of liquor and also to take out the amount accused already owed; that "I was going to show him my pass and he stated, 'Leech, your identification is not

necessary as long as you have been buying liquor from me!"; that Robbins took the check and went out, saying he was going to the theatre, come back within three or four minutes, and "give me the money and he took out for my two fifths and the fifth that I bought", whereupon accused left; that he then returned to the Silver Moon where he had left the soldier, and they continued drinking for a while; that they then separated (R 56, 57); that he had never seen the soldier before (R 57); that when this soldier handed him the check it was folded in three folds and he (accused) put it in his bill fold and never looked at it (R 56, 58, 62); that Robbins did not give him a pen to sign the check (R 58); that Prosecution Exhibit A is the check in question (R 62); and that he did not write the indorsement on it (R 65).

At the direction of the Law Member, accused wrote his name, rank, serial number and organization on a sheet of paper (R 66; Court Exhibit B); the Law Member then dictated and had accused write the name, serial number, organization and station of the payee of the check as the same appears in the indorsement thereon (R 66; Court Exhibit A).

4. It is clear from the foregoing that the only issue before the court was whether the accused indorsed the check in question as alleged. Indeed, by the very nature of the case that was the sole issue to be determined by the court. In a brief filed by individual counsel employed by the accused the following charge was made as an assignment of error committed during the trial:

> "During the trial of this case, the Court closed after hearing all the evidence and arguments by both defense Counsel and the Trial Judge Advocate. It spent quite some time in deliberation on the case, and then called prosecution and defense personnel to confer with the Court. At such conference the Court stated it desired to obtain some specimens of the accused's handwriting, that he had made prior to the trial. At this point one of the Court appointed defense counsel produced from his pocket a property receipt slip, which he stated he had gotten from the guard house records, and he stated the signature there on was Leech's. The Court then made a comparison of the writing on this document, the endorsement on the check, and samples of handwriting the accused had made during trial (Court exhibits A and B) at the request of the Court. There were comments by various members of the Court, the property receipt slip was returned to the officer who had produced it, and the Court was again closed. In approximately five minutes Court was opened, and the record of any previous convictions called for, indicating a guilty verdict had been reached."

In a Certificate of Correction executed by the president and trial judge advocate of the court on 24 October 1946, it is stated:

> "It is certified that during the closed session of the General Court-Martial appointed by paragraph 15, Special Orders No. 178, Headquarters Fort Benning, 1 August 1946, in the case the United States v. Private First Class CARL D. LEECH, that one member of this court suggested that a sample of the accused's hand writing, made before the trial, be obtained.
>
> "The prosecution and counsels for defense were summoned and informed of the courts desire. At this point the regularly appointed defense counsel handed the court a property slip, allegedly signed by the accused.
>
> "The President-Law Member before viewing or permitting other members to view this slip asked both the defense and prosecution whether they desired to voice objection. Both the defense and the prosecution replied that they had no objection to offer.
>
> "The receipt slip was then viewed by members of the court and handed back to the defense counsel."

It thus appears conclusively that (1) after the court was closed to deliberate upon its findings it was not satisfied that the accused wrote the indorsement on the back of the check, and was in a state of indecision upon that sole and vital issue of fact, and desired further proof in the form of a specimen of accused's handwriting made before the trial; (2) that the court then called before it in closed session the prosecution and defense counsel and informed them of its desire; (3) that the regularly appointed defense counsel thereupon in the closed session of the court produced and handed to the court a property receipt slip and stated that the signature thereon was the accused's; and (4) that, with the express consent of the prosecution and defense, the property receipt slip was viewed by the members of the court and returned to defense counsel. That the alleged signature of the accused upon that property receipt slip immediately resolved against the accused the court's doubts regarding the handwriting in the indorsement is abundantly demonstrated by its findings of guilty.

In his review of the record of trial the staff judge advocate called this "incident of the trial" to the attention of the reviewing authority and stated:

> "It is conceded that under ordinary circumstances the admission in evidence of a material document not properly authenticated or identified would constitute prejudicial error especially when the evidence is received in other than an open session of the court and in the absence of the accused. In this case, however, the legal

evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men a finding of guilty. Such being true, the illegal reception of the document in question is not prejudicial, and may be disregarded entirely. The test to be applied is thus laid down in CM ETO 1693 (1944) quoted in Bull. J.A.G., May 1944, p. 185:

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

We are unable to concur with the staff judge advocate's contentions, either that this illegally admitted document was insubstantial, or that the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men a finding of guilty. As to the latter, the court's very frankly admitted indecision patently proves that to its mind the legal evidence of record was insufficient to prove accused's guilt beyond a reasonable doubt, much less "practically to compel in the minds of conscientious and reasonable men a finding of guilty". With this we agree. That the property receipt slip, placed before the court then admittedly deadlocked in the abyss of uncertainty, was in fact the substantial factor which swayed the court to conclude that the accused wrote the indorsement is inescapable.

That placing the property receipt slip before the court and the court's consideration thereof in closed deliberative session was wholly illegal is obvious when fundamental principles of law and concepts of fair dealing and fair trial are considered. Those principles and concepts are recognized and given expression in the Manual for Courts-Martial.

> "The clearing and closing of a general or special court-martial is impliedly or expressly required by statute (A. W. 19, A.W. 31), during the deliberation and voting upon the findings and sentence .....
>
> "When the court is closed, all persons except the members who are to vote on the matter will withdraw, unless such members withdraw to another room for the closed session. See A.W. 30 in this connection " (par. 50, MCM, 1928).

Article of War 30 provides that:

"Whenever a general or special court-martial shall sit in closed session; the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the record evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if any there be". (Emphasis supplied).

Again in Paragraph 78d of the Manual it is prescribed that:

"The court sits in closed session during deliberation on the findings. Deliberation may properly include full and free discussion as to the merits of the case."

And Paragraph 78a expresses a mandatory injunction with respect to the basis of findings:

"Only matters properly before the court as a whole may be considered. A member should not, for instance, be influenced by any knowledge of the acts, character, or service of the accused not based on the evidence or other proper matter before the court; or by any opinions not properly in evidence; ....." (Emphasis supplied).

In CM 156620, German, the court was closed during the trial of the case and before final argument. Upon reopening, and without having made any findings, it adjourned for the stated purpose of consulting higher authority on certain questions. The record fails to disclose the nature of those questions. Upon reconvening, the court, without disclosing what advice it had received, immediately proceeded to find the accused guilty. It was held that the procedure was illegal, and that a court-martial is not permitted in closed session to consult any outside authority, and that the error was fatal to the conviction.

It is true that a court-martial has the power and authority to require additional evidence, upon its own initiative. But the manner of presenting any such additional evidence is clearly defined by the Manual:

"The court is not obliged to content itself with evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence." (par. 75a, MCM, 1928).

The language employed in the foregoing provision plainly manifests that it contemplates the presentation in open court of any additional evidence which the court may desire. In his Military Law and Precedents (Second Edition, Reprint 1920, page 287), Colonel Winthrop said on this subject:

> "All testimony, whether oral or written, and whether upon the main or an interlocutory issue, is to be introduced in open court, and no testimony can be received by the court during a period of deliberation after it has been cleared" (Emphasis supplied).

To permit the door of the court's closed session to be opened for the admission of extra-judicial evidence or information never subjected to the tests of trustworthiness and truth provided by law plainly constituted fatal error; and that error was in no way mitigated by the defense counsel's consent that the questioned document be considered by the court. Counsel is powerless to waive or forfeit a right so substantial and vital to an accused. The action of the court in receiving and considering such evidence was illegal, and as a matter of law injuriously affected the substantial rights of the accused within the meaning of Article of War 37.

5. The court was properly constituted and had jurisdiction of the person and the subject matter. Except as noted, no errors injuriously affcting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

Charles M. Dickson, Judge Advocate

Th Thyne Oliver, Judge Advocate

James S. Dahlen, Judge Advocate

JAGQ - CM 316780 1st Ind

DEC 27 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Fort Benning, Georgia.

1. In the case of Private First Class Carl D. Leech (43032384), Company H, Infantry Regiment, School Troops, Infantry School, Fort Benning, Georgia, 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. I recommend that the findings of guilty and the sentence be vacated.

2. Under the circumstances of this case and in view of the conflict in the competent evidence, it affirmatively appears that the error injuriously affected the substantial rights of accused within the meaning of Article of War 37.

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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 316780).

1 Incl
Rec of Trial

HUBERT D. HOOVER
Colonel, JAGD
Acting The Judge Advocate General

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

JAGH CM 316801

30 DEC 1946

UNITED STATES v. PRIVATE FIRST CLASS LEE A. SMITH, (RA 34874874) 3526th Quartermaster Truck Company, and TECHNICIAN FIFTH GRADE EARL GREEN (44049060), 3693d Quartermaster Truck Company.	HEADQUARTERS UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M. convened at Headquarters, PHIBCOM, APO 358, 21 June 1946. Sentences as to each accused: dishonorable discharge, suspended, total forfeitures, and confinement at hard labor for three (3) years. Branch United States Disciplinary Barracks, Camp McQuaide, California

OPINION of the BOARD OF REVIEW

HOTTENSTEIN, SOLF and FLANAGAN, 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 sentence as to each accused. 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 were tried upon the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War

Specification: In that Private First Class Lee A. Smith, 3526th Quartermaster Truck Company, and Technician Fifth Grade Earl Green, 3693rd Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Manila, P. I., on or about 1 May 1946, wrongfully and knowingly attempt to dispose of about 217 boxes of lard, of value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 94th Article of War

Specification: In that Private First Class Lee A. Smith, 3526th Quartermaster Truck Company, and Technician Fifth Grade Earl Green, 3693rd Quartermaster Truck

Company, acting jointly and in pursuance of a common intent, did, at Manila, P. I., on or about 1 May 1946, wrongfully and willfully apply to their own use and benefit one truck, of the value of about $ 2,521.00, property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of both Charges and of the specifications thereunder. 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 three (3) years. The reviewing authority approved each sentence and ordered it executed, but suspended the dishonorable discharge until the soldier's release from confinement. Branch United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War may direct, was designated as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 1720, United States Army Forces, Western Pacific, dated 14 September 1946.

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

About 0830 hours, 1 May 1946, on the basis of information furnished by a confidential informer, First Lieutenant Agapito P. Manrique, G-2, Military Police Command, Philippine Army, and three other military policemen in an automobile, trailed a truck driven by accused Green and Smith along Dewey Boulevard, Manila. The truck was followed by a jeep occupied by four Filipino civilians. Along the way the jeep passed the truck and the truck followed the jeep. Lieutenant Manrique continued to follow the truck. Accused turned left and drove the truck through a gate to a building occupied by the Paramount Restaurant. The jeep passed on by the gate. Lieutenant Manrique and his military policemen followed the truck and went around to the rear of the building where they found the truck parked at the back of the restaurant. Accused were placed under arrest and were taken to AFWESPAC compound where they were searched and questioned (R 7-12). The civilians in the jeep were not apprehended. The jeep had passed the restaurant gate and was far away, and the civilians in it were not taken into custody (R 8, 11, 13). No weapons were observed in the possession of the civilians in the jeep (R 8, 13).

A pier cargo tally issued to accused Green was admitted in evidence (Pros. Ex. "D"; R 18), which showed that 217 boxes of lard were placed on Green's truck and that the consignee was "Q.M. Depot #17." It was stipulated that the lard in question had a value of more than $50.00 (R 7).

Accused Green made a pre-trial statement after being warned of his rights. No threats or promise of reward were made (R 15; Pros Ex A). In his statement, which was admitted into evidence, Green stated that after he left the pier to go to Quartermaster Depot 17 accused Smith, the armed guard, told him to turn left. When he did so, three armed Filipino civilians told him to turn right and later to turn into a yard. When he did so, Lieutenant Manrique drove up and the Filipino civilians ran away. Smith, the armed guard who was riding in the rear, told Green he did not shoot when they were held up because he did not have a clip for his carbine (Pros Ex A).

After being advised of his rights, told that he need not make a statement, and that if he did, such statement could be used against him (Pros Ex B), Smith also made a pre-trial statement which, in substance, was similar to Green's (Pros Ex C).

4. The evidence for the defense is summarized as follows:

After receiving an explanation of their rights, accused Green elected to remain silent (R 19). Accused Smith testified for the defense substantially as follows: On the day in question, he was riding in the rear of the truck and told Green to turn off into a side street to avoid traffic. A civilian jeep with four armed Filipino civilians "came up in a jeep and shoved their guns on the driver" (Green). They ordered him to drive to Dewey Boulevard. Later they again drove near the truck and ordered Green to go left to the cafe. Two Filipinos then got out of the jeep and told accused "to get to the yard" (R 20). The military policemen followed the truck into the yard and ordered accused to go to the Philippine Provost Marshal's headquarters. Lieutenant Manrique also gave the same order to the Filipino civilians in the jeep (R 21). Green remembered the names and types of revolvers that the civilians had, because "they had their guns when Lt. Manrique talked with them" (R 20-21). Green further testified that he had never been to the cafe before and knew no one connected with the restaurant (R 22).

5. Lieutenant Manrique was recalled in rebuttal by the prosecution and testified that he did not see the Filipinos in the jeep indicate where the truck was to go (R 25). The Filipinos were not present when he talked to the accused. Witness did not see anyone pointing a weapon at the accused and if the Filipinos in the jeep were armed and were threatening accused, he would have seen it (R 25-26). When witness approached accused in the yard, they were standing behind the truck and one accused said to him, "I don't know why those two Filipinos directed me here" (R 25).

6. The first question presented for consideration is whether accused did "wongfully and knowingly, attempt to dispose of about 217 boxes of lard" as alleged (Charge I and its Specification). In paragraph 152c,

Manual for Courts-Martial, 1928, page 190, an attempt is defined as follows:

> "An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark.)
>
> "An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt."

Further in the same paragraph and under the elements of proof necessary, we find:

> "(a) That the accused committed an overt act which if not interrupted by circumstances independent of the doer's will would have resulted in the commission of the offense, as alleged; (b) that the accused intended to commit that particular offense (this may usually be shown by the facts and circumstances surrounding the act); and (c) the apparent possibility of committing the offense in the manner indicated."

Accused were to take the lard to Quartermaster Depot 17. The court evidently disbelieved the contention by the defense that accused were forced against their will by armed Filipino civilians to drive the loaded vehicle into the restaurant yard. However, even if it be assumed that accused voluntarily followed the directions of the Filipino civilians to the yard, and that no threats or duress of any nature were used by the civilians, there is no evidence of any connivance with respect to the lard between accused and the Filipinos. The mere fact that accused, following directions, drove along a certain route and into the yard does not, in and of itself, provide a reasonable inference that accused intended to dispose of the lard either on their own account or pursuant to any preconceived agreement with the civilians. Accused could have followed the Filipinos' directions to the restaurant for a variety of other reasons. There is no evidence from which it could reasonably be inferred that accused intended to sell the lard to that particular restaurant nor, in fact, was the identity of any intended buyer established. There is no evidence whatsoever as to the reason accused drove into the yard, and the possibility that they merely intended to have a conference with the civilians, or to eat or drink in the restaurant, is as reasonable an inference as the inference that they intended to sell the lard to the restaurant. When Lieutenant Manrique apprehended accused, they were standing at the rear of the truck. No attempt to unload the vehicle had been made, nor was there any other act there performed by accused which indicated an intent to dispose of the lard.

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of the defendant's guilt. We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen." (Buntain v. State (15 Tex. Crim. App. 490) (Underscoring supplied).

The Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty of Charge I and the Specification thereunder.

It is alleged in the Specification of Charge II that accused wrongfully and willfully applied the vehicle described to their own use and benefit.

Misappropriation and misapplication is defined in the Manual for Courts-Martial, 1928, par. 150i, page 184, as follows:

"Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. The misappropriation of the property or money need not be for the benefit of the accused; the words 'to his own use or benefit' qualify the word 'applies' only."

The same paragraph above referred to also sets out the proof required:

"(a) That the accused misappropriated or applied to his own use 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 willfully and knowingly done; and (d) the value of the property, as specified."

Accused were properly dispatched from the pier to deliver the lard at Quartermaster Depot 17. There was no evidence as to the route which they should follow from the pier to Quartermaster Depot 17, nor any evidence that the streets along which the truck was driven constituted a deviation from any prescribed instructions as to the route accused were to follow

to their destination. As hereinbefore stated, the evidence failed to show that accused wrongfully attempted to dispose of the property. Therefore, the evidence may not be considered in this connection with respect to the alleged misapplication.

Does the fact that accused drove from the street into the yard in the rear of the restaurant, itself constitute an application of the vehicle to their own use? For all that appears in the evidence the street on which the gate to the yard of the restaurant was situated, was on an authorized route to Quartermaster Depot 17. It was not shown that accused were to proceed directly to their destination without stopping, or that they were without authority to enter the restaurant enroute for a meal, coffee, or for other normal purposes.

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 of guilty and the sentence as to each accused.

A. Hottenstein, Judge Advocate

Waldemar A. Loef, Judge Advocate

_____, Judge Advocate

JAGH - CM 316801 1st Ind

WD, JAGO, Washington 25, D. C. JAN 6 1947

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) and Executive Order No. 9556, dated 26 May 1945, is the record of trial in the case of Private First Class Lee A. Smith (RA 34874874), 3526th Quartermaster Truck Company, and Technician Fifth Grade Earl Green (44049060), 3693rd Quartermaster Truck Company.

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 sentences and recommend that the findings of guilty and the sentences be vacated and that all rights, privileges and property of which the accused have been deprived by virtue of the findings and sentences so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CM-316801

(G.C.M.O. 13, 22 January 1947).

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

JAGK - CM 316809

21 NOV 1946

UNITED STATES	)	US MILITARY GOVERNMENT IN KOREA
v.	)	Trial by G.C.M., convened at Seoul, Korea, 6 September 1946. "Dishonorable discharge," total forfeitures and confinement for three (3) years.
Major HARRY W. PARDEE (0-906346), Air Corps	)	

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 80th Article of War.

Specification 1: In that Major Harry Pardee, Air Corps, Headquarters, United States Army Military Government in Korea did, at Taejon, Korea on or about 1 June 1946 unlawfully dispose of the following captured or abandoned property of the United States, namely: two Chevrolet trucks of the value of more than $50.00, thereby receiving as profit to himself the sum of more than $50.00.

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

Specification 1: In that Major Harry Pardee, ***, did at Taejon, Korea on or about 7 June 1946, with intent to defraud falsely alter a certain receipt in the following words and figures, to wit:

S 104 MCC	Materials Controls Corporation Seoul, Korea	No. 6-3-15
Contract No. Shipped to Destination: Taejon	Provincial Transportation Officer	P 1 of 2 pages Date: 12 March 1946
Terms: In full 12 Mar 46	Chung Chong Namdo Sold to Moon Kap Tong	Date Shipped From Car No. How shipped and route: FOB

(60)

Description	Quantity	Price	Amount
Trucks, Jun, Numbers listed below	16 ea.	¥ 225.00	3,600.00
0118073248			
63042			
17657			
23402			
1037			
11135			
19615			
23400			
18181			
82763			
122136			
1238737			
711066			
23447			
53044			
1266			
2219336	2 ea.		150,000.00
2166496			

Origin & or Authority
Approved by /s/ Maj W N Rider
Above materials received and found satisfactory (Signed)
Charge Account Approved
Which said receipt was a writing of a public nature, which might operate to the prejudice of another.

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

Specification 1: In that Major Harry Pardee, ***, did at Taejon, Korea, on or about 7 June 1946, with intent to defraud, wrongfully and unlawfully alter and utter to Moon Kap Tong a certain receipt in words and figures as follows, to wit:

S 104 MCC
Material Controls Corporation
Seoul, Korea
No. 6-3-15

Contract No.
P 1 of 2 pages
Shipped to
Provincial Transportation Officer
Date: 12 March 1946
Destination: Taejon
Chung Chong Namdo
From
Terms:
Car No.
In full 12 Mar 46
How shipped and route:
Sold to Moon Kap Tong
FOB

Description	Quantity	Price	Amount
Trucks, Jun, Numbers listed below	16 Ea.	¥ 225.00	3,600.00
0118073248			
63042			
17657			
23402			
1037			
11135			
19615			
23400			
18181			
82763			
122136			
1238737			
711066			
23447			
53044			
1266			
2219336	2 ea.		150,000.00
2166496			

Origin & or Authority
Approved by /s/ Maj W N Rider

Above materials received and found Satisfactory (Signed)
Charge Account Approved

and by means thereof did fraudulently obtain from the said Moon Kap Tong the sum of 150,000 yen, he the said Major Harry Pardee, then well knowing that he did not have authority to make such alteration.

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

Specification 1: In that Major Harry Pardee, ***, did at Taejon, Korea, with intent to defraud, on or about 20 May, 1946, knowingly and willfully apply to his own benefit ten fifty gallon drums containing 500 gallons of gasoline more or less of the value of about ¥ 9000, property of the Military Government in Korea.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of all the charges and guilty of all the specifications except Specification

2 of Charge IV. 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, the Commanding General, U.S. Military Government in Korea, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

In September 1945 the accused, who had been assigned to the 102nd Military Government Group, was stationed at Taejon, Korea, where he performed the duties of Mayor of the city and Group Transportation and Petroleum Control Officer (R. 36, Pros. Ex. 9). Under the provisions of Ordinance No. 24, Headquarters United States Army Military Government in Korea, dated 5 November 1945, there was created a "corporation" known as "Materials Control Corporation" and such ordinance further provided that

> "The corporation is hereby constituted an independent agency of the Government of Korea for the purpose of aiding in and facilitating the procurement, receiving, handling, storing, safe-guarding, custody, accounting, sale and other distribution of all civilian relief and rehabilitation supplies, surplus war materials, and all surrendered or abandoned Japanese movable and tangible personal property which is the subject of market operations" (R. 15).

The main office of the Materials Control Corporation was at Seoul, Korea, however, there was a branch office in Taejon where Major William N. Rider, Air Corps, was at one time a director (R. 15, Pros. Ex. 4). For several months prior to March 1946, Mr. Moon, Kap Tong, the President of a large Korean lumber and fuel business was officially employed by accused as a supervisor in the repairing and allocating of captured and abandoned Japanese vehicles to the various departments of the Military Government. He had also borrowed from the Materials Control Corporation some twenty of these trucks to haul fuel wood from the mountains (R. 20). Mr. Moon testified that he was interested in buying all "broken up trucks and putting them together" and that on or about 12 March 1946 the accused introduced him to "M.C.C." where he purchased 16 of such vehicles for the sum of 3600 yen, receiving a receipt therefor signed and approved by Major Rider, Materials Control Corporation director at that time (R. 21,23; Pros. Ex. 6). Sometime during the first part of June 1946 the accused and his interpreter, Mr. Kwak, went to the office of Mr. Moon, where accused, through the interpreter, informed him that he was offering for sale two trucks, the same being two of the twenty trucks which Moon had previously borrowed for the hauling of fuel for his company. After some discussion Mr. Moon agreed to pay the sum of 150,000 yen therefor, stating that he needed the trucks "badly" (R. 22). About a week later the accused appeared at the office of Mr. Moon where Moon's business manager, who had procured the money from a bank, counted the money in the presence of the other parties and delivered

150,000 yen to accused (R. 22,27). Either Moon or his business manager mentioned a receipt for the money and accused stated, "Bring that receipt that you got from M.C.C., and I will add on to that receipt these two vehicles" (R. 27). On the following morning Mr. Moon took the receipt he had secured when he purchased the 16 junk trucks to the office of accused, left it and in the afternoon accused returned the receipt to him with two additional trucks listed thereon, numbered 2219336 and 2166496 (R. 23).

Mr. An, Chong Kun, business manager for Mr. Moon, testified that these transactions took place on or about 19 June 1946.

First Lieutenant Thomas F. Parker, CAC, Chung Chong, Taejon, testified that he was branch director of Materials Control Corporation, and custodian of its records and that the Chevrolet trucks Nos. 2219336 and 2166496 were carried on his records as Japanese motor vehicles, the property of Materials Control Corporation, and that they had never been officially sold by the corporation (R. 13,17, Pros. Ex. 3).

Mr. Clarence T. Burbine, Materials Control Corporation salesman, Seoul, Korea, testified that his duties involved the appraisal of and sale of captured vehicles, that he had examined Chevrolet trucks Nos. 2219336 and 2166496 and that according to his price lists these trucks had a resale value of between 15,000 and 30,000 yen each, however, upon objection by defense he was not permitted to give an opinion as to whether their values exceeded $50 in American money (R. 19).

On some date in May 1946 Mr. Moon purchased from accused ten 53-gallon drums of gasoline paying accused the sum of 1,104 yen per drum. This gasoline was in addition to the regularly authorized ration allowed Moon's company and he was able to withdraw the gasoline from a warehouse by an order written and initialed by accused (R. 23-25, Pros. Ex. 7).

Mr. Thomas P. Nock, Director of the Petroleum Distributing Agency, charged with supervision of the distribution of petroleum in the Provinces of Chung Chong Namdo and Chong Chung Pukto, which includes Taejon, testified that according to his records 20 or 30 drums of 62 octane gasoline, out of a total shipment of 119 drums, 16 January 1946, had been allotted to the 102 Military Government and signed for by Major Pardee (R. 29). He further stated that only agents of the Petroleum Distributing Agency were authorized to sell gasoline to civilians (R. 31). Mr. Nock made inquiry by letter to the accused as to the disposition of the gasoline allotted the Military Government at Taejon and on 11 June 1946 the accused replied by letter as follows:

> "Portion of gasoline assigned to K.T.C. Taejon, from K.T.C. Pusan, 16 January 1946 to Provincial Military Government, Chung Chong Nando was 15 Drums of 62 octane gasoline. This amount was signed for by the undersigned and distributed to Provincial Military Government

Depts for use." (R. 30).

John W. Braddock, court reporter for 25th Criminal Investigation Division, identified a typewritten statement signed by accused on 19 July 1946 and introduced in evidence as Prosecution Exhibit 9. Braddock stated that prior to taking the statement Agent Gower advised accused of his rights under Article of War 24, told him that any statement he made could be used against him in the event of trial (R. 33-34). The statement, which was signed and sworn to before a summary court officer sets forth a series of questionable property transactions with Koreans and included therein is a complete confession that accused on 1 June 1946 sold to Moon the two trucks (1939 Japanese, numbers 2219336 and 2166496) for 150,000 yen, retaining the money for his own personal use. He also confessed that he took the receipt previously issued to Moon for 16 trucks and added the numbers of these trucks (2219336 and 2166496) thereto. He further admitted that sometime after 1 March 1946 (the date 15 drums of gasoline were consigned to him) he sold 10 drums to Moon, Kap Tong, for 10,000 yen and used the money for his personal benefit (R. 36, Pros. Ex. 9).

At the suggestion of the prosecution the court-martial took judicial notice of the provisions of FM 27-10, WD Basic Field Manual, "Rules of Land Warfare," and more particularly paragraph 320 authorizing an army of occupation to take possession of movable property of the hostile state and situated in the occupied territory; paragraph 321 defining movable property; paragraph 322 authorizing the occupying power to treat movable property as public property when the ownership is unknown; and paragraph 327 which states that all captures and booty belong to the government of the captor (R. 11).

4. For the defense.

The accused elected to testify as to the manner in which his confession was procured. He stated that he was first contacted by the Criminal Investigation Division at the Yung Dong Po Replacement Depot where Captain Sagar requested permission to talk to him. He agreed to be interviewed. The captain asked if he understood his rights under Article of War 24. He replied that he did so understand. Accused asked if he was under arrest and the captain replied, "No." He (accused) was so nervous he had no idea of what was going on and considered the incident as a routine investigation or inspection. He was again advised of his rights after the statement was prepared and before he signed it. Prior to signing the statement he read same, including the portion thereof reciting,

> "I have read the foregoing statement in its entirety and fully understand its contents. This statement is made by me voluntarily and willingly without threat, or fear, or hope of reward, and the same is true to the best of my knowledge and belief" (R. 35-36).

After being further advised of his rights the accused elected to be sworn

as a witness in his own behalf but he did not testify concerning any of the offenses for which he was charged. He related his age, 47 years, his marital status, stating that he had three children all of whom were in the service and that in civilian life he earned more money as a manager of a large trucking concern than he earned as an officer in the Army. The only entertainment he had found in Korea was to drink and "that's about all" (R. 38-39). The prosecution did not cross-examine accused since he did not testify to any matter concerning which he was charged.

5. Before pleas to the general issue were received defense counsel argued at length that the charges and specifications, as drawn, violated the rule against unreasonable multiplication of charges (see par. 27, p. 17, MCM, 1928). Although the Specification, Charge I, alleged unlawful disposition of two Chevrolet trucks in violation of Article of War 80, and Specification 2, Charge IV, alleged that accused applied the same vehicles to his own benefit in violation of Article of War 96, no prejudice resulted since the court acquitted accused of the latter alleged offense. The above-quoted paragraph of the Manual recognizes that "there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses." The Specification, Charge II (AW 93), and the Specification, Charge III (AW 95), cover substantially the same transactions but there is no illegal multiplicity as the same facts and circumstances may give rise to two or more offenses and an officer may be charged with and found guilty of violations of both the 93rd and 95th Articles of War, although the separate offenses stem from the same set of facts (CM ETO 10362, Hindmarsh; McRae v. Henkes, 273 Fed. 108; CM 315575, Heilman).

The Specification of Charge I alleges that accused unlawfully disposed of two Chevrolet trucks, "captured or abandoned property of the United States," at a profit to himself in excess of $50.00. Accused admits in his confession and the evidence shows that at the time and place alleged he unlawfully and without authority sold two trucks, each described by serial number, to Mr. Moon, a Korean civilian, at a profit to himseof of 150,000 yen. It was shown that these trucks were Chevrolets and it also appears, both from accused's confession and from the business records of the Materials Control Corporation, a creature of the Military Government in Korea, that these trucks were captured Japanese property. The court could properly take judicial notice of Section V, W.D. Circular 64, 5 March 1946, fixing the rate of exchange of the Korean yen at .066667 in United States money. That all captured property belongs to the United States is beyond dispute (AW 79; par. 327, FM 27-10; CM 310446, Ruppel; CM 302833, Young).

Specification 1 of Charge IV alleges that the gasoline was the property of the "Military Government in Korea." The evidence shows that the United States Military Government is the only military government in Korea. The ownership alleged may be either that of the general or special owner (CM 244621, Morrison, 28 BR 361).

It was sufficient therefore to allege that either the United States or the agency of the Government having actual custody of the gasoline was the owner (CM 266206, Heselwood, 43 BR 180).

The evidence clearly shows that accused wrongfully sold the gasoline to Mr. Moon, a Korean civilian, and kept the proceeds of the sale. Such acts certainly constituted a fraudulent application of the property to his own benefit as alleged in Specification 1 of Charge IV. The evidence further established that accused made a material alteration on an official receipt for property legally purchased by Mr. Moon to cover up a subsequent illegal transaction as alleged in the Specification to Charge I, and that he fraudulently uttered such illegally altered receipt to Mr. Moon as alleged in the Specification to Charge III.

The Board of Review is of the opinion that the evidence, including accused's confession, clearly establishes his guilt of the offenses charged. The testimony of accused himself leaves no doubt but that his confession was obtained without threat or promise of reward. An Army officer of mature years cannot be heard to say that he was overreached in giving his confession to one his junior in rank solely because he thought it was just a routine affair. This it may have been. The confession is shown to have been voluntarily given.

6. The court sentenced the accused to be dishonorably discharged the service. Since accused was an officer this part of the sentence was inappropriate. However, it was not illegal and the irregularity in form may be cured by the action of the confirming authority (CM 249921, Maurer, 32 BR 229).

7. War Department records disclose that accused was born 28 May 1899 and is therefore 47 years of age. He is married and has three children, all of whom have served or are serving in the armed forces. Major Pardee was commissioned a captain, Air Corps, AUS, on 21 May 1942, assigned duty at the AAF Technical Training Command, Chanute Field, Illinois, where he was alternately motor transportation officer and assistant motor transportation officer until May 1945. On 10 March 1945 he was promoted to major. His last efficiency report shows a rating of excellent. From 21 May 1945 to 14 July 1945 he attended The School of Military Government at Charlottesville, Virginia, but failed to meet the academic requirements. As a civilian he has had extensive experience as general manager of a large motor transport company.

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. 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 mandatory upon conviction for violation of Article of War 95 and authorized upon conviction for violation of Articles of War 80, 93 and 96.

Chester D. Silvers, Judge Advocate

On Leave, Judge Advocate

Gilbert Gatchpoyle, Judge Advocate

JAGK - CM 316809 1st Ind

WD, JAGO, Washington 25, D. C. Nov 29 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Harry W. Pardee (0-906346), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of unlawfully disposing of two captured Chevrolet trucks, property of the United States, in violation of Article of War 80, forgery by falsely altering a certain receipt for vehicles in violation of Article of War 93, by falsely altering and uttering a certain receipt for vehicles in violation of Article of War 95, and willfully applying to his own benefit ten 52-gallon drums of gasoline, property of the Military Government in Korea, in violation of Article of War 96. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I also concur in the opinion of the Board of Review that that portion of the sentence imposing dishonorable discharge, while inappropriate in the case of a commissioned officer, is not illegal.

The record shows that the accused, the town Mayor, Group Transportation and Petroleum Control Officer, at Taejon, Korea, on or about 1 June 1946 unlawfully sold to a Korean civilian named Moon, Kap Tong, two captured Chevrolet trucks, property of the United States, for the sum of 150,000 yen; that he also, to conceal this sale, altered and uttered an official receipt which had been given Moon by an officer of the Material Control Corporation so as to include the two trucks in question; that on or about 20 May 1946 he unlawfully sold to Mr. Moon ten 52-gallon drums of 62 octane gasoline for the sum of 1,104 yen per drum, such gasoline being the property of the United States Military Government in Korea. The accused retained the proceeds of these illegal sales totaling 161,040 yen and used the money for his own personal benefit.

4. The accused is 47 years of age and married. He has two sons and

a daughter, all of whom served in the armed forces. His oldest son achieved a creditable record as a pilot with the Eighth Air Force, having 73 missions over Germany to his credit. His younger son served with the Marines in the South Pacific and the daughter was enlisted in the Women's Army Corps. In civilian life accused had wide experience as general manager of a large motor transport company in the Eastern United States. He was commissioned a captain, Air Corps, AUS, on 21 May 1942 and assigned to the Army Air Forces Technical Training Command, Chanute Field, Illinois, where he performed duty as motor transportation officer or assistant thereto until May 1945. His efficiency ratings show excellent or better, although he failed the course in military government at Charlottesville, Virginia, in July 1945.

5. I recommend that so much of the sentence as provides for accused 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 be confirmed and ordered executed. Accused was convicted of forgery, an offense made punishable by penitentiary confinement for more than one year by section 72, Title 18, U.S.C. In view of accused's age and all the circumstances I recommend that an appropriate United States disciplinary barracks be designated as the place of confinement.

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

CM 316809

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 371, 11 December 1946).

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

NOV 4 1946

JAGQ-CM 316812

UNITED STATES	)	11TH AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Sapporo, Hokkaido, Japan, APO 468, 23 August and 5 September 1946. To be hanged by the neck until dead.
Private FRANK R. WALLRATH (42072432), Company F, 187th Glider Infantry.	)	

OPINION of the BOARD OF REVIEW
DICKSON, OLIVER and McDONNELL, 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 58th Article of War.

Specification 1: In that Private Frank R. Wallrath, Company "F", 187th Glider Infantry, did, at or near Nasugbu, Luzon, Philippine Islands, APO 468, on or about 8 February, 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was returned to military control at Batangas Province, Luzon, Philippine Islands on or about 22 July, 1945.

Specification 2: In that Private Frank R. Wallrath, Company "F", 187th Glider Infantry, did at or near Lipa, Luzon, Philippine Islands, APO 468, on or about 23 July, 1945, desert the service of the United States and did remain absent in desertion until he was returned to military control at Manila, Luzon, Philippine Islands, on or about 11 February, 1946.

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

Specification 1: In that Private Frank R. Wallrath, Company "F", 187th Glider Infantry, having been placed in confinement in the Regimental Stockade, 187th Glider Infantry, on or about 22 July, 1945, did, at or near Lipa, Luzon, Philippine Islands, APO 468, on or about 23 July, 1945, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Frank R. Wallrath, Company "F", 187th Glider Infantry, having been placed in confinement in the Regimental Stockade, 187th Glider Infantry, on or about 30 June 1946, did, at or near Tsukisappu, Hokkaido, Japan, A.P.O. 468, on or about 25 July, 1946 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War.
(Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

He pleaded not guilty to all Specifications and Charges. Upon motion by the defense at the close of the prosecution's case, the accused was found not guilty of Charge III and its Specification. He was found guilty of all other Specifications and Charges. No evidence of previous convictions 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 sentence was adjudged on 23 August 1946. By second indorsement dated 5 September 1946, the reviewing authority returned the record of trial to the court for proceedings in revision, in accordance with paragraph 83 of the Manual for Courts-Martial. The indorsement stated, inter alia:

"3. Due to the severity of the sentence adjudged, and in view of the fact that said sentence is not mandatory for the offense, it is desired that the court be afforded an opportunity to reconsider its sentence after sufficient time has elapsed since the trial to insure careful thought and deliberation thereon.

"4. The members of the court present at the original trial should reconvene, reconsider their previous sentence, and either adhere to their previous sentence or revoke their previous sentence and upon secret written ballot adjudge a different sentence".

The court was accordingly reconvened on 5 September 1946, all members who were present at the previous session being present, and adhered to its former findings and sentence. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. The evidence for the prosecution may be summarized as follows:

a. Specification 1, Charge I. A duly authenticated extract copy of the morning report of Company F, 187th Glider Infantry, was introduced in evidence and established the initial unauthorized absence of the accused on 8 February 1945 (R 7; Pros. Ex. 1). Accused's return to military control on 22 July 1945 was proved by an extract copy of the morning report of the same organization, introduced in evidence (R 7, 8; Pros. Ex. 2). An extract copy of the morning report of Company F, 187th Glider Infantry, introduced in evidence as Prosecution Exhibit 6, showed the Record of Events of that organization for the dates 27 and 31 January 1945; 1, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 15 February 1945 (R 8). This record of the activities of the organization shows that during the periods immediately preceding and following accused's unauthorized absence his company was in combat with the enemy. The morning report entries for the dates of 5, 6, 7, 8, 10 and 11 February 1945 reflect the following:

"5 Feb 45- 1st Platoon less one squad rejd Co at Ag. Squad sent on patrol to reconnaisance caves W of Mt Aiming. 2 EM WIA,

6 Feb 45- Left Aga at 0800 marched 2½ mi and Co moved by truck to Tagaytay City arrived at 1900.

7 Feb 45- Patrol sent to Mt Sungay was ambushed, returned to Co. 1 O KIA. Co moved by truck 13 mi set up perimeter and sent out patrols.

8 Feb 45- Co marched to Las Pinas and set up perimeter on arrival.

10 Feb 45- Co marched to Baclaran on So Manila Rd, set up perimeter. 1300 moved 2000 yds Nof Baclaran took up position. Received accurate Jap Mortar fire 4 EM SWA

11 Feb 45- Co moved to Polo Field dug in and was subjected to arty fire."

An officer of the 187th Glider Infantry testified that on the 7th and 8th of February 1945, Company F and the balance of the battalion were on

the road between Tagakai and Southern Manila and were pushing forward to get into Manila; that they were subject to enemy contact during that time; that there was active patrolling; that the situation was hazardous; and that "We were surrounded by the enemy, actually" (R 9, 10).

b. Specification 2, Charge I. Accused's initial unauthorized absence on 23 July 1945 was established by a proper extract copy of the morning report of Company F, 187th Glider Infantry, introduced in evidence as Prosecution Exhibit 2 (R 7, 8). The termination of this absence and accused's return to military control on 11 February 1946 were shown by another extract copy of the organization's morning report (R 8; Pros. Ex. 4). An officer of Company D, 187th Glider Infantry, testified that during January and February 1946, he frequently saw the accused in Ye Old Mansion Club in Manila; that the accused was introduced to him as First Lieutenant Frank Gleason; that accused was wearing the insignia of a first lieutenant of infantry; that accused said he had been a member of the 187th Glider Infantry, was at that time on terminal leave and a member of a crash boat squadron in Manila (R 10, 11). The last time the witness saw the accused was in February 1946 when he visited accused at a detention barracks outside of Manila where accused had been confined when apprehended (R 12).

c. Specification 1, Charge II. The confinement of the accused at the 187th Glider Infantry Stockade on 22 July 1945, and his escape therefrom on 23 July 1945, were established by an extract copy of the morning report of Company F, 187th Glider Infantry, introduced in evidence as Prosecution Exhibit 2 (R 7, 8).

d. Specification 2, Charge II. Accused's confinement at the 187th Glider Infantry Stockade on 30 June 1946 was established by an extract copy of the morning report of Company F, 187th Glider Infantry, introduced as Prosecution Exhibit 5 (R 8).

The Commanding Officer of Company F signed Prosecution Exhibit 9, which he testified is a confinement order and which is addressed to the Police & Prison Officer and requests the confinement of the accused in the regimental stockade (R 13). The adjutant of the Second Battalion, 187th Glider Infantry, as such was custodian of the guard report of the 187th Stockade, and identified an extract copy of such guard report signed by him which shows that the accused was confined on 30 June 1946 and escaped from confinement on 25 July 1946 (R 13, 14; Pros. Ex. 10). The Sergeant of the Guard, 187th Glider Infantry, testified that on 25 July 1946 there was a prison break in which the accused and two other prisoners escaped; that a cell bar was bent making a hole large enough for a man to crawl through; that the prisoners' sleeping bags were made up and had the mosquito netting tucked in around them to give the appearance that they were occupied; and that a hole large enough for a man to go through

was cut in the stockade fence (R 14, 15). The Provost Sergeant testified that he received the accused into confinement as a prisoner on 30 June 1946, and that accused escaped on 25 July 1946 (R 17).

4. Evidence for the Defense. After being fully advised concerning his rights as a witness in his own behalf, the accused elected to remain silent (R 23). No evidence was offered by the defense.

5. The record of trial admits of no doubt that the accused deserted the service on 8 February 1945, and that he did so with the fixed purpose and intent thereby to avoid the hazardous duty of combat with the enemy. The Morning Report Record of Events of his organization, depicting combat with and casualties at the hands of the enemy both immediately prior to and after accused absented himself without leave, as well as the testimony of an officer of the 187th Glider Infantry, show the desperate and perilous situation confronting the accused's company at the time. From these circumstances, plus the fact that accused remained absent for four and a half months without any explanation, the conclusion is inescapable that he was motivated by an intention to avoid the hazards of enemy action.

It is equally clear from the evidence in this case that the accused absented himself without leave with the intention not to return to the service when he escaped from confinement on 23 July 1945, and that he remained absent in desertion until 11 February 1946, assuming in the meantime an alias and posing as an officer on terminal leave.

The evidence is also legally sufficient abundantly to establish that the accused was twice placed in confinement and twice escaped therefrom, as alleged in Specifications 1 and 2 of Charge II.

6. The objection by defense counsel to the introduction of the extract copy of the morning report admitted in evidence as Prosecution Exhibit 2 was without merit and was properly overruled. There was no evidence to indicate that the officer who made the entries did not have personal knowledge of the facts stated therein.

The charge sheet shows that the charges were served on the accused on 15 August 1946 by First Lieutenant Leonard B. Farrell, Trial Judge Advocate. The order appointing the court to which the case was referred for trial, and which appointed Lieutenant Farrell as trial judge advocate, was dated 20 August 1946. And the charges were referred to Lieutenant Farrell by first indorsement on the charge sheet dated the same day. Lieutenant Farrell, therefore, purported to act in his capacity as trial judge advocate and serve the accused with the charges before appointment as trial judge advocate. It does not appear from the record

of trial, however, that any of the accused's substantial rights were in anywise prejudiced or injuriously affected by this error. The Board of Review is consequently of opinion that this irregularity was harmless. In CM 238591 Nicholl, 24 BR 285, the majority of the Board of Review passed an identical error without comment and held the record of trial legally sufficient, with which The Judge Advocate General concurred.

7. The charge sheet shows that the accused is twenty-one years and nine months of age. He was inducted at Armed Forces Induction Station, New York, on 9 March 1944, without prior service. According to the review of the Staff Judge Advocate, accused's education consisted of grammar school and two years in high school; he is single and claims to have been employed as an auto mechanic on midget racing cars; he served eighteen months of a two-to-five-year sentence in a reform school for theft of auto parts; he was given seventeen weeks of basic training at Fort McClellan, Alabama, and attended the Parachute School at Fort Benning for six weeks; he was sent to New Guinea, Leyte and finally Luzon; he was tried by a special court-martial in New Guinea in November 1944 for absence without leave and received a sentence of three months confinement; a CID report indicates that while confined in Manila pending return to his unit he was sentenced to thirty days confinement for attempt to escape; his AGCT score is 86 (Class IV). The allied papers to the record of trial show that accused was assigned to Company "F", 187th Glider Infantry, on 24 January 1945. Prosecution Exhibit 6 shows that Company "F" departed from Leyte on 27 January 1945 and was en route to Luzon from 27 to 31 January 1945. Prosecution Exhibit 6 further shows that Company "F" was in combat from 31 January until 8 February 1945 when accused deserted and that the company suffered four casualties during this period. There is nothing to indicate that accused had any other combat experience or that he was subjected to any unusual combat strain.

For the trial of this case it appears from the record that Captain James D. Holmes, 187th Glider Infantry, was appointed as defense counsel and that Second Lieutenant Harold G. Moore, 187th Glider Infantry, was appointed as assistant defense counsel. The record shows that the latter officer was not present at the trial. However, the accused stated at the trial that he desired to have First Lieutenant Robert L. McDaniels as his special defense counsel. Captain Holmes, regularly appointed defense counsel, and First Lieutenant McDaniels, special defense counsel, accordingly represented the accused in the trial of this case.

On 30 October 1946, Messrs. Henry B. Lamm and Andrew J. Feinman, attorneys representing the accused and his mother, appeared in oral argument before the Board of Review. Counsel also presented and filed with the

Board three briefs, as follows: Number one, brief on the record of trial; number two, brief on the new evidence; number three, brief on the medical questions. In support of brief number two, counsel also filed with the Board the affidavits of two former enlisted men who were associated with the accused; an affidavit of a former member of the Women's Army Corps, who became acquainted with the accused during one of his absences; an affidavit of two members of a USO troop who became acquainted with the accused while in Manila; and the affidavit of the former Criminal Investigation Division Agent who assisted in the apprehension of the accused. In support of brief number three counsel filed an affidavit of the Medical Record Librarian of Misericordia Hospital, New York, New York; a letter from the Hospital Administrator of New York Medical College, Flewer and Fifth Avenue Hospitals, New York, New York; a letter from Doctor William A. Fraser, M.D., F.A.C.S., New York, New York; a letter from Doctor Frank S. Caprio, M.D., Washington, D.C.; a letter from Doctor Louis S. London, M.D., Washington, D.C.; a letter from Doctor Walter Goldfarb, M.D., Washington, D. C., and an affidavit of the accused's mother, Mrs. Elizabeth M. Wallrath. Mrs. Elizabeth M. Wallrath accompanied her counsel and also made an oral statement to the Board of Review. The arguments of counsel, the briefs and supporting papers filed, and the statement made by the mother of the accused have been carefully considered.

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. The death penalty is authorized for desertion in time of war, pursuant to Executive Order 9048, 3 February 1942, as to offenses thereafter committed.

Martin M. Dickson, Judge Advocate

Wayne Olivier, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ-CM 316812 1st Ind

NOV 5 1946

WD, JAGO, Washington 25, D. C.

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 Frank R. Wallrath (42072432), Company F, 187th Glider 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. The record evidence fully establishes that the accused deserted the service with the intent to avoid enemy combat on or about 8 February 1945, and that he remained in desertion until 22 July 1945. The morning report record of events of the accused's organization shows that it was in contact with the enemy for several days immediately preceding his desertion. On 5 February 1945 two enlisted men were wounded in action. On 7 February 1945 one officer was killed in action. Contact with the enemy continued after the accused left his organization. On 10 February 1945 four enlisted men were seriously wounded in action as the result of Jap mortar fire. The organization was subjected to enemy artillery fire on 11 February 1945. On the 7th and 8th of February 1945 the accused's organization was pushing forward into Manila. The situation was hazardous. One officer of the organization testified that "We were surrounded by the enemy, actually". Immediately after accused returned to military control on 22 July 1945, he escaped from confinement on the following day and again deserted. The record shows that this period of desertion continued until about 11 February 1946, and that during January and February of 1946 the accused was posing as a first lieutenant of infantry, under an assumed name, and represented that he was on terminal leave and was then a member of a crash boat squadron in Manila. After his return to military control, he again escaped from confinement on 25 July 1946.

Before the reviewing authority took final action, he returned the record of trial to the court for proceedings in revision, in accordance with paragraph 83 of the Manual for Courts-Martial, to afford the court an opportunity to reconsider its sentence "after sufficient time has elapsed since the trial to insure careful thought and deliberation thereon". The court was accordingly reconvened, and adhered to its former findings and sentence. The reviewing authority thereupon approved the sentence and forwarded the record for confirming action.

4. At the time of trial the accused was 21 years and 9 months of age. He was inducted into the service at the Armed Service Induction Station, New York, on 9 March 1944. Although no evidence of previous convictions was introduced at the trial, the review of the staff judge advocate states that the accused was convicted by special court-martial in November 1944 for absence without leave and received a sentence of three months confinement, and that while confined in Manila pending return to his organization in the instant case the accused was sentenced to thirty days confinement for attempted escape. The staff judge advocate's review further states that in civilian life the accused served eighteen months of a two-to-five-year sentence in a reform school for theft of automobile parts. His AGCT score is 86 (Class IV).

5. On 30 October 1946, Messrs. Henry B. Lamm and Andrew J. Feinman, attorneys representing the accused and his mother, appeared in oral argument before the Board of Review. Mrs. Elizabeth M. Wallrath, mother of the accused, appeared before the Board at the same time. Three briefs were presented by counsel. Brief number one concerns the record of trial proper. Brief number two is devoted to new evidence. Brief number three deals with medical questions. In support of the latter brief, various affidavits and letters from hospitals and neuropsychiatrists, as well as an affidavit of the accused's mother, were filed. It appears that the accused suffered an epileptic attack at an early age and had subsequent recurrences thereof. The last such attack appears to have been in October 1937. Based upon the case history of the accused, the belief is expressed by some of the medical experts whose statements were submitted that the accused may have suffered an "epileptic equivalent" at the times in question. It is stated that during an epileptic equivalent the person is completely unaware of what he is doing for an indeterminate period; that epilepsy is incurable and throughout the remainder of life is a potential; that the epileptic equivalents often take the form of unstable, irritable and impulsive acts which the patient would not ordinarily perform; and that although such sufferers do not lose consciousness and they may remember their activities, they are unable to control their behavior and cannot distinguish between right and wrong. Other affidavits of former fellow soldiers were submitted by counsel, in which the belief of possible mental instability was expressed. In her appearance before the Board of Review the mother of the accused described his epileptic seizures. The Board of Review has considered all the foregoing. These matters have also had my careful thought. With the desire of resolving all possible doubt as to the accused's mental responsibility, and to obviate any possibility of an injustice, I have requested the reviewing authority to have the accused examined by a Board of Officers convened under AR 600-500, and have requested that the Board's report be expedited and forwarded to this office. I do not find, either in the

record of trial or in the briefs and supporting documents above referred to, any evidence of mental irresponsibility sufficient to challenge the legal sufficiency of the sentence or to warrant further delay in the final disposition of the case.

6. This case has received wide publicity, largely occasioned, I am convinced, by the sentence adjudged by the court. A total of approximately 512 letters and 55 telegrams have been received. Twenty-four United States senators and twenty United States congressmen have written letters about this case. Eighty-one petitions with a total of approximately 6,684 signatures, and eight resolutions from veterans organizations, labor organizations and others, have also protested the severity of the sentence. Many of these communications were addressed to the President; all have been carefully considered.

A petition for a writ of habeas corpus has been filed in the United States District Court for the District of Columbia to test the legality of the trial and sentence. The case is styled "In the Matter of George B. Murphy, Petitioner, against Robert P. Patterson, Secretary of War of the United States of America, Respondent", and is Habeas Corpus No. 3102 on the docket of said Court. The cause is still pending. The last action of the Court, taken on 28 October 1946, ordered that the previously entered Rule to Show Cause why the writ should not issue be continued subject to a two day call, and stayed and enjoined execution of the death sentence pending final hearing and determination of the case.

7. Upon consideration of all the circumstances, I am of the opinion that neither the execution of the death sentence nor a long sentence to confinement is justified in this case. I accordingly 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 ten years in a United States Disciplinary Barracks, that the execution of the dishonorable discharge be suspended until the soldier's release from confinement, and that the sentence as thus commuted and modified be carried into execution.

8. In the event the report of the Board of Medical Officers recently requested should reveal pertinent data, the case may be further examined at that time for appropriate administrative action.

9. 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 316812

4 Incls
1. Rec. of trial
2. Dft ltr for sig USW
3. Form of Exec. action
4. Briefs (3), w/affids. and ltrs

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 361, 3 Dec. 1946).

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

MAR 5 1947

JAGQ - CM 316858

UNITED STATES v. First Lieutenant WILLIAM W. STROUD (O-2044760), Air Corps.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at AAF Military Training Center, San Antonio, Texas, 29 August 1946. Dismissal, total forfeitures and confinement for six (6) months.

OPINION of the BOARD OF REVIEW
SCHEID, BOYLES 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 61st Article of War.

Specification: In that 1st Lt William W Stroud, Squadron PB, 3543rd AAF Base Unit, AAF Military Training Center, did without proper leave, absent himself from his command at AAF Military Training Center, San Antonio, Texas from about 6 July 1946 to about 16 July 1946.

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

Specification: In that 1st Lt William W Stroud, did at Selfridge Field, Michigan, on or about 9 July 1946, make a claim against the United States by presenting to J. D. Murfield, 1st Lt, Air Corps, Finance Officer at Selfridge Field, Michigan, an officer of the United States duly authorized to approve, allow and pay such claims, in the amount of $177.08 for flying pay, which claim was false and fraudulent in that 1st Lt William W Stroud was not on authorized flying status, and was then known by said 1st Lt William W Stroud to be false and fraudulent.

Accused pleaded not guilty to, and was found guilty of, all the Specifications and Charges. One previous conviction was introduced of a violation of the 94th and 96th Articles of War. 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 (6) months. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and Charge I as involves a finding of guilty of absence without leave from 10 July 1946 to 16 July 1946, in violation of Article of War 61, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

An extract copy of the morning report of accused's organization was introduced in evidence, showing in part as follows:

"10 July 1946

— Stroud William V (AC) 02044760 1st Lt.
Sick lv to AWOL 6 Jul 46

Jack N Rivers, Major AC."
(Pros. Ex. 1).

Major Rivers identified the extract copy of the morning report (Pros. Ex. 1; R 8). The defense objected "to the submission of this report" (R 8). Defense counsel then requested permission to cross examine the witness as to the authenticity of the extract copy, "and also as to where he [Maj. Rivers] received his information." Permission to cross-examine was granted. The cross-examination in part revealed:

"Q When was this entry made in your morning reports?
"A It was made July 10th.

"Q From what information did you make this report?
"A It was made from a disposition sheet that is put out by the hospital, dated July 10th, making the entry as of July 6th, and verified by letter dated the 16th of July.

"Q And do you have that disposition sheet with you?
"A This is the disposition sheet (indicating).

"Q How many officers do you have — well, I won't cross examine on that, I will just confine it to this. When was this extract copy made?
"A The extract was made on or about July 30th.

"Q As a matter of fact, you didn't have any record about Lieutenant Stroud being reported as AWOL until the 16th of July, did you?
"A The 10th of July.

"Q What kind of information do you get; where do you get your information?

"THE PROSECUTION: If the court please, the prosecution submits that this entirely unnecessary and irrelevant, and it is delaying the trial, because it says here in paragraph 97 that it is unnecessary to call the company commander to testify as a witness, the entry in the morning report is enough. (TM 27-255, Military Justice Procedure.)

"THE DEFENSE: I didn't call him.

"THE LAW MEMBER: It was believed that the cross examination referred to the authenticity of the extract copy, and since it has proven otherwise, the objection of the defense counsel will be overruled and the extract copy of the morning report will be received into evidence and marked as requested.

(The extract copy of morning report
(referred to was then received in
(evidence by the court, was read to
(the court by the trial judge
(advocate, marked Prosecution's
(Exhibit No. 1, and is hereto
(attached.

"THE DEFENSE: I am sure that this extract from the Judge Advocate General's ruling covers this case.
"THE LAW MEMBER: If it does the reviewing authority may pass upon it. This court has passed upon its admissibility, and it is now an exhibit in this case.

"THE DEFENSE: I still want it recorded that attention was called to an extract from Volume 3, Bulletin No. 8 of the Judge Advocate General for August, 1944, page 337, subject evidence.

"THE LAW MEMBER: For the edification of the defense counsel, TM 27-255 was printed on 23 February, 1945, subsequent to the date of that opinion, and it is believed that TM 27-255 is the authority that will prevail at this particular time." (R 9-10).

Without objection an extract copy of accused's organization, Prosecution Exhibit 2, was accepted in evidence. It states as follows:

"16 July 1946
Stroud, William W. (AC) 02044760
1st Lt.
AWOL to dy 1935.

Jack N. Rivers, MAJ AC."

On recross-examination Major Rivers stated that when he went into the squadron on or about 11 June 1946 the morning report words were not accurate (R 13).

It was shown by Lieutenant Colonel John M. Cassidy, Flight Surgeon, that accused was hospitalized for a period of over six months, which automatically extended a temporary suspension from flying at the time accused was admitted to the hospital to an indefinite suspension from flying (R 16). So far as the flight surgeon's records show he had been placed on an indefinite suspension which has never been cleared. He was on indefinite suspension from flying status for the months of May and June 1946. The accused took a physical examination relative to his flying status and it was recommended his indefinite suspension from flying be revoked (R 17, 19, 21). At this point the following appears in the record:

"THE LAW MEMBER: Therefore, do you know if the accused is on flying status or not, was he ever restored to flying status?

"A. He was never restored to flying status ***"

* * * *

"EXAMINATION BY THE COURT

"Q Would it be possible for a man to be returned to full flying status without such information coming to the medical authorities on the base?

"A No, they come to this headquarters, not the medical authorities, the headquarters here will write an order restoring this man to flying status upon receipt of the proper authority from Army Air Forces. He must be in possession of an order which returns him to a flying status after an indefinite suspension before he can again assume flying duties.

"Q Is it possible that such an order could be issued at this headquarters without the knowledge of the Flight Surgeon?
"A He might have one in his possession." (R 21-22).

First Lieutenant Emmit J. O'Connell, Base Unit Legal Officer testified that on 21 August 1946 he and Lieutenant Williams, the trial judge advocate, talked with the accused in Ward 9 of the hospital. The trial judge advocate told accused he was going to read the 24th Article of War to him, but accused stated he knew about it (R 23-24). The accused said "he didn't wish to make any statement" (R 24). The defense objected to the witness testifying on the ground "—— The 24th Article of War was not read to him and there was no explanation made to him and that he was tricked into saying something" (R 24). The law member ruled as follows:

"The Law Member: On behalf of the prosecution, the law member objects to the word 'tricked' being inserted in there. There has been evidence that the accused stated he was aware of the 24th Article of War." (R 24-25).

According to Lieutenant O'Connell the accused stated to him:

"—— that he had been granted a leave, and went home, and while he was home he had been drinking pretty regularly; when his leave was up, he was aware that his leave was up, and he did not send any telegrams, he knew he should have sent the telegram he stated, when his leave time was up. And he stated that his wife, she was causing some trouble, and his wife had gone off on a vacation, and she took his money with her. And he took off for some place, I believe he said it was in Michigan, and he started out, headed for the place where his wife was vacationing, and he never did get there. He said he stopped in at Selfridge Field and signed a pay voucher there and collected a partial payment. He didn't state it was a partial payment. He stated he did get paid there, signed a pay voucher; that he came back to San Antonio here, and he was here for two or three days before he reported into the station. While he was here he stated that his sister called him, or he called his sister, and his sister informed him she had been informed he was AWOL; and after two or three days here in San Antonio he reported back to the station." (R 25-26).

Accused acknowledged that Prosecution's Exhibit 3 was a true copy of a duplicate pay voucher he signed at Selfridge Field and that the amounts were the same (R 26-27). The trial judge advocate told the accused "it would make the case a lot easier if he would stipulate certain things in there and answer the questions." (R 31). The trial judge advocate was referring to making the "trial easier". (R 32). Accused was not told he would get off easier if he answered the questions (R 33).

It was stipulated that if present, Lieutenant J. D. Murfield, Disbursing Officer, Selfridge Field, would testify that the accused presented a claim for flying pay for the period from 1 May 1946 to 30 June 1946 and payment for such was made (Pros. Ex. 4).

5. Evidence for the Defense.

Major Jack N. Rivers was recalled as a witness for the defense. The following testimony was given:

"Q When did you receive notification from the hospital that Lieutenant Stroud was absent without leave?
"A We received preliminary notification July 10th, and the entry was on the hospital disposition sheet, and received verification July 16th.

"Q I show you this letter. Have you seen that before?
"A I have.

"Q Can you identify it?
"A That is a letter written to Squadron FB on the 16th of July notifying us — shall I read the contents?

"Q No, just identify it is all.

(The letter referred to was then passed to the trial judge advocate.

THE DEFENSE: No objection?

THE PROSECUTION: Yes, if you attempt to introduce it in evidence, I certainly will object to it.

THE DEFENSE: I am going to have him identify it and introduce it in evidence.

THE PROSECUTION: I object to it as hearsay. It is not a record kept in the ordinary course of business, and certainly can not come within any exception of the hearsay rule.

THE DEFENSE: I beg your pardon, it is a record, it came out of the file, Major Rivers brought it down to me.

"Q (By the Defense) Is this a part of your official records?
"A This is part of our correspondence file, yes.

THE PROSECUTION: It is correspondence, and not a record.

THE LAW MEMBER: If the defense counsel is endeavoring to introduce that into evidence, it is quite conclusively proven to be purely hearsay. If the defense counsel wishes to examine the witness regarding facts therein contained, that are facts known to the witness, he may have the witness use that memorandum for the purpose of refreshing his recollection.

THE DEFENSE: (Maj.Hall) May I ask a question?

Questions by the Defense: (Maj.Hall)

"Q Major Rivers, how did you get this information to enter it on the morning report of July 10th?
"A The information came out on the regular hospital publication known as the disposition sheet.

"Q On what date did that disposition sheet come out?
"A The 10th of July.

"Q Stating that all these facts that you have previously testified to occurred on that particular date?
"A Not all, no, sir.

"Q On what?
"A Beg pardon?

"Q I say you stated that you received that information on the hospital disposition sheet. Did that state all these facts at that time?
"A You mean, I suppose, the three entries in the morning report?

"Q That is correct.
"A It did not. It stated the fact of the AWOL, putting the man from sick leave status to a status of AWOL, and the entry was made as of July 10th.

"Q In other words, your information was merely handed to you, and you had no knowledge of the true facts of this entry?
"A Except what the hospital tells me.

"Q You personally have no knowledge of it?

THE PROSECUTION: I object to this question as incompetent, irrelevant and immaterial, whether he had personal knowledge of the facts in the morning report or not.

THE DEFENSE: (Maj.Hall) I think that the morning report has been offered in evidence, may it please the court, and as a document in this case, and he has already signed to the fact that the statements therein contained are true. Therefore, this line of questioning is in order.

THE LAW MEMBER: The assistant defense counsel should bear in mind that the morning report has already been introduced into evidence and is part of the evidence in this particular trial, and the court feels that this examination is redundant and superfluous in that these facts have already been brought out quite clearly." (R 38-40).

It was shown by Captain Royce L. Couch that he was detailed in the latter part of June 1946 to go to accused's squadron and straighten out the squadron's morning reports. The reports were not current (R 42).

"Q Did Lieutenant Stroud's name appear as in the hospital in the morning reports?
"A Not to my knowledge.

"Q From your experience in handling and the preparation of morning reports, could Lieutenant Stroud have been present in the orderly room and the orderly room not know about it?
"A Definitely." (R 43).

After the first of July the reports were in good condition (R 44).

The investigating officer testified that he interviewed accused in Ward 9 of the hospital, that accused was warned of his rights, and stated he did not wish to make a statement. Accused was in the insane ward, where prisoners were also kept, the entrance was barred, the room of accused was entered through a very heavy wooden door, the window of the room was barred, "—— The condition around there was that there was so many of these people who were just loose inside there, running up and down yelling, just like anything you could see in the insane asylum, and it was very hard to even talk." (R 50, 53). At one point one of the insane patients rushed into the room and tried to attack them but he was pulled out of the room by a ward boy (R 50). After that he was locked, "in the cell with Lieutenant Stroud so that we could talk" (R 50). The place where the interview was held was similar both to a room in a hospital and a cell in a jail. It was moderately clean (R 53-54).

Lieutenant Colonel John M. Cassidy, flight surgeon, was called as defense witness and stated that accused had been recommended to be returned to flying status (R 59). It was shown by Chief Warrant Officer William F. Reno that the certificate appearing on Prosecution Exhibit 3, "... is not a certificate at all. It is a form of a certificate, but not the particular certificate we require" (R 61).

The trial judge advocate was called to the stand under protest, as a witness for the defense. He testified that he went to the office of the defense counsel, asked if the defense counsel had any objection to the trial judge advocate taking a statement from accused, to which the defense counsel replied that he did not want the accused to make any statement but that he had no objection to the trial judge advocate talking to accused (R 63).

The accused elected to take the stand after being advised of his rights as a witness and testified as to his military record; that he had been awarded the silver star, the Distinguished Flying Cross with four clusters, the Air Medal with seven clusters, the Purple Heart with two clusters, and the British Distinguished Flying Cross. He flew 99 combat missions and has 614 combat hours (R 66-67).

6a. As to the Specification and Charge I.

The accused was found guilty of being absent without leave from 10 July 1946 to about 16 July 1946. To substantiate such charge the prosecution offered in evidence two extract copies of morning reports of accused's organization. The initial absence was shown by the extract copy of the morning report dated 10 July 1946. The defense objected to the entry and urged that the commanding officer of accused who signed the morning report had no personal knowledge of the matter contained in the entry. It was definitely shown, without contradiction that the only information the commanding officer had with relation to the status of accused at the time of the report was "—— what the hospital tells me" (R 40) or "It was made from a disposition sheet that is put out by the hospital —— and verified by a letter dated the 16th of July" (R 9). In the view we take of the question it becomes unnecessary to decide whether Prosecution Exhibit 1 was admissible as a morning report as an exception to the hearsay rule within the meaning of paragraph 117a, Manual for Courts-Martial, 1928. The exhibit was acceptable in evidence as a record made in the regular course of business within the meaning of the Federal Shop Book statute (act of 20 June 1936, c. 640§1; 28 U.S.C. 695; 49 Stat. 1561), which reads as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

There is nothing in the Manual for Courts-Martial which leads to the conclusion that a morning report may be introduced in evidence only as an official writing. The exception to the hearsay rule relating to an official writing is based upon the probability of the truth of its contents because the officer or other person making it had the duty to know the matter stated and to record it (MCM, 1928, par. 117a, p. 121). Entries made in the regular course of business are admissible under the statute as constituting an exception to the hearsay rule, based upon the probability of the trustworthiness of the records because they are a routine reflection of the day-to-day acts, transactions, occurrences, or events of an organization. If offered evidence is shown to be the product of the regular course of business followed the evidence is admissible (CM 312023, Schirmer). The regular course of business pertaining to this case is established by the provision of paragraph 7i, AR 40-590, 21 January 1946 (Administration of Hospitals), which reads as follows:

"Immediately upon discovery that a patient is absent without leave notification will be given to his immediate commanding officer."

The usual presumption of regularity would indicate that this procedure was followed in this case (CM 313619, Coppock). The commanding officer of the accused was duly notified by the hospital on 10 July 1946 that accused was absent without leave as of 6 July 1946.

The defense raised no objection to the introduction of Prosecution Exhibit 2 being an extract copy of the morning report of accused's organization as follows:

"16 July 1946
Stroud, William W. (AC 02044760)
1st Lt.
AWOL to dy 1935.

Jack N. Rivers, MAJ AC."

Assuming Exhibit 2 to be subject to the same objection as Exhibit 1, it was nevertheless admissible under the Shop Book Rule for all of the reasons as set out with reference to Exhibit 1. Accordingly, the record is legally sufficient to support the finding of guilty of the Specification and Charge I.

b. As to the Specification and Charge II.

The prosecution failed to show that accused was not entitled to draw flying pay for the period alleged in the specification. On the contrary, it is indicated by prosecution's witness, the Flight Surgeon, upon whose testimony the prosecution's case rests, that accused had been recommended for his return to flying status, that the headquarters, not the medical authorities, would write the order restoring him to flying status, and that accused must be in possession of an order which returns him to flying status before he can assume flying duties. The witness was then asked directly:

"Q Is it possible that such an order would be issued at this headquarters without the knowledge of the Flight Surgeon?
"A He might have one in his possession." (R 22).

Thus the evidence on which the conviction of this specification and charge is to rest is as consistent with innocence as with guilt and is insufficient to sustain the finding of guilty of such specification and charge (CM 216425, Frye, et al., 49 BR 99).

c. As to the testimony of Lieutenant Emmit J. O'Connell.

It is noted that this opinion of the Board of Review does not take into consideration the alleged statements of the accused to Lieutenant O'Connell. The record of trial shows that the accused originally stated to the investigating officer that he did not wish to make a statement. Subsequently, the trial judge advocate and the defense counsel held a conversation in the office of the defense counsel as follows:

"Q Lieutenant Williams, on or about the 21st of August, did you have occasion to come to my office in connection with this case?

"A I did.

"Q During the conversation that ensued between you and Lieutenant Stroud's defense counsel, did you make any request of that counsel to take statements from Lieutenant Stroud?
"A I didn't make any request, but I asked if you had any objection.

"Q What was the defense counsel's reply?
"A Your reply, as I recall, was that you did not want the accused to make any statement, but you had no objection to me talking to him." (R 63).

Thereafter, the trial judge advocate, taking the Base Legal Officer with him, for no other conceivable purpose than as a witness, interviewed the accused, who again reiterated he did not wish to make a statement and that he wouldn't talk to anybody but Colonel Roundy (defense counsel) (R 24). Thereafter, following dubious statements of the trial judge advocate as to it making "the case a lot easier if he would stipulate certain things in there and answer the questions", he made certain statements which resulted in the trial judge advocate using the Base Legal Officer as a witness to testify to the statements of accused. The actions of the trial judge advocate in securing the statements of accused were so irregular as to have required the court to exclude such statements from the record and failure of the court so to do was error, but nonprejudicial.

6. Accused, at the time of the conviction of the offenses for which he was tried, was 24-8/12 years of age and has been in the military service since 17 June 1940. He was commissioned on 1 October 1943, in England, where he went as a Staff Sergeant bombardier; he was shot up three times while in ETO; he was awarded the Silver Star, the Distinguished Flying Cross with four clusters, Air Medal with seven clusters, the Purple Heart, two clusters, and the British Distinguished Flying Cross; he flew ninety-nine combat missions, six-hundred and fourteen combat hours; he was tried by a general court-martial on 12 March 1946, for violation of Article of War 94 and Article of War 96 and convicted of wearing the insignia of a Lieutenant Colonel of the United States Army, and of presenting claims against the United States for payment as a Major and a Lieutenant Colonel; he was sentenced to be restricted to the limits of his post for three months and to forfeit one-hundred ($100.00) dollars of his pay for three months. The record does not disclose any civilian criminal record or delinquencies.

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of

guilty as to the Specification and Charge II; but legally sufficient to support the findings of guilty of the Specification and Charge I; and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation, by an officer, of Article of War 61.

Lucius M. Schlesinger, Judge Advocate

Francis E. Baker, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 316858 1st Ind

WD, JAGO, Washington, D. C. MAR 10 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 William W. Stroud (O-2044760), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from his command from about 6 July 1946 to about 16 July 1946 (Spec., Charge I), in violation of Article of War 61, and of making a false claim against the Government (Spec., Charge II), in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six (6) months. The reviewing authority approved only so much of the findings of guilty of Charge I and its specification as involves findings of guilty of absence without leave from 10 July 1946 to 16 July 1946, in violation of Article of War 61, approved the sentence, and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that accused was absent without leave from his command from about 6 July 1946 to 16 July 1946. At the time he absented himself he was a patient in the hospital. The accused was also found guilty of presenting a false claim for flying pay in the amount of $177.08, but the prosecution failed to present competent evidence to sustain the charge.

5. War Department records show that at the time of the conviction of the offenses for which accused was tried, he was 24-8/12 years of age and has been in the military service since 17 June 1940. He was commissioned on 1 October 1943, in England, where he had been on duty as a Staff Sergeant bombardier; he was wounded three times while in the European Theater of Operations; he was awarded the Silver Star, the Distinguished Flying Cross with four clusters, Air Medal with seven clusters, the Purple Heart with two clusters, and the British Distinguished Flying Cross; he flew ninety-nine

combat missions, six-hundred and fourteen combat hours. He was tried by a general court-martial on 12 March 1946, and was convicted of wearing the insignia of a Lieutenant Colonel of the United States Army, in violation of Article of War 96, and of presenting false claims against the United States for payment as a Major and a Lieutenant Colonel, in violation of Article of War 94; he was sentenced to be restricted to the limits of his post for three months and to forfeit one-hundred ($100.00) dollars of his pay for three months. The accused also was given disciplinary punishment by reprimand under the 104th Article of War for absenting himself without leave from 4 July 1945 to 11 July 1945.

No psychiatric examination of accused was made at the time of this trial, though he had previously been given two such examinations. On 14 December 1945, the Chief of the Neuropsychiatric Service of the AAF Regional and Convalescent Hospital, San Antonio District, examined accused and found no indication of any psychiatric disease, although accused reacted to the stress of overseas duty with the development of mild tension symptoms, which were not incapacitating in degree. Subsequently, on 20 February 1946, after the accused had been under psychiatric observation in the same hospital from 17 January 1946, the Chief of the Neuropsychiatric Service expressed the opinion that there was no indication that the accused, either at the time of his alleged offenses or on the date of the examination on 20 February 1946 had any impairment of mental capacity which would prevent him from being able to distinguish right from wrong or to adhere to the right, and that he was capable of conducting or cooperating in his defense should he be brought to trial. The only explanation for his actions appears to have been his bitterness and disillusionment over family troubles.

6. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and, in view of the outstanding combat record of accused, that the sentence as modified be suspended during good behavior.

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

CM 316858

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 100, 18 March 1947.
(G.C.M.O. 248, 4 July 1947).

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

JAGK - CM 316886

11 DEC 1946

UNITED STATES	THIRD UNITED STATES ARMY
v.	Trial by G.C.M., convened at Munich, Germany, 21 June 1946. Dismissal and fine of $500.
Captain PHILIP CHAFFIN (0-1573765), Quartermaster Corps	

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 Captain Philip Chaffin, Detachment H-302, Company D, Third Military Government Regiment, APO 170, U.S. Army did, wrongfully and unlawfully enter into a bigamous marriage with Marguerite Lotar by participating in a marriage ceremony in the home-chapel of the Cathedral Niedermunster in Regensburg, Germany on or about 17 October 1945 and did thereafter present said Marguerite Lotar as his lawful wedded wife, when at the same time he was legally married to Ruth G. Chaffin then living and residing in the United States and from whom he was not legally divorced.

NOTE: Near the close of the evidence and on motion of the prosecution the court amended this specification to include the words "did attempt to wrongfully and unlawfully enter into a bigamous marriage."

Specification 2: In that Captain Philip Chaffin, ***, on or about 17 October 1945 did, without proper authority and in violation of pertinent sections of Circular 41, Headquarters, European Theatre of Operations, U.S. Army, 17 April 1944 and in violation of AG letter 291.1 GAP-AGP, Headquarters USFET of 12 October 1945, wrongfully participate in a marriage ceremony with Marguerite Lotar in the home-chapel of the Cathedral Niedermunster in Regensburg, Germany.

Specification 3: In that Captain Philip Chaffin, ***, did wrongfully transport or secure or assist in the unlawful transportation of Marguerite Lotar on or about 22 March 1946, without securing approval or authority therefore from any proper official source or making the clearances required by IN CITS 210-482-50 AGP, SUBJECT: Security Control of Travel into and out of Germany, dated 14 December 1945, Headquarters, US Forces European Theatre.

Specification 4: In that Captain Philip Chaffin, ***, did, at Eggenfelden, Germany on or about 28 March 1946 with intent to deceive the Director, Office of Military Government, Det E-204, 3rd Regiment, APO 403, U.S. Army officially state to said Director in writing, requesting a PX card for his wife, Ruth G Chaffin that said wife is "now stationed with me in Eggenfelden," which statement was known by the said Captain Philip Chaffin to be untrue in that Ruth G Chaffin was not then and is not now in Eggenfelden.

He pleaded not guilty to the charge and all the specifications. No evidence of any previous convictions was introduced. He was found guilty of the charge and all specifications, and was sentenced to be dismissed the service and to be fined $500.00. The reviewing authority approved only so much of the findings as to Specification 1 of the Charge as involved findings "that the accused, did, participate in a marriage ceremony in the home chapel of the Cathedral Neidermunster, Regensburg, Germany on or about 17 October 1945 with Marguerite Lotar, and did, thereafter live as man and wife with Marguerite Lotar, such conduct bringing discredit to the military service of the United States, in violation of Article of War 96." The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

The facts, as shown by the evidence, are undisputed and can be stated briefly. During the times hereinafter mentioned the accused was assigned to the 3rd Military Government Regiment, Regensburg, Germany. His officer's qualification card, Form No. 66-1, executed 3 July 1942, contains the following entry: (21) Emergency addressee - Mrs. Ruth G. Chaffin, 9114 Georgetown Road, Bethesda, Maryland. Relationship - Wife (R. 8, Pros. Ex. 5). During the month of June 1946 the accused received mail from the United States with the name Ruth G. Chaffin, Bethesda, Maryland, written thereon as the sender or return addressee (R. 24-25).

On 17 October 1945, the accused and a French woman named Marguerite Lotar procured the priest of the Niedermunster Church at Regensburg, Germany, to administer to them the church marriage ceremony, observing all formalities required in the laws of the church for a true sacramental marriage, and the

priest issued to them a certificate of such marriage (R. 16-18, Pros. Ex. 6).

Mr. Felix J. Freeman, Jr., Chief of the Legislation and Legal Advice Branch of the Office of Military Government for Bavaria, and who was a graduate of Harvard Law School and the University of Munich, testified for the defense that the marriage was illegal under German law, irrespective of any bigamous aspect thereof, and was not recognized by the military government (R. 27-28).

Marguerite Lotar testified that she and the accused had lived together at various times prior to and after the ceremony was performed, that both parties thereto knew the marriage was illegal but that the ceremony was entered into in order to give a cloak of respectability to their relationship, she not desiring to be looked upon socially as a mistress (R.14). Miss Lotar had visited her home in Paris during the month of November 1945, when accused returned to the United States on leave, and when he reached Paris on his return to Germany, sometime in March 1946, she accompanied him by train to Regensburg, Germany (R. 11-12). She was told by some soldier at the Railway Transportation Office in Paris that there was no objection to her going along with the accused. On 22 March 1946 Miss Lotar accompanied accused by motor car to Eggenfelden and lived with him in his assigned quarters. She took her meals with him in the officers' mess and accused introduced her to his fellow officers as his wife, however, on some occasions he introduced her as Miss Lotar (R. 12,13,25). The mess officer procured rations for the accused and his wife, "Ruth Chaffin" (R. 22).

On about 5 April 1946, Major Thaddeus R. B. Coykendall, accused's immediate commanding officer at Eggenfelden, asked him "when he was divorced and why his 66-1 card showed a wife in the States, also why he did not get permission of his commanding officer for his marriage over here." Accused replied "that he was divorced from his wife in the States in 1933. He said he did not think he needed permission to get married over here because his alleged wife was not a German, that she was French. He could not explain the fact of the non change of the name on his 66-1 card" (R. 25-26). A few days later, and upon being requested to produce a certificate of marriage, accused admitted that he had never been divorced and that his subsequent marriage was illegal. Major Coykendall further testified that accused and his alleged wife (Miss Lotar) occupied a room in the officers' quarters from 23 March until 18 April (R. 26).

In a letter of 28 March 1946 addressed to the Director, Office of Military Government, Det E-204, 3rd Military Government Regiment, APO 403, U.S. Army, Attention P-X Officer, requesting a P-X card, the accused stated that his wife, Ruth G. Chaffin, was then stationed with him in Eggenfelden (R. 8, Pros. Ex. 4).

By first indorsement to a letter of 9 April 1946 from the Director,

Office of Military Government, Det E-204, Company D, 3rd Military Government Regiment, which letter requested information concerning his marital status, accused admitted that he had never been divorced from his wife, Ruth G. Chaffin, and that he had no authority to contract the alleged marriage with Marguerite Lotar (R. 6-7, Pros. Exs. 2,3). In a written statement submitted at the close of the case accused admitted the facts set forth above and gave a brief history of his life, declaring that he joined the British Army at the age of 14 and was wounded at the Battle of Gollipolis during World War I. He returned to the United States after that war, graduated from Harvard University and was engaged in the loan brokerage business at Bethesda, Maryland, prior to entering the Quartermaster Officer Candidate School in April 1942. He was commissioned a second lieutenant three months later, went overseas as Security Officer for war cargo and participated in the Dieppe Raid earning the Arrowhead. He had been awarded the bronze star and four battle stars. Accused stated that he never intended to bring dishonor on the service and had no intention of entering into a bigamous marriage, and that "my wife knows nothing about this and I hope she never finds it out" (R. 30).

Captain Martin C. Baer, CWS, Office of the Military Government for Bavaria, testified that he had known accused since 1943, attended the civil affairs school with him at Shrivingham and that in his opinion the accused was a man of good character and the highest integrity (R. 29).

4. Specification 1

It will be noted that this specification alleges bigamy by entering into a marriage ceremony with Marguerite Lotar at a time when he was legally married to Ruth G. Chaffin who was living and from whom he had not been divorced. On motion of the prosecution the specification was amended so as to "include the word did attempt to wrongfully and unlawfully enter into a bigamous marriage." The reviewing authority approved only so much of the findings of guilty of the specification as amended "as involved findings that the accused, did, participate in a marriage ceremony *** and thereafter live as man and wife with Marguerite Lotar, such conduct bringing discredit to the military service of the United States in violation of Article of War 96." It will be readily seen that, as approved by the reviewing authority, no offense remains pleaded in this specification. It is no offense (and no discredit to the military service) to enter into the marriage relation and thereafter live as man and wife. The specification was thereby stripped of all incriminating language. Not even the word "wrongfully" or "unlawfully" remains. Where an act or acts alleged in the specification, as finally approved by the reviewing authority, is not per se an offense, words (of criminality) must be used, and remain in the specification to make the act or acts alleged an offense. Ordinarily, such words as "wrongfully," "unlawfully" or "without authority" are therefor employed. (See Dig Op JAG, 1912-40, sec. 451 (8) (CM 113535 and CM 130811); CM 218409, Chadderdon, 12 BR 61; CM 226512, Lubow, 15 BR 105.) In the Lubow case it was held that a specification alleging that an accused "did *** drive a motor vehicle while drunk" in violation of Article of War 96 did not state

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NAVY DEPARTMENT

an offense because it was not alleged that the driving was "wrongful or unlawful" nor that the vehicle was driven on a public road or highway.

Stated in another manner, the specification must exclude every reasonable hypothesis of innocence - must be in such language that if all the facts expressly or impliedly pleaded therein be admitted as true, or duly proven to be true, the accused cannot be innocent. This has been said to be the settled law of this office as well as the law of the land (CM 187548, Burke, 1 BR 55).

Specification 2

This specification alleges that accused "*** did, without proper authority and in violation of pertinent sections of Circular 41, Headquarters, European Theatre of Operations, U.S. Army, 17 April 1944 and in violation of AG letter 291.1 GAP-AGP, Headquarters USFET of 12 October 1945, wrongfully participate in a marriage ceremony with Marguerite Lotar ***."

The facts and circumstances as well as the admissions of accused show that he had no authority from the military establishment to enter into such a marriage ceremony. Although not introduced in evidence at the trial, and there is no specific mention that the court took judicial notice of Circular 41, Headquarters, ETO, U.S. Army, 17 April 1944, a copy of such circular has been appended to the record of trial. Section 2 thereof provides as follows:

> "2. War Department Prohibition of Marriage Without Approval. a. Sec II, Cir 305, WD, 1942, provides, in part, that: 'no military personnel on duty *** in any foreign country or possession may marry without the approval of the commanding officer of the United States Army Forces stationed *** in such foreign country or possession.'"

It is obvious that the court was cognizant of and took judicial notice of the above circular. In fact it was a matter of common knowledge throughout the Army that permission had to be obtained in order for military personnel to be married in foreign countries. The court was therefore authorized to take judicial notice of the general orders and circulars of Headquarters, ETO, USA (MCM, 1928, par. 125, p. 135; CM ETO 952, Mosser). The Board of Review may likewise take judicial notice of same upon appellate review (Coha v. U.S., 152 U.S. 211, 222, 38 L. Ed. 415-419; Thornton v. U.S. 271 U.S. 414, 70 L.Ed. 1013, 1017; CM ETO 1538, Rhodes, 4 BR ETO 391). The AG letter referred to in the specification was not introduced in evidence nor was a copy thereof forwarded with the record of trial.

Specification 3

The only evidence in the record to support the findings of guilty of this specification is the statement of Miss Lotar that she accompanied accused by train from Paris to Regensburg, Germany, sometime in March when

he returned to duty. She further stated that at the Railway Transportation Office permission was granted her to make this trip. The circular or directive cited in the specification was not produced at the trial nor any reference made thereto. Since the only evidence is to the effect that she had some kind of authority to accompany accused into Germany the conviction under this specification must fail.

Specification 4

It was proven that on 28 March 1946 accused requested in writing of the Director, Office of Military Government, Det E-204, 3rd Regiment, U. S. Army, a P-X card for his wife, Ruth G. Chaffin, stating that his said wife was stationed with him in Eggenfelden.

The surreptitious conduct of the accused in pretending to have been divorced from the woman, Ruth G. Chaffin, shown on his officer's qualification card to be his wife and residing in Bethesda, Maryland; his masquerading Miss Lotar as his wife before his fellow officers; his drawing of rations for Ruth G. Chaffin while eating at the officers' mess and living at the officers' quarters with Miss Lotar; his subsequent admission that he was not divorced from the woman shown to be his wife in the records; his receipt of mail in June 1946 bearing the return address, "Ruth G. Chaffin, Bethesda, Maryland" and accused's statement that "my wife knows nothing about this and I hope she never finds it out" all lead to the inexorable conclusion that his wife, Ruth G. Chaffin, was not stationed with him in Eggenfelden and that the statement made by the accused to the Director, Office of Military Government, requesting a Post Exchange card for his wife, Ruth G. Chaffin, "that said wife is now stationed with me in Eggenfelden" was false and was made with the intent to deceive as alleged. In fact such fraud was perpetrated upon the military establishment by the securing of lodging and rations for Miss Lotar at the officers' quarters.

5. War Department records disclose that the accused was born 23 November 1900 at Washington, D. C. He received the Bachelor of Arts Degree from Harvard University in 1922 and was employed by various banks until entering business for himself as an insurance broker. He is married and the father of six children. On 3 July 1942 he was appointed second lieutenant, Army of the United States, after having graduated from the Quartermaster School at Camp Lee, Virginia. He was promoted to first lieutenant on 7 September 1942. This officer attended the Provost Marshal General School, Camp Custer, Michigan, in September-October 1943 and failed to fulfill the academic standards. He also attended the Civil Affairs Training School, Ann Arbor, Michigan, in October-December 1944 but received an unsatisfactory academic rating and no efficiency report was rendered. Two efficiency reports in his record show a rating of "Excellent."

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1 and 3 of the Charge, but is legally sufficient to support

all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Chester L. Silvers, Judge Advocate

On Leave, Judge Advocate

Gilbert E. Hickey, Judge Advocate

JAGK - CM 316886 1st Ind DEC 3 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 Philip Chaffin (O-1573765), Quartermaster Corps.

2. Upon trial by general court-martial accused was found guilty of attempting wrongfully and unlawfully to enter into a bigamous marriage by participating in a marriage ceremony with one Marguerite Lotar at a church in Regensburg, Germany (Spec. 1); of wrongfully and in violation of pertinent sections of Circular 41, Headquarters, European Theater of Operations, U.S. Army, 17 April 1944, and AG letter 291.1 GAP-AGP, Headquarters USFET, 12 October 1945, participating in a marriage ceremony with Marguerite Lotar (Spec. 2); of unlawfully transporting Marguerite Lotar without procuring proper clearances in violation of security control and travel regulations (Spec. 3); and on 28 March 1946 of officially stating in a writing requesting a P-X card, with intent to deceive the Director, Office of Military Government, that his wife, Ruth G. Chaffin, was then stationed with him in Eggenfelden, Germany, which statement was known by accused to be untrue, all in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be fined $500. The reviewing authority approved only so much of the findings of guilty of Specification 1 "as involved findings that the accused, did, participate in a marriage ceremony in the home chapel of the Cathedral Niedermuster, Regensburg, Germany on or about 17 October 1945 with Marguerite Lotar, and did, thereafter live as man and wife with Marguerite Lotar, such conduct bringing discredit to the military service of the United States, in violation of Article of War 96." He 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 not legally sufficient to support the findings of guilty of Specifications 1 and 3 of the Charge alleging the attempt to enter a bigamous marriage and the unlawful transportation of the woman, respectively, but is legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence.

The record shows that the accused, a married man with wife in the United States, from whom he had never been divorced, did at Regensburg, Germany, on 17 October 1945 procure a priest to administer to him and one Marguerite Lotar, a French woman, the church marriage ceremony and the priest issued his certificate of said marriage. Accused had been living with Miss Lotar

and continued such relation after this marriage ceremony. It is also proven that the accused had no authority from his commanding officer to "marry" Miss Lotar, as was required by pertinent Army circulars and directives. The record fails to disclose the authority, if any, that accused obtained in order to transport Miss Lotar from Paris to Regensburg, Germany.

On 28 March 1946 the accused requested a P-X card in writing from his commanding officer stating that his wife, Ruth G. Chaffin, was stationed with him in Eggenfelden. The statement was false. Accused admitted all of the foregoing in an unsworn statement at the trial. He asserted that he had never intended to enter into a bigamous marriage, thereby dishonoring the service, but merely attempted to provide a cloak of respectability for Miss Lotar and her illegitimate child by securing for her the sanction of the church of their relationship.

The accused is an intelligent, highly-educated person. His military record is not impressive and while he claims that his motives for his fraudulent conduct were to help an otherwise unfortunate woman, his conduct as shown in the record impels me to the view that he is unfit to be an officer. I recommend that the sentence be confirmed but that the fine be remitted. Remission of the fine is recommended in view of the fact that the officer has a wife and six minor children residing in the United States.

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

CM 316886

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 6, 15 January 1947).

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

JAGK - CM 316898

28 OCT 1946

UNITED STATES	1ST CAVALRY DIVISION
v.	Trial by G.C.M., convened at Tokyo, Japan, 2 August 1946. Dishonorable discharge and confinement for life. Disciplinary Barracks.
Private JOE C. MESQUITE (38004277), Troop B, 7th Cavalry.	

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

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

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

CHARGE: Violation of the 58 Article of War.

Specification: In that Private Joe C. Mesquite, Troop B, 7th Cavalry, did, at Barrey, Leyte Island, P.I. on or about 16 November 1944 desert the service of the United States and did remain absent in desertion until his return to military control at Leyte Island on or about 1 December 1945.

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 the period 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 only question to be considered is the propriety of the investigating officer acting as defense counsel. The record of trial discloses that the charges were investigated by Captain Delbert I. Fleek (R. 3). Captain Delbert I. Fleek was the regularly appointed defense counsel of the court which tried the accused (R. 2). Captain Delbert I. Fleek signed the record of trial as defense counsel (R. 15). The record of trial contains the following statement: "The accused stated he desired to be defended by the regularly appointed defense counsel and the assistant defense counsel" (R. 3). The trial judge advocate stated that the charges were investigated by Captain Delbert I. Fleek (R. 3). It appears from the report of investigation accompanying the record of trial that Captain Delbert I. Fleek recommended

that accused be tried by general court-martial.

In CM 284066, Mejie, the Board of Review 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 CM 315877, Ellis, The Board of Review said:

"*** 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."

The Board of Review is of the opinion that where it affirmatively appears that the officer who investigated the charges against accused

and who recommended trial by court-martial thereon acts as defense counsel at the trial and there is no indication that accused particularly desired and sought the services of such officer in preference to or along with those of other defense counsel the conviction obtained upon such trial must be set aside.

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

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Seibold, Judge Advocate

JAGK - CM 316898 1st Ind NOV 6 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, 1st Cavalry Division, APO 201, c/o Postmaster, San Francisco, California

1. In the case of Private Joe C. Mesquite (38004277), Troop B, 7th Cavalry, 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: 6 46 AM

(CM 316898).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DISPATCHED
WAR DEPARTMENT
J.A.G.O.

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

JAGH - CM 316917

19 JAN 1947

UNITED STATES v. Private First Class ROBERT D. MORRISON (RA 15315800), 1530th Area Service Unit, United States Disciplinary Barracks Section, Fort Benjamin Harrison, Indiana	FORT BENJAMIN HARRISON, INDIANA Trial by G.C.M., convened at Fort Benjamin Harrison, Indiana, 16 September 1946. Confinement at hard labor for six (6) months and forfeiture of $34 per month for six (6) months. Post Stockade, Fort Benjamin Harrison.

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

1. The record of trial by general court-martial in the case of the above named soldier has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. 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 93rd Article of War.

Specification: In that Private First Class Robert D. Morrison, 1530th Area Service Unit, United States Disciplinary Barracks Section, Fort Benjamin Harrison, Indiana, did, at Indianapolis, Indiana, on or about 5 August 1946, feloniously take, steal, and carry away, an Army Surplus Vehicle, Earth Borer w/winch closed, Chevrolet 1944, Vehicle Number 3288, Motor Number BV 620433, Serial Number 9NR30-10324, Sale Number 09065, value about $1400.00, the property of Joe Cohn, Cohn Brothers Auto Company, Indianapolis, Indiana.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be confined at hard labor at such place as the reviewing authority may direct for six months and to forfeit

$34.00 per month for six months. Evidence of one previous conviction was considered. The reviewing authority approved only so much of the findings of guilty as involves findings of guilty of wrongful use of the vehicle at the time and place alleged, approved the sentence and ordered it executed and designated the Post Stockade, Fort Benjamin Harrison, Indiana, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 193, Headquarters Second Army, Baltimore 2, Maryland, 26 September 1946.

3. The court found accused guilty of larceny of the property alleged. The reviewing authority approved only so much of the findings of guilty as involve findings of guilty of wrongful use of the property at the time and place alleged. The question presented for consideration is whether the reviewing authority, by his action, approved a lesser offense necessarily included in that charged. As no legal precedent involving this particular point can be found, it becomes necessary to treat the determination of this question in the light of those cases most closely related thereto. As wrongful use of property necessarily implies a state of possession or control thereof, it is considered that the legal precedents in which it has been decided that a finding of "wrongful possession of stolen property alone and of itself does not constitute a lesser included offense of larceny", are applicable in the discussion of the present issue.

The controlling principle in the determination of the propriety of the substitution of an included offense by a court-martial is found in the following extract from paragraph 78c, Manual for Courts-Martial, 1928, page 65 (see also TM 27-255, par. 106):

> "Lesser Included Offense.-- If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter. ****" (Underscoring supplied)

In CM 294896, Faulkner, accused was charged with larceny of an automobile in violation of Article of War 93. The court found accused not guilty of larceny but guilty of violation of Article of War 96 in that he was in wrongful possession of the car with knowledge that the car was stolen. The Board of Review, in holding the record was not legally sufficient to support the findings of guilty, stated:

> "Larceny is the 'taking and carrying away, by trespass, of personal property which a trespasser knows to belong either generally or specifically to another with intent to deprive such owner permanently of his property therein.' (MCM, 149g) (Underscoring supplied). Unless there is a trespass by the offender in the appropriation of the property or an intent to convert an article at the time it is purportedly borrowed or hired, or unless the possession is obtained by some means which may be assimilated to trespass by reason

of the artifice employed in obtaining possession there can be no larceny (idem). As set forth in the manual (idem) the elements of the offense are:

'(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value.'"

The Board of Review then continued:

"While, therefore, at least temporary possession of a stolen article by the offender is necessary, the required possession is clearly that which the offender obtained by virtue of his having 'taken the property' in one of the inhibited methods previously described, and it is unlawful possession thus obtained and only such possession that is necessarily included in larceny. ****" (Underscoring supplied)

The Board of Review concluded:

"* * * In our opinion the court's finding is equivalent to a conclusion that accused obtained possession of or received stolen property other than by having stolen it himself, an offense not included in but separate and distinct from larceny" (see CM 120948, 120949, Dig. Op. JAG 1912-40 (451) (43), p. 327).

"It goes without saying, that unlawful possession may be obtained in numerous ways."

In support of the foregoing view, the Board of Review in the Faulkner case cited CM 151032, Yewell et al, wherein it was also held that a finding of unlawful possession of certain personal property was not a lesser included offense of larceny. In that case the Board stated:

"Here the accused were found guilty of unlawful possession without specifying the kind of unlawful possession. Since all kinds of unlawful possession

> not included in larceny were not excluded from the findings of guilty the convictions in this case are not of an offense necessarily included in the offense alleged and for which the accused were tried and the findings of guilty were therefore unauthorized and illegal." (Underscoring supplied).

In CM 198798 Sherwood, involving a similar problem, it was held as follows:

> "Accused was charged with larceny of six Y.M.C.A. coupon books, under A. W. 93, and found not guilty of larceny but guilty of wrongful possession of them, under Article of War 96. The court by its findings acquitted him of larceny. The findings do not indicate how he acquired possession of the tickets which they describe as 'wrongfully' in his possession, but undoubtedly the court was not convinced that he came into possession of the property by trespass. Trespass being eliminated and the kind of possession not being specified, it cannot be said that the offense found was necessarily included in that charge, viz, larceny. There may be wrongful possession which is in no way connected with larceny, and not a lesser included offense of larceny." (Dig. Op. JAG, 1912-40, Sec. 451 (43), p. 328) (Underscoring supplied).

Since wrongful use of property necessarily implies a state of possession, the foregoing legal principle with respect to the offense of wrongful possession would appear to be equally applicable to the offense of wrongful use. Further, it is to be noted, that the term "use" interposes into the findings an element not necessarily included in the offense charged, viz, larceny.

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 as approved.

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 316917 1st Ind

WD, JAGO, Washington 25, D. C. JAN 24 1947

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 First Class Robert D. Morrison (RA 15315800), 1530th Area Service Unit, United States Disciplinary Barracks Section, Fort Benjamin Harrison, Indiana.

2. The true test as to whether an offense found is included in that charged, is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found. Applying this test, the case must fall, for it was not necessary in proving larceny, to prove any wrongful use of the vehicle.

3. 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 all rights, privileges and property of which the accused has been deprived by virtue of the findings and the sentence so vacated be restored.

4. 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. 31, 11 Frbruary 1947).

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

JAGK - CM 316930

30 OCT 1946

UNITED STATES v. Private ROBERT L. MITCHELL (42211055), 560th Motor Ambulance Company.	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremerhaven, Germany, 2 August 1946. Dishonorable discharge and confinement for six (6) years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

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

Specification 1: In that Private Robert L. Mitchell 560 Motor Ambulance Company did, at Bremerhaven, (Fischeriehaven) Germany, on or about 10 July 1946, willfully, feloniously, and unlawfully kill ANNEGRET HEROLD, by striking her with a 3/4 ton 4x4 ambulance which he, the said Private Robert L. Mitchell, was then operating in a reckless and grossly negligent manner.

Specification 2: In that Private Robert L. Mitchell 560 Motor Ambulance Company did, at Bremerhaven, (Fischeriehaven) Germany, on or about 10 July 1946, willfully, feloniously, and unlawfully kill KARIN GIGGEL, by striking her with a 3/4 ton 4x4 ambulance which he, the said Private Robert L. Mitchell, was then operating in a reckless and grossly negligent manner.

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

Specification: In that Private Robert L. Mitchell 560 Motor Ambulance Company did, at Bremerhaven (Fischereihaven) Germany, on or about 10 July 1946 wrongfully knowingly and without proper authority take and use one 3/4 ton 4x4 ambulance of the value of over fifty Dollars property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to Charge I and the two Specifications thereunder and guilty to Charge II and its Specification. He was found guilty of Specifications 1 and 2 of Charge I, except, in each Specification, the words "willfully, feloniously, and" of the excepted words not guilty, guilty of Charge I and guilty of Charge II and its Specification. 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 nine years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for six years, designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification. In view of this holding the discussion will be limited to the findings of guilty of Charge I and its Specifications and the sentence.

Since no useful purpose would be served by setting out at length the facts in this case, we deem it sufficient to point out that nowhere in the evidence do the names or other sufficient identification of the two German girls struck by the ambulance operated by accused appear nor does it appear to what specific hospital they were taken for treatment of their injuries. In cases involving homicide, the identity of the deceased with the person alleged to have been killed in the specification and with the person shown to have been assaulted by accused must be fully established (CM 202359, Turner, 6 BR 87, 122; CM ETO 17663 Taylor; CM CBI 49 Coe). Although it has been held in such cases that identity of name raises a presumption of identity of person (CM ETO 12486 Herbert), the stipulation entered into between prosecution, defense and the accused to the effect that two German girls bearing the same names as those described in Specifications 1 and 2 of Charge I were admitted to the 121st General Hospital in Bremerhaven on the day of the incident in question and died of undescribed injuries is not sufficient to support a finding of guilty of the offenses charged in such Specifications, for no evidence whatsoever was presented at the trial tending to show that these girls were the same two unidentified German girls struck by accused and taken to an unnamed hospital.

Only five years confinement is authorized upon conviction of the offense of unauthorized taking and using of a motor vehicle of another. A United States penitentiary (or, in a proper case such as this, a Federal reformatory, par. 5d, AR 600-375, 17 May 1943; s. II, W.D.Circ. 25, 22 January 1945) may be designated as the place of such confinement (CM ETO 6383 Wilkinson).

4. For the foregoing reasons the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and the Specifications thereunder, legally sufficient to support the findings 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 in a Federal reformatory for five years.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Robert G. Schmidt, Judge Advocate

JAGK - CM 316930 1st Ind

NOV 6 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding Officer, Seventeenth Major Port, APO 69, c/o Postmaster, New York, New York

1. In the case of Private Robert L. Mitchell (42211055), 560th Motor Ambulance Company, 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 of Charge I and the Specifications thereunder, legally sufficient to support the findings 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 in a Federal reformatory for five years, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge I and the Specifications thereunder and upon reduction of the term of confinement to five years, you will have authority to order execution of the sentence.

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

(CM 316930).

1 Incl
Record of Trial

RECEIVED 20 11 1946 5320

THOMAS H. GREEN
Major General
The Judge Advocate General

RECEIVED STAFF JUDGE ADVOCATE 20 NOV 1946

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

JAGH - CM 316932

3 APR 1947

UNITED STATES	)	YOKOHAMA BASE
v.	)	Trial by G.C.M., convened at Yokohama Base, 17 June 1946. Confinement at hard labor for ten (10) years. The United States Disciplinary Barracks
Able-Bodied Seaman ISIE YAROSLOWSKY (Z-103355), SS Santa Maria Hills, APO 404	)	

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

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

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

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

Specification: In that Isie Yaroslowsky, a person accompanying the Army of the United States in the Field, as able bodied seaman aboard the SS Santa Maria Hills, said vessel then and there carrying cargo in connection with the military operations of the United States in the War, did at Tokyo, Honshu, Japan, on or about 11 May 1946, willfully and illegally impersonate an officer of the Army of the United States.

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

Specification: In that Isie Yaroslowsky, a person accompanying the Army of the United States in the Field, as able bodied seaman aboard the SS Santa Maria Hills, said vessel then

and there carrying cargo in connection with the military operations of the United States in the War, having been duly placed in arrest at Tachikawa Air Base, Honshu, Japan on or about 12 May 1946, did, at Tokyo, Honshu, Japan on or about 13 May 1946 break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Isie Yaroslowsky, a person accompanying the Army of the United States in the Field, as able bodied seaman aboard the SS Santa Maria Hills, said vessel than and there carrying cargo in connection with the military operations of the United States in the War, did without proper leave absent himself from his ship at Yokosuka, Honshu, Japan, from about 2 December 1945 to about 12 May 1946.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, "or, if this is not applicable, to be barred from all future federal employment or benefits, 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 (10) years." The reviewing authority approved and ordered executed only so much of the sentence as provides for confinement at hard labor for ten years, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of War may direct as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 36, Headquarters Yokohama Base, dated 29 August 1946.

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

John G. Andrews, the Traffic Manager, War Shipping Administration at Yokohama, testified that his duties involved control over merchant seamen on War Shipping Administration vessels, direct operational charge of the vessels in the area under War Shipping Administration charters, and co-ordination of ship movements between various agencies of the armed forces, the Navy Department, War Department, Office of Foreign Liquidation Commission, and the task forces which deal with petroleum products in general (R 6-7). In such capacity he received an official report from the master of the Santa Maria Hills, a tanker, on 2 December 1945 that a seaman, Isie Yaroslowsky, had not returned to the vessel, that the vessel was about to set to sea, and that Yaroslowsky's whereabouts were unknown (R 5, 13). On 12 January 1946, Yaroslowsky was brought before Andrews by two military policemen. Andrews assigned him to the SS Berkeley Victory, but witness was told that when the vessel sailed, accused was not aboard (R 8-9).

On 10 May 1946 the accused was seen in Kanoya, Japan, by First Lieutenant Don I. Cameron, who testified that the accused was dressed in an Army officer's summer uniform (R 21), consisting of khaki trousers and shirt with officer's shoulder straps (R 23). He wore an ensign's gold bar on the right side of his collar and Transportation Corps insignia on the left side of his collar. An ensign's bar was seen on the right side of his cap. The witness identified an ensign's insignia and Transportation Corps' insignia (Pros Ex A) as being similar to the insignia worn by the accused on the occasion described by the witness. On 11 May 1946, Lieutenant Cameron again saw the accused attired in the same officer's uniform at Tachikawa Air Base (R 21). On 12 May 1946, the witness observed the accused similarly attired as an officer, eating breakfast in the dining room of the Tokyo Electric Building which was used as an officer's billet. The witness reported the accused's suspicious appearance to the CID at that time (R 22).

On 12 May 1946, the accused was apprehended by Lieutenant Stahl at the Tachikawa Air Base and delivered to Special Agent Alvin Copeland, 23 CID, on 13 May 1946, who returned the accused to Tokyo. At that time the accused was dressed in a khaki uniform without tie, his cap was in his pocket and bore an ensign's bar. Pin holes were observed in his shirt collar. Lieutenant Stahl asked the accused what had become of the collar insignia (R 14), whereupon he withdrew a Transportation Corps' insignia and an ensign's bar from his pocket and stated that they had fallen off. Copeland took custody of these items which were received in evidence as Prosecution Exhibit A (R 15).

On 13 May 1946, Special Agent James McKitrick examined the register at the Tokyo Electric Building and noticed the following entry on the register: "Isie Yaroslowsky, 2nd Lt., U.S.T.C." (R 27-28).

After the accused was returned to Tokyo he was initially confined in the Metropolitan Police Station. On 16 May 1946, he was taken to the Office of the Provost Marshal, Eighth Army at Yokohama. From Yokohama he was taken to the Office of the 23d CID in Tokyo where Lieutenant William Morgan told him that he was to be taken to the Eighth Army Stockade for confinement by Special Agent Copeland (R 15). While Copeland was attempting to locate a vehicle in the street in order to take the accused to the Stockade, the latter eluded him by running down an alley and effected an escape (R 15, 18). At the time the accused began to run away he was within approximately twenty-five feet of Agent Copeland (R 17).

4. The defense counsel stated that the accused's rights as a witness had been explained to him and stated that the accused elects to remain silent (R 28).

5. The first problem presented by the record is whether the record establishes that the accused is a person subject to military law within the meaning of Article of War 2 (d).

Each specification upon which the accused was tried describes him as:

> "* * * A person accompanying the Army of the United States in the Field, as an able bodied seaman aboard the SS Santa Maria Hills, said vessel then and there carrying cargo in connection with the military operation of the United States in the War * * *."

There is nothing in the record, however, to show that the SS Santa Maria Hills was under Army control, owned by the Army, that it carried military personnel or military cargo, or that it was allocated to the Army by the War Shipping Administration. In CM 286743, Leiby, et al, it was held that a crew member is not serving with the Armies in the field where, as here, it was not shown that he was on a vessel owned by or allocated to the Army, or under Army control, or that it carried military personnel or military munitions, arms or cargo of any description. In the same case, it was held that where offenses were committed by accused after his ship had arrived in a foreign port, and while he was in a city during a period when the city was a supply base within an active theater of operations, his mere presence in the city does not constitute serving with the Armies in the field.

The record in the instant case, however, shows that immediately after arraignment and before the accused entered a plea to the general issue, the defense moved to strike Charge III and the specification thereof, which allege that the accused absented himself without leave from his ship from 2 December 1945 to 12 May 1946 on the grounds that Article of War 61 is not applicable to members of the merchant marine and that punishment for unauthorized absence by members of the merchant service is governed by 46 United States Code 701 (R 5a).

In the course of the argument which followed, the defense stated:

> "We are not denying the fact that the man is subject to military law and subject to the Articles of War" (R 5b).

Although it is elementary that a defense counsel cannot confer jurisdiction by consent where none otherwise exists (CM 211377, Short, 10 BR 57), in the circumstances of the case, and for the reasons stated below, we are of the opinion that the defense counsel's statement immediately after arraignment, amounted to a waiver of proof of jurisdictional fact rather than to a consent to jurisdiction.

Had the record disclosed no evidence from which it might have been inferred that the accused was accompanying or serving with the Armies of the United States in the field, we would be reluctant to hold that the accused is a person subject to military law within the meaning of Article of War 2 (d)

solely upon the basis of the defense counsel's statement. But such is not the case. The testimony of Mr. Andrews, the Traffic Manager of the War Shipping Administration Office at Yokohama, whose duties include the control of merchant seamen in the area, shows that the accused was a seaman under the control of the War Shipping Administration and that he had served aboard a tanker in occupied Japan. The court was warranted in taking judicial notice of the fact that private shipping to and from Japan is not authorized by the Supreme Commander for the Allied Powers. Only shipping which furthers the objects of the occupation is permitted. Such shipping may include limited imports of food essential for civilian consumption which is procured and processed through War Department channels and certain exports which may be necessary to obtain foreign credits for food imports, which are handled through the United States Commercial Company, a subsidiary of the Reconstruction Finance Corporation (Occupation of Japan, Dept of State. Publication 267, Far Eastern Series 17, p 39-40; Appendix 38, pp 168-171).

Since imports for civilian consumption are presently limited to food, and since the home islands of Japan do not produce petroleum products for export, it is inconceivable that the tanker, SS Santa Maria Hills, was carrying cargo in connection with any activity for the civilian population.

It is apparent from the foregoing that the economic control exercised by the Supreme Commander for the Allied Powers in Japan does not warrant an inference that all American seamen in Japanese harbors are serving aboard vessels allocated to the Army, carrying military cargo, or military personnel. Nor may it be inferred that all such seamen are accompanying the Armies in the field (CM 318380, Yabusaki). Vessels in Japanese harbors may serve functions which further the object of the occupation by carrying essential food products for the civilian population, supplies for the use of the Navy, or for other purposes in no way connected with the Army. But under the circumstances of the present economic conditions in Japan the probability that the tanker on which the accused had served was carrying military cargo was sufficient to warrant the court in accepting the defense counsel's waiver of proof of the jurisdictional facts without further inquiry, particularly since those jurisdictional facts were fully alleged in the specifications.

The court was also warranted in considering the fact that the accused availed himself of Army billets and messing facilities as a circumstance warranting the inference that he was accompanying the Armies in the field and that he voluntarily put himself in the position of a person subject to military law (CM 306157, Pollard, 29 BR (ETO) 209, Pollard v. Sanford, U.S.D.C. N. District, Georgia, Atlanta Div. Habeas Corpus No. 2159).

Accordingly, we are of the opinion that the record of trial sufficiently shows that the accused was a person accompanying the Armies in the field to establish the jurisdiction of the court over the person of the accused.

6. The specification of Charge I avers that on or about 11 May 1946 the accused wilfully and illegally impersonated an officer of the Army of the United States at Tokyo, Honshu, Japan.

The evidence clearly shows that at or about the time alleged, the accused wore the uniform of an Army officer, availed himself of the use of officers' billets and messing facilities, and registered at the Tokyo Electric Building, which was used as an officer's billet as Second Lieutenant Isie Yaroslowsky USTC. Although it is true that the accused's impersonation was somewhat clumsy in that he wore naval ensign's bars instead of second lieutenant's bars and wore the cap insignia on the right side of his cap instead of on the left side, nevertheless, his intention to impersonate an Army officer was clear, and he succeeded in convincing the personnel at Tokyo Electric Building that he was an Army officer. The wilful and illegal impersonation of an officer of the Army of the United States has been held to be a military offense within the scope of Article of War 96 as a "disorder * * * to the prejudice of good order and military discipline" and as "conduct of a nature to bring discredit upon the military service " (CM 266137, Miller; CM 318380, Yabusaki).

The next question which must be considered is the maximum punishment authorized upon a conviction of the offense alleged in this specification.

It will be noted that the specification does not allege that the accused falsely impersonated an officer and thereby fraudulently demanded, claimed or obtained something of value, an offense in violation of Title 18, Section 76, United States Code, punishable by imprisonment for a term of three years and therefore that statute is not applicable (CM 266137, Miller; CM 318380, Yabusaki).

The Board of Review has held in a case involving a similar offense to the one here considered:

> "The federal statute most nearly applicable (18 USC 76a and b) prescribes a punishment not exceeding a fine of $250 and confinement for six months for the unauthorized manufacture, sale, or possession of any badge, identification card, or other insignia prescribed by the head of any department of the United States or by any officer or subordinate thereof. The term 'insignia includes * * * distinctive devices worn on the uniform to show rank' (TM 20-205). Based on the mentioned statute, Army Regulations provide that the unauthorized wearing of any insignia prescribed by the War Department is prohibited, and that any person violating the provision is subject to punishment not exceeding a fine of $250 and confinement for six months (par 12, AR 600-90, 29 February 1944) * * *" (CM 251348, Gaston, 33 BR 211; CM 266137, Miller, 23 BR 135).

The unlawful wearing of the uniform of the Army is also denounced by 10 United States Code 1393 and made punishable by a fine not exceeding $300 and imprisonment not exceeding six months.

While the specification does not allege specifically that the accused wore a uniform or insignia of rank, or that the impersonation was effected by either means, it is common knowledge that at the time of the alleged offense, Army officers in Japan were required to wear the uniform (including insignia of rank and devices of their respective arm or service) in public. It may therefore be reasonably implied from the specification that the accused impersonated an officer either by wearing an Army uniform unlawfully, in violation of 10 United States Code 1393 or by the use of some badge, identification card, or insignia, involving possession thereof, in violation of 18 United States Code 76a and b, and paragraph 12, Army Regulations 600-90, 29 February 1944.

Accordingly, we are of the opinion that the maximum confinement at hard labor authorized upon a conviction of the offense alleged in the specification of Charge I is six months.

7. The specification of Charge II avers that the accused, having been duly placed in arrest on or about 12 May 1946, broke his arrest on or about 13 May 1946.

The evidence shows that the accused was apprehended at the Tachikawa Air Base on 12 May 1946 and subsequently confined at the Metropolitan Police Station, Tokyo, Japan, on 13 May 1946. Thereafter on 16 May 1946 the accused was taken to the Office of the 23d CID where he was told by Lieutenant Morgan that he was to be taken to the Eighth Army Stockade under guard for confinement. As the accused and the guard, Special Agent Copeland, left the building, the accused eluded his guard and effected an escape by running through an alley.

Although breach of arrest is alleged, the evidence shows that the offense committed by the accused amounts to escape from confinement. Arrest within the meaning of Article of War 69 is a moral restraint, usually imposed by orders fixing the limits of arrest. Confinement imports some physical restraint (MCM 1928, sec 139a, p 153). In the instant case the accused was under guard en route to a place of confinement when he effected his escape; thus he was under physical rather than moral restraint. A breach of arrest is not a lesser included offense of escape from confinement (CM 171335, Dig Op JAG 1912-40, Sup 1, Sec 427 (6a); CM 244521, Humphrey, 28 BR 338).

Accordingly, we are of the opinion that the variance between the allegation and the proof is fatal and that the record of trial is not legally sufficient to support the findings of guilty of the specification of Charge II.

8. The specification of Charge III avers that the accused absented himself without leave from his ship at Yokosuka, Japan, from about 2 December 1945 to about 12 May 1946.

The only evidence tending to show the accused's initial unauthorized absence from his ship was the testimony of Mr. John G. Andrews, the Traffic Manager of the War Shipping Administration at Yokohama, that the master of the SS Santa Maria Hills telephoned him on or about 2 December that the accused had not returned to the vessel, that the vessel was about to set to sea, and that the accused's whereabouts were unknown.

This evidence is obviously hearsay and was incompetent to establish the accused's initial absence. Similary, Mr. Andrews' testimony that he subsequently assigned the accused to the SS Berkeley Victory and that the master of that ship reported that the accused was not aboard when the latter vessel sailed is incompetent to establish the accused's absence from the SS Berkeley Victory.

Accordingly, we are of the opinion that the record of trial is not legally sufficient to support the findings of guilty of the specification of Charge III.

9. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the specification of Charge I and Charge I, legally insufficient to support the findings of guilty of Charges II and III and the specifications thereof, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six (6) months.

A. Hartenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip E. Kendall, Judge Advocate

JAGH - CM 316932 1st Ind

WD, JAGO, Washington 25, D. C. APR 24 1947

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½ as amended by Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) is the record of trial in the case of Able-Bodied Seaman Isie Yaroslowsky (Z-103355), SS Santa Maria Hills.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally insufficient to support the findings of guilty of Charges II and III and their specifications, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six (6) months. For the reasons stated, I recommend that the findings of guilty of Charges II and III and their specifications be vacated and that so much of the sentence as modified by the reviewing authority as is in excess of confinement at hard labor for six (6) months be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 156, 2 May 1947).

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

JAGN-CM 316961

UNITED STATES	) EUROPEAN AIR TRANSPORT SERVICE (PROV)
v.	) Trial by G.C.M., convened at Wiesbaden, Germany, 23 August 1946. Dismissal and total forfeitures.
Second Lieutenant HAROLD L. GUERNSEY (0-2079573), Air Corps.	)

OPINION of the BOARD OF REVIEW
WHITE, McMILLAN and JOHNSON, Judge Advocates

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

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

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

Specification 1: In that Harold L. Guernsey, 2nd Lt., AC, 0-2079573, 32nd TC Sq., 441st TC Gp., USAF Station, Eschborn, Germany, APO 57, did, without proper leave, absent himself from his station at USAF Station, Eschborn, Germany, APO 57, from about 10 May 1946 to about 27 May 1946.

Specification 2: In that * * *, did, without proper leave, absent himself from his station at USAF Station, Eschborn, Germany, APO 57, from about 11 June 1946 to about 8 July 1946.

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

Specification 1: In that * * *, did, at USAF Station, Eschborn, Germany, on or about 28 May 1946, with

intent to deceive his Commanding Officer, officially report to the said officer, that he had been sick in the 50th Field Hospital, Paris, France, which report was known by the said Harold L. Guernsey to be untrue.

Specification 2: In that * * *, having been placed under arrest in quarters, did, on or about 11 June 1946, break said arrest by going to Paris, France.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

The evidence in support of Charge I and the Specifications thereunder consists of Prosecution's Exhibits 4, 5, 6 and 7, being extract copies of the morning report of the 32nd Troop Carrier Squadron, 441st Troop Carrier Group. These respectively show accused: from duty to absent without leave 2400 hours 10 May 1946; from absent without leave to duty 28 May 1946; from confinement to absent without leave "24" hours 11 June 1946; and from absent without leave to confinement 8 July 1946. All such exhibits are inferentially supported by the stipulated testimony of the official custodian of the morning reports so extracted (Pros. Ex. 1).

The evidence in support of Specification 1 of Charge II consists of a stipulation:

"* * * that if records of the 50th Field Hospital, Paris, France, were presented as evidence in court that they would show that the accused, 2nd Lt. Harold L. Guernsey, 0-2079573, was not sick in the 50th Field Hospital, Paris, France, at any time from about 10 May 1946 to about 8 July 1946."

and,

"* * * that if Major Robert H. Riemensnider, 0-753738, were present in court that he would testify as follows:

I was Commanding Officer of 2nd Lt. Harold L. Guernsey, 0-2079573, for the period 10 May 1946 to 31 May 1946. On 28 May 1946 Lt Guernsey stated that the reason he was absent from his station from about 10 May 1946 to about 27 May 1946 was because he was sick in the 50th Field Hospital, Paris,

France. I sent an investigating officer to ascertain if Lt Guernsey had been a patient in the 50th Field Hospital, Paris, France, and the investigating officer could find no records at the hospital or anyone in the hospital in charge of the records who knew of Lt Guernsey being a patient at that hospital" (Pros. Ex. 3).

The evidence in support of Specification 2 of Charge II consists of a stipulation:

"* * * that if Captain Edwin L. Kier were present in court he would testify as follows:

On 11 June 1946 I was the immediate Commanding Officer of 2nd Lt. Harold L. Guernsey, 0-2079573. At that time I had proper authority to place Lt Guernsey under arrest in quarters and did so on 11 June 1946. I didn't give Lt Guernsey authority to leave his quarters, but could not find Lt Guernsey anywhere on or about the station. I placed notices on all bulletin boards stating that Lt Guernsey was to report to me. These notices remained on all bulletin boards, but Lt Guernsey did not report to me until about 8 July 1946 at which time he was apprehended in Paris, France" (Pros. Ex. 2),

and the morning report extracts above referred to which were introduced as Prosecution's Exhibits 6 and 7.

4. Evidence for the defense:

The defense introduced no evidence but the accused, being advised of his rights, elected to make the following unsworn statement through counsel:

"I cannot bring evidence at this time because of the plea of guilty. In February, the accused was on authorized leave in Paris. Shortly after, he received word that his father was in a critical condition at home. He asked for an emergency furlough. This was denied him, but was told that perhaps at a later date it would be granted. A short time after, he was offered a civilian job with 'Air France' and he requested from the same Commanding Officer for a discharge to accept civilian employment. This was also refused. On approximately 10 May 1946, the accused decided

that in order to hold his job he would have to get to Paris and see the people and find if it could be arranged. He tried to make these arrangements, but was refused and he went AWOL. After coming to terms and contracts with 'Air France', he came back and told his Commanding Officer that he had been sick in hospital while in Paris. In Paris he had suffered from a skin irritation and rash and was given an admission slip to the 50th Field Hospital; but the next day due to appointments with people at 'Air France', he did not report to the hospital. He returned to his station and falsified this statement, thinking it would not be checked because of the slip he had that he had never used. He was placed in arrest pending trial. About the time of the trial, he received more information on his civilian job in Paris, and in order to make final arrangements, he broke arrest to get the matter straightened out as far as contracts were concerned. He was picked up in Paris by the CID and brought back to Frankfurt. Due to the fact that he had tried in many ways to get leave, and by being refused by the Commanding Officer with whom he had had difficulties, and because of his upset mind, he did not realize the seriousness of the AWOL. At the same time, his mind had been upset because of his wife and child at home and his wife waiting for his discharge to start divorce proceedings, the boy's mind was confused to the extent that he committed these offenses under mental strain. The accused has a three year old boy at home, and the uppermost thing in his mind has been the future of his child - to give him a home and the education he should have. It is desired the Court take cognizance of these facts and weigh them" (R. 7).

5. The evidence introduced, and the unsworn statement of accused, supports the findings of the court and are consistent with the plea of guilty duly entered as to each of the Charges and the Specifications thereunder.

Specification 2 of Charge I and Specification 2 of Charge II allege offenses which would appear from the record to be different aspects of the same act and the more serious aspect (absence without leave in this case) is the only one of the two which may be considered in respect to punishment (CM 313544, Carson (1946); V Bull. JAG 202).

6. War Department records show that the accused is 26 years of age and married. He is a high school graduate, completed one year of college at the University of Toledo, Ohio, and worked as a clerk and salesman until he enlisted 31 January 1943. He was appointed temporary

second lieutenant, Army of the United States, 23 December 1944. The extent of his overseas duty does not appear.

7. The reviewing authority recommends "remission of that portion of the sentence adjudging total forfeitures."

8. 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 Articles of War 61 and 96.

Thomas J. White, Judge Advocate.

Robert E. McMullin, Judge Advocate.

Edward D. Tomson, Judge Advocate.

JAGN-CM 316961 1st Ind 31 October 1946
WD, JAGO, Washington 25, D. C.
TO: The Under Secretary of War

1. Pursuant to Executive Order 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harold L. Guernsey (0-2079573), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave on two separate occasions, in violation of Article of War 61; of making a false official report with intent to deceive his commanding officer; and of breaking arrest, in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, recommended remission of the forfeitures, 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 is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

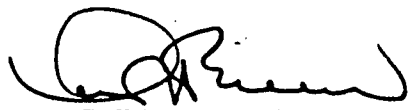
The record shows that the accused was absent without leave from 10 May 1946 to 27 May 1946. He attempted to escape the consequences of such act by knowingly and intentionally falsely reporting to his commanding officer that he had been sick in the hospital during such period. He was thereafter placed in arrest in quarters, but broke his arrest and again was absent without leave from 11 June 1946 until he was apprehended on 8 July 1946.

This officer was convicted 23 April 1946 of absence without leave, in violation of Article of War 61; and of an unlawful attempt to utter an illegally altered order in furtherance of such absence, in violation of Article of War 96. In that case he was sentenced to a reprimand and to forfeitures which were still in effect when he committed the offenses of which he was convicted in this case.

4. In view of the number of absences, and the element of deceit which is present in both cases, 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 out 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

(G.C.M.O. 347, 14 November 1946).

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

JAGQ - CM 316965

APR 1 4 1947

UNITED STATES v. First Lieutenant MATHIAS C. LASCHECK (0-787517), Air Corps.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 20 September 1946. Dismissal and total forfeitures.

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

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

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

Specification 1: In that First Lieutenant Mathias C. Lascheck, Air Corps, Squadron PB-1 (Training and Operations), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 20 July 1946, wrongfully strike Louise Hadley in the face with his fist.

Specification 2: In that First Lieutenant Mathias C. Lascheck, Air Corps, Squadron PB-1 (Training and Operations), 3704th Army Air Forces Base Unit, was, at or near Keesler Field, Mississippi, on or about 20 July 1946, drunk and disorderly in uniform in a public place, to wit: a public street adjoining Gate No. 2 of Keesler Field, Mississippi.

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

Specification 1: In that First Lieutenant Mathias C. Lascheck, Air Corps, Squadron PB-1 (Training and Operations), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 20 July 1946, wrongfully strike Louise Hadley in the face with his fist.

Specification 2: In that First Lieutenant Mathias C. Lascheck, Air Corps, Squadron PB-1 (Training and Operations), 3704th Army Air Forces Base Unit, was, at or near Keesler Field, Mississippi, on or about 20 July 1946, drunk and disorderly in uniform in a public place, to wit: a public street adjoining Gate No. 2 of Keesler Field, Mississippi.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions 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.

3. Evidence for the prosecution. On or about 20 July 1946 accused invited his friend, Miss Alzina Webster, Mrs. Ada Travirca and Mrs. Louise Hadley Holt to accompany him to the Officers' Club at Keesler Field for the purpose of celebrating his birthday (R. 6, 7, 11). Mrs. Holt's maiden name was Hadley and she used the name Hadley instead of her married name (R. 6, 8, 9). While at the club all of the members of the party except Miss Webster drank gin and liquor (R. 6, 7, 11). At about 12:30 A.M. the party left the club and started to the City of Biloxi in an automobile owned and driven by Mrs. Holt (R. 6, 7, 11, 12). As they were driving down Division Street, accused exclaimed "the Japs are coming, let me out". He was let out of the car and the three women drove on. The women decided that they should go back and take accused to Gate 2 Keesler Field so that he could go to bed (R. 7, 12). They returned for accused and drove to a street adjacent to Gate No. 2 and asked accused to get out. Accused refused and an argument ensued between him and Mrs. Holt. Mrs. Holt told him that she was out of gas and could not take him back to town (R. 7, 12). Accused slapped Mrs. Holt who then called him a "no good son of a bitch". Accused climbed out of the car went around to the left side and struck Mrs. Holt over the eye with his fist (R. 6, 8, 12; Exs. 1 and 2). The disturbance attracted the attention of military police at Gate No. 2 and they went to the scene accompanied by the Officer of the Day. Accused was fighting and shouting that the Japs were coming or words to that effect. Both accused and Mrs. Holt were drunk (R. 15, 18, 20, 22). Mrs. Holt was taken to the hospital where six stitches were taken above her eye. Accused was taken in custody by the Duty Officer who returned him to his quarters. It was necessary to use force to put accused into a staff car (R. 16, 18, 20, 22).

Two statements made by accused were received in evidence, setting forth that he had not eaten during the day and the drinks that night "hit me pretty bad"; that he did not remember talking about Japs but did

recall the argument with Mrs. Hadley; that she called him a "no good dirty son of a bitch" whereupon he "got out of the car, proceeded to her side, and hit her with my right fist"; that he remembered nothing further except being at Post Headquarters; that this was the first time that he had ever allowed himself to get in that condition (Exs. 1 and 2).

4. Evidence for the defense. Captain Edward J. Murphy, Flight Training Section, Keesler Field, testified that he had known accused about 9 weeks and had observed the manner in which he performed his duties; that accused performed his duties in an excellent manner and that his reputation among the officers and personnel of the Flight Training Section was excellent (R. 24). Captain Leo C. Brown testified that he had known accused for about one year, having served with him in the Pilot Section at Ellington Field; that accused served as his co-pilot and performed his duties in a superior manner; that during this time accused had always conducted himself as an officer and gentleman should (R. 26). Second Lieutenant Charles B. Moran testified that he had known accused approximately eleven months and had been associated with him both on and off duty; that he had never seen accused drinking and had never seen him behave himself in any manner other than that of an officer and a gentleman; that he had never heard anyone speak ill of accused so far as his reputation for sobriety and temperance was concerned (R. 27, 28).

Accused made an unsworn statement through counsel to the effect that due to his excessive drinking on the occasion he could not add anything to his two sworn statements which had been introduced as Prosecution's Exhibits 1 and 2.

5. The evidence of accused's guilt of all Charges and Specifications is clear and conclusive. The witnesses spoke of Mrs. Holt as "Mrs. Hadley" and the specifications allege that the assault was committed upon Louise Hadley. The record is clear that the woman struck by accused is the person set out in the specifications. Both accused and Mrs. Holt were drunk and accused slapped her after which she cursed him. This provoked the assault with which he is charged, i.e., striking Mrs. Holt with his fist. These facts do not constitute a justification but may be properly considered in extenuation. His actions in the street near Gate No. 2 of Keesler Field, cursing and fighting to prevent entering the staff car as ordered by the military police constituted disorderly conduct beyond that involved in his assault on Mrs. Holt. Accused was charged with identical offenses under both Article of War 95 and Article of War 96. There is no inconsistency nor any unlawful duplication in the findings of guilty upon identical specifications under

both Article of War 95 and Article of War 96 where the proof supports conviction under each (CM 273450, Antalek, 47 BR 7; CM 239609, Mulroy, 25 BR 215), but in fixing appropriate punishment it should be considered as a single offense (CM 230222, Daly, 17 BR 331; CM 275518, Linville, 48 BR 55).

6. War Department records show that accused is 22 years of age and unmarried. He is a high school graduate. He served in the merchant marine from November 1942 to May 1943. He entered the service as an aviation cadet 22 June 1943, was commissioned second lieutenant in the Air Corps 20 November 1944, and was promoted to first lieutenant 26 June 1946. His MOS is 1051 Pilot, two engine. He has no previous convictions and has not been subject to disciplinary action pursuant to Article of War 104.

7. The court was legally constituted and had jurisdiction of the person and the 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 mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

Albert D. Hiner, Judge Advocate

Carlton G. Scheuber, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 316965 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 Mathias C. Lascheck (0-787517), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of striking a woman on the face (Specification 1, Charge I) and of being drunk and disorderly in a public place (Specification 2, Charge I) in violation of Article of War 95, and of the identical offenses in violation of Article of War 96 (Specifications 1 and 2, Charge II). 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 shows that accused is 22 years of age and unmarried. Three women guests accompanied him to the Officers Club, Keesler Field, Mississippi, for the purpose of celebrating his birthday. He and two of his guests drank gin and other intoxicants. The party started to Biloxi about midnight, in one of the guest's car. Accused was drunk and started shouting "about Japs" and demanded that he be let out of the car. This was done. In a few minutes the party returned and picked up accused for the purpose of returning him to the Field. He demanded that he be driven to town. The driver, one of the women, refused. He slapped her, she cursed him, and he got out of the car, walked to the left side and struck her with his fist. The blow was severe enough to require six stitches to be taken over her eye. Military police were attracted by the noise and force was required to get accused in the military police car.

5. The record of accused as a civilian appears clear, and has been good while upon active military service since 1943. He is 22 years of age. It is recommended that the sentence be confirmed but in view of the

youth of accused and his previous good record it is recommended that the sentence be commuted to dismissal and a reprimand and that the sentence as thus commuted be carried into execution but that execution of the dismissal be suspended during good behavior.

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

CM 316965

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 149, 2 May 1947).

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

JAGK - CM 316970

6 NOV 1946

UNITED STATES)	WESTERN BASE SECTION
)	US FORCES, EUROPEAN THEATER
v.)	
)	Trial by G.C.M., convened at Paris,
Private JAMES E. HOWARD)	France, 27 and 28 June 1946. Dis-
(36393053), 392nd Engineer)	honorable discharge and confinement
General Service Regiment)	for life. Penitentiary.

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 93rd Article of War.

Specification: In that Private James Eugene Howard of Company D, Three Hundred Ninety Second Engineer General Service Regiment, did, at Darnetal, France, on or about 11 January 1945, with intent to commit murder, commit an assault upon Mr. Robert Alexander Prudent, of the French Police, by wilfully and feloniously shooting him with a rifle.

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

Specification: In that Private James Eugene Howard ***, did, at Darnetal, France, on or about 11 January 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Jack Goldsmith, Criminal Investigation Department, United States Army, a human being, by shooting him with a rifle.

He 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 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," 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 findings of guilty and sentence

of death adjudged on 3 April 1945 were vacated by action of the Commanding General, U.S. Forces, European Theater, dated 8 September 1945 and a rehearing was ordered before another court-martial which was thereafter designated and before whom the present case was tried. The opinion of the Board of Review in the Branch Office of The Judge Advocate General with the European Theater and the first indorsement thereto of the Assistant Judge Advocate General are found in CM ETO 13222 dated 18 August 1945.

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

5. 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).

Charles L. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stevens, Judge Advocate

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

MAY 7 1947

JAGQ - CM 316971

UNITED STATES	)	WESTERN BASE SECTION U.S. FORCES, EUROPEAN THEATER
v.	)	Trial by G.C.M., convened at Paris, France, 30-31 May and 1-5 June 1946. Dishonorable discharge and confinement for life. Penitentiary.
Private EDDIE JONES, JR. (34549394), Third Replacement Depot, Ground Forces Replacement Center, APO 872.	)	

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 and found not guilty of Specification 4, Additional Charge II, and guilty by exceptions and substitutions of the following Charges and Specifications:

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

Specification: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, in conjunction with Private Edgar D. Jordan, 2nd Replacement Depot, at Paris, France, on or about 16 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private James C. Clendaniel, a human being, by shooting him with a pistol.

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

Specification 1: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, in conjunction with Private Edgar D. Jordan, 2nd Replacement Depot, and Private Theodore Taylor, 4253rd Quartermaster Truck Company, and Private James Willis Blue, 4253rd Quartermaster Truck Company, near Le Havre, France, on or about 14 February 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of First Lieutenant Thomas Harrigan, two (2) 1/4-ton 4x4 motor vehicles, the property of the United States, value of more than $50.00.

Specification 2: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, in conjunction with Private Edgar D. Jordan, 2nd Replacement Depot, and Private Theodore Taylor, 4253rd Quartermaster Truck Company, and Private James Willis Blue, 4253rd Quartermaster Truck Company, near Le Havre, France, on or about 14 February 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Sergeant Milford Kirkland, one (1) 1/4-ton 4x4 motor vehicle, the property of the United States, value of more than $50.00.

Specification 3: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, in conjunction with Private Edgar D. Jordan, 2nd Replacement Depot, at Paris, France, on or about 16 February 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Technician Fifth Grade Lee R. Barker, one (1) 1/4-ton 4x4 motor vehicle, the property of the United States, value of more than $50.00.

Specification 4: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, in conjunction with Private Edgar D. Jordan, 2nd Replacement Depot, at Paris, France, on or about 6 March 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Roger Dalval, one thousand eight hundred and fifty (1,850) francs, French currency, property of the said Roger Dalval, of the value of about $15.00, American currency.

Specification 5: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, in conjunction with Private Edgar D. Jordan, 2nd Replacement Depot, at Paris, France, on or about 6 March 1946, with intent to do them bodily harm, commit an assault upon Paul Berthoumieux, Lucien Pezin, Casimir Fievet, Mathurin Rouxel, Alphonse Lefort, Georges Morel, Robert Noel, by threatening them with a dangerous weapon, to wit., a pistol.

Specification 6: In that Private Eddie Jones, Junior, 3rd Replacement Depot, did, at Paris, France, on or about 6 March 1946, with intent to do them bodily harm, commit an assault upon Casimir Fievet, Robert Noel, and Henri Benot, by shooting at them with a dangerous weapon, to wit., a pistol.

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

Specification: In that Private Eddie JONES Junior, Paris Detention Barracks, Western Base Section, United States Forces, European Theater having been duly placed in confinement in the said Paris Detention Barracks on or about 8 March 1946 did at the said Paris Detention Barracks on or about 13 April 1946 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Eddie JONES Junior, Paris Detention Barracks, Western Base Section, United States Forces, European Theater, in conjunction with Private John LEE and Private Gomer C. BLACKBURN, did, at or near Mons, Belgium on or about 21 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 Thomas CESTORO, a military policeman acting in line of duty, one (1) pistol with holster, MP helmet, brassard and white belt, of some value, the property of the United States.

Specification 2: In that Private Eddie JONES Junior, Paris Detention Barracks, Western Base Section, United States Forces, European Theater in conjunction with Private John LEE and Private Gomer C. BLACKBURN, did, at or near Soissons, France on or about 21 April 1946 by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Technician Fourth Grade Sidney C. GLEBER, Technician Fifth Grade Harold R. GAYER, Technician Fifth Grade Earl BAKER, and Private First Class Alexander J. OLSZEWSKI, fifteen thousand (15.000) francs, French currency, and two (2) wrist watches, property of the said Technician Fourth Grade Sidney C. GLEBER, eight (8) United States Postal Money Orders of the value of seven hundred fifty dollars ($750.00), sixty dollars ($60.00) United States currency, eighteen thousand (18.000) francs, French currency, and one (1) Kodak camera, the property of the said Technician Fifth Grade Harold R. GAYER, one (1) wrist watch, the property of the said Technician Fifth Grade Earl BAKER, three thousand five hundred (3.500) francs, French currency, ten dollars ($10.00) United States currency, and one (1) wrist watch, the property of the said Private First Class Alexander J. OLSZEWSKI, of the total value of more than fifty dollars ($50.00).

Specification 3: In that Private Eddie JONES Junior, Paris Detention Barracks, Western Base Section, United States Forces, European Theater, did, at Paris, France on or about 26 April 1946 with intent to do him bodily harm, commit an assault upon French Policeman Marius PANNAUX, by shooting him in the left arm with a dangerous weapon, to wit, a pistol.

Specification 4: (Finding of Not Guilty).

ADDITIONAL CHARGE III: Violation of the 94th Article of War.

Specification: In that Private Eddy JONES Junior, Paris Detention Barracks, Western Base Section, United States Forces, European Theater, in conjunction with Private John LEE and Private Gomer C. BLACKBURN, did, at or near Soissons, France on or about 21 April 1946, feloniously take, steal and drive away a 3/4 ton truck, value more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

No evidence of previous convictions was introduced. With three-fourths of the members of the court present at the time the vote was taken concurring, the 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 pursuant to Article of War 50½.

3. The Board of Review adopts the statement of evidence in the staff judge advocate's review.

4. The crime of murder, of which accused was charged, tried and convicted, if legally sustained, is sufficient to support the sentence to life imprisonment imposed by the court and approved by the appointing authority. Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. Malice may be presumed from the act and is sufficient if it exist at the time the act is committed; premeditation is not required.

The murder was a logical sequence of the wrongful taking of the car and the forceful abduction of the messenger and mail courier, acts accompanied by threats of violence and the menacing use of firearms, while

riding through the streets of Paris. Every essential element of murder was proved beyond a reasonable doubt, the defense resting its case solely on an attempt to discredit identification of the accused by Barker, whose testimony in this respect was positive, unequivocal, and convincing. Barker had not a fleeting glimpse but excellent opportunity to observe accused when he approached and stood by the jeep, and still better opportunity while accused faced Barker and deceased during the subsequent ride until the murder was committed. Barker's identification of accused on direct examination at the trial (R. 61, 68) was not shaken by the defense on cross-examination (R. 90, 94, 96), and on redirect examination his clear and positive identification was confirmed (R. 104). So the court thought, and the record amply supports its findings.

The remaining Charges and Specifications of which accused was found guilty were conclusively proved by the evidence, in fact no serious attempt was made to disprove them.

Irregularities in the consideration of an alleged confession were cured by appropriate action of the trial judge advocate in withdrawing it and declining to allow the court to hear its contents. The offer and receipt in evidence of a statement in the confession, as an admission against interest, pertaining to the possession by accused at the time of the murder of a 45 calibre U.S. Army pistol and a Belgian P 35 automatic pistol was cumulative in character and not governed by the rule concerning confessions (MCM, 1928, par. 114b). The purported admission was not a confession of guilt of the crime charged but mere rebuttal evidence concerning a fact the court might well have adduced from all the attendant circumstances. In such a situation its admission was not error (Dig. Ops. JAG 1912-40, sec. 393 (3); CM 121529).

5. The court was legally constituted and had jurisdiction over the accused 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 and the sentence. Imprisonment for life is one of the mandatory sentences upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42.

CM 316971

W. H. Johnson Jr, Judge Advocate

Joseph J. Stern, Judge Advocate

Carlton E. Johnson, Judge Advocate

(G.C.M.O. 200, 5 June 1947).

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

JAGN-CM 316977

U N I T E D S T A T E S	)	WESTERN BASE SECTION
v.	)	Trial by G.C.M., convened at Paris, France, 18 July 1946.
Privates THOMAS R. KING (35224005), Company A, 1st Staging Area, and JESSIE WILLIAMS (34006967), 3200th Quartermaster Service Company.	)	King: Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks. Williams: Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
WHITE, HARDY and JOHNSON, Judge Advocates

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1. The record of common trial in the case of the soldiers named above has been examined by the Board of Review and as to the accused Williams is held to be legally sufficient to support the sentence. The remainder of this holding refers only to the accused King.

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

CHARGE: Violation of the 94th Article of War.

Specification 1: (Nolle prosequi).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Disapproved by reviewing authority).

Specification 5: (Disapproved by reviewing authority).

Specification 6: In that Private Thomas R. King, Company A, 1st Staging Area, Calas, United States Forces, European Theater, did, in conjunction with one Clavel, at or

near Massillargues, France, on or about 18 December 1945, knowingly and willfully dispose of by sale to a French civilian, one 2 1/2-ton 6x6 truck value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Specification 7: (Finding of not guilty).

Accused pleaded not guilty to the Charge and all Specifications thereunder. A Nolle Prosequi was entered as to Specification 1. Accused was found not guilty of Specifications 2, 3, and 7, guilty of the Charge and all remaining Specifications thereunder, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for fifteen years. The reviewing authority disapproved the findings of guilty of Specifications 4 and 5, approved only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York , as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution:

Fernand Clavel, a french civilian, testified, in substance, that a colored soldier named Thomas (pronounced "Toma" by the witness (R. 16)) sold him a GMC truck (one of two so sold) which he took to the village of Massillargues, Atuech, there giving it to a Mr. Julian from whom he received in exchange the sum of 100,000 francs, and that he gave 80,000 of the francs so received to "Toma" (R. 8-11). When asked to describe the truck he testified:

"A. They are trucks with 10 wheels and there were big figures on them, big numbers on them.

Q. What markings, other than numbers, if any, did these trucks have on them?

A. I don't think so.

Q. What color were they painted?

A: Gray" (R. 15).

Clavel was unable to identify the accused as "Toma" (R. 8).

Mr. Jean Julian, a french civilian, testified in substance

that "about Christmas" 1945 at his home in Massillargues he purchased a truck for 110,000 francs from Clavel and "Toma"; that he placed the purchase money on a table, in the presence of both Clavel and "Toma," from which it was taken by Clavel. He identified the accused as "Toma." He described the truck as "a GMC, double wheels," "military type," with "eleven wheels, eleven tires" (R. 33-35).

4. The accused elected to remain silent and no evidence was introduced in his behalf.

5. The evidence, directly or by reasonable inference, sufficiently proves all of the allegations of Specification 6 excepting that the truck in question was "property of the U.S. furnished and intended for the military service thereof," an essential element of the Specification and Charge as laid under Article of War 94. There is no direct evidence in the record to support such allegation. "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" (CM 212505, Tipton, 10 BR 244; CM 316052, Elmore, (1946)). The Board is of the opinion that no reasonable inference in support of the allegation of ownership can be drawn from the evidence in the record of trial of this case.

6. For the reason stated the Board of Review holds the record of trial legally insufficient to support the findings and sentence as to accused King.

Thomas G. Wise, Judge Advocate.

Glenn W. Hendy, Judge Advocate.

Edward J. Johnson, Judge Advocate.

NOV 25 1946

JAGN-CM 316977 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Western Base Section, APO 513, c/o Postmaster, New York, New York.

1. In the foregoing case of Privates Thomas R. King (35224005), Company A, 1st Staging Area, and Jessie Williams (34006967), 3200th Quartermaster Service Company, I concur in the holding by the Board of Review and for the reasons therein stated recommend that as to the accused King the findings of guilty and the sentence be disapproved. Upon disapproval of the findings of guilty and the sentence as to accused King you will have authority to order the execution of the sentence as to the accused Williams.

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:

30 DEC 1946

(CM 316977).

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.

(157)

JAGK - 316982

12 DEC 1946

UNITED STATES	)	86TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Marikina, Rizal Province, P.I., 11 July 1946 and 1 August 1946. "Dishonorable discharge", total forfeitures, and confinement for five (5) years.
	)	
Captain MERTON C. NORMAN (0-1315094), Infantry	)	

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

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 on the following charge and specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Captain Merton C Norman, L Company, 342d Infantry did, at Balingasag, Mindanao, P I, on or about 14 April 1946, wrongfully and knowingly sell one LeRoi Air Compressor mounted on one two and one-half ton General Motors Corporation Truck, United States Army Number 60104528, of the value of about $2507.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the specification and of the charge. 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 and forwarded the record of trial for action under Article of War 48.

3. Prior to pleading to the general issue the defense moved for a continuance until further investigation of the mental condition of accused could be made. Accused had been examined on 1 July 1946 and 10 July 1946. Evidence was then introduced in support of the motion. At the conclusion of the testimony, the motion of the defense was sustained and the court adjourned 11 July 1946 to meet at the call of the president (R.9).

The court reconvened 1 August 1946, and the prosecution read into evidence the psychiatric report of examination of accused accomplished after approximately two and one-half weeks observation at the 4th General Hospital, Fort

William McKinley, Rizal Province, P.I. (R. 9, Pros. Ex. 3). The defense offered no further evidence on this point. After considering the psychiatric report the court ruled "that at the time of the commission of the offense charged and at the present time the accused is not suffering from any mental disease and difficulty, can distinguish between right and wrong and adhere to the right, and that the trial will proceed" (R. 9).

4. Evidence for the prosecution

On the morning of 15 April 1946, Private First Class Eugene Van Holde, in response to a request of the accused made the previous evening, drove a compressor truck from the motor pool of L. Company, 342d Infantry, Mindanao, to Balingasay, P. I. He followed accused, who preceded him in a staff car, to the house of Mr. Vladimir Denisenko. The accused entered the house first and later summoned Van Holde. Accused told Mr. Denisenko that the truck was for sale for 2,000 pesos. Denisenko agreed on the price and promised to make payment therefor the following day. Van Holde was present during the conversation between accused and Mr. Denisenko (R. 14-16, Pros. Ex. 5).

At about 0200, 17 April 1946, accused and Van Holde returned to the home of Mr. Denisenko who stated that he was unable to raise all of the purchase price of the truck. Accused did receive, however, 800 pesos from Mr. Denisenko as a down payment and gave him a certificate of purchase in the amount of $1,000.00 (Pros. Ex. 1). Later, on 17 April 1946, accused, at the instance of Mr. Denisenko, gave him a receipt for 2,000 pesos signed by "Arthur P. Bates, Capt. Ordnance" and countersigned by "Edward J. Wineberg, Colonel Commanding" (Pros. Ex. 2). The balance of the agreed purchase price was not paid. Private First Class Van Holde was present during all of these transactions (R. 12,15,16; Pros. Ex. 5).

The compressor truck was identified as the property of the United States Government, intended for the use of the military service, by Second Lieutenant George D. Jackson, Headquarters Company, 2nd Battalion, 342d Infantry, to whom it was charged on memorandum receipt (R. 12, Pros. Ex. 4). Further identification of the vehicle, and its value, was established by the court taking judicial notice of Army Service Forces Catalogue, Engineer 3-1 (R. 10). Lieutenant Jackson, on being advised that the compressor truck was missing, ascertained that Van Holde had driven it out of the motor pool. He thereupon questioned Van Holde and proceeded to the home of Mr. Denisenko where he found the truck and compressor (R. 12).

5. Evidence for the defense

Accused having been advised of his rights by the court elected to remain silent.

Lieutenant Colonel Thomas M. Ward, accused's battalion commander for two years, testified that his performance of duty was noted either "Superior" or "Excellent" on his efficiency report; that he was courageous in combat, a good leader and did his job well.

6. The uncontroverted evidence clearly shows that accused wrongfully sold to Mr. Denisenko a LeRoi air compressor mounted on a two and one-half ton General Motors Corporation truck, all being the property of the United States intended for the use of the military service and of the value of $2,507.00. All of the elements of the offense were conclusively proved (MCM, 1928, par. 150i, p. 185).

The testimony of Colonel Ward as to the military record of accused may be considered in mitigation but has no bearing on the guilt or innocence of accused.

Prosecution's Exhibit 3, upon which the court based its opinion that accused was sane has been given careful consideration. This psychiatric report is dated 31 July 1946, and is written in longhand by the reporting officer, Captain Donald J. Silverstein, MC, the psychiatrist of the 4th General Hospital. The report does not comply with the provisions of War Department Technical Bulletin (TB Med. 201), 1 October 1945, but does state that in the opinion of the psychiatrist the accused is not psychotic and is "certainly responsible for his acts." In view of the presumption of sanity, and the fact that the presumption continues until sufficient evidence is presented, either by the defense or the prosecution, which raises a reasonable doubt to the contrary, it is considered that the court was justified in concluding (1) that the accused was, at the time of the alleged offense, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged to distinguish right from wrong; (2) that he was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular act charged to adhere to the right; (3) that at the time of the trial he had sufficient mental capacity to understand the nature of the proceedings and to intelligently cooperate in his defense (MCM, 1928, par. 78a, p. 63, par. 112a, p. 110; see also WD Tech. Bull. TB MED 201).

It is to be noted that accused was sentenced in part "to be dishonorably discharged the service." That portion of the sentence is inappropriate inasmuch as the accused is a commissioned officer and the sentence should have been to dismissal. However, "dishonorable discharge" and "dismissal" are legal equivalents and the sentence, although inartful, is in legal effect a sentence to dismissal (CM 249921, Maurer, 32 BR 229; CM 271153, Karsanoff, 46 BR 61).

7. War Department records show accused to be 28 years of age and married. He enlisted in the Regular Army 5 January 1937, and on 20 March 1943 he was commissioned second lieutenant, AUS. He was appointed first lieutenant on 19 January 1944 and captain on 5 January 1946. His efficiency ratings have been either "Superior" or "Excellent."

8. 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 94.

Charles L. Silberg, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lockwood, Judge Advocate

JAGK - CM 316982 1st Ind

WD, JAGO, Washington 25, D. C. JAN 2 1946

TO: 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 Merton C. Norman (0-1315094), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and knowingly selling one LeRoi air compressor mounted on one 2-1/2 ton General Motors Corporation truck, property of the United States, of the value of about $2,507.00, furnished and intended for the military service. 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 and forwarded the record of trial for action under Article of War 48.

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

The accused at Mindanao, P. I., on 15 April 1946, sold an air compressor truck, property of the United States and intended for the military service, to a Mr. Denisenko for 2,000 pesos. He received 800 pesos as partial payment and gave Mr. Denisenko a receipt for 2,000 pesos signed and countersigned by fictitious names. All elements of the offense were proved conclusively and without contradiction.

Evidence was introduced tending to show accused to have had an acceptable prior military record.

The War Department records show accused to be 28 years of age and married. He enlisted in the Regular Army 5 January 1937, and on 20 March 1943 he was commissioned second lieutenant, AUS. He was appointed first lieutenant on 19 January 1944 and captain on 5 January 1946. His efficiency ratings have been either "Superior" or "Excellent."

In view of all the circumstances of the case, it is recommended that the sentence be confirmed, that the period of confinement be reduced to three years, that the sentence as thus modified be ordered executed, and that a United States disciplinary barracks be designated as the place of confinement.

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

CM 316982

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

THOMAS H. GREEN
Major General
The Judge Advocate General

G.C.M.O. 8, 15 Jan 1947).

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

JAGK - CM 317081

14 NOV 1946

UNITED STATES v. Private THOMAS L. SANDERS (39074103), 3211th Ordnance Base Small Arms Maintenance Company, 611th Ordnance Base Armament Maintenance Battalion	FIRST ARMY Trial by G.C.M., convened at Fort Jay, New York, 20 and 21 August 1946. Dishonorable discharge and confinement for life. Penitentiary.

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 soldiernamed 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 L. Sanders, 3211th Ordnance Base Small Arms Maintenance Company, 611th Ordnance Base Armament Maintenance Battalion, did, at Butzbach, Kreis Friedberg, Germany on or about 10 October 1945 with malice aforethought, willfully deliberately, feloniously, unlawfully, and with premeditation kill one, Technician Fifth Grade, Lawrence E. Dixon, a human being, by shooting him with a pistol

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

Specification: In that Private Thomas L. Sanders, ***, did, at Butzbach, Kreis Friedberg, Germany, on or about 10 October 1945, with intent to commit a felony, viz, murder, commit an assault upon Technician Fifth Grade Edward R. Harman, by willfully and feloniously shooting the said Technician Fifth Grade Edward R. Harman, in the head and chest with a pistol.

He pleaded not guilty to and was found guilty of each Charge and Specification. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, 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," 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. 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 D. Gilbert, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert J. Almquist, Judge Advocate

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

JAGK - CM 317039

24 OCT 1946

UNITED STATES	III CORPS
v.	Trial by G.C.M., convened at Fort Crockett, Texas, 3-11 September 1946. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.
Private WILBUR W. HIGHTSHOE (RA 20746279), Enlisted Detachment, 1856th Area Service Unit, Fort Crockett, Texas.	

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, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was found guilty of leaving his post as a sentinal before being regularly relieved, committed at Fort Crockett, Texas, on or about 5 July 1946, in violation of Article of War 86. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Hood, Texas, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 30, Headquarters III Corps, Camp Polk, Louisiana, 7 October 1946.

3. The only question requiring consideration is whether the trial is null and void for the reason that a member of the court testified as a witness for the prosecution and thereafter resumed his seat upon the court and participated in all its deliberations.

4. Captain Jackson B. Reid was challenged by the defense for cause for the reason that he was on duty on the post at the time of an alleged rape of which accused was acquitted, and assisted in the line-ups wherein complaining witness identified accused (R 18). Captain Reid was sworn and testified that he was Post Adjutant on the date in question (5 July 1946) and took part in line-ups by checking the names of the personnel passing through, but that he had no knowledge which would prejudice him against the accused (R 19-24). He withdrew and the court voted not to sustain the challenge. Captain Reid resumed his seat.

Captain Jackson B. Reid was called to the stand as a witness by the prosecution. The defense asked if such procedure was in order as the defense had challenged him as a member of the court. The president replied, "We are duty bound to interrogate the man at this time for cause" (R 291). Captain Reid took the stand and was briefly examined by the prosecution as to his knowledge concerning the identification of accused (R 291,292). Upon completion of his testimony Captain Reid was excused as a witness and withdrew. The court was closed, voted on his competency to act as a member of the court, and ruled that he was competent. Captain Reid thereupon resumed his seat (R 292).

5. No officer is eligible to sit as a member of a general court-martial if he is a witness for the prosecution (AW 8). If, at any stage of the proceedings, a member of the court is called as a witness for the prosecution he shall, before qualifying as a witness, be excused from further duty as a member of the court (MCM, 1928, par. 59). Thus, if a member of a general court-martial testified as a witness for the prosecution, even with accused's consent, whether or not his testimony be prejudicial to accused and though it relate merely to an unimportant collateral issue, he is ineligible as a matter of law to resume his place upon the court and if he be permitted so to do the entire proceedings are null and void (Sec 365(8), Dig Op JAG, 1912-40, p 173; 1 Bull JAG 321-322). The prohibition is absolute and is in nowise dependent upon whether or not the testimony of the member injuriously prejudiced the substantial rights of the accused. The rule is a derivative from a fundamental precept of our jurisprudence, military as well as civil, that our courts, their functions and their members shall remain separate and apart from the prosecution of cases to be determined before them. Thus Captain Reid's ineligibility could not be waived, and his participation in the proceedings rendered the findings and sentence null and void (CM 259563, Grant, 38 BR 370).

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

Christy T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert J. Schroyer, Judge Advocate

JAGK - CM 317039 1st Ind

WD, JAGO, Washington 25, D. C. OCT 2 1946

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 Wilbur W. Hightshoe (RA 20746279), Enlisted Detachment, 1856th Area Service Unit, Fort Crockett, Texas.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

----G.C.M.O.----
(G.C.M.O. 354, 21 November 1946).

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

JAGH - CM 317064

30 JAN 1947

UNITED STATES	)	EIGHTH ARMY
v.	)	Trial by G.C.M., convened at Headquarters Eighth Army, APO 343, 20-23 May 1946. Dismissal, total forfeitures and confinement for one (1) year
First Lieutenant ROBERT LOUIS JOHNS (O-463439), Infantry	)	

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 94th Article of War.

Specification: In that First Lieutenant Robert Louis Johns, Headquarters 3rd Military Railway Service, in conjunction with First Lieutenant William E. Wing, Headquarters 7th Air Service Group, and Flight Officer Raymond F. Belanger, Headquarters and Headquarters Squadron, 7th Air Service Group, did, at Tachikawa, Japan, on or about 30 January 1946, knowingly and willfully apply to his own benefit fifty thousand six hundred dollars ($50,600) lawful money of the United States, property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 96th Article of War. (Disapproved by the reviewing authority.)

Specification: (Disapproved by the reviewing authority.)

The accused pleaded not guilty to both Charges and the Specifications thereunder. He was found guilty of the Specification of Charge I except the words and figures, "fifty thousand six hundred dollars ($50,600) lawful money of the United States," substituting therefor, the words and figures, "twenty-six thousand seven hundred dollars ($26,700) lawful money of the United States, and thirty-four thousand Philippine pesos (P-34,000)," of the excepted words and figures, not guilty, and of the substituted words and figures, guilty; guilty of Charge I, Charge II, and of the Specification of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one (1) year. The reviewing authority disapproved the findings of guilty of the Specification of Charge II and Charge II, 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:

Accused was identified as being in the military service of the United States (R 17, 42, 49, 70, 99, 110, 135, 139, 166).

Atsuo Kimizuka, a Japanese radio manufacturer, testified he met accused in mid-January on an occasion when the latter was a guest in his home (R 17). Later he visited accused's office. The accused spoke of exchanging yen for dollars and asked if the witness knew of any wealthy Japanese interested in doing so. The witness replied that Mr. Matsui, a friend, might desire to make such exchange, which fact he would ascertain (R 18). A few days later accused again came to witness's house and asked to be taken to see Matsui. The witness complied and after introducing the two, Matsui said he would call on the accused at his office shortly (R 19).

Miss Reiko Asaoka testified that she had been a secretary to Mr. Matsui, an industrialist, now deceased. She was present on an evening about 20 January when Mr. Kimizuka came to see Matsui and asked him if he was interested in purchasing dollars for yen (R 26). She accompanied Matsui to the accused's office several days later where she acted as interpreter for the two. In this capacity she conveyed the information to the accused that Matsui wanted to obtain dollars for yen but wished to know from what source the dollars would come. Accused responded that they would come from the finance office (R 28).

Several days later Miss Asaoka drew out Mr. Matsui's money from a bank. This, together with other money secured by a Mr. Uchisugawa, a friend of Matsui, was placed in a large rucksack and taken by them to the accused's office (R 31). There the accused accepted the money, checked it in a cursory manner, and placed it in his desk. The exact amount of money present was unknown to the witness but it consisted of many large bundles of hundred-yen notes. Accused asked them to return the following day. They did so and accused then turned over to Matsui

$6,000 in American currency and an additional large amount of Philippine pesos, explaining that the latter was good money, each peso being equal to half an American dollar (R 32). Mr. Matsui, after some reluctance, accepted both kinds of money and all departed.

Mr. Uchisugawa testified similarly but stated further that the amount of money he put into the rucksack, in addition to Mr. Matsui's money, was ¥ 700,000 (R 44). The $6,000 received from accused consisted of four bundles; two contained 100 ten-dollar bills and two contained 100 twenty-dollar bills; all appeared to be new money, not previously circulated. The Philippine money received consisted of 1,000 ten-peso notes, 80 fifty-peso notes, and 200 one-hundred-peso notes, a total of P-34,000 (R 47-48).

Through the stipulated testimony of a finance officer previously given in another trial, it was shown that the army finance office receives large amounts of American and Philippine currencies with which to exchange limited amounts of Japanese currency for personnel under orders to proceed to the States or the Philippines (R 55, 67). The American money is always new money of various denominations in bundles and numbered consecutively (R 56). The finance office is the sole source of such American money in the occupational area (R 58).

The prosecution next called Flight Officer Belanger as a witness. Mr. Belanger was one of the two persons charged jointly with accused but tried separately. He testified that he was club and mess officer and that the accused approached him in December regarding his billeting and messing. In a general conversation which followed, accused said he was vice president of a Japanese concern manufacturing radios, that he was soon to make a large profit in yen from this enterprise, that he wished to convert these yen into dollars, that he supposed the witness was acquainted with the local finance officer who might be willing to make the conversion, and that he wondered if the witness would make the necessary arrangements (R 81-82). The witness agreed saying he knew Lieutenant Wing, the finance officer, and would find out from him whether he would cooperate in accomplishing the exchange. Accused, at the same time, "offered approximately ten per cent of the amount of money he would bring" to the witness and the finance officer (R 82) in the nature of a "cut."

Belanger thereafter consulted Lieutenant Wing, who was rather indefinite as to whether or not he could accomplish the exchange, and witness so informed accused when next he saw him (R 83). A few days later, however, accused came to the witness's quarters in the evening, bringing with him a large duffle bag which he said contained approximately $51,000 worth of yen, his profits from the radio manufacturing venture (R 84). Later that night the accused went into a nearby BOQ while the witness entered the finance office and asked Lieutenant Wing whether he would make the exchange. Lieutenant Wing and a military policeman, who was standing about twenty feet away, were the only persons in the finance office,

other than the witness. After thinking the matter over for ten or fifteen minutes, Lieutenant Wing said that he would (R 84). He brought out American and Philippine money in a manila envelope and placed it in the glove compartment of the jeep. Then Lieutenant Wing and the witness carried the large bag of yen from the jeep to the finance office (R 85). The witness then drove to the BOQ, picked up accused, and told him the money was in the glove compartment. The accused took the money out, examined it, and put it into a cloth bag. After that the witness returned to his quarters (R 86).

Lieutenant Clayton, an officer working in the finance office, testified that, on 30 January, Lieutenant Wing borrowed his key to the office safe in order to put a package into it for safekeeping (R 100). Four days later, when witness learned of the arrest of accused together with Flight Officer Belanger and Lieutenant Wing, he became suspicious, opened the safe, and found therein an envelope containing American money. It was new money mostly in bills of $50 denomination (R 101). The witness turned this over to the CID and, in the presence of agents, it was counted and found to amount to $9,340 (R 103, 108). The money was identified by the witness and introduced in evidence (R 119; Pros Ex 1). Neither the finance office nor any of its personnel make any claim to this money (R 104-105).

Members of the CID testified that in the course of their investigation they received the above-described money from Lieutenant Clayton under the circumstances narrated (R 110). They also searched accused's quarters and confiscated his footlocker (R 112). It was opened in his presence and in it were found stacks of new American money in denominations of 50's, 20's, and 10's and a few Philippine pesos totaling $20,700 (R 114). The defense stipulated that Prosecution's Exhibit 2 consisting of $20,700 was the money actually removed from accused's footlocker and this exhibit was received in evidence (R 116; Pros Ex 2).

A handwritten signed confession by the accused, and a typed copy thereof, sworn to and signed by him, were admitted in evidence (R 158-159; Pros Exs 3 and 4), despite objection by defense that this confession had been procured under circumstances rendering it involuntary. In his confession the accused stated the following:

> "Approximately two (2) months ago I was approached by F. O. Ballinger who told me if I could get hold of eight (8) or nine (9) hundred thousand yen that he knew where it could be changed into American dollar notes. I told him it was impossible for me to acquire that money legally and I did not mention the subject again at that time. It was my opportunity in Japan to meet many people, some of whom were very wealthy and from excellent families. During the course of a visit with a Japanese gentleman by the name of Kimizuka one of us brought up the subject of money, exchange value, possible

future rates, international currency value, yen--dollar--pound sterling equations etc, and then after a lengthy debate on the import-export future of Japan he told me he had a friend who wanted to exchange some yen for American dollar instruments. Thinking back on what Mr. Ballinger had said I told him to have his friend come and see me and I would introduce him to my friend. When I spoke to Mr. Ballinger he informed me that he would remain unknown and I should handle it with the Japanese gentleman and he would arrange the transaction. A few days later a Mr. Matsui came to visit me and explained how much money he had, how much he wanted and everything else. I visited Mr. Matsui's home the following night with the idea of seeing if his yen was obtained from normal business sources. After visiting him I came to the following conclusions: (1) He was an honest business man, (2) He had been wealthy before the war and was not a 'get-rich-quick' war profiteer, (3) His yen came from his business profits. I also had the following points in mind: (1) Speculation on the international value of the currency of various countries was being carried on every day, (2) I felt that being in the Army it was 'frowned upon', but that if I were a civilian it was all right to engage in such business, (3) I had no idea about the coming Moritorium or new monitary laws that were to be put into effect two (2) months hence, (4) I planned to return to the Orient after limited import and export were started in Japan and make financial gain through buying and selling on the international market. And I thought this was all the same except for the fact I was in the Army, (5) I definitely did not think of this exchange as illegal but, I repeat, merely 'frowned upon' because I was still under arms. It was arranged that I should get twenty-three thousand (23,000) dollars for Mr. Matsui for eight hundred forty-five thousand (845,000) yen, the rest I could keep. Actually it was a gift to me of twenty thousand (20,000) dollars and thirteen thousand (13,000) dollars to Mr. Ballinger and a Mr. Wing, however as far as an actual net return it was quotable at thirty-three (33) yen per dollar. Mr. Matsui brought me the money, I took the money to Mr. Ballinger who inturn took the money to Lt. Wing and they exchanged. I picked up the American dollars from Mr. Ballinger--minus the amount he and Lt. Wing had decided they wanted-- and I returned to Mr. Matsui and gave him what he had asked for. The net result was to be for my trouble. I did not plan to re-sell this money but too keep it to finish my education at a good university and help me obtain an M.A. and an LLB degree. In fact I never counted the money instrument by instrument and after the money was counted it turned out that there was twenty thousand seven hundred (20,700) dollars instead of twenty thousand (20,000) dollars. Several days after the financial matter had been completed I spoke to Mr. Ballinger and he asked me if I felt 'guilty' I said, 'No'. Following my ejaculation we had a long talk on

ethics, legal policy etc. throughout which I maintained such an exchange in civilian life was legal and being practiced in banks and stock exchanges all over the world, the only difference being Japan had no legal international monetary exchange. I was also dubuous as to Army regulations--was I free to engage in business or not etc, was I free to except a monitary gift from some one for help neither of a Military or Official nature but of a personal one? It was my honest opinion that where I neither used my official Military position nor any other Army source but my own personal knowledge any profit gained was legal provided the exchange was legal and I felt that it was. I believed that holding back of currency from the Japanese was to cutdown blackmarket operations and not because of anything else. I was approached on two (2) more transactions, one for two million (2,000,000) yen and one for ten million (10,000,000) yen by Mr. Matsui, however, I turned both of these down as I felt such a large exchange would mean definite illegal means of acquiring the American dollar notes and I did not wish to become involved in something meaning embezzelment or other fraudulent activities with American bills. I am not a finance officer and when I was told the first exchange could be arranged for properly I excepted that. Until after speaking with Capt. Frisch I was unaware of how extensive or actually illegal this exchange was--even as a civilian. I believe the time period was around the end of January for the transaction that was carried out. It was approximately two (2) weeks later that I was approached by Mr. Matsui on the other two (2) transactions. I mentioned the fact to Mr. Ballinger that Mr. Matsui had approached me again, merely as a point of interest, and he said it possibly could be arranged again however he later told me it could not be arranged and I never pressed the question" (Pros Ex 4).

The following directives pertaining to currency exchange and transactions were received into evidence without objection:

Circular Number 268, Headquarters Eighth Army, APO 343, 11 October 1945, which provides in pertinent part:

"Section V - Exchange of American and Allied Currency.

"Exchange or conversion of American or Allied currency or coin for yen (military types B or A or Bank of Japan notes) may be made only with United States Army disbursing officers or United States Navy paymasters. Exchanges of currency with any institutions or persons other than the above is prohibited. (AG 123.7) (U)" (R 153; Pros Ex 5).

Circular Number 67, General Headquarters, United States Army Forces, Pacific, APO 500, 10 September 1945, Currency to be Used in the Main Islands of Japan which provides:

"1. Supplemental Military Yen Type 'B', Bank of Japan Notes, and Japanese State Notes and Coins will be the only types of currencies used in the main islands of Japan, which consist of the islands of Honshu, Hokkaido, Shikoku, and Kyushu.

"2. The use of United States currency, currencies of the Allied Powers, or any other currency except those mentioned above is prohibited" (R 153-154; Pros Ex 6).

Circular Number 262, Headquarters Eighth Army, APO 343, 6 October 1945, which provides in pertinent part:

"Section I - Exchange of United States Currency in Japan.

"The circulation of United States currency in Japan must be eliminated. If permitted to continue, this practice will result in establishment of black market exchanges which will have serious adverse effects on United States troops and the Japanese economy. In order to prevent such conditions, the following action will be taken:

"a. Immediately upon arrival of units in Japan, commanding officers will inform troops that the circulation of United States currency is unauthorized, and that all dollar currency in their possession must be exchanged for yen.

"b. Enlisted personnel will exchange currency through unit personnel officers. The latter will be appointed Class "A" Agent Finance Officers to the nearest disbursing officer without delay, and will draw from the disbursing officer such amounts of yen currency as will be required to exchange yen for all United States currency held by troops in their organizations. Upon completion of currency exchange, personnel officers will settle accounts with disbursing officers, returning United States and any remaining currency. (AG 123.7) (U)" (R 154; Pros Ex 7).

4. The evidence for the defense is summarized as follows:

Witnesses, who were assigned to organizations of which accused had been an officer since his arrival in Japan, were called. Of these, Lieutenant Hoffer, who succeeded accused in the RTO office at Tachikawa, testified that no circulars or directives of Eighth Army, AFPAC, or SCAP were present in the files when he took over upon the arrest of accused (R 166). Sergeant Bowser testified he was assigned to Yokohama Port from 13 October to the present and that accused was also in the same organization up to his transfer to Tachikawa in December. This witness stated that during that period no circulars or directives from Eighth Army were ever distributed or posted

at the port (R 168). He further stated that the personnel who knew accused considered him very efficient and capable and that he was very well liked (R 169).

Major James G. Baker, Third Military Railway Service, Tokyo Division, the accused's immediate commanding officer, testified as to the inadequacy of distribution of directives from Eighth Army to the various units of the Third Military Railway Service. Such directive had to be reproduced at the witness's headquarters, and many such directives were not distributed to the subordinate echelons because they were not reproduced. However, on cross-examination he testified that a complete file of such directives was to be found in the headquarters which is available to the subordinate unit commanders when they visit the headquarters. However there was no requirement that RTO's visit the headquarters personally or that they examine the central file of directives in that headquarters (R 173-174).

Sergeant Robert Frank Brewer testified that he has been the chief clerk of the Tokyo Division, Third Military Railway Service since 15 January 1946. He stated that distribution of directives to the various subordinate echelons was difficult due to a shortage of available personnel. At the time he became chief clerk most directives were distributed throughout the headquarters organization only. Matters of great importance were extracted, mimeographed and distributed to subordinate echelons. The files at the headquarters were available to the RTO at Tachikawa and any other officer who might visit the headquarters (R 175). The witness stated that the accused visited the Tokyo Division Headquarters approximately once a week (R 176).

Several other enlisted men who had worked under accused testified that he had a fine reputation, was a good officer, a "straight character" (R 170), that he was "very fair and honest" (R 171), and "very honest and straight forward" (R 177). His commanding officer, Major Baker, testified that he had an "excellent character and reputation as an officer for efficiency, honesty and fairness" and that the witness would consider him desirable as an officer to serve under him (R 172).

Brigadier General Besson testified that he, as commanding general of the Third Military Railway Service from 14 September 1945 to 1 March 1946, had occasion to rate accused as an officer of his command. He gave accused "excellent rating, regular 4.8" (R 49). The witness stated there was no question regarding accused's reputation for honesty and integrity while serving in his command and he would be very glad to have him as an officer therein (R 50).

Other enlisted men testified that accused was the type of officer one would be "willing to go into combat with" (R 177), that he was always "very fair in his dealings with the men," and "everything an officer should be" (R 178).

By stipulation, testimony of two finance officers given in a previous trial was introduced (R 179-190). This testimony was to the effect that the records of the finance office contained no discrepancy following the money exchange involved in this trial (R 180) and that they failed to show any shortage of funds (R 187). A total of about $200,000 in American money was issued to returnees in small amounts during January and February (R 181). The office changed pesos into yen for men arriving from the Philippines and these pesos then became property of the United States furnished and intended for use in the military service. These pesos could only be issued in small amounts to men departing for the Philippines. A dollar-yen exchange at the established 1 to 15 ratio would not cause discrepancies in the office records since accountability was in either currency (R 190). Large sums of money, in high denominations, with consecutive serial numbers on the bills contained in bound bundles, such as the money contained in the Prosecution's Exhibits, could only be expected to be found in a finance office (R 189).

The accused elected to take the stand and testified under oath in his own defense (R 191-220). He stated that he is now 23 years old (R 191). He related that, after six years of training in military schools, during the final year of which he was given the military efficiency medal, he was commissioned on 12 June 1942, a second lieutenant, Infantry Reserve, and thereupon called to active duty. He served first as a platoon leader and later as a company executive officer. In the latter position he was promoted to first lieutenant on 25 November 1942 (R 192). He volunteered for ranger training but a leg fracture caused his return to his company of which he then became commanding officer. After several periods of maneuvers, he volunteered to be sent overseas and was assigned to the Americal Division on Bougainville. There he engaged in combat for seven or eight months as a platoon leader, a liaison officer, and assistant regimental S-3. He was wounded in the back by a mortar fragment during this campaign (R 195-196).

In January 1945 he went with his division to Leyte where he participated in the Philippine Campaign first as assistant regimental S-3 and platoon leader, later as an executive officer, and finally as a company commander. His organization was committed to action for forty-four days and he was again wounded, this time in the leg by artillery fire (R 197).

After recovery he returned as company commander and his regiment was ordered into the fighting on Cebu where the entire Division so distinguished itself as to be singled out for highest praise both by Lieutenant Colonel Eichelberger and by General MacArthur (R 197). On Cebu, accused was shot in the mouth by a Japanese, his third wound, and was thereby immobilized about a month, and, on the recommendation of the Division Surgeon that he be not returned to combat, was placed on temporary duty with the division quartermaster. Later he was assigned to the Military Government Section and sent to Japan where he arrived on 8 September 1945. After a four-day

tour of northern Japan as military escort to Brigadier General Besson, the latter assigned him as Rail Transportation Officer at Niigata, though he had no previous transportation experience (R 198). At Niigata he received no distribution of army circulars or directives nor any mail whatsoever (R 199).

In mid-October accused was transferred to Yokohama as Rail Transportation Officer of the port where he had the duties of maintaining adequate movement of freight cars and unloading from Central Pier. Here too he claimed to have received no directives, regulations, or circulars of the Eighth Army (R 200). About 1 December accused was assigned to Tachikawa for the purpose of establishing a station there and fifteen others in the adjoining territory. He remained there until 1 March and during that time received operational directives from the superintendent of the Tokyo-Yokohama Division but no other directives or circulars (R 200).

When he arrived at Tachikawa he met Flight Officer Belanger who, as mess and club officer, arranged for his billeting. Frequently thereafter he met Belanger, having weekly occasions to procure PX supplies, beer, whiskey, and other rationed items from him. Belanger often spoke of receiving American money from incoming officers and often gave accused American money as change when he made purchases. Accused received thirty or forty dollars from him in this way (R 202). Later Belanger mentioned to accused that, should he ever want to change yen into dollars, he could do that too. As a result, when he later met a former roommate who had ¥30,000 that he desired to change to American dollars, accused brought these yen to Belanger who effected an exchange with Lieutenant Wing, the finance officer. Belanger gave accused only $1,800 in return, stating, according to accused, that he and Lieutenant Wing retained the balance of $200 for their trouble (R 203).

Some time after this transaction accused met the Japanese Kimizuka who told him that, though the official exchange rate on yen was 15 to 1, he knew a Japanese businessman who would gladly give 30 to 40 yen for a dollar in order to build up a reserve with which to purchase American products when trade would be resumed. Accused immediately saw possibilities of making an exchange through Belanger at 15 to 1, paying the Japanese at 30 or so to 1, and thus realizing a profit at the expense of the Japanese. He told Kimizuka to send his friend to see him. Matsui was this friend. He came to see accused and said he would like to exchange about ¥900,000 at 33 to 1. Accused recalled that Belanger had told him there was a bundle of $51,000 available at the finance office. He told Matsui that he would try to make the exchange, but only of some ¥750,000 (R 205). This was agreeable and the exchange was accomplished in the manner testified to by previous witnesses. Wing and Belanger retained about $8,000 for their trouble, giving accused about $43,000 (R 208). Of this, accused took out $23,000 in American and Philippine currency which he later gave to Matsui. The remainder he put into his footlocker, uncounted, as his profit (R 209).

Accused testified that at the time of the transaction, thereafter, and now he considered and still considers the whole deal quite legitimate for he believes that the United States lost nothing by it; that it was neither fraud nor embezzlement; that it is perfectly honest to get American money from a finance office provided one turns in yen for it at the official rate of exchange; that such money ceases to be government property but becomes one's own to do with as one sees fit; and, finally, that his profit was legal since it was at the expense of the Japanese and not the Government (R 209-210, 215, 217-218, 220).

The accused further testified that sometime subsequent to 1 February Mr. Matsui again approached him with a suggestion for the exchange of yen for dollars. However the sum involved was so large that at first the accused merely laughed the suggestion off and later found it necessary to frighten Matsui "in order to get rid of him" (R 209-217). On cross-examination the accused admitted having written a note to Matsui which was delivered to Miss Asaoka and he identified a three page handwritten note as that note and as being in his handwriting (R 219). The note which was introduced into evidence as Prosecution's Exhibit 8 stated:

> "There are CIC men now here in _____ until March 7th. This friend comes from my other friend who has the money. He can not change yen to dollars now as all officers are being watched for such business during the national change of yen. My friend will not be able to exchange any of the old yen for he will be under observation until March 7th. Maybe later in March or April if Mr. _____ wishes we will exchange new yen for American dollars.
>
> "Counter Intelligence Corps
>
> "Please come to see me Monday morning for sure. Perhaps I should like to borrow about 200,000.00 <u>old</u> yen and repay end of April with new yen.
>
> "I am very sorry about this, but it is good that Mr. _____ finds out now instead of after March 7th and then <u>lose</u> ¥2,000,000."

5. In our deliberations upon this record careful consideration has been given to a brief filed on behalf of the accused by Mr. Jack A. Persky, an uncle of the accused, and Mr. Warren Woods, who also appeared as defense counsel at the trial. Oral argument by Mr. Persky and Mr. Woods were heard by the Board of Review. Numerous assignments of error have been made, all of which have been considered by the Board. However, only those requiring comment are discussed below.

6. At the outset of the trial defense counsel examined all members of the court as to whether they had been in Japan at the time of the transaction out of which this case arose and whether they had read newspaper accounts concerning the case. In reply, one member said he was not in Japan during the time concerned; two others said they had no recollection of having read anything in the newspapers regarding the matter of dollar-yen exchange; all other members said they vaguely remembered the headlines and the gist of newspaper articles about some yen-dollar transaction, but could not recall any specific facts, details, or names of persons reported to have been involved. Thereupon defense counsel announced:

> "Now that satisfies my questions.... Actually I have no specific challenge against any individual member of this court for cause. I have ground for my motion for a change of venue, which is in the nature of a challenge against the entire court sitting in this case, or any other court selected from a command in Japan" (R 7).

It was agreed that the proper time for a motion for change of venue would be at the time of arraignment and again prosecution asked defense whether accused desired to challenge any member of the court for cause or peremptorily. Defense replied it did not. Prosecution then asked whether accused objected to being tried by any member of the court then present. This inquiry provoked the following result:

> "Defense: Again I will have to make the same answer that I did before, sir. In my motion at the time of arraignment, I will indicate an objection against being tried by any court sitting in Japan.
>
> "President: You will have to state definitely whether you have a challenge for cause or not, which the court will consider; and the change of venue is a different motion that will be made and acted upon at the proper time also.
>
> "Defense: Well, sir, this is a somewhat unusual type of motion or position that I am in. I realize that under court-martial procedure each member must be challenged individually, and my motion is in the nature of a challenge to the entire membership of the court, not singling out any one individual members of the court.
>
> "President: It can be accepted that way.
>
> "Defense: Very well, sir; then I will present it at this time. The defense challenges each and every member of this court on the grounds that there has been such extensive and misleading publicity given to this case in the only English language newspapers published in Japan, and

there is at present such a concerted drive in the army, in this occupation area against all suspected types of black market activity that no court, including this one, and it is not directed against the individual members of the court in that sense, no court selected from this Command in Japan can be expected to be wholly impartial in a case of this nature. Now I can call the court's attention to specific items appearing in 'Stars and Stripes' which are wholly misleading.

"President: The court will now just consider the challenge for cause, and we will have a closed session and vote on that; and when it comes to the time of arraignment, if you desire, you can make another motion for a change of venue. The court will be closed" (R 7-8).

* * * *

"President: As a result of secret written ballot, the challenge in each individual case was not sustained" (R 8).

The above procedure was, of course, irregular and contrary to the provisions governing challenges for cause as set forth in the Manual for Courts-Martial (MCM, 1928, sec 58a - f incl).

Article of War 18 in pertinent part provides:

"Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time * * *."

A challenged member may not be present during deliberations or voting on a challenge against him (MCM, 1928, par 58f, p 97).

In the instant case, due to error by the president of the court, and the failure of the law member to correct him, the defense was mislead to challenge all members simultaneously. The record shows that the court was then closed, and apparently considered the challenge as to each member individually. The record does not show affirmatively, that at the time his own challenge was being deliberated and voted upon, each challenged member withdrew. The court's action in inviting the defense's challenge to each of its members simultaneously and the manner in which the court acted upon the challenge was erroneous.

It remains to be considered whether any substantial rights of the accused were injured thereby. This may be determined by an examination of the facts presented as a basis for challenge. If the defense had sound reasons for objecting to trial by any or all members of the court, then the errors not only would have violated a substantial right of the accused but might also have made the trial void on jurisdictional grounds (MCM, 1928, par 58f, p 46).

However in the instant case the only grounds for challenge advanced by the defense were those brought out on the voir dire of each member and those alleged in the portion of the record quoted above. On voir dire the defense sought to determine whether any member had, as a result of reading newspaper articles about the case, already formed an opinion. The replies indicated that no one had. Even the members who had seen the articles remembered them but vaguely and did not connect them either with accused or with the case about to be tried. In his reasons alleged at the time of challenge, counsel for accused simply reiterated his contention that, because of publicity given this case in the press and because activities of the type out of which this case arose are so generally frowned upon in this area, a fair trial by any court sitting in Japan was impossible.

To conclude from such specious argument that any members of the court were disqualified is untenable. Both reasons given would apply to nearly every case tried by any tribunal. Almost all alleged crimes, when detected, receive widespread publicity. Little if any of it may be considered accurate, and most of it is misleading in a legal sense. Reading and remembering such publicity, even with some degree of exactitude, however, is not cause for the disqualification of a member of a court; nor is the fact that the charges involve conduct generally frowned upon. The test is rather whether, as a result of prior information, from the press or otherwise, or from the nature of the charges being considered, a member has already formed an opinion as to the guilt or innocence of the accused and is thereby prejudiced, or that he could not be impartial for another reason. In the present case there is not the slightest evidence of such prejudice on the part of any member nor is there evidence that any one of the nine grounds for challenge recognized by the Manual for Courts-Martial (MCM, 1928, par 58e) existed. Even if each challenge had been made and acted upon correctly, the court would have had to deny every one of them as groundless. As observed by Colonel Winthrop (Military Law and Precedents, 2d Ed. 1920 Reprint, p 209), "the court may properly decline to entertain a challenge clearly frivolous." Under the circumstances, it is the opinion of the Board of Review that no substantial rights of the accused were injured by the improper procedural action of the court (CM 267760, Lawrence, 44 BR 116).

7. At the time of arraignment defense counsel made "a motion in the nature of a motion for a change of venue" (R 10) alleging two grounds therefor. The first was that accused was being denied his right under Article of War 17 to be represented by civilian counsel; the second was a reiteration of defense's contention that neither this nor any court sitting in Japan could give accused a fair trial because of publicity and the nature of the charges. Defense argued that the trial should be transferred to a court in the United States in order that accused might be represented by his uncle, a former army officer and a member of the Ohio bar, whom he desired as counsel and who was not available in Japan. Defense also claimed that only a court sitting in America could be free from prejudice where black market activities were involved.

The court considered the matters thus brought before it as two motions, one for a continuance to obtain the desired civilian counsel, and the other for a change of venue. After considerable argument by prosecution and defense upon the merits of these motions, the court went into closed session and, when it was reopened, the president announced that "the court has ruled that the motion for change of venue and motion for continuance be denied" (R 14).

Again, the action of the court was irregular. The application for a continuance was an interlocutary matter other than a question of admissibility of evidence and the law member should have ruled upon it, subject to objection by any member of the court (MCM, 1928, par 51a and b, p 39).

The charges were served on the accused on 25 April 1946 (R 10) and the trial did not begin until 20 May 1946. When questioned by the court, the defense revealed that, although accused had been apprehended on 1 March 1946, no attempt had been made to communicate with the desired counsel in order to determine his availability to come to Japan nor had any steps been taken to have such a trip authorized by the War Department.

In the face of this complete lack of effort to provide his own civilian counsel, even the contention that the accused desired to obtain such counsel must be seriously doubted. Hence, it cannot be said that defense made any showing of reasonable cause for the granting of a continuance. Moreover, it appears that, since at least a majority of the court voted against granting the continuance, a ruling by the law member favorable to accused could not have been sustained. The procedural irregularity, therefore, did not injure any substantial right of the accused. In CM 231539, Casarella, 18 BR 241, 247, the Board of Review held that the erroneous action by the court in denying a motion for a continuance in order to obtain civilian counsel by a vote of the members of the court, instead of by a ruling of the law member, did not prejudice the substantial rights of the accused where it was not shown that the accused exercised due diligence in attempting to obtain such counsel prior to trial.

The motion for a change of venue was acted upon by the court in the same manner and is likewise an irregularity. Since the jurisdiction of courts-martial is geographically universal a motion for a change of venue to a court-martial in another locale is unknown as such in military law. In its place, an accused is given the opportunity of objecting to trial by any or all members of a particular court. When such objection, adequately supported by facts, is made by counsel (and for the purposes of review it may be considered that this motion of the defense was equivalent thereto), the court should recess and inform the appointing authority of the objection made and reasons therefor. It is then within the sound discretion of the appointing authority to withdraw the case, refer it for trial to another command, or, order the same court to continue its proceedings, should he be of the opinion that the objection to trial by this court is groundless.

In the instant case no valid grounds were advanced on support of the allegation that the accused could not receive a fair trial before this court or before any court in Japan. A court sitting in the United States or elsewhere cannot reasonably be expected to look more leniently upon the offense charged, nor would a court sitting in Japan necessarily be prejudiced in such a case. There is no indication in the record that the court was in any way prejudiced against the accused. It would furthermore have been extremely difficult to try the case adequately in the United States due to the absence of witnesses for both the prosecution and defense. While the action of the court deprived the appointing authority of an opportunity to examine into the matter, it is not reasonable to assume that the appointing authority's action would have been different from that taken by the court. Accordingly we are of the opinion that no substantial rights of the accused were adversely affected by the error.

8. At the trial, the defense objected strenuously to the admission into evidence of the accused's handwritten confession and the signed and sworn copy thereof, and in their brief filed with the Board of Review, counsel for the accused strongly urge that the court erred in admitting the confession. Counsel contend that the circumstances under which the confession was obtained render it involuntary. In support of this contention it was alleged that the accused was confined in the Metropolitan Police Jail in Tokyo where he was denied right to counsel and held incommunicado until he had made a statement; that he was told he would have to remain in Metropotilan Police Jail until he made a confession and that he was promised a benefit as an inducement to make a confession.

Accused took the stand for the limited purpose of narrating the circumstances under which his confession was obtained. This testimony tended to show that, upon his arrest he was asked if he had any comment to make, and upon his refusal to say anything, he was lodged in the Tokyo Metropolitan Jail in a section on the second tier reserved for allied personnel

but within sight of, and visible to, other cells occupied by Japanese. Within the reserved section enlisted personnel were also lodged. The latter could also see accused who, being in officer's uniform, was highly embarrassed thereby. In addition accused's cell was very filthy. The commode, the usual Japanese type of "slit-trench," was located within the cell and was not functioning properly so that it emitted foul odors from the undisposed wastes it contained. Blankets already in the cell on his arrival were dirty and, according to him, were infested with vermin. He was held incommunicado overnight and his request for legal counsel was denied. He was placed in this cell on the evening of 1 March after he had stated at the time of his arrest that he did not wish to make any statement. About 2200 hours he was visited by a Captain Frisch of the CID for a few minutes and again accused said he did not wish to make any statement. During the visit the captain destroyed a note accused had previously given one of the guards in which he requested that a telephone call be made to his roommate asking the latter to send him defense counsel (R 140). Before he was placed in the jail, Frisch had told him that a request for counsel would have to be submitted in writing and forwarded thru channels to General Eichelberger. It would be two or three weeks before the request could be approved (R 139).

The following morning the captain again called on accused, took him to his own quarters where he allowed him to clean up and shave, and then took him to his mess hall for food. Accused claimed that while talking with him, Frisch said it would be to his advantage to confess since more favorable language could be used in his report of the case, if he so desired. However the accused admitted that the captain at the same time had also stated that he could not make any promises or coerce him in any way and that he intended to "get to the bottom of this case" whether or not accused cooperated and that it was to the accused's own benefit to cooperate (R 141). Accused insisted that, although Frisch had warned him of his rights under Article of War 24, he had also stated that the accused would be kept in the jail until he confessed. The latter statement was specifically denied by Captain Frisch when he took the stand (R 120).

Accused maintained that he decided to write out a confession, being motivated by his desire to get out of the jail and his belief that there would be some benefit to him from making a statement (R 141). It was defense's contention that the resulting confession was involuntary. The court overruled defense's objection to its admissibility (R 158).

The allegations that Captain Frisch employed threats and promises to induce the accused's confession were denied by Captain Frisch. However the latter was somewhat evasive on cross-examination and stated that he did not remember telling accused that a request for counsel through channels would take two weeks (R 125). He further stated that

he did not know whether the cell in which accused was confined was unsanitary (R 127) and stated that he did not remember telling the accused that he might use terminology which can "cast a more favorable light in your direction" if accused cooperated by making a statement. He admitted that he and the accused discussed psychology and that he might have spoken about the psychology of the use of words (R 133).

However the law member was not unreasonable in placing greater credence in the testimony of Captain Frisch than in that offered by the accused with respect to the voluntary nature of the confession. Evidence supporting the voluntary nature of the confession was not entirely lacking in the accused's account of the manner in which it was obtained.

There is no doubt but that Captain Frisch, by having the accused placed for eighteen hours in an ill-kept Japanese jail, by then removing him to his own quarters and providing him with the comforts of bathing, shaving, and eating and by engaging him in several hours of general conversation, employed all the tactics both subtle and obvious known to criminal investigators to gain a suspect's confidence and thus induce his confession. Such practice uses powerful psychological influence to lessen the accused's desire to protect himself by remaining silent. Considering that the accused is an educated officer with substantial combat experience, it cannot be said that he was forced thereby to confess involuntarily. Nor can it be said that confinement for so short a period as eighteen hours shows that the confession was made under circumstances which render it involuntary. While lengthy confinement of a soldier under similar conditions has been held to be sufficient to render a confession involuntary (CM 131194, Dig Op, JAG, 1912-40, Sec 395 (10) p 205), we have found no cases where so short a period of confinement as eighteen hours, standing by itself, has been considered grounds for holding a confession to be involuntary. It would be unreasonable to suppose that an officer who had successfully endured the hardships necessarily involved in periods of many months of infantry combat, and who had been exposed to the filth, danger, disease, and stench which characterizes the battlefield, should be so overcome in but eighteen hours by the condition of the jail, even as he described them, as to destroy the voluntary character of his acts.

Little credence can be given to his statement that, although he had been an investigating officer in court-martial cases, he was not familiar with the meaning of Article of War 24 (R 142).

In view of all the circumstances we are of the opinion that the confession was properly admitted into evidence. But even if we had arrived at the conclusion that the confession was improperly received in evidence it would be difficult to see how it adversely affected the

accused's substantial rights in view of his voluntary testimony the substance of which is identical to the substance of the confession.

9. In their brief counsel for the accused alleged that error was committed by the trial judge advocate in disclosing to the court that the witness Belanger, had been tried and convicted by another court-martial for the same offense, acting in conjunction with the accused and Lieutenant Wing.

When Belanger took the stand the defense urged that he be warned of his rights against self-incrimination. The trial judge advocate thereupon stated that he had fully advised him of his rights under Article of War 24 prior to trial. Thereupon the defense counsel asked:

> "Did you also tell the witness if he didn't testify it might ruin his rights to review?" (R 71).

Thereafter, in the course of answering a question of the law member, the trial judge advocate stated "* * * and if necessary I will ask the witness questions as to that (the witness's) trial, that is so far as the fact that he was tried and convicted" (R 75). To this remark the defense objected observing that "This court has no authority to know whether this man was convicted" and a motion of the defense to strike the comment was granted (R 75). Counsel for the accused contend that the damage could not be eliminated by sustaining a motion to strike.

It is obvious that the fact that Belanger had already been tried and convicted was first called to the attention of the court by the defense counsel when he asked the trial judge advocate in open court whether he had told the witness that if he didn't testify it might ruin his right to review. The use of the word "review" carries a clear implication of a prior conviction, now subject to review. In the circumstances the defense can not complain of the improper disclosure of information to the court by the trial judge advocate after the defense had made such disclosure in the first instance.

10. As their final contention in their brief the counsel for the accused allege that the trial of accused was unfair in that the president of the court exhibited bias and prejudice against accused in questioning him as to the truth of his confession at a time when he took the stand only to testify as to the circumstances under which it had been obtained (R 147), in usurping the law member's position by advising the witness Belanger as to self-incriminating testimony (R 79), in threatening (off the record) to hold defense counsel in contempt if the latter continued to object to Belanger testifying, and in the autocratic and venomous character of remarks made by him to counsel throughout the trial (R 78).

The record shows that the president of the court displayed a rather injudicious attitude during the course of the trial (R 74, 78, 147). However the record shows that the law member carefully preserved the right of the accused not to be questioned regarding the truth of his confession by having the president's inquiry stricken from the record (R 146-147) and that he was quick to forestall the president from any attempt to usurp the functions properly belonging to his own position. Although the president was inclined to be brusque in his remarks to both the prosecution and defense, the record does not show that he was prejudiced against the accused, that he unduly influenced the other members of the court, or that he exceeded the rights of his office in maintaining order and expeditious procedure throughout the trial.

11. Under the approved findings of guilty the accused stands convicted of a specification laid under Article of War 94, alleging that he, in conjunction with Lieutenant Wing and Flight Officer Belanger, knowingly and wilfully misapplied $26,700 lawful money of the United States and 34,000 Philippine pesos (of a value of $17,000) property of the United States furnished and intended for the military service thereof.

The ninth sub-paragraph of Article of War 94 denounces in pertinent part:

> "Who steals, * * * knowingly and wilfully misappropriates, applies to his own use or benefit * * * any * * * money or other property of the United States furnished or intended for the military service thereof; * * *."

Misapplication means devoting to an unauthorized purpose for the party's own use or benefit (MCM, 1928, par 150i, p 184).

The elements of proof as stated in the Manual for Courts-Martial are:

> "(a) That the accused * * * applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and was furnished or intended for the military service as alleged; (c) the facts and circumstances of the case indicate that the acts of the accused were wilfully and knowingly done; and (d) the value of the property, as specified" (MCM, 1928, par 150i, p 185).

The uncontradicted evidence shows that the accused obtained 759,000 yen from a Japanese, brought it to Flight Officer Belanger for the purpose of having it exchanged into American money at the official rate of exchange of 15 to 1 by Lieutenant Wing, a finance officer and acquaintance of Belanger. Belanger induced Wing to effect the exchange and the latter two officers took out a total of $50,600 in American and Philippine currency from the finance office, replacing it with an equivalent amount of

yen at the established rate of exchange. They retained about $7,000 as their share, and delivered the balance to accused. The latter paid the Japanese, at a ratio of 33 to 1 with $6,000 in American currency and 34,000 Philippine pesos (of a value of $17,000) and retained the remaining $20,600 as his profit.

It must first be determined whether the accused and his two accomplices applied the property to their own use without authority.

As indicated above the prosecution introduced into evidence the following pertinent directives:

Circular Number 268, Headquarters Eighth Army, APO 343, 11 October 1945, which provides in pertinent part:

"Section V - Exchange of American and Allied Currency.

"Exchange or conversion of American or Allied currency or coin for yen (military types B or A or Bank of Japan notes) may be made only with United States Army disbursing officers or United States Navy paymasters. Exchanges of currency with any institutions or persons other than the above is prohibited. (AG 123.7) (U)" (R 153; Pros Ex 5).

Circular Number 67, General Headquarters, United States Army Forces, Pacific, APO 500, 10 September 1945, Currency to be Used in the Main Islands of Japan which provides:

"1. Supplemental Military Yen Type 'B', Bank of Japan Notes, and Japanese State Notes and Coins will be the only types of currencies used in the main islands of Japan, which consist of the islands of Honshu, Hokkaido, Shikoku, and Kyushu.

"2. The use of United States currency, currencies of the Allied Powers, or any other currency except those mentioned above is prohibited" (R 153-154; Pros Ex 6).

Circular Number 262, Headquarters Eighth Army, APO 343, 6 October 1945, which provides in pertinent part:

"Section I - Exchange of United States Currency in Japan.

"The circulation of United States currency in Japan must be eliminated. If permitted to continue, this practice will result in establishment of black market exchanges which will have serious adverse effects on United States troops and the Japanese

economy. In order to prevent such conditions, the following action will be taken:

"a. Immediately upon arrival of units in Japan, commanding officers will inform troops that the circulation of United States currency is unauthorized, and that all dollar currency in their possession must be exchanged for yen.

"b. Enlisted personnel will exchange currency through unit personnel officers. The latter will be appointed Class "A" Agent Finance Officers to the nearest disbursing officer without delay, and will draw from the disbursing officer such amounts of yen currency as will be required to exchange yen for all United States currency held by troops in their organizations. Upon completion of currency exchange, personnel officers will settle accounts with disbursing officers, returning United States and any remaining currency. (AG 123.7) (U)" (R 154; Prosecution Exhibit 7).

In addition to the foregoing directives the Board of Review takes judicial notice of the following pertinent directives:

a. Circular Number 280, Headquarters Eighth Army, APO 343, 22 October 1945 which provides in pertinent part:

"Section II: Prevention of Illegal Currency Transactions

"1. Radio CINCAFPAC, 18 October 1945 is quoted for the information and compliance of all concerned.

"a. In order to prevent military personnel in possession of yen currency obtained from sales of property, black market currency transactions and other illicit sources from utilizing such currency to their own advantage, it is directed that every instrument which transmits a dollar credit to the United States (except as pay voucher or payroll deductions) such as PTA list or which effects a dollar credit through Soldiers' Deposits or effects the purchase of a war bond or postal money order for cash will be accompanied by a signed certificate from the appropriate personnel officer that: 'I certify that I have personally inquired into and examined the sources of the funds herewith transmitted, deposited or used for purchases of war bonds and postal money orders and have determined that these funds were legitimately obtained as payment of pay and allowances from a finance officer of the United States Army and were not obtained from sale of property, black market currency operations or other illicit sources.' * * *

* * * *

"c. Postal officers in Japan will cash incoming postal money orders in yen only. Finance officers will not exchange United States currency for yen unless the individual desiring exchange is under orders to return to the United States and presents appropriately modified certificate as shown above from the unit personnel office that the funds were legitimately acquired as pay and allowances from an army finance officer. Officer personnel will execute a similar certificate. You will take measures to insure that United States currency is withdrawn from personnel arriving from the United States within 72 hours from date of debarkation (Underscoring supplied).

* * * *

"3. These instructions will be observed by personnel officers and officers certifying to their own transactions immediately upon receipt of this circular, and disbursing officers and postal officers will accept and exchange currency only in compliance therewith.

* * * *"

b. Circular Number 287, Headquarters Eighth Army, 30 October 1945:

"* * * *

"1. All personnel will be advised at a time sufficiently in advance of departure, that the return of yen currency to the United States is strictly prohibited, except nominal amounts which are carried as souvenirs, and not as currency to be subsequently exchanged for dollars.

"2. Commanding officers will insure that adequate facilities are available for withdrawal of all yen currency from troops through the following transactions:

"a. Exchange of yen for dollar currency, up to a maximum of one hundred and fifty dollars ($150.00).

* * * *"

c. Circular Number 3, Headquarters, Eighth Army, 3 January 1946:

"Section V - Prevention of Illegal Currency Transactions.

"'* * * Authority is granted to convert into dollars or dollar instruments the yen currency representing official funds of governmental agencies or authorized non-appropriated funds such as funds of army exchanges, Red Cross, hospitals or units, provided such yen were acquired from previous conversions of dollar instruments through army disbursing officers or from yen disbursed to authorized personnel as cash pay and allowances, or exchanged for other currencies received as cash pay and allowances. When request is made of disbursing officers to exchange yen currency representing part or the entire amount of such funds, the custodian of fund will execute certificate stating name of fund and unit; amount of foreign currency for which exchange is requested; type of currency desired; approximate percentage that the amount represents of current balance of fund; reason for requesting exchange; that no personal funds are included. Your exchange controls must be adequate to prevent increases in such funds from unauthorized sources.' (AG 123.7) (U)."

The foregoing directives clearly and without ambiguity forbid the exchange of yen for dollar currency (or the currency of other Allied Powers), with two exceptions:

a. Troops returning to the United States are authorized to exchange yen for dollar currency up to a maximum of $150.00.

b. Official funds of government agencies or authorized non-appropriated funds may under certain circumstances be converted to dollars.

It is clear that the currency exchange of dollars for yen in the instant case does not fall within the scope of either exception listed above. The directives were intended to prevent, and specifically forbade, such exchanges as the one involved in the instant case.

In view of the foregoing there can be no doubt but that the accused and his two accomplices put to an unauthorized use $50,600 of government funds. The offense of misappropriation was complete and entire as to each of the joint perpetrations at the moment when these funds were removed from the finance office through their combined efforts (CM 243287, Pool, 27 BR 321, 3 Bull JAG, p 236, 237; CM 307097, Mellinger). However since the accused is charged with misapplication it must be shown that the property was devoted to his own use or benefit.

The evidence shows that the accused and his associates, each derived a substantial and unjust enrichment from the transaction. The two associates withdrew approximately $7,000 of the $50,600 as their compensation. The accused took the balance amounting to $43,600 of which he gave $23,000 to Matsui and retained the remainder as his profit. This portion of the transaction is clearly the application of the full amount taken, to the use and benefit of each individual in order that he might realize some profit. Had

the accused been charged with misapplying $33,600 lawful money of the United States, and 34,000 Philippine pesos, the court would have been warranted in finding him guilty of misapplying the entire amount including the $7,000 retained by his associates.

However the evidence shows that the property misapplied included 34,000 Philippine pesos - which is not lawful money of the United States. Although the court by substitution and exceptions found him guilty of misapplying $26,700 and 34,000 pesos, such variance as to the specific type of property misapplied can not be cured by substitution and exceptions. In State vs. Phillips, 27 Washington 364, 67 Pacific 608, the court stated "proof that money stolen was Canadian currency will, of course, not support an allegation that the defendant stole money of the United States" (cited in CM 262043, Matthews, 5 BR (ETO) 201, 203).

It was clearly shown by competent evidence that the United States currency involved in this transaction was the property of the United States furnished and intended for the military service thereof. The currency which was introduced into evidence was shown to consist of new, i.e., previously uncirculated bills, and consecutively numbered American currency. Such money, it was shown, was only procurable at a finance office and was money intended for military pay for individuals leaving Japan.

Counsel for the accused do not deny that the sum in question was the property of the United States and that it was furnished or intended for the military service thereof, while it was in the hands of an Army finance officer. It is, however, their contention that the accused did not receive any American money until after Wing, acting in his official capacity as finance officer, had received an equivalent amount of yen. They contend that when the finance officer accepted the yen and then delivered an equivalent amount of American dollars to the accused, title of the money passed to "someone else" and the money, by virtue of the exchange, ceased to be the property of the United States.

There is little merit in counsel's contention. It is not necessary for us to determine whether a purported transfer of title of government property by an unfaithful agent of the government to a third party with notice of the fraudulent nature of the transaction, is void or merely voidable. Certainly an agent can not bind his principal in a transaction in which he acts beyond the scope of his authority, and contrary to the interest of the principal. Wing, acting beyond the scope of his authority, could not vest title in trust funds under his control to a fellow perpetrator. Such funds may be recovered by the government from third parties who have notice of its fraudulent character (United States vs Carter, 217 U.S. 286, 317-318).

It is further to be noted that in the instant case the specification alleges that the accused misapplied the government property in conjunction with Lieutenant Wing, the finance officer to whom the funds were entrusted.

The joint venture was clearly established by the testimony of Belanger, accused's confession and his testimony at the trial. The accused secured the services of Belanger to induce Wing to devote government property to an unauthorized purpose. The entire course of conduct of the accused as shown by the evidence adequately supports a finding that he was an active participant in the misapplication, although Wing was the person who actually, in the first instance, devoted the property to an unauthorized purpose.

It is well settled that where a joint offense is charged against a perpetrator and those who are present to aid and abet in the commission of an offense, each is responsible for the act and may be convicted as a principal. The presence which distingushes a principal may be either actual or constructive. One is constructively present if he is performing an act in furtherance of the offense provided he shares the principal's criminal intent (CM 234118, Reis, 20 BR 243, 248; CM 230070, Henry, 17 BR 291, 296).

It follows from the foregoing authorities that (even if the government lost title to the currency when Wing exchanged it for yen) if one of the three joint accused misapplied the property in furtherance of a common intent, the other two are equally guilty as principals. There can be no doubt that Wing devoted the currency to an unauthorized purpose for the benefit of each of the three perpetrators. Consequently Wing's act is imputed to the accused and to Belanger.

We must next consider whether the facts and circumstances indicate that the acts of the accused were wilfully and knowingly done as alleged.

Counsel for the accused strongly contend the record does not establish a criminal intent on the part of the accused since the accused had no knowledge of the prohibiting directives. It was contended that ignorance of such directives is an ignorance of fact, and that such ignorance of fact excuses an offense where it is not the result of carelessness or fault.

It is true that the prosecution did not prove actual notice of the directives to the accused. The defense introduced the testimony of several officers and enlisted men that the directives had not been distributed to the accused's detachment, and enlisted men who served in a clerical capacity in accused's detachment testified that they had not seen the directives.

However it was shown that the directives were received by the accused's superior headquarters where they were filed in a central file which was available to the accused, and that the accused visited that headquarters on the average of once a week.

The general prohibition contained in the directives were a matter of common knowledge and discussion in Japan. Aside from such common knowledge, which accused must have had, under the circumstances shown, it must be presumed that the directives were released and distributed on or about the date

they bear, and the accused was charged with notice of the prohibitions contained in them. In CM 291176, Besdine, 18 BR (ETO) 181, a case involving the violation of currency directives, the Board of Review sitting in the European Theater of Operations stated in part:

> "The prohibition * * * is a matter of importance, directive in nature, and evidently of permanent duration. * * * It becomes effective as a part of the written military law on the date of its promulgation, i.e., the date of its release and distribution by deposit in the mails (AR 310-50, WD, 8 Aug 1942, par 2). In the absence of evidence to the contrary, it may be presumed that the directive was released and distributed on or about the date it bears in the regular course of the performance of their duties by the officers concerned * * *. Accused was thus chargeable with notice of the prohibition."

The rule of the Besdine case has been followed in CM 307465, Danker, CM 282694, Andrews, 24 BR (ETO) 11, and CM 307097, Mellinger.

It may well be true that while the accused was stationed at Niigata he was so isolated as to receive no distribution of directives of any sort. However, he was in Niigata only a few weeks. He then returned to Yokohama where, it was universally known that there were regulations against exchanging yen for dollars as well as giving allied currency to enemy nationals. Later he was transferred to Tachikawa which was an important air base in the vicinity of Tokyo and where such knowledge was common. The actions of the accused belie his professed ignorance. The clandestine nature of the circumstances by which the exchange was effected at night instead of during business hours, the accused's efforts to induce a finance officer to exchange the currency through a mutual friend, and the substantial bonus which he paid to the finance officer and the friend for their part in the transaction clearly negative his professed lack of criminal intent. Had he actually believed the transaction to be lawful it is most natural to assume that he would have taken the simple course of bringing the yen to a finance office during business hours as a normal business transaction. The note which he subsequently sent to Matsui wherein he stated in part:

> "There are CIC men now here in _____ until March 7th. This friend comes from my other friend who has the money. He can not change yen to dollars now as all officers are being watched for such business during the national change of yen. My friend will not be able to exchange any of the old yen for he will be under observation until March 7th. Maybe later in March or April if Mr. _____ wishes we will exchange new yen for American dollars."

clearly shows that the accused knew the transaction to be wrongful before he was apprehended and that he was willing to engage in further similar transactions when his friend would no longer be "under observation."

Under the circumstances the court was amply justified in inferring that the acts of the accused were wilfully and knowingly done.

Counsel for the accused contend that since an equivalent of yen at 15 to 1 was simultaneously placed into the finance office for the sum withdrawn, the United States suffered no financial loss. This argument is irrelevant, because loss to the United States is not charged. The offense charged consists in bringing about the deviation of government funds from their intended use to an unauthorized use to the benefit of the accused. It is accordingly not necessary that we consider whether the government suffered a loss as a result of the transaction.

For the reasons stated above we are of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the specification of Charge I as involves a finding that the accused misapplied $26,700 lawful money of the United States, property of the United States, furnished and intended for the military service thereof.

12. The accused is 24 years of age and unmarried. He attended the Greenbrier Military Academy for four years and attended the Riverside Military Academy for one year. He was commissioned as a second lieutenant, Infantry-Reserve on 1 June 1942 and entered on extended active duty on 12 June 1942. He was promoted to first lieutenant on 25 November 1942. War Department records show that he served as an Infantry Officer until May 1945 and is authorized to wear the Combat Infantryman Badge. He was awarded the Purple Heart and one Oak Leaf Cluster to the Purple Heart. He is also authorized the Asiatic-Pacific Ribbon with two Bronze Service Stars, Bronze Arrowhead for the Cebu, Philippine Islands landing, Bronze Arrowhead for the Negros, Philippine Islands landing and the Philippine Liberation Ribbon with one Bronze Star.

13. Attached to the record of trial is a recommendation for clemency signed by one member of the court wherein it was stated:

> "* * * Lt. Johns testified in his own behalf in the proceedings and, in the opinion of this officer, appeared to be a fine young man. All testimony from military personnel who had known and worked with Lt. Johns indicated him to be a man of fairness in dealing with other men. His combat record and other military duties as shown from testimony now in the record, present evidence of distinguished service to the United States * * * clemency can, and should, rightly be extended to Lt. Johns. He is young and just starting life as an adult."

A recommendation signed by the defense counsel and assistant defense counsel wherein clemency is recommended in view of the youth of the accused and his excellent military record and character, as adduced by character witnesses for the accused at the trial,is also attached to the record.

In addition to the brief filed on behalf of the accused by Mr. Persky, and Mr. Woods, the Board of Review has considered the following communications pertaining to clemency on behalf of the accused: letter from Major Charles Seidle, AGD, Headquarters Eighth Army, dated 9 December 1946; letter from First Lieutenant Thomas J. Bagley, CMP, Adjutant, Eighth Army Stockade, dated 9 December 1946; letter from Major Ray Miller, Inf, Executive Officer, Eighth Army Stockade, dated 12 December 1946; and letter from Mr. H. William Holsinger, Attorney at Law, Cleveland, Ohio, dated 21 November 1946.

14. The court was legally constituted and had jurisdication 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 finding of guilty of Charge I, legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as involves a finding that the accused, did, at the time and place alleged, in conjunction with the persons alleged, knowingly and wilfully apply to his own benefit, twenty-six thousand seven hundred dollars ($26,700), lawful money of the United States, property of the United States furnished and intended for the military service thereof, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence to dismissal and confinement at hard labor for one year is authorized upon a conviction of a violation of Article of War 94.

A. Gottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip J. Smith, Judge Advocate

JAGH - CM 317064 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 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert Louis Johns (0-463439), Infantry.

2. Upon trial by general court-martial this officer was found guilty of knowingly and wilfully applying to his own benefit, in conjunction with two other named persons, $26,700 and 34,000 Philippine pesos (of a value of $17,000), property of the United States furnished and intended for the military service thereof in violation of Article of War 94 (Spec, Chg I) and of wrongfully delivering to a Japanese national $6,000 and 34,000 Philippine pesos contrary to regulations, circulars and standing orders in violation of Article of War 96 (Spec, Chg II). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one (1) year. The reviewing authority disapproved the findings of guilty of Charge II and its Specification involving the wrongful delivery of currency to a Japanese national, 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 finding of guilty of Charge I, legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as involves a finding that the accused, did, at the time and place alleged, in conjunction with the persons alleged, knowingly and wilfully apply to his own benefit, twenty-six thousand seven hundred dollars ($26,700), lawful money of the United States, property of the United States furnished and intended for the military service thereof, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused was assigned to the 3rd Military Railway Service RTO Station at Tachikawa Air Base in the vicinity of Tokyo. In January 1946, while serving in that assignment the accused learned through Flight Officer Belanger, the club officer at the air base, that the finance officer at the base was in a position to exchange dollars for Japanese yen. Thereafter the accused became acquainted with a wealthy Japanese manufacturer named Matsui, who was interested in obtaining dollars for yen and offered to pay for dollars at a ratio of 33 to 1.

The accused obtained the sum of 759,000 yen from Matsui, brought it to Belanger on or about 30 January 1946 for the purpose of having it exchanged into American currency at the official rate of 15 to 1 by Lieutenant Wing, the finance officer at Tachikawa and an acquaintance of Belanger. Belanger induced Wing to effect the exchange and the latter two officers took American and Philippine currency of a total value of $50,600 from the finance office, replacing it with an equivalent amount of yen at the established rate of exchange, retained about $7,000 as their share, and delivered the balance to accused. The latter paid Matsui at a rate of 33 to 1 with $6,000 in American currency and 34,000 Philippine pesos (of a value of $17,000) and retained the remaining $20,700 as his profit. The exchange of dollars for yen (except for individuals under orders to return to the United States who were authorized to receive up to a maximum of $150) was prohibited by competent directives of the Eighth Army and Headquarters, Army Forces in the Pacific, which were in effect at the time of the offense alleged.

4.. Attached to the record of trial is a recommendation for clemency signed by one member of the court wherein it is stated:

> "* * * Lt. Johns testified in his own behalf in the proceedings and, in the opinion of this officer, appeared to be a fine young man. All testimony from military personnel who had known and worked with Lt. Johns indicated him to be a man of fairness in dealing with other men. His combat record and other military duties as shown from testimony now in the record, present evidence of distinguished service to the United States * * * clemency can, and should, rightly be extended to Lt. Johns. He is young and just starting life as an adult."

A recommendation signed by the defense counsel and assistant defense counsel wherein clemency is recommended in view of the youth of the accused and his excellent military record and character, as adduced by character witnesses for the accused at the trial, is also attached to the record.

Consideration has been given to a brief filed on behalf of the accused by Mr. Jack A. Persky of Cleveland, Ohio, an uncle of the accused and Mr. Warren Woods, of Washington, D. C., who also appeared as defense counsel at the trial. Oral argument by Mr. Persky and Mr. Woods were heard by the Board of Review. In addition thereto, consideration has been given to the following communications pertaining to clemency on behalf of the accused: letter from Major Charles Seidle, AGD, Headquarters Eighth Army, dated 9 December 1946; letter from First Lieutenant Thomas J. Bagley, CMP, Adjutant, Eighth Army Stockade, dated 9 December 1946; letter from Major Ray Miller, Infantry, Executive Officer,

Eighth Army Stockade, dated 12 December 1946; and letter from Mr. H. William Holsinger, Attorney at Law, Cleveland, Ohio, dated 21 November 1946.

5. Although the accused is young and has a creditable military record, I do not believe that further clemency is appropriate in this case. The preponderance of the evidence shows that the accused was the originator of the corrupt plan and played the predominate part in its execution. His unjust profits were much greater than those of his associates. Accordingly, I recommend that only so much of the finding of guilty of the Specification of Charge I as involves a finding that the accused did, at the time and place alleged, in conjunction with the persons alleged, knowingly and wilfully apply to his own benefit, twenty-six thousand seven hundred dollars ($26,700), lawful money of the United States, property of the United States furnished and intended for the military service thereof, be approved, that the sentence be confirmed, that a United States disciplinary barracks be designated as the place of confinement and that the sentence be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 48, 27 February 1947).

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

(201)

JAGK - CM 317087

15 NOV 1946

UNITED STATES v. Private First Class WILLIAM T. OSBOURNE (37534137), 305th Port Company, 519th Port Battalion, US Forces, European Theater.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Antwerp, Belgium, 9 July 1946. Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for six (6) months. Disciplinary Barracks.

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 upon the following charges and specifications:

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

Specification: In that Private First Class William T. Osbourne, 305th Port Company, 519 Port Battalion, did, at or near Antwerp, Belgium, on or about 20 December 1945, desert the service of the United States and did remain in desertion until he was apprehended at Antwerp, Belgium, on or about 13 May 1946.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification of Charge I, except the words "desert" and "in desertion" substituting therefor, respectively, the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge I but guilty of a violation of Article of War 61, and not guilty of Charge II and of the specifications thereunder. 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 six months. The reviewing authority approved the sentence, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The results of the trial were promulgated in General Court-Martial Orders No. 783, Headquarters Western Base Section, United States Forces, European Theater, dated 30 September 1946.

3. Evidence for the prosecution.

Celestina De Schryver, 14 Kipdorpvest Street (Antwerp, Belgium), a Belgian civilian, testified that she and accused began living together on 20 December 1945 and continued to live together until 13 May 1946 (R. 10). They spent Christmas day in the country (R. 9). Accused wore his uniform until about the middle of February 1946 (R. 10,13). Thereafter he wore civilian clothes furnished by the witness, except for trousers (R. 10,15). His uniform trousers had been dyed (R. 10). During a part of the period of time from December to May the witness was employed but she saw accused every day throughout the period. As far as she knew accused was stationed and worked at Luchtbal Barracks but she never saw him in uniform from the middle of February until 13 May (R. 9,13,15). Accused's health appeared to be good and he never made any statement to her about returning to the Army (R. 15,16). As far as the witness knew they were commencing life as two civilians (R. 16).

Mr. Hubertus Weverbergh, 14 Kipdorpvest, Antwerp, in whose house accused lived for several weeks with Madame De Schryver, saw accused two or three times during March and April 1946 dressed in civilian clothes (R. 16-18,29). Witness did not know the state of accused's health (R. 29).

Joseph Van Gucht, civilian investigator, 7 Van Peene Street, Antwerp, a Belgian policeman, arrested accused and took him to the police station. Accused wore ordinary trousers and a pullover sweater (R. 21,22). About the middle of May 1946, Technician Fifth Grade Sigard W. Erickson, Company B, 707th Military Police Battalion, received accused from the Belgian Secret Police (R. 5,6). Accused was then dressed in dark brown trousers, civilian shoes and a blue and white wool sweater (R. 6,7; Pros. Ex. A).

Evidence for the defense.

After his rights as a witness were explained to him, accused elected to remain silent, and no evidence was introduced in his behalf (R. 30).

4. The burden rested upon the prosecution to prove beyond a reasonable doubt, by means of competent evidence, that accused was absent from his command during the period alleged and that such absence was unauthorized.

The evidence offered by the prosecution shows only that accused, during the period of alleged absence, lived in a civilian house in Antwerp, Belgium, that a woman saw him each day and that for a part of the period he wore civilian clothing.

There was no documentary evidence that accused was absent without leave from his organization during the periods alleged, nor did his company commander or any other member of his organization so testify. It is a matter of common knowledge that United States soldiers and officers overseas are frequently billeted in private houses. Accused was found guilty of absenting himself without leave at or near Antwerp, Belgium. The evidence shows that he lived in Antwerp during the alleged absence. For all that appears in the record of trial he might well have been billeted in the Antwerp house and performed his daily duties with his organization which was stationed at such place.

The evidence that accused was in custody of the Belgian Secret Police on 13 May 1946 because of an investigation of civil crimes which had allegedly been committed, and that he wore civilian clothes during part of his alleged absence does not of itself establish that he was absent from his organization without leave during the period. Further, assuming that he was absent from his organization during the time alleged, there is no evidence that accused did not have permission to be absent. Absence itself is not the gist of the offense, but absence without proper leave.

5. Accused is 21-6/12 years of age. He was inducted at Fort Leavenworth, Kansas, 13 July 1943, and had no prior service. On 14 October 1944 he was found guilty of absence without leave by a general court-martial 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 for five years. The execution of the sentence to dishonorable discharge was suspended, but by General Court-Martial Orders No. 782, Headquarters Western Base Section, dated 30 September 1946, the suspension of the dishonorable discharge was vacated and the unexecuted portion of the sentence was ordered executed.

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

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 317087 1st Ind

WD, JAGO, Washington 25, D. C. NOV 18 1946

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 First Class William T. Osbourne (37534137), 305th Port Company, 519th Port Battalion, US Forces, European Theater.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 373, 16 December 1946)

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

JAGK - CM 317112

3 JAN 1947

UNITED STATES	THIRD UNITED STATES ARMY
v.	Trial by G.C.M., convened at Heidelberg, Germany, 26, 27 and 29 July 1946. Dismissal, total forfeitures and confinement for one (1) year.
Captain MARION G. CREATH (O-229515), Corps of Military Police.	

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 93rd Article of War.

Specification: In that Captain Marion G. Creath, Town Major Team #4, Headquarters 346th Engineer General Service Regiment, did, at or near Schlierbach, Germany, between 16 September 1945 and 15 December 1945, feloniously take, steal, and carry away one Leica camera, five pair of ladies gloves, thirty nailfiles, two clippers, nineteen combs, six pairs of nail scissors, twenty pair of tweezers, one manicure set, three hairbrushes, four handbrushes, one bracelet and two necklaces, the property of Friedrich Fischer, a German civilian, and one pigskin suitcase with built-in toilet set, the property of Elisabeth Altenkamp, a German civilian, of total value in excess of Fifty Dollars ($50.00).

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

Specification 2: In that Captain Marion G. Creath, *** did, at or near Schlierbach, Germany, for a period of eight days between 18 November 1945 and 23 December 1945, wrongfully permit two German civilian women to be fed United States Army rations.

Specifications 1, 3 and 4: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. By exceptions and substitutions he was found guilty of the Specification, Charge I, as amended so as to read:

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

Specification: In that Captain Marion G. Creath, Town Major Team #4, Headquarters 346th Engineer General Service Regiment, did, at or near Schlierbach, Germany, between 16 September 1945 and 15 December 1945, feloniously take, steal, and carry away one Leica camera, one manicure set and miscellaneous toilet articles such as combs, hairbrushes, nailfiles, clippers, nail scissors and hand brushes of a total value of about Fifty Dollars ($50.00), the property of Friedrich Fischer, a German civilian.

He was found guilty of Specification 2 of Charge II, not guilty of the remaining specifications under Charge II, and guilty of both Charges I and II. No evidence of any previous conviction was introduced. 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 at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48.

3. Evidence for the prosecution

In September 1945, the accused assumed command of the 204th Military Police Company located at Heidelberg, Germany. The officers of this company were billeted in a house belonging to one Friedrich Fischer, a German national, located at Herman-Lonsweg 10, Schlierbach, a suburb of Heidelberg (R. 8,24,64). Fischer had been in business at Mannheim, Germany, and had stored in the basement of the above house a large quantity of merchandise classified as toilet articles and including combs, brushes, nailfiles, clippers, nail scissors, manicure sets and two cameras, a Leica and an Ikoflex (R. 11,12,27,35,38,67,84). At about the time accused came to the company and became billeted in the Fischer house, Friederick Fischer and his wife, who had been living in the house were compelled to take other quarters, but when they departed the basement room containing the merchandise was securely locked (R. 10,34,65). A German woman named Elizabeth Marquardt was the housekeeper and cook for accused and the officers of the company (R. 8). Some unknown person or persons broke the lock off the basement storage room and the accused, together with Lieutenant Peterson, also of the 204th Military Police Company, and Frau Marquardt, the housekeeper, went into the room and removed various items of household equipment for use in the house (R. 12,13,66). At the same time the accused took the Leica camera (R. 12,70). Mr. Fischer had paid 275 reichmarks for the camera in 1939 but it was an old model of indefinite value (R. 25).

In the early part of December 1945 two German civilian dressmakers lived in the Fischer house for eight or ten days and were fed Army rations along with the officers, the housekeeper and maids (R. 14,55,56,71).

Sometime in December the accused was transferred to Weinheim, Germany, and after he had left the Fischer house a representative of the Inspector General's Department called at the house and interviewed Lieutenant Gascoyne, the mess officer, concerning a complaint that the house had been looted. Lieutenant Gascoyne testified that he thereafter went to Weinheim, sought out the accused, told him an investigation was being conducted and that he (Lieutenant Gascoyne) had already replaced the Ikoflex camera "back in the cellar." The accused thereupon gave to Lieutenant Gascoyne the Leica camera and requested him to place it in the storage room (R. 71). Subsequent to this occurrence the accused, in company with Mrs. Marquardt took two suitcases, identified as Prosecution's Exhibit 2, to the home of Mrs. Elise Koch in Kirchheim, Germany, a nearby town, and accused requested Mrs. Koch to keep the suitcases for him (R. 15,21,119). On 18 February 1946 the German police raided the Koch home and recovered the suitcases and contents thereof and turned them over to Agent Porath of the Criminal Investigation Division. The following articles were found inside the suitcases:

"1 pigskin suitcase with built-in toilet set, consisting of:
- 2 brushes, 1 comb in case
- 1 brush to polish fingernails
- 6 manicure sets, 1 shoehorn
- 5 glass containers for toilet articles
- 4 big traveling sets complete
- 4 small traveling sets
- 1 shaving set
- 1 cleaning set, complete
- 1 small empty traveling set

"1 dark brown imitation leather suitcase with a bag containing:
- 5 pair of ladies' gloves and 2 handbrushes
- 2 blankets
- 1 empty purse
- 1 bag with 5 toothbrushes, 1 powder box
- 10 combs in case
- 18 combs
- 5 shaving brushes in cases
- 2 clothes brushes
- 3 hairbrushes
- 2 empty containers for razors
- 2 can openers
- 1 cake spoon
- 1 bracelet
- 2 necklaces
- 2 yellow filters
- 1 comb
- 1 leather case with 30 nailfiles
- 2 pair of clippers
- 6 pair of nailscissors
- 20 pair of tweezers" (R. 42,43,51; Pros. Ex. 2).

No inventory was made by the Fischers of the merchandise stored in the basement of the Fischer house, but Mr. Fischer testified that the property missing from the storeroom consisted, in addition to the Leica camera, of "certain things from my business like toothbrushes, sets of brushes, manicure sets, and other household items like a vase" (R. 26,34,102).

A German civilian testified that she knew and saw the accused during the period from September until the beginning of December and that accused gave her a manicure set which she gave to the first officer that searched her house (R. 59).

4. For the defense

The defense called as a witness Mrs. Marquardt, the housekeeper who had testified for the prosecution. This witness stated that the two seamstresses who were fed rations at the Fischer house paid one mark each for their meals and that she turned this money over to the mess officer. She also stated that she turned over to the accused money she received from the "exchange" of candy, soap and cigarettes (R. 89).

The accused, after being apprised of his testimonial rights, elected to take the stand as a witness and testify under oath. He admitted that he took the Leica camera from the basement of the Fischer home at Schlierbach, Germany, and removed it to Weinheim but that he had intended merely to make some pictures and that when the Fischers started complaining that things were missing from their home he sent it back by Lieutenant Gascoyne. He had been permanently transferred from Schlierbach, but the place of his new assignment was not a great distance from Schlierbach and he had a standing invitation to return (R. 104,105). He bought rings, crosses and necklaces from Mrs. Marquardt but paid her in Allied currency. The accused admitted giving Miss Fuchs a manicure set, which was the property of Mr. Fischer and which he had taken from the basement of the Fischer house, and when questioned concerning other property he had removed from the house, accused replied:

> "A. Yes, sir. I took one of each type of shaving set - there were four, I believe - and one of each type of manicure set. I took what I considered a cross section of the items down there and I placed them in a cardboard carton which came from the basement and they remained under my bed for about two weeks.
>
> * * *
>
> "*** we had discussed the possibility of maybe requisitioning these items for the PX" (R. 110,111).

The accused stated further that Mrs. Marquardt had some property which she had removed from the basement and when it became known that a search was to be conducted he placed the items he had removed in a black suitcase and Mrs. Marquardt placed hers in a "big one." He then took the suitcases to Kirchheim (R. 116,119).

On cross-examination the accused stated that he was the senior officer in the Fischer house, that he saw the seamstresses in the house and thought they were sewing for Mrs. Marquardt and a WAC, but he did not know whether they were fed Government rations. On occasion German people ate at the house and the officer host paid one mark per meal into the mess fund for such guests. He identified Prosecution's Exhibit 4 as one of three statements he had given to the Criminal Investigation Division, and without objection the statement was received in evidence. The statement is as follows:

"18 Feb. 1946

"In the early part of Dec. a warrant officer from M.G. and civilian came to the Fischer home in Schlierbach where the officers of the 204 M.P. company were living and asked to see some stores of goods which had been reported to them as being in the basement of the Fischer home. I showed them to the basement and the civilian said he would like some samples of the goods as he thot it might be sold to the U.S. Army PX. He took several articles with him and said he would come back for more samples. I took several samples of toilet sets and brushes and manicuring sets and placed them in a small black suitcase which had been in the storeroom in the basement. I placed this suitcase in my room and awaited the return of the civilian from M. Govt. In the meantime while I was not at the house Military Government sent trucks to the house and moved the entire store from the basement to another location. At this time there was to be a thorough search of all military billets for unauthorized articles so I suggested to Frau Marquardt that we take the suitcase to some other house which she mentioned as friends of hers lived in a nearby town. I took this one black suitcase containing the samples and another larger suitcase which contained a smaller leather travelling bad inside, we deposited at the civilian home and told them we would leave them there for a few days. I intended to go back later and get the suitcases and give them to the civilian who had first requested them. I would have taken the suitcases to him then but I did not know his name and did not have sufficient time to inquire thru Mil. Govt. to get the whole story. This was late in afternoon and the reported search of all billets was to take place early next morning. I thot it would be easier to get the samples out of sight than to explain their presence in the house.

"A few days later I was transferred from the company and did not bother to do anything more about the samples as the stores were gone from the basement and I had no further interest in their disposal.

"While I lived at the Fischer house, Frau Marquardt showed me some samples of rings. She said she could get me several of them if I wanted them. I told her I would like several and would pay her for them. Several days later she gave me several rings and I paid her for them with American invasion money. At the time I did not know where

she obtained them as she merely said she had some civilian friends who could get them for her.

"I certify the above statements to be true to the best of my knowledge.

"M G Creath
Capt CMP."

In response to questions by a member of the court accused admitted taking the suitcases heretofore mentioned to the "Koch home" (R. 126). Lieutenant Jack Gascoyne testifying for the defense stated that Mrs. Marquardt paid him for the meals served guests at the Fischer house and that Mrs. Marquardt, with money supplied her, purchased food from local sources to supplement the mess. This was the policy in operating the mess (R. 129). None of this money found its way into official sources, it was strictly a "slush" fund (R. 134).

No further material evidence was presented by either side.

5. There is no competent evidence in the record concerning the value of the items alleged to have been stolen. The members of the court-martial however saw the property and could, under the circumstances, reasonably conclude, without specific evidence that the sum total value of an old model Leica camera and all the other items was "about" $50.00. The limits of maximum punishment, set forth in paragraph 104c, Manual for Courts-Martial, 1928, do not apply to officers and value is not of vital importance here (CM 267247, Bewley, 43 BR 362).

The court in its findings of guilty of the Specification, Charge I, found that the property stolen consisted of "one Leica camera and miscellaneous toilet articles such as combs, hairbrushes, nailfiles, clippers, nail scissors and brushes, one manicure set." Although the findings did not specify the number of items alleged to have been stolen, the accused admitted that, without any authority, he took from the basement of the Fischer home the Leica camera, "one of each type of shaving set - there were four, I believe - and one of each type of manicure set. I took what I considered a cross-section of the items down there and I placed them in a cardboard carton which came from the basement and they remained under my bed for about two weeks." He asserted that his motive was to make the property available to the Post Exchange for requisitioning and that he treated the items as samples. Subsequently however the accused and the housekeeper placed these and other items in suitcases and took the property to the home of the Kochs at Kirscheim, some twenty miles distant from Schlierbach, and left them for safekeeping. This was done when an investigation had been started to determine what disposition had been made of the Fischer property. Now it is contended by the accused that he did not intend to permanently deprive the Fischers of their property. It is significant that he gave one of the manicure sets to another German woman.

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark.)

"Once a larceny is committed, a return of the property or payment for it is no defense to a charge of larceny. Personal property only is the subject of larceny.

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification." (MCM, 1928, par 149g, p. 171.)

The taking and carrying away, by trespass, of property of the general description as alleged, and in the amount alleged (although expressed in indefinite terms) being admitted, the issues regarding the Specification, Charge I, narrow down to that of intent. A person's intent is his mental state which is generally established as a fact by proof of (a) the information or knowledge accused possessed and (b) his conduct thereafter (CM 267342, Rose, 43 BR 379).

The court, by its findings concluded that the accused intended to permanently deprive the owner of his property. There is no evidence that accused took the "samples" to the Post Exchange but he did attempt to return the camera after being warned by Lieutenant Gascoyne that an inspection was to be had. He did not return the property in the suitcases but surreptitiously removed them to another place. This, and the giving to the woman the manicure set are such circumstances in consideration of which the court, 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, found that he did intend to permanently deprive the owner of the property. As there was competent, substantial evidence to support the findings of guilty, they will not be disturbed on appellate review.

Specification 2 of Charge II alleged that accused wrongfully permitted two German women to be fed U.S. Army rations for the period of eight days between 18 November and 23 December 1945. To support a conviction under this specification it is necessary that the record show, (1) that the feeding of any rations to the women was wrongful, and (2) that accused in willful or negligent disregard to his duty as commanding officer permitted the same to be done. Although the evidence reasonably shows that two seamstresses were fed U.S. Army rations at the officers' mess for about a week, there is no proof that such conduct was wrongful, or prohibited by any orders or regulations. In fact, the record shows that they were working at the house and paying for their meals. Where an act or omission is not unlawful per se the prosecution must specifically prove that such act or omission is wrongful as being in violation of laws, regulations, orders or established customs of the service. Under the

circumstances prevailing in this case, as shown by the record, we find no basis for presuming that it was wrongful for the women to be fed Army rations. Other civilian employees, the housekeeper, maids and servants were being fed U. S. Army rations at the officers' mess. This fact tends to show that permitting civilians to eat at the mess was not prohibited. There is therefore no evidence in the record tending to show that the accused "wrongfully" permitted the women to be fed Army rations.

6. War Department records show the accused to be 42 years of age, married, and the father of three minor children. He graduated from the University of Illinois with a BS in chemical engineering in 1926 and took post-graduate work, earning a MS degree from Northwestern University in 1927. He was commissioned second lieutenant, Infantry (Res.) in June 1926, promoted to first lieutenant on 17 July 1929, and captain on 12 November 1935. He was ordered on extended active duty 14 January 1941. The accused has had no combat experience and his efficiency reports average "Very Satisfactory."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as herein noted no errors 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 is legally insufficient to support the findings of guilty of Charge II and Specification 2 thereof, but legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction for a violation of Article of War 93.

Chuter A. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

(On Leave), Judge Advocate

JAGK - CM 317112 1st Ind

WD, JAGO, Washington 25, D. C. JAN 17 1947

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 Marion G. Creath (O-229515), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of the larceny, at or near Schlierbach, Germany, of one Leica camera, one manicure set and miscellaneous toilet articles (not enumerated) such as combs, hairbrushes, nailfiles, clippers, nail scissors and hand brushes of a total value of about $50.00, in violation of the 93rd Article of War, and of wrongfully permitting two German women to be fed U.S. Army rations for a period of eight days, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for 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. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specification 2 and Charge II (wrongfully permitting German women to be fed U.S. Army rations), but is legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the sentence and to warrant confirmation of the sentence.

On some date or dates between 16 September 1945 and 15 December 1945 the accused, then commanding officer of the 204th Military Police Company stationed at Schlierbach near Heidelberg, Germany, wrongfully took and carried away from the basement storage room of a house located at Herman-Lonsweg #10, Schlierbach, one old model Leica camera and some toilet articles such as combs, brushes, nail files, clippers, scissors and manicure sets. He gave one manicure set to a civilian friend and placed the remaining articles in a cardboard box under the bed in his room. All the articles were the property of one Friederick Fischer, a German national, who also owned the house at Herman-Lonsweg #10, Schlierbach, and wherein accused was quartered. He took the camera with him to Weinsheim, Germany, when he was transferred to that town, and later, when he learned that an investigation was being conducted concerning Fischer's property, he removed the toilet articles in two suitcases to the home of a German woman named Koch living at Kircheim, some 20 miles from Schlierbach, Germany. At about the same time he gave the camera to another officer requesting him to replace

the camera in the storage room. The accused admitted the taking of a "cross section" of all the toilet articles and the camera from the basement of Fischer's home but stated that he intended only to use the camera temporarily and to exhibit the "samples" of the toilet articles to the PX officer with a view of requisitioning such property for sale in the PX. The evidence does not show that he exhibited any of the articles to the PX officer, although he had been in possession of them for several months. The court, considering all the circumstances, found that the taking was with intent permanently to deprive the owner of his property therein. This finding is amply supported by the evidence. There was no proof as to market value of the stolen articles. Some value may be assumed.

4. The accused is 42 years of age, married and the father of three minor children. He graduated from the University of Illinois in 1926 and obtained a MS Degree from Northwestern University in 1927. He was commissioned second lieutenant, Infantry (Res.), in June 1926, promoted to first lieutenant 17 July 1929 and to captain 12 November 1935. He was ordered to extended active duty on 14 January 1941. His efficiency reports average "Very Satisfactory."

5. The offense of which accused was convicted indicates such degree of moral turpitude as to render him undesirable as an officer. His offense is aggravated by the fact that accused, as a military police officer in the military government, was entrusted with the supervision and proper protection of the property of both the United States and civilians in the occupied zone.

6. There is appended to the record a request for clemency addressed to the Commanding General, Third U. S. Army, and signed by Lieutenant Colonel William H. Jordan, Special Defense Counsel. Colonel Jordan suggested that the sentence be commuted to a fine of $350.00. The action of the reviewing authority contains no request for clemency.

7. I recommend that the findings of guilty of Charge II and Specification 2 thereof be disapproved, that the sentence be confirmed but that the confinement be reduced to eight months and that the sentence as thus modified be ordered executed. I further recommend that an appropriate U.S. disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 20, 3 February 1947).

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

JAGH-CM 317120

29 OCT 1946

UNITED STATES v. Private CHARLEY D. BERRY (38275747), Company B, 31st Engineer Training Battalion, Army Service Forces Training Center, Fort Leonard Wood, Missouri.	FIFTH ARMY Trial by G.C.M., convened at Fort Leavenworth, Kansas, 19 September 1946. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.

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

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 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 58th Article of War.

Specification: In that Private Charley D. Berry, Company B, 31st Engineer Training Battalion, Army Service Forces Training Center, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about 21 June 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself on 31 July 1946.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words, "desert" and "in desertion," substituting therefor, respectively, the words, "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words, guilty, and not guilty of the Charge, but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing

authority approved the sentence and ordered it executed but suspended execution of the dishonorable discharge, and designated the Branch United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 145, Headquarters, Fifth Army, 8 October 1946.

3. Accused was tried on 19 September 1946 for desertion alleged to have begun on 21 June 1944 and to have been terminated by surrender on 31 July 1946. By exceptions and substitutions he was found guilty of the lesser included offense of absence without leave for the same period. There is no doubt that the evidence sustains the court's finding that the accused was absent without leave for the period alleged.

Article of War 39 provides in part that:

"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:"

The question raised by this case is whether, when an accused is charged with an offense against which the Statute of Limitations has not run, and is found guilty of an offense against which it has run, the court is obliged to advise him of his right to plead the statute as a bar where there is no indication in the record that he was aware of this right. The same question has recently been before the Board of Review in CM 313593, Sawyer. In the course of that opinion the Board discussed the rule laid down by CM 231504, Santo, 18 BR 235, wherein it was held that such an explanation to accused was not necessary since it was presumed that defense counsel advised accused of his rights in the premises before trial. In overruling the Santo case, the Board held that where 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.

A. L. Lottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Harry A. Clemmer, Judge Advocate

JAGH - CM 317120 1st Ind

WD, JAGO, Washington 25, D. C. NOV 5 1946

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 Charley D. Berry (38275747), Company B, 31st Engineer Training Battalion, Army Service Forces Training Center, Fort Leonard Wood, Missouri.

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 all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 358, 26 November 1946).

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

JAGQ - CM 317140

APR 18 1947

UNITED STATES v. Captain VERNON K. RUST (O-453771), Casual Officer Detachment, 10th Reinforcement Depot.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Hq, Western Base Section, USFET Paris, France, 22 August 1946. Dismissal and confinement for one (1) year.

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 96th Article of War.

Specification 1: In that Captain Vernon K. Rust, Casual Officer Detachment 10th Reinforcement Depot, did, at or near Bromsgrove, Worcestershire, England, on or about 21 October 1944, with intent to defraud, wrongfully and unlawfully make and utter to Lieutenant Paul Ecenia, a certain check in the sum of five hundred ($500.00) dollars, dated 21 October 1944, drawn on the Security Bank, Harrison Arkansas, payable to the order of Mrs. Anna Ecenia and by means thereof did fraudulently obtain from the said Lieutenant Paul Ecenia one hundred and twenty-five pounds (£125.0.0) lawful money of the United Kingdom, of an exchange value of about five hundred ($500.00) dollars, he, the said Captain Vernon K. Rust then well knowing that he did not have and not intending that he should have sufficient funds with the Security Bank for the payment of such check, which conduct was of a nature to bring discredit upon the military service.

Specifications 2-13, same as Specification 1 with pertinent details as follows:

Spec. No.	Amount	Date	Payee
2	$200.00	25 Oct. 44	Lt. Paul Ecenia
3	400.00	4 Oct. 44	Cash
4	100.00	4 Oct. 44	George A. Stahl
5	200.00	8 Oct. 44	Leonard C. Krebs
6	200.00	9 Oct. 44	Cash
7	300.00	21 Oct. 44	Cash
8	300.00	29 Oct. 44	William W. Starr
9	300.00	29 Oct. 44	William W. Starr
10	400.00	31 Oct. 44	Cash
11	120.00	1 Nov. 44	Cash
12	201.75	3 Nov. 44	Lt.L.C. Krebs
13	200.00	6 Nov. 44	Cash

Specification 14: In that Captain Vernon K. Rust, Casual Officer Detachment, 10th Reinforcement Depot, was, at Lichfield, Staffordshire, England, on or about 24 July 1945, drunk and disorderly in uniform in a public place, to wit, Lichfield, Staffordshire, England.

CHARGE II: Violation of the 95th Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

Accused pleaded not guilty to all specifications and Charges. He was found guilty of Charge I and all specifications thereunder and not guilty of Charge II and the specification thereunder. No evidence of previous convictions was introduced. 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 one year. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: Specifications 1-13, Charge I.

Twelve checks or photostatic copies of checks drawn on the Security Bank of Harrison, Arkansas, signed by accused, were introduced into evidence (R. 9; Pros. Exs. B1 to B12). These checks were as follows:

Spec. No	Exhibit No.	Date	Payee	Amount	Indorser
1	B-1	21 Oct 44	Mrs. Anna Ecenia	$500.00	Anna Ecenia
3	B-2	4 Oct 44	Cash	400.00	Midland Bank, Ltd.
6	B-3	9 Oct 44	Cash	200.00	Midland Bank, Ltd.
4	B-4	4 Oct 44	George A. Stahl	100.00	George A. Stahl Midland Bank, Ltd.
5	B-5	8 Oct 44	Leonard C. Krebs	200.00	Leonard C. Krebs Midland Bank, Ltd.
7	B-6	21 Oct 44	Cash	300.00	Midland Bank, Ltd.
10	B-7	31 Oct 44	Cash	400.00	Midland Bank, Ltd.
8	B-8	29 Oct 44	William W. Starr	300.00	William W. Starr Midland Bank, Ltd.
13	B-9	6 Nov 44	Cash	200.00	Midland Bank, Ltd.
9	B-10	29 Oct 44	William W. Starr	300.00	William W. Starr Midland Bank, Ltd.
12	B-11	3 Nov 44	Lt. L. C. Krebs	201.75	Lt. L. C. Krebs Midland Bank, Ltd
11	B-12	1 Nov 44	Cash	120.00	Midland Bank, Ltd.

It was stipulated (R. 9; and Ex. A) that accused drew these checks, that he received value for the checks for the amounts in which drawn, that the checks were presented to the Security Bank, Harrison, Arkansas, for payment and were returned unpaid because accused had no account at this bank, that the checks were legally protested, and that during the months of September, October and November 1944, accused did not maintain an account at the Security Bank, Harrison, Arkansas. It was further stipulated that on 25 October 1944, accused drew a check for $200.00, payable to Lieutenant Paul Ecenia, and received $200.00 for this check from Lieutenant Ecenia.

Specification 14, Charge I.

About 2000, 24 July 1945, accused was observed walking in the gutter in front of The George Hotel, Lichfield, Staffordshire, England. A civilian

girl passed by, walking in the opposite direction on the other side of the street, whereupon accused yelled out at the top of his voice, "Look at the head on that one. Look at that can." There were about six people on the street at that time. Accused was then seen entering the George Hotel with another officer (R. 16-18).

At the George Hotel bar, accused and three friends were served several beers (R. 26). He asked for "spirits" and when told there were none, he threatened to throw a couple of glasses at the barmaid and used abusive language, calling her a "f-ing mare and one or two other things of the same nature" (R. 27, 32). After considerable argument and quarreling, the MPs were called and at the latter's request, accused and his friends left the George Hotel bar (R. 24, 32). In the opinion of the barmaid and the MP officer, accused was drunk and disorderly (R. 27, 32).

4. Evidence for the Defense.

Captain Derry K. Anderson, Hq. Command, testified that accused had been under his supervision for six months, that he was conscientious and his work had been quite satisfactory (R. 35-36).

Lieutenant Colonel Wilfred Jackson, Hq. Western Base Section, testified that he had met accused in England in February 1946; that his reputation is very good, he is somewhat loud and sarcastic in his kidding (R. 58).

After being advised of his rights, accused testified under oath as follows: He was commissioned from OCS in March 1942; was married in October 1943; on 1 November 1943 he made an allotment of $250 a month to the Security Bank, Harrison, Arkansas, to the credit of his wife (R. 40). At an orientation course just prior to embarking, accused (with others) was told to make out his bank account in his wife's name to avoid legal complications (R. 41). His wife had an income from her first husband and also worked for accused's father. She was living with his parents and he had an agreement with her that when he wrote checks on the Security Bank, the bank would call her and she would honor them. In addition to his allotment checks, accused sent his wife $800-$900 which he won gambling. He had written a couple of small checks on the above arrangement and they were duly honored (R. 42).

Accused went in on the Normandy Beach on D plus 4 and was wounded on 5 July 1944. He was sent back to England and issued the above-mentioned checks (Exs. B-1 to B-12) while at a Rehabilitation Hospital at Bromsgrove, England (R. 43). When he issued the first check, he wrote

to his wife and then he wrote her a second letter to "please honor" the additional checks (R. 42). He returned to the front and was again evacuated about 15 January 1945 (R. 43). At Metz, accused learned that his wife had not honored his checks (R. 44), and on 29 January 1945, he cancelled his allotment to his wife and made a monthly allotment of $300 to the Midland Bank, Ltd, Bromsgrove, England (Def. Exs. 1 and 2). Later, he was told that he could not make an allotment to an English bank and the allotment was cancelled (R. 46), whereupon he drew the accumulated amount of $600 but did not apply it to these checks (R. 57).

The 24 July 1945 incident occurred when accused was nervous and upset about the investigation of these checks. He and several other officers had been drinking; they went to the George Hotel and had a couple of beers. When they asked for spirits, they were refused although they were selling spirits to others (R. 46). He thought the barmaid was joking at first; then she got a little angry but he did not become belligerent and was not disorderly (R. 48).

On cross-examination, accused stated that all thirteen checks were written in connection with games of chance except the five for $1340 presented directly to the Midland Bank. He received cash for these 5 checks. He had not made any repayment of any checks because he expected his wife to honor the checks (R. 49); that he had not heard from his wife for over a year (R. 48). He had made no further effort to make restitution because the officer investigating his case said he would file charges anyway and his various defense counsels had advised him not to make any payments (R. 49). He did not remember his written statement on 15 April 1945 that he intended to pay off all unpaid checks to the order of Mrs. Ecenia (R. 50), and had made no payments thereon (R. 51). He recalled writing the Midland Bank that he would send them 40 pounds by a certain date; but he did not send this money to the bank due to the fact that he made an allotment (R. 51).

5. The accused pleaded not guilty to all Charges and specifications and then entered into a stipulation that he had issued 12 checks amounting to $3221.75 on a bank in which he did not have an account. Ordinarily, such a stipulation should not be received by a court but the theory of accused's defense in this case was not to deny the issuance of the checks but to explain them by other testimony and under such circumstances, it cannot be said that the court abused its discretion in receiving the stipulation (48 BR 123; 31 BR 254).

> "A member of the military establishment is under a particular duty not to issue a check without maintaining a bank-balance or credit sufficient to meet it. 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 carelessness or neglect." (III Bull. JAG, July 1944, p. 290, sec. 454 (67)).

The fact that some of the checks involved may have been given in payment of gambling debts does not preclude a finding that accused is guilty of the offenses charged (CM 275309, Sappington).

The evidence (stipulations) clearly established (and accused admitted) the making and uttering of each of the checks described in the specifications. The fact that accused did not have a bank account at the Security Bank, Harrison, Arkansas, is also clearly established (and admitted).

The only serious question is whether the accused had reason to believe that his wife would honor these checks and pay them out of funds that he had sent her. The only evidence of this possibility is accused's own statement. After the checks had been returned marked "no account", accused's wife wrote to the Midland Bank on 26 February 1945 (Def. Ex. 4) asking that the unpaid checks be returned to the Security Bank at Harrison, that she would pay them "as Capt. Rust is sending me money to cover same". Accused testified that he had no knowledge of the status of his wife's bank account but that they had agreed that she would not use the money he was sending her and he expected it to be intact for his withdrawal.

The Court apparently did not believe accused's explanation of these checks and the stipulations contain sufficient evidence to support the findings of specifications 1 and 3 to 12, inclusive, Charge I. The stipulation regarding the check described in Specification 2, Charge I merely recites that accused issued a check to Mrs. Ecenia (R. 9); the name of the bank on which the check was drawn is not shown; there is no indication whether the check was good or bad; and the evidence regarding this check is not sufficient to support the finding of guilty.

Evidence regarding accused's condition and conduct on the night of 24 July 1945 at Lichfield was ample to support the finding that accused was drunk and disorderly as alleged in Specification 14, Charge I.

6. Accused is 28 years old, married, and childless. He completed 2 years at Oklahoma University and was inducted in November 1940. He was commissioned a second lieutenant in March 1942 and has been a Captain since February 1943. He arrived in England in April 1944, saw several months of combat, was wounded and holds the Purple Heart award. During September 1944, accused was reprimanded under Article of War 104 for excessive drinking. FBI records show that as a civilian, accused was charged with keeping a gambling game — disposition of charges not shown. An Efficiency Report dated 17 February 1945 gives accused a rating of 4.0 (Excellent) and comments that he is a little overbearing and does not cooperate at all times to the fullest extent.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors 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 insufficient to support the finding of guilty of Specification 2, Charge I, but is legally sufficient to support the findings of guilty of Specifications 1 and 3 to 14, inclusive, Charge I and Charge I, and the sentence, and to warrant confirmation thereof. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96 by an officer.

Albert D. Hume, Judge Advocate

Carlton E. Schenken, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 317140 1st Ind

WD, JAGO, Washington 25, D. C. MAY 2 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 Captain Vernon K. Rust (O-453771), Casual Officer Detachment, 10th Reinforcement Depot.

2. Upon trial by general court-martial this officer was found guilty of making and uttering, with intent to defraud, between 4 October 1944 and 6 November 1944, thirteen worthless checks amounting to $3421.75, knowing that he did not have and not intending that he should have sufficient funds for payment in the bank on which drawn, and of being drunk and disorderly in a public place, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge I (worthless check for $200), legally sufficient to support the findings of guilty of the remaining specifications and the Charge and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

4. During the period from 4 October 1944 to 6 November 1944, in England, accused issued checks to banks and others amounting to $3221.75 on a bank in Arkansas in which he did not have an account. Some of the checks were made to pay gambling debts. Accused testified that he was sending money to this bank for the credit of his wife and that he had an arrangement with her to honor his checks. It does not appear that the bank was ever informed of this intra-marital arrangement, and accused's wife never informed him as to the status of her account. During the twenty-one months that elapsed between the date of issuance of these checks and trial by court-martial none of the checks has been made good. At one time accused made an allotment to the Midland Bank, Bromsgrove, England, which cashed certain of the checks, and $600 was deducted from two pay vouchers. This allotment was held invalid and accused subsequently withdrew this accumulated

fund but did not apply it or any part thereof to the liquidation of the checks.

5. This officer has a good combat record and was awarded the purple heart. His efficiency ratings were consistently excellent. Deliberate frauds appear however to have been committed. I recommend that the finding of guilty as to Specification 2, Charge I, be disapproved and that the sentence be approved and orderd executed. I further recommend that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

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

CM 317140

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 170, 20 May 1947).

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

JAGH - CM 317149

14 NOV 1946

UNITED STATES	)	UNITED STATES FORCES IN AUSTRIA
	)	
v.	)	Trial by G.C.M., convened at Vienna, Austria, 22 August 1946. Dishonorable discharge and confinement for life. United States Penitentiary.
	)	
Corporal PHILIP R. DYSARD (42177976), Company B, 796th Military Police Battalion	)	

REVIEW by 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.

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

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

Specification: In that Corporal Philip R. Dysard, Company B, 796th Military Police Battalion, did, at Vienna, Austria, on or about 7 June 1946, without authority, wrongfully take and use a Military vehicle, 4x4, ¼ ton, Willys truck No. 26647212, value about $1090.00, property of the United States.

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

Specification: In that Corporal Philip R. Dysard, Company B, 796th Military Police Battalion, did, at Vienna, Austria, on or about 7 June 1946, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection with Margaretet Urban, a female person, by inserting his penis into her mouth.

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

Specification: In that Corporal Philip R. Dysard, Company B, 796th Military Police Battalion, did, at Vienna, Austria, on or about 7 June 1946, forcibly and feloniously against her will, have carnal knowledge of Margarete Urban, a female person.

He pleaded not guilty to and was found guilty of the Charges and Specifications. 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 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 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 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. Lorenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Peter J. Hanagan, Judge Advocate

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

JAGK - CM 317168

5 DEC 1946

UNITED STATES v. Private CLAUDE R. PITTS (14144101) and Private JOSEPH D. COSPOLICH (14186081), both assigned Squadron A-5, Lowry Field, Colorado	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 14 September 1946. As to each accused: Dishonorable discharge (suspended) and confinement for six months. Guardhouse.

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

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

CHARGE: Violation of the 93rd Article of War.

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

Specification 2: In that Private Joseph D Cospolich, Air Corps Assigned Squadron A-5 3705th Army Air Forces Base Unit (Technical School) and Private Claude R Pitts, Air Corps Assigned Squadron A-5 3705th Army Air Forces Base Unit (Technical School), acting jointly, and in pursuance of a common intent, did, at Lowry Field, Denver, Colorado, on or about 14 July 1946, feloniously take, steal and carry away a 1930 Ford Model "A" racer type automobile in the excess value of $250.00, the property of Private Robert M McCuen.

Each accused pleaded not guilty to the Charge and its Specifications. Accused Pitts was found not guilty of Specification 1 of the Charge but guilty of wrongful conversion in violation of the 96th Article of War thereunder and guilty of Specification 2 of the Charge and of the Charge. Accused Cospolich was found guilty of Specification 1 of the Charge except the allegation that he acted jointly with accused Pitts and guilty of Specification 2 of the Charge and of the Charge. No evidence of any previous convictions was introduced against either accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due

and 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 disapproved the finding of guilty of Specification 1 of the Charge as to each accused, approved only so much of the sentence as to each accused as provided for dishonorable discharge, total forfeitures and confinement at hard labor for six months and ordered execution of the sentence as approved, suspending as to each accused that portion thereof adjudging dishonorable discharge until release from confinement and designating the Post Guardhouse, Lowry Field, Denver, Colorado, as the place of confinement. The results of the trial were promulgated in General Court-Martial Orders No. 291, Headquarters, Army Air Forces Technical Training Command, Scott Field, Illinois, 11 October 1946.

3. Evidence for the Prosecution

On 14 July 1946 Corporal Robert M. McCuen, Lowry Field, Denver, Colorado, was the owner of a 1930 Model "A" Ford convertible roadster. As the ignition key was broken, McCuen customarily started the car by connecting the coils to the distributor. He parked his automobile "across the street from the brick barracks" on Saturday night, 13 July 1946, and found it missing on Sunday, 14 July 1946. He notified the military police and the authorities in Denver. On Tuesday he went to the Motor Theft Bureau and recovered his automobile, which was in the same condition as when he last parked it, except that the muffler and extension pipe were missing and a tire was flat (R. 10-13). On 14 July 1946 Mr. Clifford L. Willis of Denver, Colorado, saw both accused with a "1930 Ford" which he tried to purchase for $150. Accused Cospolich seemed willing to sell the car but the sale was not completed because accused could not furnish a "title." Later on the same day both accused told Mr. Willis that "the car" had been taken by the police (R. 14-17). On the afternoon of 14 July 1946 as a result of a telephone call, two Denver policemen met Mr. Willis who informed them that two soldiers tried to sell him "a car." Earlier in the afternoon one of the patrolmen had "picked up the car." Both accused admitted to the policemen that they had taken "the car" (R. 19), and Pitts, when questioned by Staff Sergeant Charles L. Dwyer, an investigator, admitted taking "the automobile" and stated that he and Cospolich had started it without a key (R. 20,21,26). In a pre-trial "investigation" conducted by the trial judge advocate, accused Cospolich admitted trying to sell "the car" and accused Pitts admitted that "they" drove the "car" away and were unable to sell it because "they" had no "bill of sale" (R.34,35).

4. Evidence for the Defense

Accused Pitts, having been warned of his rights as a witness, elected to make an unsworn statement as to his general background and education. Accused Cospolich elected to remain silent. It was stipulated that if Chaplain John J. Klek, Lowry Field, Denver, Colorado, were present in court he would testify as to the good character of accused Cospolich.

5. Specification 2 of the Charge alleges that accused, acting jointly and in pursuance of a common intent, did, on or about 14 July 1946, at Lowry Field, Denver, Colorado, feloniously take, steal and carry away a 1930 Ford Model "A" racer type automobile, the property of Private Robert M. McCuen. The evidence shows that on 14 July 1946 a 1930 Model "A" Ford convertible roadster, the property of Corporal Robert McCuen, was missing from its parking place "across the street from the brick barracks," presumably at Lowry Field, and that on 14 July 1946 accused were seen in possession of a "1930 Ford," presumably in Denver, Colorado, which they were trying to dispose of by sale. Although accused admitted having "taken" this latter automobile, it appears only by remote inference that it was taken from Lowry Field. Nowhere in the evidence is any proof adduced as to the ownership of this "1930 Ford" nor is it further described with sufficient particularity to identify it as the 1930 Model "A" Ford convertible roadster owned by McCuen which was apparently intended as the subject of the specification under discussion. This failure of proof is not materially aided by Pitt's admission that he started the car accused had taken "without a key" and the fact that McCuen's Ford had to be started in that manner, for in the ordinary case of car theft one would hardly expect the thief to be supplied with an ignition key.

In prosecutions for larceny or other wrongful taking, where the specification alleges an asportation of particular property owned by a named person, the allegations as to the property taken and the ownership thereof must be proved as laid. It is not sufficient in such cases to show merely that accused took property of the same general description as that alleged or that the property taken was not owned by accused but belonged to one other than the owner alleged or to an unknown owner (CM IBT 380, Yacavone; CM 216425, Frye, 49 BR 99,103; CM 314758, Bickham; CM 314174, Agens; CM 314249, Stewart; CM ETO 8555, Kenney). In view of the foregoing rule of law, it is obvious that the evidence fails to establish the commission by accused of the offense set out in Specification 2 of the Charge.

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

Clinton Gilmore, Judge Advocate

(On Leave), Judge Advocate

Gilbert E. Lefroyd, Judge Advocate

JAGK - CM 317168 1st Ind

WD, JAGO, Washington 25, D. C. DEC 6 1946

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 Claude R. Pitts (14144101) and Private Joseph D. Cospolich (14186081), both assigned Squadron A-5, Lowry Field, Colorado.

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 sentences and, for the reasons stated therein, recommend that the findings of guilty and the sentences be vacated, and that all rights, privileges and property of which the accused have been deprived by virtue of the findings and sentences so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

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

APR 14 1947

JAGQ - CM 317170

UNITED STATES	)	EIGHTH ARMY
v.	)	Trial by G.C.M., convened at Eighth Army, APO 343, 9 August 1946. Dishonorable discharge and confinement for life. Penitentiary.
Sergeant RICHARD P. WULF (36997777), Attached Unassigned 276th Replacement Company, 4th Replacement Depot, APO 703.	)	

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 Sergeant Richard P. Wulf, attached unassigned 276 Replacement Company, Fourth Replacement Depot, APO 703, did, at or near Kyoto, Honshu, Japan, on or about 5 June 1946, forcibly and feloniously, against her will, have carnal knowledge of Kaoru Nomura.

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 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 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 pursuant to Article of War 50½.

3. Evidence for the prosecution.

The events of this case occurred on 5 June 1946 on a Tokyo-bound train. The prosecuting witness, Mrs. Kaoru Nomura, a Japanese national, was a passenger on the train. Mrs. Nomura was riding in a coach reserved for

Japanese, behind a coach reserved for allied personnel. The prosecutrix noticed accused and other soldiers drinking, and finally all except accused and a New Zealand soldier fell asleep (R 6; Ex. 1). Accused came into her car and spoke in English to her. She replied she could not speak English and accused then told her that he had a Japanese interpreter in the next car and that she was to go into the next coach as he had questions to ask (R 6). She followed him to the next coach and as they entered the military coach, accused stopped outside the door to the toilet and grabbed her hand (R 6). She called for help and clutched the wall with her free hand. The New Zealand soldier approached and both soldiers pushed her into the toilet room (R 6). Accused came into the toilet room and prevented her escape through the window (R 6). Accused pushed her onto the wash basin and lifted her dress. She attempted to keep accused away but did not succeed (R 6). She told accused she was menstruating (R 6). Accused removed her undergarments, pulled off the menstrual cloth which he threw into the toilet, lifted her up on the wash basin and pushed her legs apart. She fought and pushed but the accused succeeded in accomplishing his purpose (R 7). After accused completed the act he left the toilet room and the New Zealander came in (R 7). As the New Zealander left, the train was entering the Kyoto station and Mrs. Nomura escaped by jumping from the train window onto the station platform injuring her face (R 8).

The witness testified that she had prior to this incident been impressed by the kindness shown Japanese women and children by American troops and that the unexpected attack and conduct of accused so surprised her that she never thought of defending herself by biting, kicking, or scratching (R 7).

The prosecution introduced a sworn confession of accused, signed after the accused had been fully informed of his rights under Article of War 24 (Pros. Ex. 1; R 11). Defense had no objection to the entry of the confession into evidence. In the confession accused stated that he and the New Zealander had planned sexual intercourse with Mrs. Nomura. He stated that he had pushed her into the toilet room and that he accomplished his purpose over her struggle and resistance.

4. Evidence for the Defense.

After accused's rights were explained to him, accused elected to make an unsworn oral statement through his counsel. In this statement accused admitted the commission of the act charged and said he had done as he did under the influence of liquor. He asked the court to consider the effect of the liquor in determining its sentence (R 12).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b). The prosecution, through

the testimony of Mrs. Nomura and the legally admissible confession of the accused, proved all the elements of the crime of rape. While the resistance offered by Mrs. Nomura may seem at first to have been not as vigorous as possible, when considered with the other evidence in the case it is clearly indicated that she did in fact resist sufficiently. She was lured into a position where resistance was futile, and despite the futility of her situation she called for help and attempted to repel the advances of the accused. That the prosecuting witness consented cannot be inferred in any degree from the evidence. The fact that she jumped from a train window to flee indicates her terror and vitiates any possible contention that she consented to the perpetration of the act of intercourse. The court heard all of the evidence and concluded that she did not consent.

6. The accused is 20 years of age and was inducted into the military service 20 February 1945. On 31 May 1946 he was discharged for the convenience of the Government and on 1 June 1946 he enlisted in the Regular Army for one year.

7. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence.

Five of the six members of the court joined in a plea for clemency which was not concurred in by the reviewing authority.

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 USC 457).

Albert D. Kime, Judge Advocate

Carlton G. Schenck, Judge Advocate

Thomas L. Parsons, Judge Advocate

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

JAGH - CM 317175

UNITED STATES v. First Lieutenant MARSHALL C. WELLS (0-2056203), Air Corps	)	HEADQUARTERS FIFTEENTH AIR FORCE Trial by G.C.M., convened at Walla Walla Army Air Field, Washington, 30 September 1946. Dismissal, total forfeitures, and confinement for five (5) years

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 Charge and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Marshall C. Wells, Air Corps, Squadron A, 423rd Army Air Forces Base Unit, did, at Pocatello, Idaho, on or about 17 May 1946, wrongfully, knowingly, and without proper authority, dispose of to one Olvie M. Lenon, one L. C. Smith typewriter, of the value of about $56.31, and one Remington Rand typewriter, of the value of about $93.87, and one Allen computing and listing machine, of the value of about $125.60, of the total value of about $275.78, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Marshall C. Wells, Air Corps, Squadron A, 423rd Army Air Forces Base Unit, did, at Pocatello, Idaho, on or about 22 May 1946, wrongfully, knowingly, and without proper authority, dispose

of to one Susan F. Gibbs, one Royal typewriter, of the value of about $84.90, and one Allen computing and listing machine, of the value of about $162.00, of the total value of about $246.90, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that First Lieutenant Marshall C. Wells, Air Corps, Squadron A, 423rd Army Air Forces Base Unit, did, at Pocatello, Idaho, on or about 28 May 1946, wrongfully, knowingly, and without proper authority, dispose of to one Gus Thiros, one Remington Rand typewriter, of the value of about $93.87, and one Underwood Sundstrand computing machine, of the value of about $214.00, of the total value of about $307.87, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that First Lieutenant Marshall C. Wells, Air Corps, Squadron A, 423rd Army Air Forces Base Unit, did, at Pocatello, Idaho, on or about 4 June 1946, wrongfully, knowingly, and without proper authority, dispose of to one Danny Pullos, one Remington Rand typewriter, of the value of about $93.87, and one Underwood Sundstrand computing machine, of the value of about $269.90, of the total value of about $363.77, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that First Lieutenant Marshall C. Wells, Air Corps, Squadron A, 423rd Army Air Forces Base Unit, did, at Pocatello, Idaho, on or about 15 June 1946, wrongfully, knowingly, and without proper authority, dispose of to one Paul Dudunake, one Remington Rand typewriter, of the value of about $93.87, and one Remington computing machine, of the value of about $162.00, and one Woodstock typewriter, of the value of about $92.64, of the total value of about $348.51, property of the United States, furnished and intended for the military service thereof.

The accused pleaded guilty to, and was found guilty of, the Charge and all Specifications thereof. No evidence was introduced of any previous convictions. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for nine (9) years. The reviewing authority approved the sentence but reduced the period of confinement to five (5) years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused is in the military service of the United States (R 8), and was a member of Squadron A, 423rd Army Air Forces Base Unit (R 21). He was appointed Base Commanding Officer at Pocatello Army Air Field, Pocatello, Idaho, by Special Order

No. 3 of the Pocatello Army Air Field, dated 15 April 1946 (R 8, Pros Ex 1).

The seven typewriters and five computing machines described in the specifications of the Charge were introduced into evidence (Pros Exs 2-13), and identified as Government property by comparison of numbers contained on each machine with the stock records of typewriters and computing machines at Pocatello Army Air Field (R 9-12). Stipulations were introduced into evidence to the effect that if the civilians named in the specifications were present in court each would testify that he purchased the machines as set forth in the specification relating to him. It was further stipulated that the total value of the property disposed of by the accused was $1,542.83 (R 18-20; Pros Exs 15-24).

Lieutenant Wells admitted, in a confession (Pros Ex 14), signed by him in the presence of Charles Kimball, Special Agent of the Federal Bureau of Investigation, (R 16) that while he was Commanding Officer at Pocatello Army Air Field, he sold the typewriters and computing machines in question, without authority, to the named civilians, in five separate transactions, between the middle of May and the middle of June, 1946, for a total sum of $560.00. It was stipulated that if the persons to whom the property was sold were present they would testify that they paid the accused a total of $610.00 upon delivery of the machines (R 18-20; Pros Exs 15, 17, 19, 21 and 23). However, as indicated above, the stipulated value of the twelve machines was $1,542.83 (R 18-20; Pros Exs 16, 18, 20, 22 and 24).

4. After being duly warned of his rights as a witness, the accused made an unsworn statement to the effect that the only mitigating circumstances relating to his actions were that he had not been on flying status for some time, and, consequently, was not drawing "too much money," that he was paying installments on a car and on a bank loan and had also acquired the habit of drinking heavily since being transferred to Pocatello Army Air Field, and that these circumstances caused him to live beyond his means which resulted in financial difficulties (R 21-22).

5. The War Department records show that the accused is 24 years of age. He is a high school graduate and unmarried. With the exception of a reprimand under the 104th Article of War in December 1944, for being drunk and disorderly, the accused has received no civil or military punishment. He entered the military service as a private on 9 May 1940. He received a battle-field appointment as a second lieutenant, Army of the United States on 22 November 1943. He was promoted to first lieutenant on 12 November 1945. The accused served thirteen months in the European Theater of Operations where he was awarded the Silver Star and Purple Heart Medals. He has also been awarded the Good Conduct Medal and is entitled to wear the European and American Theater Ribbons. The accused was a prisoner of war from December 1942 to September 1943, in an Italian Prison Camp, from which he escaped on the latter date.

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

D. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 317175 1st Ind

WD, JAGO, Washington 25, D. C. FEB 12 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 Marshall C. Wells (0-2056203), Air Corps.

2. Upon trial by general court-martial accused was found guilty of wrongfully disposing of seven typewriters and five computing machines, property of the United States, furnished and intended for the military service, of the value of $1542.83 (five specifications), in 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 nine years. The reviewing authority approved the sentence but reduced the period of confinement to five years, 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.

While serving as Base Commander and Property Officer at Pocatello Army Air Field, Pocatello, Idaho, between 17 May and 15 June 1946, the accused wrongfully and without authority disposed of by selling to various individuals seven typewriters and five computing machines, property of the United States, furnished and intended for the military service, receiving therefor the sum of $560.00. He pleaded guilty to the Charge and Specifications. He made an unsworn statement to the effect that his offenses resulted from drinking and financial embarrassment.

The members of the court, the trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel recommended clemency on behalf of the accused on the basis of his previous creditable military record, including his escape from an Italian prisoner of war camp where he had been confined for approximately nine months. Accused was wounded in action and received the Silver Star Medal for gallantry. He received a battlefield commission. The record contains a letter from the officer who investigated the offenses, commending the accused for his cooperation after apprehension and requesting clemency for him.

4. I recommend that the sentence be confirmed but in view of the recommendations for clemency and accused's prior military record, recommend that the period of confinement be reduced to three years, 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 into effect the foregoing recommendation, should it meet with your approval.

CM 317175

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 56, February 28, 1947).

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

JAGK - CM 317183

31 DEC 1946
FORT ORD, CALIFORNIA

UNITED STATES	
v.	Trial by G.C.M., convened at Fort Ord, California, 19 and 20 September 1946. Dismissal.
Second Lieutenant JOHN BJORNSON (0-2017495), Quartermaster Corps	

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

Specification 1: In that Second Lieutenant John Bjornson, Quartermaster Headquarters and Headquarters Company, 2nd Engineer Special Brigade, did, at Fort Ord, California, on or about 2 July 1946, with intent to defraud, wrongfully and unlawfully make and utter to the Monterey County Trust and Savings Bank, Army Branch, Fort Ord, California, a certain check, in words and figures, to wit:

"NATIONAL BANK OF COMMERCE
LONGVIEW BRANCH NO.
LONGVIEW, WASHINGTON 7-2-46

PAY TO THE
ORDER OF CASH $300.00

THREE HUNDRED & 00 - - - - - - - - - - - - - - - - - - DOLLARS

Qm Hq & Hq Co /s/ JOHN BJORNSON
2nd ESB, Ft. Ord 0-2017495 "

and by means thereof, did fraudulently obtain from Monterey County Trust and Savings Bank, Army Branch, Fort Ord, California, the sum of $300.00, he, the said Second Lieutenant Bjornson, then well knowing that he did not have and not intending that he should have any account with the said National Bank of Commerce, Longview Branch, Longview, Washington for the payment of said check.

Specification 2: In that Second Lieutenant John Bjornson, ***, did, at San Luis Obispo, California, on or about 21 June 1946, with intent to defraud, wrongfully and unlawfully make and utter to the Anderson Hotel, San Luis Obispo, California, a certain check, in words and figures, to wit:

"
NATIONAL BANK OF COMMERCE
KELSO, WASHINGTON June 21, 1946

PAY TO THE
ORDER OF Anderson Hotel $ 25.00
TWENTY-FIVE & NO/100 - DOLLARS
/s/ JOHN BJORNSON"

and by means thereof, did fraudulently obtain from the Anderson Hotel, San Luis Obispo, California, the sum of $25.00, he, the said Second Lieutenant Bjornson, then well knowing that he did not have and not intending that he should have any account with the said National Bank of Commerce, Kelso, Washington for the payment of said check.

Specification 3: (Finding of guilty disapproved by reviewing authority).

Specification 4: (Finding of guilty disapproved by reviewing authority).

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

Specification 1: In that Second Lieutenant John Bjornson, ***, did, at Monterey, California, on or about 12 July 1946, with intent to defraud, wrongfully and unlawfully make and utter to Monterey Elks Lodge, Monterey, California, a certain check, in words and figures, to wit:

"
90-238 SAN LUIS OBISPO BRANCH 90-238
BANK OF AMERICA No. 22
National Trust and Savings Association
SAN LUIS OBISPO, CALIF., 12 July 1946

PAY TO THE
ORDER OF B.P.O.E. #1285 $ 10.00

TEN - no/100 DOLLARS
Brig QM Off /s/ JOHN BJORNSON
2nd Engr Spec Brig. 02017495 "

and by means thereof, did fraudulently obtain from Monterey Elks Lodge, Monterey, California, the sum of $10.00, he the said Second Lieutenant Bjornson, then well knowing that he did not have and not intending that he should have any account with the said Bank

of America, National Trust and Savings Association, San Luis Obispo, California Branch Bank for the payment of said check.

Specification 2: In that Second Lieutenant John Bjornson, ***, did, at Monterey, California, on or about 13 July 1946, with intent to defraud, wrongfully and unlawfully make and utter to Monterey Elks Lodge, Monterey, California, a certain check, in words and figures, to wit:

"

90-238 SAN LUIS OBISPO BRANCH 90-238
BANK OF AMERICA NO. 23
National Trust and Savings Association.
SAN LUIS OBISPO, CALIF., 13 July 1946

PAY TO THE
ORDER OF B.P.O.E. #1285 $25.00

TWENTY-FIVE - no/100
DOLLARS

Brig QM Off /s/ JOHN BJORNSON
2nd ESB, Ft Ord 02017495 "

and by means thereof, did fraudulently obtain from Monterey Elks Lodge, Monterey, California, the sum of $25.00, he the said Second Lieutenant Bjornson, then well knowing that he did not have and not intending that he should have any account with the said Bank of America, National Trust and Savings Association, San Luis Obispo, California Branch Bank for the payment of said check.

Specification 3: (Finding of guilty disapproved by reviewing authority).

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

Specification 1: In that Second Lieutenant John Bjornson, ***, did, without proper leave, absent himself from Ward C-1, Regional Hospital at Fort Ord, California from about 6 August 1946 to about 17 August 1946.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit 22 days pay. The reviewing authority disapproved the findings of guilty of Specifications 3 and 4 of Original Charge I and Specification 3 of Additional Charge I and approved only so much of the sentence as provided for dismissal from the service 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 as contained in the Staff Judge Advocate's review.

4. War Department records show the accused to be 29-9/12 years of age

and married. He graduated from high school and attended Washington State College for three years, studying journalism, but did not graduate. He was inducted into the Army 17 December 1942 and attained the grade of technical sergeant. On 12 February 1945 he applied for and was detailed to Officer Candidate School. He was appointed and commissioned a second lieutenant, Infantry, 5 May 1945, upon completion of Officers Candidate School at Ground Force Training Center, APO 545. On 3 June 1946 he was detailed to the Quartermaster Corps. His efficiency report for the period 5 May 1945 to 30 June 1945 is "Excellent."

5. 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 thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 61.

Chester T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 317183 1st Ind JAN

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 John Bjornson (O-2017495), Quartermaster Corps.

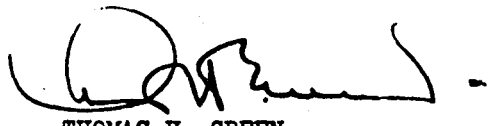
2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully making and uttering seven checks, totaling $419.00, with intent to defraud, well knowing that he did not have and not intending that he should have any account in the drawee banks to pay the same upon presentation (Specs. 1,2,3,4, Original Charge I; Specs. 1,2,3 Add'l Chg. I), in violation of Article of War 95, and of being absent without leave from 6 August 1946 to 17 August 1946 in violation of Article of War 61 (Add'l Chg. II). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit twenty-two days pay. The reviewing authority disapproved the finding of guilty of Specifications 3 and 4 of Charge I and Specification 3 of Additional Charge I, involving the making and uttering of three checks totaling $59.00, approved only so much of the sentence as provided for dismissal from the service 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 was adopted by 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.

The accused made and uttered four checks totaling $360.00 without having an account in the drawee banks. It was shown that two of the checks were drawn on a non-existent bank. One check drawn on a non-existent bank was for three hundred dollars and was cashed at the Fort Ord branch of the Monterey County Trust and Savings Bank after identification based upon a War Department identification card. The accused was also absent without leave from 6 August 1946 to 17 August 1946.

4. I recommend that the sentence as approved by the reviewing authority 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.



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 5, 15 January 1947).

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

JAGH - CM 317206

8 JAN 1947

UNITED STATES	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Weisbaden, Germany, 15 August 1946. Dismissal.
Second Lieutenant JOHN P. GREENE (O-1020453), Cavalry	)	

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.

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 2nd Lieutenant JOHN P. GREENE, 37th Constabulary Squadron, did, at Bad Schwalbach, Germany, on, or about 7 July 1946, conduct himself in a manner unbecoming an officer, in that he did have sexual intercourse with Annemarie Schmidt, a woman not his wife, in the presence of two enlisted men.

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

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the United States Constabulary Judge Advocate, APO 46, dated 3 September 1946.

4. The accused is 31 years of age, unmarried and a high school graduate. He completed two years at Iowa State College. The records of the War Department show that he was inducted 5 March 1945 and served

as an enlisted man until 21 December 1945. On 22 December 1945, he was graduated from Armored Officer Candidate School, was commissioned a second lieutenant, Army of the United States, and entered active duty.

5. 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. 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.

R. Lottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 317206 1st Ind

WD, JAGO, Washington 25, D. C. JAN 22 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 John P. Greene (0-1020453), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of having sexual intercourse with a German girl, in the presence of two enlisted men, in violation of the 95th Article of War. He was sentenced to dismissal. No evidence of previous convictions was introduced. 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 review of the Staff Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the law and the evidence in the case. 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 7 July 1946, two enlisted men, accompanied by their German female companions, entered the accused's apartment in Bad Schwalbach, Germany. Later, after one of the girls had left, the accused asked the enlisted men to leave. They did so, leaving the remaining girl with him, and when they returned the accused and the girl were in bed together, and appeared to be engaged in sexual intercourse. Both soldiers returned and went to bed in the same room, one beside accused and the woman or in a bed close to theirs. Accused and the woman had intercourse while the enlisted men were in the room.

Two officers, with whom the accused had served, were called by the defense and testified that he was an efficient officer and that his character had always been good.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 23, 3 February 1947).

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

JAGK - CM 317232

31 DEC 1946

UNITED STATES	NEW YORK PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Camp Kilmer, New Jersey, 3 October 1946. Dismissal and total forfeitures.
First Lieutenant LEO G. TAYLOR (0-885714), 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 charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant Leo G. Taylor, 9225 Technical Service Unit, Transportation Corps, Company F, 10th Receiving and Casual Holding Regiment, Overseas Replacement Depot, New York Port of Embarkation, Camp Kilmer, New Jersey, did, while en route from Fort McClellan, Alabama to Camp Kilmer, New Jersey, on or about 7 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Lynbrook, New York, on or about 24 July 1946.

He pleaded guilty to and was found guilty of the specification except the words "desert the service of the United States" and "in desertion" substituting therefor, respectively, the words "absent himself without leave from his station" and "without leave", of the excepted words not guilty, of the substituted words guilty and not guilty of the charge but guilty of violation of the 61st Article of War. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

On 13 May 1946 the accused was granted fifteen days leave effective 14 May 1946 (R. 5, Pros. Ex. 1). On 14 May 1946 he signed the officers' register showing the time of his departure from the post to be 1000 hours pursuant to his leave orders (R. 5, Pros. Ex. 2). On 20 May 1946 the accused's leave

was increased to twenty-one days. By paragraph 20, Special Orders 118, Headquarters Infantry Replacement Training Center, Fort McClellan, Alabama, the accused was released from his assignment at Fort McClellan and transferred to Camp Kilmer, New Jersey. He was to arrive at Camp Kilmer by 1200 hours 7 June 1946 (R. 5,6, Pros. Ex. 3). The accused did not report to any organization or adjutant at Camp Kilmer on 7 June 1946 (R. 7). He was apprehended by civil police at Lynbrook, New York, while in uniform at about 5:25 p.m. on 24 July 1946 (R. 8, Pros. Ex. 5). He was released by the civil police to the Provost Marshal, Mitchel Field, about 6:30 p.m. 24 July 1946 (R. 9, Pros. Ex. 6).

4. Evidence for the defense

About 1:00 p.m. 24 July 1946 the accused informed Eddy Bell, a bartender at the Atlantic Cafe, Lynbrook, New York, that he was going to Camp Kilmer, New Jersey, on the train leaving at 6:00 o'clock that afternoon and that he would attend a show first (R. 10). Sometime during the day of 24 July 1946 he left a note at the home of Miss Anne MacCormack, which note stated that he (Lt. Taylor) was going to Camp Kilmer that afternoon (R. 11). The accused was awarded the Distinguished Service Cross "for extraordinary heroism in action against an armed enemy on 1-5 December 1942; during a raid on the coast west of Bizerte, Tunisia ***" (R. 9,10).

The accused elected to make a sworn statement after his rights as a witness had been explained to him. He testified that while at Council Bluffs, Iowa, he received orders directing him to report to Camp Kilmer, New Jersey, on 7 June 1946; that pursuant to these orders he went to New York City, arriving there on 7 June 1946. He had checked two bags on his ticket and was carrying two other bags. Two of his bags were stolen while he was at the Pennsylvania station. He reported the theft to the station master and spent the balance of the day attempting to find his stolen property. He went to Lynbrook, a twenty or twenty-five minute ride on the Long Island Railroad, to spend the night. During the next four days he attempted to find his property but was not successful. After he could not find his stolen property he put off returning to military control. During the time he was absent his health was good and he did not drink to an excess. He entered the Army 10 February 1941 and received a battle field commission 3 January 1943 in North Africa. His decorations include the American Defense ribbon, European Theatre, Combat Infantryman's Badge, four battle stars and the Arrowhead for the invasion of North Africa. He wore his uniform at all times and always intended to return to the Army (R. 11,12,13,14).

At the time the accused was apprehended he had in his possession a one-way ticket on the Long Island Railway from Lynbrook, New York, to New York City, and a one way ticket on the Pennsylvania Railroad from New York City to New Brunswick, New Jersey (R. 10).

5. The evidence shows that the accused was absent without leave from

7 June 1946 to 24 July 1946, a period of 47 days, in violation of Article of War 61.

6. War Department records show the accused to be 25 years of age. He has had approximately six years of service in the Army of the United States. He was a sergeant before his appointment as a second lieutenant, Infantry, on 3 January 1943 in Algiers. On 1 March 1943 he was awarded the Distinguished Service Cross. He also holds the Combat Infantryman's Badge. On 17 August 1943 he received a temporary promotion to first lieutenant. His efficiency reports for the year 1945 are "Excellent." He studied recruiting at the Adjutant General's School at Fort Oglethorpe, Georgia, from 8 March 1946 to 22 March 1946, graduating with an "Excellent" rating.

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 thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Chester D. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

(On Leave), Judge Advocate

JAGK - CM 317232 1st Ind

JAN

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 First Lieutenant Leo G. Taylor (O-885714), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 7 June 1946 to 24 July 1946, a period of 47 days, 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. 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 record of trial discloses that the accused was given orders transferring him to Camp Kilmer, New Jersey. He failed to report to Camp Kilmer, and remained absent without leave 47 days until apprehended by civil police. He has had about six years service. He received a battlefield promotion to officer grade. He was awarded the Distinguished Service Cross for heroism in action in December, 1942.

The accused was tried 3 October 1946 and according to information, dated 3 December 1946, from Camp Kilmer, New Jersey, the accused was then and had been absent without leave since 4 October 1946.

4. I recommend that the sentence be confirmed and, in view of the persistent absence, that it 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
Major General
The Judge Advocate General

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

(G.C.M.O. 11, 15 January 1947).

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

MAY 15 1947

JAGQ - CM 317233

UNITED STATES	FIFTEENTH AIR FORCE
v.	Trial by G.C.M., convened at Smoky Hill Army Air Field, Salina, Kansas, 23 September 1946. Dismissal.
Second Lieutenant DONALD R. MARTIN (0-2084360), Air Corps.	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Donald R. Martin, 341 Bombardment Squadron, 97 Bombardment Group, did, at Manhattan, Kansas, on or about 15th May 1946, wrongfully use without the consent of the owner, a certain automobile: to-wit, staff car #154866, of a value over $50,00, property of the United States.

Specification 2: In that Second Lieutenant Donald R. Martin, 341 Bombardment Squadron, 97 Bombardment Group, was, at Manhattan, Kansas, on or about 15 May 1946, wrongfully disorderly in his relations with Angelina B. Kanawall, also known as Angelina Bertola.

Accused pleaded not guilty to, and was found guilty of, the Charge and specifications. 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, with a recommendation that said sentence be commuted.

3. Evidence for the Prosecution. It was stipulated between prosecution and defense, with the accused consenting, that if Mrs. Angelina B. Kanawall, also known as Angelina Bertola, were present and sworn as a witness she would testify that she was separated from her husband and that on 15 May 1946 she was living with a Mrs. Miller in a rooming house at Ogden, Kansas. Accused came to pick her up at her place of employment at Manhattan, Kansas, about 0100 hours on 15 May 1946 in an Army sedan. They then went to a White House Cafe and had a few drinks and some food. From there they started towards witness' home; en route, the car became stuck in the mud and in trying to get it out, they ran out of gas. Sometime during the night they had sexual intercourse. About 0800, some men with a truck pulled the car out of the mud, and they then continued to Ogden, where they had breakfast. They stayed at Ogden about an hour and then returned to Manhattan. Before leaving Ogden, Mrs. Kanawall talked to the Chief of Police there and advised him that she was looking for an apartment in Manhattan. (The Chief of Police had previously advised Mrs. Miller to leave Ogden.) Accused then drove Mrs. Kanawall and Mrs. Miller to Manhattan. (R. 6-8).

Another stipulation was entered into by prosecution and defense, with the accused consenting, that if Adryn B. Bolejack were present and sworn as a witness he would testify that he is the Chief of Police of Ogden, Kansas; that he saw accused with two women in the front seat of Army sedan #154866 on or about 15 May 1946; that one of the women was Mrs. Angelina B. Bertola, who, to his knowledge, had been in jail in Junction City; that both of the women were well known to the police and had been ordered to stay away from Ogden and Junction City. On this date he had informed the women that he had a complaint from Mrs. Stevens, owner of the rooming house where they lived, that an Army staff car was parked near her house for approximately two hours and that an Army officer had gone to Mrs. Miller's room. The women had replied they were going with the lieutenant to look for an apartment. The women had then departed toward Manhattan with the same officer in the Army car (R. 8-9).

Lieutenant Steele testified that he and accused were members of a recruiting team, that Army vehicle #154866 was assigned to him for the purpose of that duty and that this car was frequently driven by accused in the performance of his official duties. That on 14 May 1946, their official duties being completed, the vehicle was parked and subsequently, he had not given accused permission to operate the vehicle (R. 9-13).

A written confession signed by accused was entered into evidence without objection (R. 16; Ex. 1). In this confession, accused stated

that he met a girl named Lee at the College Inn, Manhattan and offered to take her home; that there was no transportation except the Santa Fe Bus so he obtained the staff car and picked her up. They started to her home about 0200 and 0230; he became confused and took the wrong road out of town and when the pavement ended, the car became stuck in the mud. After getting the car free, he became stuck again, ran out of gas and stayed there until 0800 when he went to call a tow truck. They had sexual intercourse about 0800. After the tow truck pulled the car out he drove the girl to Ogden where she lived, had some coffee, picked up Mrs. Miller, and drove back to Manhattan (Exhibit 1).

4. Except for the direct testimony of Lieutenant Steele, the entire evidence against accused consists of two stipulations and a confession.

Paragraph 126b, Manual for Courts-Martial, provides that "a stipulation which practically amounts to a confession *** should not ordinarily be accepted by the court" when the accused has pleaded not guilty and such plea still stands. Furthermore, a stipulation "should not be accepted when any doubt exists as to the accused's understanding of what is involved."

Defense counsel is urged in paragraph 45b, Manual for Courts-Martial, to "join in appropriate stipulations as to unimportant or uncontested matters".

> "Stipulations, however, should not be made as to vital matters amounting either to a complete defense or substantially admitting the accused's guilt (par. 126b, MCM). For example, if the accused pleaded not guilty to a charge of desertion it would not be proper to stipulate that he intended to desert the service, since such a stipulation would be entirely inconsistent with his claim that he was not guilty and would practically amount to a confession." (Par. 68b, TM 27-255 (Feb. 1945)).

The language of the Manual for Courts-Martial leaves the acceptance or rejection of a stipulation to the discretion of the court. The case of CM 248408, Young, 31 BR 249, held that a stipulation coupled with admissions made by defense counsel in his closing argument were sufficient to support a finding of guilty. This ruling is followed in the case of CM 3686 Morgan, 10 BR (ETO) 179 in which a stipulation was

held sufficient to establish the corpus delicti, thereby laying the foundation for the court's receiving a confession. The stipulation and confession were then considered legally sufficient to support the findings of guilty of wrongfully using a Red Cross truck.

In the case of CM 275648, Creighton, 48 BR 117 (123), the Board of Review cited the Young case, supra, with approval but pointed out that although the accused had pleaded not guilty and then agreed to a stipulation admitting practically all elements of the offense, "the theory of the defense was not to deny the commission of the offenses but to excuse them by proving lack of mental responsibility (and) it cannot be said that the court abused its discretion in receiving the stipulation." The Creighton ruling was cited with approval in CM 317140, Rust.

It is important to note that the stipulations in the instant case are not stipulations "of facts" but are stipulations "of testimony" and as such are not binding on the court even though uncontradicted by any other evidence in the case. Further the court may be more liberal in accepting stipulations as to "testimony" than as to "facts" (MCM, 1928, par. 126b). Consequently the Board of Review is of the opinion that the stipulations of testimony in this case were not inconsistent with accused's plea of not guilty and were properly received by the court.

The next question for determination is whether an offense under the 96th Article of War was established by the evidence. Accused was charged with being "wrongfully disorderly in his relations" with a female civilian. It is sufficient to note that the alleged "disorderly" relations took place in the early hours of the morning presumably on a lonely country road. No person witnessed the actions of accused and it is admitted that they were consummated with the tacit consent of his companion. Consequently the Board of Review is of the opinion that from all the facts and circumstances of the particular case the offense of "disorderly conduct" in violation of Article of War 96 was not established by the evidence.

As to Specification 1, there is direct evidence (Lt. Steele's testimony) in addition to the stipulations and in its finding of guilty of this specification the court was not required to rely on the stipulations alone. The testimony of Lieutenant Steele established that accused did not have permission to use the car at the time in question, and this evidence established one of the elements of the offense charged. The corpus delicti having been established by Lieutenant Steele's testimony and the stipulations, accused's confession was properly received in evidence. The record of trial is therefore legally sufficient to support the findings of guilty of this specification and the Charge.

5. The accused is 22-0/12 years of age, was in the Enlisted Reserve Corps from 18 November 1943 to 9 February 1945. On the last named date he was discharged to take a commission as Second Lieutenant, Air Corps for the duration plus six months. He is single, graduated from high school and attended Phoenix Junior College for 3 months prior to entering the service. He graduated from Army Air Forces Navigation School at San Marcos, Texas, as Aerial Observer (Navigator). His academic rating at an officers' school for Radar Observer Bombardment (19 March 1945 to 23 June 1945) was "very satisfactory." He has a record of no previous convictions. One member of the court, Trial Judge Advocate, Assistant Trial Judge Advocate, Defense Counsel and Assistant Defense Counsel, joined in a plea for clemency. The Staff Judge Advocate recommended the sentence to dismissal be commuted. While under investigation accused submitted a resignation for the good of the service which was not accepted on the ground that "the facts are not sufficiently serious to justify, and do not warrant the imposition of the serious penalties attendant to resignation for the good of the service in lieu of trial by court-martial."

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors other than those enumerated above 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 insufficient to support the finding of guilty of Specification 2, but legally sufficient to support the findings of guilty of Specification 1, the Charge and the sentence and to warrant confirmation thereof. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 317233 1st Ind

WD, JAGO, Washington 25, D. C. JUN 5 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 Donald R. Martin (0-2084360), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully using without the consent of the owner, a Government vehicle (Spec. 1) and of being wrongfully disorderly in his relations with a woman (Spec. 2), in violation of Article of War 96. He was sentenced to be dismissed the serfice. The reviewing authority approved the sentence, recommended commutation, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of the Charge (that accused was wrongfully disorderly in his relations with a female person), but is legally sufficient to support the findings of guilty of Specification 1 of the Charge (unauthorized use of Government vehicle), and the Charge; legally sufficient to support the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The accused is 22 years of age and was in the Enlisted Reserve Corps from 18 November 1943 to 9 February 1945. On the latter date he was discharged to take a commission as Second Lieutenant, Air Corps. Accused is single. He graduated from high school and attended Phoenix Junior College for 3 months prior to entering the service. He graduated from Army Air Forces Navigation School at San Marcos, Texas, as Aerial Observer (Navigator). His academic rating at an officers' school for Radar Observer Bombardment (19 March 1945 to 23 June 1945) was "very satisfactory." He has a record of no previous convictions.

One member of the court, the trial judge advocate, assistant trial judge advocate, defense counsel and assistant defense counsel, joined in a recommendation for clemency. The reviewing authority and staff judge advocate recommended the sentence to dismissal be commuted. While under investigation accused submitted a resignation for the good of the service which was not accepted. Headquarters Strategic Air Command, in this connection, expressed the view that "the facts are not sufficiently serious to justify, and do not warrant the imposition of the serious penalties attendant to resignation for the good of the service in lieu of trial by court-martial."

5. In view of the character of the offense of which accused was properly convicted, the youth of accused, his previous good record of service as an enlisted man and officer, the recommendations for clemency and all the other circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 pay, 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls.
1. Record of Trial
2. Form of Action

G.C.M.O. 208, June 11 1947)

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

JAGK - CM 317251

16 JAN 1947

UNITED STATES v. Private GROVER S. B. TAYLOR (36493466), 3524th Quartermaster Truck Company.	YOKOHAMA BASE Trial by G.C.M., convened at Yokohama, Japan, 22 August 1946. Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

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

Specification 1: In that Private, Grover S. B. Taylor, 3524 Quartermaster Truck Company, APO 181, did, at Tokyo, Honshu, Japan, on or about 31 May 1946, wrongfully strike Misao Wakai on the face, shoulder, and side with his fist and foot.

Specification 2: In that Private, Grover S. B. Taylor, ***, did, at Tokyo, Honshu, Japan on or about 2 June 1946, wrongfully strike Hanae Ono on the body with his fist.

Specification 3: In that Private, Grover S. B. Taylor, ***, did, at Tokyo Honshu, Japan, on or about 2 June 1946, wrongfully strike Miyoko Kikuchi on the body with his fist.

Specification 4: In that Private, Grover S. B. Taylor, ***, did, at Tokyo, Honshu, Japan, on or about 2 June 1946, wrongfully kick Hatsue Nakajima in the thigh with his foot.

Specification 5: In that Private Grover S. B. Taylor, ***, did, at Tokyo, Honshu, Japan, on or about 3 June 1946, wrongfully strike Kiyo Ishizuko on the body with his fist and foot.

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

Specification: In that Private, Grover S. B. Taylor, ***, did, at Tokyo, Honshu, Japan, on or about 31 May 1946, forcibly and feloniously, against her will have carnal knowledge of Kazuko Yamada.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of four previous convictions for minor offenses was submitted. Two-thirds of the members of the court concurring, 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 remainder of his natural life." The reviewing authority approved the sentence, designated the U. S. Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. As heretofore stated, the record reveals that only two-thirds of the members of the court present at the time the vote was taken concurred in the sentence. Article of War 43 provides, inter alia, that no person shall be "sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken." When confinement in excess of ten years is imposed under a sentence in which only two-thirds of the members concur, the error may be corrected by reducing the confinement to ten years or less (CM 238825, Jones, 24 BR 367; CM 249737, Cooke, 2 BR(NATO -MTO) 165,167).

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty but legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of ten years.

Christy D. Gilmore, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert E. Stokroyd, Judge Advocate

JAGK - CM 317251 1st Ind

JAN 23 1947

WD, JAGO, Washington 25, D. C.

TO: The Adjutant General

1. In the case of Private Grover S. B. Taylor (36493466), 3524th Quartermaster Truck Company, 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 sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due [illegible] confinement at hard labor for a period of ten years, which holding is [illegible] approved. Upon reduction of the period of confinement to ten years you [illegible] authority to order the execution of the sentence.

2. This office was advised that Yokohama Base was [illegible] on 31 December 1946, in view of which it is recommended that War Department General Court-Martial Orders be published in this case. A draft of such general court-martial order is inclosed.

3. The return to this office of this holding together with five copies of the published War Department general court-martial order is requested.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls.
1- Record of trial
2- Draft of GCMO

C.M.O. 19, Jan. 29, 1947)

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

JAGN-CM 317274

U N I T E D S T A T E S	)	MILITARY DISTRICT OF WASHINGTON
	)	
v.	)	Trial by G.C.M., convened at Fort Myer, Virginia, 12, 24 and 25 September 1946. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Staff Sergeant EDWARD T. JONES (33846049), Headquarters and Headquarters Company, Army Ground Forces.	)	

HOLDING 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 94th Article of War.

Specification: In that Staff Sergeant Edward T. Jones, Headquarters and Headquarters Company, Army Ground Forces, did, on or about September 6, 1945, introduce and record in his personnel records a spurious special order, to wit: "Headquarters, 6th Engineer Special Brigade, Office of the Brigade Commander, Camp Gordon Johnston, Fla 6 Sept 1945.

Special Orders Number 72

1. Promoting the following named EM to the grades indicated. Auth: AR 615-5

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TO BE MASTER SERGEANT (Temporary)
S/Sgt. Edward T. Jones, 33 846 049 (502 6th ESB)

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By order of Colonel Ker:

OFFICIAL: n/s SEBURN W. CARSON
WOJG, USA, Asst Adjutant

SEBURN W. CARSON
WOJG, USA, Asst Adjutant

I certify that this is a true extract s/Seburn W. Carson
WOJG, USA, Asst Adjutant

A CERTIFIED TRUE COPY (Signed)
ARTHUR J. NADEAU, Jr.
Captain, C.E."

promoting him, the said Staff Sergeant Edward T. Jones, to Master Sergeant, which said writing he then knew was false and fraudulent, thereby fraudulently obtaining from the Government of the United States the sum of about three hundred seventy one dollars ($371.00), the difference in pay of Master Sergeant of the army over Staff Sergeant for the period September 6, 1945, to May 31, 1946, inclusive.

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

Specification: In that Staff Sergeant Edward T. Jones, Headquarters and Headquarters Company, Army Ground Forces, did, on or about Sept 6, 1945, falsely make and write in his personnel records the following words and figures, to wit: "Br Sv Star, Northern France Campaign, Ltr ETOUSA AG 200.6 OPGA 25 Mar 45; Br Sv Star, Cent Europe Campaign, Ltr ETOUSA AG 200.6 Op GA 25 Mar 45; Br Sv Star, Rhineland Camp, Ltr ETOUSA AG 200.6 Op GA 28 Jun 45; Br Sv Star, Ardennes Camp, Ltr ETOUSA AG 200.6 Op GA 28 Jun 45; 1st Oak Leaf Cluster to Purple Heart, GO #18, 93rd Evac Hosp 17 Feb 45; Bronze Star- GO #125 ETO 19 Feb 45; 2nd Oak Leaf Cluster to Purple Heart, GO #97 91st Evac Hosp 15 Mar 45; Oak Leaf Cluster to Bronze Star GO #275 ETO 23 Mar 45; Croix de Guerre-avec Etoile de Bronze (Reg) Decision No 332 Prov. Govt. Republic France Paris 25 Jan 45", which said writing he then knew to be false and of an official nature, which might operate to the prejudice of the United States of America.

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

Specification: In that Staff Sergeant Edward T. Jones, Headquarters and Headquarters Company, Army Ground Forces, did, at Washington, D. C., wrongfully and without authority, on or about March 7, 1946, wear as part of his uniform, certain ribbons and decorations to which he was not entitled, to wit: "Distinguished Unit Badge, Bronze Service Stars for Nothern France Campaign and Ardennes Campaign, two Oak Leaf Clusters to the Purple Heart Medal, Bronze Star Medal with Oak Leaf Cluster to the Bronze Star Medal, and the French Croix de Guerre avec Etoile", this in violation of Army Regulations 600-90 and a prejudice against good military traditions and discipline.

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification except the words "a certified true copy (signed) Arthur J. Nadeau, Jr. Captain, CE"; of the excepted words not guilty, guilty of the Specification of Charge II except the words and figures "Br Sv Star, Cent Europe Campaign, Ltr ETOUSA AG 200.6 Op Ga 25 Mar 45; Br Sv Star, Rhineland Camp, Ltr ETOUSA AG 200.6 Op Ga 28 Jun 45"; of the excepted words not guilty, and of Charge II not guilty but guilty of a violation of the 94th Article of War, and guilty of Charge III and its 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 might direct for five years. The reviewing authority approved the sentence and designated the East Central Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The Board of Review holds the record of trial to be legally sufficient to support the findings of guilty of Charge III and its Specification. The only question to be considered is whether or not the record of trial is legally sufficient to support the findings of guilty as to Charge I and Charge II and their respective Specifications.

4. The Specification of Charge I purportedly alleges a violation of the 94th Article of War. This Article is concerned with frauds against the Government in the nature of false or fraudulent claims. The Article states in pertinent part:

> "Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or
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> * * *
>
> Who, for the purpose of obtaining * * * the approval, allowance or payment of any claim against the United States or against any officer thereof, makes or uses or procures * * * any writing or other paper knowing the same to contain any false or fraudulent statements: * * * shall, on conviction thereof, be punished * * *."

The Specification of Charge I does not allege that the accused made a false or fraudulent claim. It merely sets forth that accused "did introduce and record in his personal records, a spurious special order * * * which said writing he then knew was false and fraudulent, thereby fraudulently obtaining from the Government of the United States the sum of * * * ($371.00) * * *." The Specification does not allege that accused either made a false and fraudulent claim or that he did the alleged act for the purpose of obtaining approval of a false and fraudulent claim. CM 154185, Allbright. It is the opinion of the Board therefore that the Specification fails to allege an offense under the 94th Article of War. Since accused was

honorably discharged 8 November 1945 and the alleged offense occurred on or about 6 September 1945 a finding of guilty under any other applicable Article of War cannot be sustained.

None of the decorations mentioned in the Specification entitles the wearer to extra remuneration. Charge II was drawn as a violation of Article of War 93 and the finding of guilty by the court was of a violation of Article of War 94. It is the opinion of the Board that the finding of guilty of a violation of Article of War 94 cannot be sustained for the reason that the Specification does not state an offense under that Article in that it fails to allege the making of a false claim by accused or that he made the entries for the purpose of obtaining approval of a false claim. This Specification likewise cannot be sustained under any other applicable Article of War because of the subsequent honorable discharge.

Under the provisions of 10 U.S.C. 1425 and paragraph 104c, Manual for Courts-Martial, 1928, the maximum penalty that may be imposed upon accused is confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period.

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, and of Charge II and its Specification, but legally sufficient to support the findings of guilty of Charge III and its Specification and so much of the sentence as provides for confinement at hard labor for six months and forfeiture of $50.00 of his pay per month for a like period.

Guy H. Hardy, Judge Advocate.

Edward F. Johnson, Judge Advocate.

Edward R Taylor, Judge Advocate.

JAGN-CM 317274 1st Ind JAN 8 1947

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Military District of Washington, Room 5-B-518, The Pentagon, Washington 25, D. C.

1. In the case of Staff Sergeant Edward T. Jones (33846049), Headquarters and Headquarters Company, Army Ground Forces, 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 I and its Specification and Charge II and its Specification be disapproved, that so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of $50.00 per month for a like period be disapproved, and that a Post Guardhouse be designated as the place of confinement. Upon disapproval of the findings of guilty of Charge I and its Specification and Charge II and its Specification and upon disapproval of so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of $50.00 pay per month for a like period, you will have authority to order the execution of the sentence.

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

(CM 317274).

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.

JAGK - CM 317327

27 January 1947

UNITED STATES	HEADQUARTERS COMMAND UNITED STATES FORCES EUROPEAN THEATER
v.	Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 22 August to 30 September 1946. Dismissal, total forfeitures and confinement for five (5) Years.
Captain KATHLEEN B. NASH DURANT (L-918024), Women's Army Corps.	

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. Accused was tried upon the following charges and specifications:

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

Specification: In that Captain Kathleen B. Nash Durant (then Captain Kathleen B. Nash), Women's Army Corps, Headquarters Command, United States Forces European Theater, did, without proper leave, absent herself from her command at Reception Center Number 7, Fort Sheridan, Illinois, from about 29 May 1946 until she was returned to military control on or about 3 June 1946.

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

Specification 1: In that Captain Kathleen B. Nash Durant (then Captain Kathleen B. Nash), Women's Army Corps, Headquarters Command, United States Forces European Theater, in conjunction with Colonel Jack W. Durant and Major David F. Watson, did, at or near Kronberg, Germany, on or about 6 November 1945, feloniously take, steal and carry away the following items of personal property, each of a value of more than $50.00:

(1) 1 diadem pearls and diamonds
(2) 1 necklace diamonds (cataract)
(3) 1 emerald jewel
(4) 1 riviere diamonds
(5) 1 pair of big ear drops diamonds
(6) 2 rings with diamonds
(7) 1 lady's watch enamel diamonds
(8) 1 riviere diamonds
(9) 1 diadem

(50) 1 pendant, gold, with pearls, a jour
(51) 1 pin, diamonds, 4 rosettes and drops
(52) 1 pin, diamonds, 1 flower with 3 clusters
(53) 1 pin, 4 pearls and diamond splinter
(54) 1 pin, gold, with 2 pearls and 1 small diamond

(10) 1 fan mother of pearl
(11) 1 medal diamonds and onyx
(12) 1 amethyst diadem with diamonds
(13) 1 large amethyst necklace with diamonds
(14) 1 small amethyst necklace with diamonds
(15) 1 buckle amethyst diamonds, 3 parts
(16) 1 large brooch amethyst diamonds, 2 parts
(17) 1 pair of ear rings
(18) 4 not fixed amethysts with diamond edge
(19) 2 ear rings with pendants
(20) 2 big diamonds
(21) 1 big diamond as brooch
(22) 1 big diamond with pearl as brooch
(23) 2 gold bracelets, blue enamel and diamonds with pictures of Friedrich Wilhelm IV and Queen Elisabeth of Prussia
(24) 1 necklace with 27 pearls and buckle
(25) 1 diadem, pearls, with diamonds with single buckle (broken at one place)
(26) 1 pearl - chain, 49 pearls
(27) 1 necklace, turquoise, diamonds
(28) 2 ear drops
(29) 1 necklace, gold with diamonds, changeable links, 17 links
(30) 1 necklace, silver (platinum) with pearls
(31) 1 necklace, gold with Lapislazuli
(32) 1 necklace, gold with several stones in egg shape
(33) 1 necklace, corals with pendant
(34) 1 necklace, corals with big stones (short chain)
(35) 1 necklace, gold, thin with light pendant
(36) 1 necklace, silver, thin with pendant, sapphire with diamonds
(37) 1 necklace, gold without pendant
(38) 1 pendant, big sapphire with diamond edge
(55) 1 Man's watch, gold with monogram
(56) 1 Lady's watch, gold with monogram
(57) 1 pair of sleeve links, gold with sapphires
(58) 1 pair of sleeve links, gold with diamonds
(59) 1 shirt stud, sapphire with crown of diamond splinters
(60) 1 shirt stud, pearls
(61) 1 ring, with round turquoise and diamond edge
(62) 1 ring, with oval turquoise and diamond edge
(63) 1 ring, with sapphire and 2 diamonds
(64) 1 ring, gold with ruby and diamonds
(65) 1 brooch (sapphire)
(66) 1 bracelet, diamond
(67) 1 brooch, rose turralin
(68) 1 bracelet, emerald, pearls, diamonds
(69) 1 pair of buttons, gold, emerald
(70) 4 golden rings
(71) 1 ring
(72) 1 pin
(73) 3 roman clasps, gold
(74) 1 golden man's watch with monogram and chain
(75) 1 golden pin, monogram with crown
(76) 1 pin, black pearl
(77) 3 buckles, aquamarines, diamonds
(78) 3 shirt studs, pearls
(79) 1 brooch, topaz diamonds
(80) 1 brooch, solitaire, diamonds
(81) 1 gold bound Bible in case
(82) 1 book, purple cloth binding, "Imitation of Jesus Christ" written in French
(83) 1 prayer book, bound in gold with blue cloth, 7 ribbons with pendants, in cloth cover
(84) 1 autograph book bound in red velvet with ribbon ties
(85) 1 autograph book (with pictures) bound in light red cloth, tied with ribbon
(86) 1 small German Bible, black
(87) 1 small autograph book bound in red cloth

(39) 1 pendant, big knot 2 diamonds
(40) 1 pendant, big cross, 7 pearls with diamonds
(41) 1 pendant, medal with gold and pearls
(42) 1 pendant, gold with turquoises and diamonds, horseshoe form
(43) 1 pendant, big amethyst heart
(44) 1 pendant, small amethyst heart
(45) 1 pendant, golden heart with enamel and diamonds
(46) 1 pendant, gold with 4 pears and diamonds
(47) 1 pendant, medal, gold with glass (Amor spotted)
(48) 1 pendant, medal, gold with glass (red cross)
(49) 1 pendant, small golden cross with diamonds

(88) 1 pin, gold, with 3 sapphires and two diamonds
(89) 1 pin, gold, 2 sapphires, 2 diamonds
(90) 1 pin, gold, with 4 pearls and diamonds
(91) 1 pin, long, platinum with diamonds
(92) 1 pin, gold with emeralds
(93) 1 tie-in gold as a crown
(94) 1 bracelet, platinum with 1 big pearl, 2 diamonds and splinters
(95) 1 bracelet, gold with watch (square)
(96) 1 bracelet, gold chain with sapphire and ruby
(97) 1 bracelet, gold chain with sapphire and diamonds
(98) 1 bracelet, gold chain with sapphire, ruby and emeralds, horseshoe form
(99) 1 bracelet, gold chain with pearl and diamonds

(Items numbers supplied. Items excepted in findings omitted.)

and of a total value of more than $50.00, the property of Prince Wolfgang von Hessen.

Specification 2: In that Captain Kathleen B. Nash Durant (then Captain Kathleen B. Nash) Women's Army Corps, Headquarters Command, United States Forces European Theater, in conjunction with Colonel Jack W. Durant and Major David F. Watson, did, at or near Kronberg, Germany, on or about 8 November 1945, feloniously take, steal and carry away the following items, each of some value:

2 envelopes containing jewels
(Items excepted in findings omitted.)

and of a total value of more than $50.00, the property of Prince August Wilhelm von Prussia.

Specification 3: In that Captain Kathleen B. Nash Durant (then Captain Kathleen B. Nash) Women's Army Corps, Headquarters Command, United States Forces European Theater, did, at or near Kronberg, Germany, between 1 October 1945 and 1 April 1946, feloniously embezzle by fraudulently converting to her own use the fllowing items of personal property, each of a value of more than $20.00:

(135) 1 silver pitcher
(137) 1 silver turtle table bell
(138) 1 silver cigarette box with hinged lid and coin on top

(171) 1 spoon, leaf design, silver
(172) 5 assorted small serving spoons, silver
(173) 2 small ladle shaped spoons, silver
(174) 1 small silver baby food pusher
(175) 1 gravy server, initial "V" on handle

(139) 1 pair small silver candle holders
(140) 2 small chalice shaped cups (159
(141) 1 small white metal box, hinged lid, milking scene on bottom
(142) 1 gold plated silver jewel box
(143) 1 small mustard jar with glass lining, engraved Christmas 1891 on top
(144) 1 small food tray, silver
(148) 1 small round silver bowl with handle
(147) 1 small silver plate
(152) 1 pencil holder engraved "Wolfgang 25 March 1912"
(153) 1 whistle, white metal
(180) 1 silver picture frame
(154) 1 small white metal tube, approximately 5 incles long
(158) 1 small crucifix, silver
(159) 1 small woven basket, silver
(164) 1 silver salad fork
(165) 1 silver salad spoon
(168) 3 butter knives, silver
(169) 1 serving spoon, shovel shaped, silver
(170) 1 small serving spoon embossed with vertical figure on handle silver
(176) 1 silver spoon, engraved on front and back
(177) 1 serving spoon, silver, figure-head stem
(178) 1 tablespoon, silver
(179) 1 grape sissors, silver
(181) 1 silver picture frame (glass broken)

and the following items, each of a value of more than $50.00:

(134) 1 yellow metal stein with V3 on bottom
(136) 12 silver bread and butter plates
(145) 1 oval shaped silver tray
(146) 1 small bowl, two handles
(149) 1 silver plate, initials A.P. with crown on top
(160) 2 small figures of warriors on small square platform, yellow metal
(182) 1 pair binoculars in leather case, No. 1554958, Prince von Hessen on case
(162) 1 armed figure on horseback
(161) 2 small figures on horseback on small square platform, yellow metal
(163) 1 set, 12 each, tablespoons, forks and knives gold with assorted semi-precious stone handles. (Some handles broken)
(166) 1 set of silver service of silver including 12 knives, 11 forks, 18 tablespoons, 6 demi-tasse spoons
(167) 1 set of 12 small demi-tasse spoons, silver

(Item numbers corresponding to item numbers on Prosecution Exhibit 14 supplied. Items excepted in findings omitted.)

and of a total value of more than $50.00, the property of the United States, intrusted to her by the United States by virtue of her appointment as Officer in Charge of Schloss Friedrichshof, also known as Kronberg Castle.

CHARGE III: (Finding of not guilty).

Specification: (Finding of not guilty).

Accused refused to plead to the charges and specifications and the trial proceeded "as if a plea of not guilty had been entered" to each charge and specification. The court found accused guilty of Charge I and guilty of the

specification thereunder except of the words and figures "29 May 1946," substituting therefor the words and figures "30 May 1946"; guilty of Charge II and guilty of Specification 1 thereunder except of the words and figures "Each of a value of more than $50.00" and of the items not shown on the Specification as copied above, guilty of Specification 2 thereunder except of the words and figures "In conjunction with Colonel Jack W. Durant and Major David F. Watson" and "and of a total value of more than $50.00" and of the items not shown on the Specification as copied above, guilty of Specification 3 thereunder except of the words and figures "each of a value of more than $20.00" and of the items not shown on the Specification as copied above; and not guilty of Charge III and its Specification. No evidence of any previous conviction was introduced. 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 at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

During the month of October 1944 Allied air raids on the German City of Frankfurt increased in severity. At this time Prince Wolfgang of Hesse, whose home was destroyed by these air raids and who was the head of the Hesse family, his older brother Phillip being in a concentration camp, held a conference with other members of his family to determine what should be done to safeguard the jewels and other valuable property belonging to the House of Hesse and the individual members thereof. They decided to wall in this property at the family castle, Schloss Friedrichshof, at Kronberg, Germany, (hereinafter called Kronberg Castle), and accordingly Prince Wolfgang gave Herr Lange, the "chief of administration" of the House of Hesse, instructions to have a box made in which to place such property (R. 101, 102, 108, 109). Herr Lange, acting on Prince Wolfgang's instructions, prepared a wooden box with a zince lining (R. 77) into which he placed the jewels of the House of Hesse, those belonging to Prince Richard, Prince Christoph, Princess Mafalda, Princess Richard, Princess Sophia (Princess Cristoph), Prince Wolfgang and his wife Princess Maria Alexandra, and the jewels and other property belonging to Princess Margarethe, the dowager Landgrafin of Hesse (R. 68, 73, 74, 76, 102, 159, 162). When he had finished packing the box the metal lining was soldered together and the wooden lid screwed on. He then turned the box over to Prince Wolfgang (R. 69, 266). On or about 30 October 1944, a hole was dug in the basement of Kronberg Castle under Prince Wolfgang's direction and Prince Wolfgang placed the box in this hole which was thereupon covered with concrete (R. 102). Prince Wolfgang "took over the responsibility of the box (R. 69, 106). He did not "abandon" the contents of the box (R. 110). He was arrested and interned the same day the castle was "occupied" (R. 113).

At the time he packed the box Herr Lange made inventories of the jewels therein belonging to the House of Hesse (Pros. Exs. 7, 7g, 7h - translation, Pros. Exs. 9, 9g, 9h), the Prince Richard (Pros. Ex. 7e - translation 9e), and to Prince Christoph (Pros. Ex. 7f - translation 9f) (R. 73-75, 86). Prince

Wolfgang inventoried the jewels therein which belonged to himself and to Princess Maria Alexandra, his wife (R. 102, 111, 105), and Princess Margarethe also inventoried her property which had been placed in the box (R. 155, 156, 160, 161; Pros. Ex. 15 - translation Pros. Ex. 15A). Princess Sophia, who lived in Kronberg Castle, delivered to her mother-in-law, Princess Margarethe, for insertion in the box, "a diadem and a necklace and a brooch, and sapphires and diamonds and pearls; and one big brooch with pink stones and diamonds around it, and a diamond bracelet with a Greek key pattern on it, and a diamond pendant" (R. 162, 163). Princess Margarethe delivered to Herr Lange the property Princess Sophia had turned over to her (R. 186). Herr Lange was not given an inventory of the jewels of Princess Mafalda which he placed in the box and no inventory of these jewels or the jewels of Princess Richard, who was dead, was produced at the trial (R. 76). Princess Margarethe owned Kronberg Castle and lived at this time in the so-called "cottage" on the grounds (R. 156, 163).

On 7 April 1945, Prince August Wilhelm of Prussia was staying at the "Cottage" in Kronberg with Princess Margarethe, his aunt, and on that date he was placed under arrest by Allied military authorities. After his arrest he delivered certain items of jewelry and other property to his cousin, Princess Sophia, so that she might safeguard them (R. 143, 148). These items were placed in an envelope (R. 144) which Princess Sophia subsequently delivered to Herr Lange for safekeeping. Herr Lange opened the envelope in Princess Sophia's presence, made an inventory of the contents (Pros. Ex. 8 - translation Pros. Ex. 10), placed the contents in five new envelopes, two of which contained jewels, and put the envelopes in a safe in Kronberg Castle (R. 79, 80, 90, 95, 97, 169, 170).

Sometime between the 10th and 20th of April 1945, Kronberg Castle and its adjoining buildings including the "Cottage," were occupied by the "American" Army (R. 157, 163, 167, 173). From June until November 1945, Colonel Robert Q. Brown, an officer of the Army of the United States, was the Headquarters Commandant of Supreme Headquarters, Allied Expeditionary Forces, "later to become Headquarters Commandant of the United States Forces, European Theater." As such, he was in charge of all the "government" installations of Headquarters Command in Frankfurt, of which Kronberg Castle was one. The officer in charge of the "Mess Section" was specifically in charge of the castle. Accused was the "Mess Section" representative at Kronberg Castle from the latter part of June 1945 until about the first of February 1946, and was officer in charge of the Castle (R. 342-344). Major Joseph M. Hartley, 2nd, Headquarters Command, USFET, was Special Service Officer, Headquarters Command, in June 1945, and as such placed accused in charge of Kronberg Castle. She was to "have full charge of the Castle and to operate it as a club and recreation center." Accused had authority to move property around the Castle grounds and later the "Mess Section" was allowed to use whatever property they needed in other parts of "the area" but this authority did not give accused the right to "transfer property back to the United States" (R. 344, 345, 351). Major

John E. Lennox, an officer of the Army of the United States, was Mess Officer of Headquarters Command, Supreme Headquarters, Allied Expeditionary Forces, during the year 1945 and until February 1946. In the latter part of June of that year Kronberg Castle was put under "his section." Accused was assigned to the "Mess Section" as assistant mess officer and further assigned by Major Lennox to Kronberg Castle. She was to take complete charge of the Castle, including the "Cottage." It was accused's duty to safeguard all of the property at Kronberg Castle (R. 357-362).

On and after 1 October 1945, Roy C. Carlton was assistant to accused in the "Mess Section" and was stationed at Kronberg Castle. A German having informed him that "he knew where something was burined which was very valuable," he reported this information to accused. Accused ordered him to have it dug up. Carlton, accused and two Germans then proceeded to the lower cellar of the Castle and after digging through about an inch and a half of concrete they uncovered a wooden box. Inside the wooden box was a zinc box sealed with solder and inside the zinc box were some packages wrapped in brown paper. Carlton, accused and two Germans carried the contents of the box to accused's room. Thereafter, one Colonel Durant and one Major Watson were observed to be in accused's room "once or twice a week." Accused's orgnization at the time the box was unearthed was "USFET" (R. 116-121).

About two days after the box was found, that is, about 8 November 1945, accused ordered Herr Lange, through his secretary, Frau von Bochmann, to turn over "everything which was still located in the castle" (R. 169, 170, 172). Herr Lange thereupon surrendered to accused the envelopes and their contents belonging to Prince August Wilhelm which he had been keeping in his safe (R. 91, 169, 170). At the same time Herr Lange, again through Frau von Bochmann and at the request of Princess Margarethe, asked accused what would happen to the jewels which had been discovered. Accused replied that Princess Margarethe would find the jewels as she had left them upon her return. (R. 267).

By paragraph 5, Special Orders Number 68, Army Service Forces, Ninth Service Command, Headquarters Separation Center, Camp Beale, California, 9 March 1946, accused was granted 81 days leave of absence effective 9 March 1946, at the end of which leave, on 30 May 1946, she was to revert to inactive status. Her mailing address while on leave was given as 1409 3rd Street, Hudson, Wisconsin (Pros. Ex. 2, R. 38). On 16 March 1946, accused was paid $100 as the first installment of mustering out pay, which sum was repaid by accused on 4 August 1946 (R. 43; Def. Ex. A). The Separation Center, Camp Beale, California, executed a WD AGO Form 53-98 "Certificate of Service" certifying that accused "honorably served in the active Federal service in the Army of the United States from 23 February 1943 to 30 May 1946." This form was dated 30 May 1946 (Def. Ex. D; R. 341). By letter orders AGPO - A-C 201, Nash, Kathleen B., 24 May 1946, so much of

paragraph 5 of the above Special Orders as provided that accused would revert to inactive status on 30 May 1946 was revoked by order of the Secretary of War and by the same orders accused's unused leave was cancelled and she was assigned to Reception Station #7, Fort Sheridan Illinois, to which she was to report on 29 May 1946 (R. 38, Pros. Ex. 1). On 24 May 1946, The Adjutant General sent to accused's mailing address a telegram advising her that orders were being mailed "recalling you to active duty effective 29 May 1946 and assigning you Reception Station Fort Sheridan, Illinois" (R. 38, Pros. Ex. 4). Accused did not report to Reception Station #7, Fort Sheridan, Illinois, as ordered and was carried as absent without leave, effective 0001, 30 May 1946, on the morning reports of that organization (R. 65, 194; Pros. Ex. 5). The morning reports of that organization also show that accused was returned thereto under armed guard on 3 June 1946 and placed in arrest of quarters (R. 65, 194; Pros. Ex. 6). On 18 June 1946 accused was paid "on terminal leave" for the period from the 1st to the 27th of May 1946 and later was paid on a separate voucher "as active duty pay" for the period from the 28th of May to the 30th of June 1946 (R. 41, 42).

Accused's motion for a finding of not guilty of Charge I and its Specification charging absence without leave having been overruled (R. 294), accused, her rights as a witness having been explained to her, elected to take the stand and testify under oath as to Charge I and its specification only (R. 379, 380). She testified that she was in the armed forces during "World War II" from 18 July 1942 until 9 March 1946 and that on the latter date she went on "terminal leave." In April 1946, she made an application for "re-entry" into the active service but her application was not accepted at that time. Not being able to get back in the Army or to go back to Europe she decided to get married and not go back in the service. About 9:00 P.M., 29 May 1946, she received a telegram from the "War Department" "recalling" her to active duty and ordering her to report to Fort Sheridan. She though this telegram was in reply to her earlier request to "go back into service" so she sent a reply to Fort Sheridan, from Hudson, Wisconsin, referring to the orders requiring her to report to that station on 29 May 1946 and stating that she did not desire further active duty and that she would await a reply (Def. Ex. I). No reply to this telegram was received. On 31 May 1946 she sent another telegram to Fort Sheridan stating that since she had previously been informed that there was no chance of returning to Europe her fiance had returned from that theater and had been released from the Army, that they were now married and on their honeymoon and that she would go directly to Washington, D. C. and make an appeal for a discharge (Def. Ex. J). She then went to Chicago, "to go to Sheridan and straighten it out." She arrived in Chicago about 9:30 or 10:00 P.M. on a Saturday and "called" Fort Sheridan on Sunday, but "no one knew what I was talking about." She was told to "come out Monday." She was "picked up" at 2:00 A.M. Monday morning, 3 June 1946. She did not recall that on the previous Saturday morning the military

police had come to her door in Hudson, Wisconsin. She was "paged" in the Chicago station upon her arrival there, but did not answer the call. She "supposed" the military authorities were looking for her. She received the telegram ordering her to report to Fort Sheridan but never received the orders cancelling her terminal leave (R. 380-387). In her deposition, Eileen A. Lonergan, accused's sister, stated that she resided at 1409 3rd Street, Hudson, Wisconsin, in the month of June 1946, and that on the 1st of June a sergeant and a "WAC" came to the door asking for accused. The family was not up at that time so the sergeant and the "WAC" left. Accused dressed and took her bag and walked out of the house before the sergeant came back (R. 338, Def. Ex. C).

Colonel Ralph W. Pierce, Provost Marshal General's Office, first met accused in the Chicago office of Mr. Leonarde Keeler at about 10 A. M., 3 June 1946. Mr. Keeler was "in the crime detection business, "worked with the Illinois State Police as their "counsel" and advisor in crime detection laboratories and maintained his own private offices in Chicago (R. 213, 187). Colonel Pierce introduced himself to accused and asked her if she knew why she was there, to which she replied that she did not "Unless it was for being AWOL." He informed her of her rights under the 24th Article of War and stated that she need not answer any questions if she did not wish to do so, and that anything she did say might be used against her. She then was asked if she was willing to take the "Polygraph Test." She was "entirely willing to do so" and said she had nothing to conceal. She was not told why she was going to take the test. Mr. Keeler, Major Salb and a Captain Cowie, WAC, were also present at this time (R. 213, 214, 215, 219). Accused asked what a "Polygraph" was and Mr. Keeler told her it was a so-called lie detector. Mr. Keeler then led her into "the other room" and had the apparatus set up. At this time he also told her that she need not take the test. He informed her that she was suspected of a crime in the European Theater and asked her if she knew what it was, to which she replied that she had no idea. He read her a list of crimes which he described, and at the conclusion of this reading she said, "I will take the test," whereupon Mr. Keeler "attached the machine." He read her "the questions" and after giving her a rest he administered another test. The second test referred to the location of the jewels. After the two tests had been completed Mr. Keeler informed accused of the results thereof. These results were not made known to the court (R. 187, 188, 190, 191). Accused asked Mr. Keeler, "What will happen to me if I tell you the entire truth regarding the gem theft?" He replied that he was a civilian and could make "absolutely no promises." Accused finally told Mr. Keeler that she had "better tell" him and that she would tell him the entire truth. She made a verbal statement to him regarding the theft of the Jewels. Mr. Keeler then called in Colonel Pierce to take a formal statement (R. 191, 192, 200). Colonel Pierce had overheard the conversation between accused and Mr. Keeler by means of a dictaphone (R. 220). Colonel Pierce explained the 24th Article of War to accused a second time and asked her if she was willing to make a voluntary statement. He told her

that she did not need to make a statement and that whatever she said might be used against her in a trial by court-martial or otherwise. Accused said she fully understood her rights and that she was perfectly willing to make a statement. She made a statement in question and answer form which was taken down in shorthand by Captain Cowie. The statement was completed about 1:30 P.M., whereupon all present, including accused, went out to lunch. After lunch they returned to Mr. Keeler's office and Captain Cowie typed the statement while accused waited in the reception room. After the statement was typed, accused read it over, initialed corrections made and the bottom of each page and signed the document (Pros. Ex. 18). Colonel Pierce "swore her in" before she signed it (R. 214, 215). On 5 June 1946 Colonel Pierce again saw accused in Mr. Keeler's office. She had been talking in private with Colonel Durant, her husband, and at Colonel Durant's request, Colonel Pierce entered the room where she was located: She said she had something to tell him and after she had spoken to him about "something else" he again warned her of her rights under the 24th Article of War and told her that anything she might say would be used against her. She then made another statement which was typed by Mr. Keeler's secretary and signed by accused (Pros. Ex. 19, R. 216). On the morning of 4 June 1946, Colonel Durant had complained that accused was being held in confinement in the "Psychopathic Ward" of the "post." Colonel Pierce immediately called the Provost Marshal and asked "if something could be done about it." Colonel Pierce was assured that accused would be moved (R. 217). Prior to the taking of the first statement accused had made no request for counsel nor did Colonel Pierce, or anyone in his presence, tell her that the War Department "is not interested in any unfavorable publicity" and that she would not be prosecuted if she made a statement (R. 220-221). Mr. Keeler did not, prior to the taking of the first statement, tell accused that the Government was interested only in recovering the missing jewels and not in the prosecution of any individual (R. 202). At the time of the first interrogation accused did not appear to be nervous and was extremely cooperative and willing to talk (R. 221).

Accused, having been warned of her rights as a witness, elected to take the stand and testify under oath as to the circumstances surrounding the taking of the two statements. She was apprehended about 2:30 A.M., June 1946, at the La Salle Hotel in Chicago and brought to military police headquarters. There she was fingerprinted and registered and was then taken to Fort Sheridan, arriving there between 3:40 and 4:00 A.M. She was given a room by the Provost Marshal of that post and was told to be ready to go back to Chicago at 7:00 o'clock in the morning. She had no sleep nor was she able to get any breakfast before she left for Chicago. Arriving in Chicago, she was taken to Mr. Keeler's office where she met Mr. Keeler, Colonel Pierce, Major Salb, Captain Cowie and a Mrs. Wilson. Mr. Keeler told her that "Washington" was looking for several people "connected with a crime in the ETO." Accused said she knew of no crime in the ETO (R. 236-238). Colonel Pierce said nothing about the 24th Article of War but did say that taking the "test" was voluntary (R. 241, 242). Accused was

then left alone with Mr. Keeler who asked her if she would mind taking a "test." She said she would not mind. Mr. Keeler showed her a thick document with affidavits from people in the European Theater who had confessed to "that crime" and accused's name was linked with it (R. 238). Accused asked Mr. Keeler what would happen to her if she told the whole truth and Mr. Keeler said he was a civilian and could make no promises (R. 242). After that test Colonel Pierce returned and told accused that the Government was only interested in getting back the stolen property and wanted to "keep everything quiet and have no publicity"; that the Government was not interested in prosecuting anyone. Accused asked to see an attorney and her husband but both requests were refused (R. 238). Colonel Pierce did not warn her of her rights under the 24th Article of War before taking down her statement (R. 242). The questioning continued until about 12:30 P.M. Accused asked for food and was told that she could eat as soon as she signed the statement. Major Salb told her that her sister was in the hospital with a nervous breakdown and that if accused would make a statement "the family wouldn't be publicized and everything would come out all right." Accused went to lunch about 2:00 P.M. before the statement was signed and returned to Mr. Keeler's office where she was kept waiting in the reception room until 9:00 P.M. At 2:30 P.M. her husband had been brought in with two "plain clothes men" but accused was not allowed to "see" him (R. 238, 239). She read the statement signed by her that day and made changes thereto in her own handwriting. She did not remember reading the phrases "do you understand that you do not have to say anything and that anything you say may be used against you in trial by court-martial or otherwise" and "is made of my own free will and accord, without any threats or promises being made and without any duress being used in any manner whatsoever," appearing in the statement. for she did not remember anything that day. She "would have signed anything that day to get rid of those men, those people" (R. 244, 245).

At 9:30 P.M. she went to dinner and was then taken to Fort Sheridan. She arrived at Fort Sheridan about 11:00 P.M. and was put in a "cell" in an "insane asylum" (R. 239). It was stipulated between the prosecution, defense and the accused that if Colonel David L. Robeson, Commanding Officer of Fort Sheridan Station Hospital, were present in court he would testify that accused was confined in Ward 2 of the Station Hospital, the psychopathic ward, from about 11:00 P.M., 3 June 1946, to about 11:00 A.M., 4 June 1946; that there were no sanitary conveniences in the cell itself; that the windows are barred and the cell has a regular cell door; that the cell occupied by accused could be fully observed from both the hall and the opposite cell; that the opposite cell was occupied by male patients; and that on 5 June 1946 accused was placed in the isolation ward of the station hospital (R. 226). Continuing accused's testimony, after she was put in the "cell" she was given a pair of "GI" pajamas and a robe and shoes. She complained of the lack of privacy and asked if the light could be turned off, which request was denied. She was told that if she wanted latrine privileges she could ask the guard. The guard was a male guard.

The "cell" had three or four grilled windows and a regular cell door. The bed was in the middle of the floor and there was no other equipment. All night "MP guards were peeking in at me wanting to know who the WAC was. Was she crazy? What was the matter, etc." At 11:00 A.M. the next day her clothes were brought to her and she was taken to the Provost Marshal's office. There she complained about her accommodations. At this time she again asked for legal counsel which request was refused. She was then taken to the "isolation ward" and ordered to go to bed and "to stay there until they wanted me in Chicago." She went to Chicago about 9:00 P.M. and remained there, in Mr. Keeler's office, until about 12:00 P.M. While in Mr. Keeler's office, Colonel Pierce asked her to call her husband and request him to make a statement. This she did, but her husband said he had nothing to say (R. 239, 240). At the isolation ward she had a private room with a private toilet. It was a very small room with a bed, a chair "and a WAC MP sitting in the chair" (R. 250). The next day she signed another statement. She did not remember reading the phrase explaining her rights under the 24th Article of War appearing at the top of this statement (R. 249). "They never read the 24th Article of War. They didn't have it and no one could get it" (R. 241).

The two statements of accused, Prosecution Exhibits 18 and 19, respectively, were admitted in evidence over defense counsel's objection and read to the court (R. 254). In the first statement accused stated that on 29 May 1946, at 9:00 P.M., in Hudson, Wisconsin, she received official orders to report to Fort Sheridan and that she did not comply with these orders. While she was on duty in Kronberg Castle one Herr Weiss told the mess sergeant, Sergeant Carlton, that there were jewels buried in the castle. Weiss and Carlton dug up a box in her presence and brought the packages contained therein to her room. The next day, accused and Carlton opened up the packages and found they contained "bracelets, tiaras, fans, and Bibles, clips." She put the jewelry in her clothes closet. That evening Colonel Durant came to visit accused and the jewels were spread out on the floor. Accused and Colonel Durant discussed what they should do with them. They first decided "to turn them in, then to take just a few pieces and then to take all of it." A few days later, Major Watson visited accused and the jewels were spread out on the floor again. Colonel Durant was also there at this time, and the group further discussed the disposition of the jewels. They decided to keep all the "jewelry" and divide it four ways, the four people sharing in the division being accused, Colonel Durant, Major Watson and Sergeant Carlton. The jewelry was left in her possession, however at that time. When accused returned to the United States she brought some of the jewelry, Colonel Durant brought some "and we mailed the Bibles and stuff." She "imagined" it was her intention to sell the jewelry and to divide the proceeds equally between the four members of their group. The jewelry had been found in October or November and accused did not leave the European Theater until February. During this period it was in accused's possession most of the time, except that at one time it was/"Col. Durant's, and in silver room." Accused thought she brought back approximately one-half

of the jewelry. Major Watson mailed her a package containing Bibles, a fan, two ash trays and a snuff box. She "hid" the jewelry she brought back at her sister's home, under the eaves in the attic. She estimated the value of the jewelry at "$50,000, maybe not that much." She had not disposed of any of the jewelry. She remembered a diamond wrist watch and ring to match, a emerald ring, some diamond band bracelets, cuff links, a stick pin, miscellaneous rings, and some pins and clips set with rubies and diamonds as among the items of jewelry. She was willing to turn over the jewelry in her possession to the proper authorities. In her second, or supplementary, statement, accused said that the jewelry she had not brought back with her was left in the care of Colonel Durant and Major Watson. Some of the jewelry had been "broken up" by punching out the stones and cutting up the mountings. Accused did not know what disposition had been made of the mountings. She "Didn't bring back anything that might be identified." All the items shown on "photographs #1 to #7" were among the items taken by her from Kronberg Castle with the exception of Item 151, a sleigh, which was given to her by Frau von Bochmann. All the items "numbered 1 to 193" were left by her at her sister's house at 1409 3rd Street, Hudson, Wisconsin. Items numbered 90,146,151,155 and 180 through 191 were mailed to her at that address by Major Watson.

On the afternoon of 3 June 1946, after lunch, accused wrote a note addressed to her sister, Eileen Lonergan, 1409 3rd Street, Hudson, Wisconsin, stating that she had confessed and requesting that the jewelry be turned over to the bearer of the note and gave this note to Major John D. Salb, Provost Marshal General's Office (R.125,126,206). This note was admitted in evidence as Prosecution Exhibit 11 and reads as follows:

"3 June 1946

"To Eileen, Jack or David -

"I have confessed to having the box of jewels, bibles & fan that I hid in the attic will you please give same to officer presenting you this note, Major John D. Salb, our code "cemetery" goes - Sorry to cause you so much grief and I don't deserve you to worry over me anymore.

Love

Vonie

(Kathleen B. Durant)."

Major Salb asked accused what the code word "cemetery" meant and she told him "that it was an agreement between she and her sister, and that if anyone came to her sister with that word 'cemetery' it would be a signal for her sister to turn over the jewels" (R. 126). After receiving this note,

Major Salb went to Hudson, Misconsin. He joined Mrs. Lonergan, her husband and her son on a street corner in "down Town" Hudson. They were not under arrest. With them be proceeded to the Lonergan home in a "carry-all, kind of a half truck and half sedan." On the way Mrs. Lonergan seemed "very upset, nervous, etc." When he arrived, there were military police stationed about the house who, he believed, were armed. These guards were dismissed (R. 135-137). Major Salb and his official party entered the Lonergan home with the Lonergan family, the official party consisting of a first lieutenant, a photographer who was not a military policeman and one other first lieutenant who was a military policeman. This latter officer was armed but did not have his arms showing (R. 137,138, 181). Major Salb did not have a search warrant and did not intend to make a search. He explained to Mrs. Lonergan that he had no right to come in her house and make a search and told her what he had come for. She and her husband immediately started bringing articles of jewelry, silverware, goldware, gold plate ware, silver mugs, boxes and Bibles out to him from various rooms in the house. Some were in the bedroom, under the bed, some in the dining room, some in the living room, and another group in a part of the house unknown to Major Salb (R. 123, 138,183). There was also an opened wooden box (Pros. Ex. 17) addressed to accused and bearing the return adress "Maj. D.F. Watson 0909086 G-1 Div. Gq. USFET" which contained "The Queen Victoria" books and several Bibles or prayer books (R. 179-181). All these items, including the contents of the wooden box (R. 179), were numbered and a label attached to each for identification. There were 193 items in all, some items consisting of sets of several pieces (R. 127,128; Pros. Ex. 12). Major Salb supervised the taking of pictures of these items (R. 132; Pros. Ex. 13 - seven pictures numbered 1 to 7). He then wrote out an inventory of the items (Pros. Ex. 14), assigning the same number to each item on the inventory as the number with which each had been tagged (R. 133). Mrs. Lonergan read the inventory, checking off each item, and signed it in Magor Salb's presence (R. 133,183). These events in the Lonergan home took place on the evening and night of 3 June 1946 and the early morning of 4 June 1946, over a period of approximately seven hours (R. 132,137). The items included in Prosecutions Exhibit 12 remained in Major Salb's custody from the time he obtained them in Hudson on 3 June 1946 to the date of trial (R. 129). Prosecution Exhibits 12, 13, 14 and 17 were admitted in evidence, defense counsel having objected to their admission on the ground that they were obtained as a result of an unreasonable and unlawful search and seizure. (R. 133,134,180).

Prince Wolfgang of Hesse identified the following items in Prosecution Exhibit 12 as property belonging to his wife which he had placed in the box:

Item Number	Description in Prosecution's Exhibit 14
1	Bracelet, appearing to be diamond, with what appears to be a pearl set in the center.
58	Necklace of large beads, coral colored.

59	Necklace of small beads, coral colored.
61	Gold type chain necklace with round pendant, screen effect, set with what appears to be pearls.
63	Heart shaped locket, pink, set with what appears to be a diamond.
72	Stick pin, crown design, set with what appears to be diamonds.
55	Necklace, appearing to be gold, with what appears to be 3 small pearls and two enameled red stones.
57	Necklace, appearing to be gold, with small link and ball design, with intermittent blue stones.
54	Necklace, appearing to be pearl, with large bar links.
10	Ring, with large blue or purple setting.
13	Ring, with oval setting, appearing to be diamond, with oval blue stone in center.
15	Ring, appearing to be diamond, with cross in center made of red stones.
24	Pair of earrings, appearing to be diamond studded with a drop setting of a large blue stone.

He also identified Item 42 (described in Pros. Ex. 14 as a single shirt stud or cuff link, circular in shape, appearing to be diamond, studded with a blue stone in center) as a button belonging to him which he had placed in the box. All these items were included in the inventory which he had previously given the court. He was not asked whether he could identify other items in Prosecution Exhibit 12 (R. 140-142).

Princess Margarethe of Hesse identified the following items in Prosecution Exhibit 12 as property belonging to her which she had delivered to Herr Lange for insertion in the box:

Item Number	Description in Prosecution's Exhibit 14
2	Rose pin.
9	Ring, which appears to be pearl, with red stones in horseshoe shape.
21	Horseshoe shaped pin, with red stones and what appears to be diamonds at the tip.
155	Fan, appearing to be mother of pearl, trimmed in yellow metal with red, white and blue stones, flower design, "M" on one side.
105	Bell shaped pendant, purple colored stone, set with one red and one green stone.
3	Bracelet, appearing to be diamond, with blue stones.
146	Small bowl, embossed grapes and fruit in bottom, white metal, two handles.
183	Yellow metal bound Bible in case.

184	Bible, yellow metal bound, with blue cloth, seven ribbons with pendants, in satin type cloth cover.
185	Book, purple cloth bound, "Imitation de Jesus Christ."
186	Autograph book, bound in red cloth, tied with ribbons.
187	Autograph book (with pictures), bound in light red cloth, tied with ribbons.
188	Small German Bible, black.
189	Small autograph book, bound in red cloth.
190	German Bible, "Die Heilige Christ," in black cardboard box.

She identified Items 134-137,138,140-142,144,145,147,148,165,169-179 as having been in the "Cottage"; Items 143,160-164,180,181,192 as having been in the castle; Items 150 and 152 as belonging to a son and Item 167 as belonging to a daughter. These items, with the exception of Items 150 and 192, a colapsible cup and small wooden box, respectively, are described in Prosecution Exhibit 14 substantially as they are described in Specification 3 of Charge II (R. 155,157-161).

Princess Sophia identified Items 49,89,118,137,156-158,164,174 and 182 in Prosecution Exhibit 12 as her property. Item 49 is described in Prosecution Exhibit 14 as a bracelet, appearing to be diamond, with three square red stones, Item 89 as two napkin rings appearing to be silver, Item 118 as a small grayish green figure, appearing to be jade, Items 156 and 157 as fans, and Items 137,158,164,174 and 182 substantially as they are described in Specification 3 of Charge II (R. 164).

Prince August Wilhelm of Prussia identified the following items in Prosecution Exhibit 12 as property belonging to him which he had delivered to Princess Sophia for safekeeping:

Item Number	Description in Prosecution's Exhibit 14
26	Pair of cuff links with large square blue stone.
32	Pair of cuff links, circular in shape, with what appears to be a pearl surrounding a red stone.
33	Pair of cuff links, circular in shape, appearing to be studded with small diamonds, green stone in center.
39	Pair of shirt studs or cuff links appearing to be gold, with what appears to be a pearl.
67	Pin, turtle design, set with what appears to be diamonds and rubies.
69	Pin, bird design, set with what appears to be diamonds.
71	Pair of cuff links, circular, lavender center, surrounded by gold type rim, surmounted by crown and crest appearing to be diamond studded.
76	Pendant, maltese cross, studded with stones appearing to be diamonds.

Item 26 was a gift from the Queen of Bulgaria, Item 33 a gift from his mother, Item 67 a gift from the King of Bulgaria, Item 71 a gift from the King of Bulgaria and Item 76 a Christmas gift from his parents (R. 144,145).

Heinrich Mercher, of Frankfurt am Main, Germany, had been a jeweler for thirty years. He had seen the Hesse jewels. During his thirty years experience he had engaged in the buying and selling of jewelry with all nationalities, specifically, Russian, Dutch, American, English and French. He sold diamonds, rubies, sapphires, and pearls with and without settings. He had appraised and set the prices of jewelry and had personally sold items similar to the Hesse jewels, including $10,000 pearl necklaces. However, since 1943 all sales of jewelry had been forbidden in Germany (R. 272,275,276,278). Nevertheless, although he had not been in the United States and had not done any business in the United States since about ten years before the war, he was of the opinion that he could state the prices of jewelry in the United States today, for all such prices were international. Prices in the United States, however, were higher than in France, Germany, England and other countries. He was acquainted with the prices of second hand as well as new jewelry (R. 278,280,281,284-286). He appraised the items listed on Prosecution Exhibits 7, 7e,7f,7g, and 7h as each being over $50 in value and assigned values to various items contained in Prosecution Exhibit 12 as follows:

Item Number	Description (Pros. Ex. 14	Value
46	Bracelet, appearing to be diamond with red stones in the center	about $6,500
48	Bracelet, with what appears to be diamond and rubies	$10,000
52	String of what appears to be pearls	about $8,000
155	Described above	$2,500
22	Pin, appearing to be diamond with what appears to be nine diamonds at tip	$3,500
23	Pin, similar to above but of smaller shape	about $18,000
79	Necklace, appearing to be pearls, with clasp studded with what appears to be diamonds	about $12,000
3	Described above	about $2,500

Items 1 to 133 (jewelry) were of a total value of over $50 and Items 134 to 193 (other property), excluding Items 155, and 182-192, were also of a total value of over $50 (R. 272,273,274,279,280,282).

4. Special Matters

On 17 August 1946, accused made application for leave to file a petition for a writ of habeas corpus in the Supreme Court of the United States. On 14 October 1946 this application was denied for want of original jurisdiction to entertain such petition in that court (Ex Parte Durant, 67 S. Ct. 39). The objections raised in the petition were brought to the attention of the court-martial in this trial (R. 17-27). These and other special matters will now be considered.

Jurisdiction

Accused claims that she had been discharged from the service and had become a civilian, that she was subsequently "recalled to active duty," and that she is not, therefore, subject to trial by general court-martial for offenses committed during her prior term of service. This claim appears to be based upon the orders of the Separation Center at Camp Beale of 9 March 1946 placing her on what is loosely known as a "terminal leave status," the payment to her of the first installment of mustering out pay, the execution by the Separation Center of a "Certificate of Service" and the telegram from The Adjutant General of 24 May 1946 advising her that orders had issued "recalling" her to active duty (R. 14). It was apparently for this reason that she refused to plead to the charges and specifications (R. 49,50).

The Board of Review has held that jurisdiction as to an offense committed during a period of service which has terminated by relief from active duty is not revived by re-entry into or recall to active military service where the provisions of the last paragraph of the 94th Article of War are not applicable and such relief from active duty has not been obtained by fraud (CM 307101, Allen; CM 283459, Reid; CM 312219, Murray, Memorandum). However, in the opinion of the Board of Review, this accused had never been relieved from active duty and, despite the language in the telegram of The Adjutant General of 24 May 1946, had never been "recalled" to active duty. By the plain terms of the orders of the Separation Center of 9 March 1946, accused had merely been granted 81 days leave of absence, at the end of which leave, on 30 May 1946, she was to revert to inactive status. It is manifest that during such leave she was still on an active status and that such leave could be revoked at any time at the pleasure of the Government. On 24 May 1946, before this leave had expired, the orders of the separation center, in so far as they provided that accused would revert to inactive status on 30 May 1946, were revoked by order of the Secretary of War and by the same order her unused leave was cancelled and she was required to report

to Fort Sheridan on 29 May 1946. The Adjutant General's telegram advising accused that she had been "recalled" to active duty was merely an inartful paraphrase of this order of the Secretary of War. This conclusion is in no manner weakened by the payment to accused of the first installment of mustering out pay, which she repaid, or by the execution of the "Certificate of Service." Mustering out payments are made as a matter of administrative expediency before the expiration of "terminal leave" on the faith that the in future separation orders will not ordinarily be revoked (see par. 12, AR 35-2490, 20 Feb. 1946) and "Certificates of Service" are likewise executed by Separation Centers throughout the United States, often before receiving notice that the separation orders concerned have been revoked by higher authority. Furthermore, a "Certificate of Service" is in no wise a certificate of discharge. It merely recites the fact of honorable service for the information of those who may be interested therein (see Ar 345-500, 10 May 1945). The payment to accused on 18 June 1946 of "terminal leave" pay for the period from the 1st to the 27th of May 1946 and the later payment of "active duty pay" for the period from the 28th of May to the 30th of June 1946 was perfectly consistent with accused's status as affected by the order of the Secretary of War of 24 May 1946. That status is one of continuous active duty from some time prior to the commission of the offenses charged against her to date. Accordingly, there has been no interruption of general court-martial jurisdiction over accused. This being so, it is unnecessary to decide whether accused, as a civilian or as an officer who had been "recalled" to active duty, would have been subject, under the 12th Article of War, to the jurisdiction of a general court-martial sitting in occupied territory and acting in the place of the local courts to enforce the law of or to keep order in such occupied territory (see CM 302791, Kaukoreit).

Pending Charges

Accused objected to proceeding with the trial on the ground that on 15 June 1946 she was served with charges in the Military District of Washington, which charges were based on the same facts as those recited in the charges and specifications upon which she was tried herein, and that such prior charges were still pending (R. 13). Although it is true that where an accused has been convicted of a certain offense and a review is pending, a trial against him on the same state of facts and for the same offense should be continued until the determination on review (see CM 255663, Davis, 3 BR (ETO) 59,75), here there was no claim that the prior charges had ever been brought to trial and it is therefore obvious that this accused could not have been harmed by their mere pendency. In the event that such charges are brought to trial at a future date, this completed trial may be brought to the attention of the court. The court, in the instant case, did not err in overruling this objection and proceeding with the trial.

Insufficient Investigation

Accused complained that the pre-trial investigation was not conducted

in accordance with the 70th Article of War and paragraph 35 of the Manual for Courts-Martial, 1928, in that the investigating officer called no witnesses and based his recommendation for trial by general court-martial only on a synopsis of the expected testimony, the opinion of the Staff Judge Advocate, a purported confession of accused and the written statement of one witness (R. 30). From the investigating officer's report which accompanies the record of trial, it appears that at the formal investigation on 10 August 1946 the investigating officer had before him and made known to accused and her counsel summaries of the expected testimony of Herr Lange, Frau von Bochmann, Princess Margarethe, Prince Phillip, Prince Wolfgang, Princess Sophia, Roy Carlton, Leonarde Keeler, Captain Cowie and Major Salb. He also had in his file a statement of Herr Lange, extract copies of morning reports of Fort Sheridan and the two statements of accused (Ex. A). It does not appear that he had received and opinion of the Staff Judge Advocate. Accused requested through counsel that the investigation be postponed until the witnesses Prince Wolfgang, Prince Phillip and Roy Carlton could be made available (Ex. B). The investigating officer determined that Roy Carlton was not in Europe and was informed by Headquarters, United States Forces, European Theater, that Prince Phillip and Prince Wolfgang were "not available in Frankfurt today" and that they were interned and physically present at an internment inclosure in Darmstadt (Ex. C).

Since 1924 the principle has been firmly established that the pretrial investigation required by Article of War 70 and paragraph 35 of the Manual for Courts-Martial, 1928, is a matter of procedure only and does not affect the jurisdiction of the court. Holdings by the Board of Review to this effect have been uniformly approved by The Judge Advocate General and then by the President, as confirming authority. Non-compliance with the prescribed investigation procedure will constitute fatal error only where accused properly objects thereto at the trial and, considered together with the whole proceeding against accused, such non-compliance amounts to a denial of due process of law (CM 257824, Cox, 50 BR 179, 204; CM 229477, Floyd, 17 BR 149,153; CM 273791, Gould, 47 BR 29,57). This construction of Article of War 70 by the officers charged with its interpretation by Congress (AW 50½) is entitled to great weight (Stout v. Hancock, 146 F. 2d 741,744). Although in the case of Hicks v Hiatt (64 F. Supp. 238) there is dicta to the effect that the investigation procedure laid down by Article of War 70 is mandatory, we deem that such dicts was unnecessary to the decision in that case, for the court found that there had been a denial of due process of law in both the investigation and the trial.

However, the Board of Review is of the opinion that there was substantial compliance in the instant case with the provisions of Article of War 70 and paragraph 35 of the Manual. The mentioned paragraph reads, in part:

> "What follows in this paragraph (35a) is primarily intended to indicate a proper procedure in the more usual cases. Variations to

save labor, time, or expense, or designed to meet other cases, or exceptional or local conditions, or for any other good reason, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements quoted above are carried out. The investigation should be prompt, dignified, and military ***. Instructions.- *** All available witnesses who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused. Ordinarily application for the attendance of any witness subject to military law will be made to such witness's immediate commanding officer. The decision of the officer exercising summary court-martial jurisdiction over the command to which the witness belongs as to availability is final. *** Where the investigating officer makes known to the accused the substance of the testimony expected from a witness *** and the accused states that he does not desire to cross-examine such witness, the witness need not be called even if available. *** To the extent required by fairness to the Government and the accused, documentary evidence and statements of non available witnesses will be shown, or the substance thereof will be made known, to the accused." (Underscoring supplied.)

Article of War 70 provides, in part:

"*** At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused." (Underscoring supplied.)

The investigating officer in this case was confronted with unusual circumstances. Of the three witnesses requested by accused, two were in an internment camp and declared unavailable by the headquarters having jurisdiction over them. The third was not in Europe. Of the other witnesses, summaries of whose testimony were before him, three were Americans with addresses in the United States and the rest German civilians. It does not appear that any of these witnesses were available and accused apparently did not desire to call them. Under the circumstances we think the investigating officer was justified in using the summaries of expected testimony in arriving at his recommendations. Furthermore, we see no reason why he should not similarly employ the statements of accused, for the prohibition found in paragraph 35 of the Manual to the effect that "No witness shall be compelled to incriminate himself or to answer any questions the answer to which may tend to incriminate him ***" is directed against the exaction of involuntary inculpatory statements from such witness. The investigating officer could fairly presume that the statements of accused in his possession had been obtained in a legal manner, expecially in view of the fact that the statements themselves contained an assertion to this effect purportedly under accused's signature.

Even if it should be considered that the investigation fell short of meeting the required standards, such defect would have been cured by the events transpiring at the trial. Although the law member refused to allow accused to produce evidence as to the conduct of the investigation on the ground that the investigation was not a jurisdictional matter (R. 35), accused did not object to going forward with the trial because of having been unable to sufficiently prepare her defense (R. 57). Apparently, defense counsel were given the opportunity of interviewing Prince Wolfgang, Prince Phillip and Roy Carlton before the trial (R. 34) and when, at the close of the prosecution's case, defense counsel asked for a continuance in order to take depositions from witnesses in the United States such continuance was readily granted (R. 313,314). Accordingly, there appears to be no merit in the contention of accused that her substantial rights have been prejudiced by an insufficient investigation of the charges upon which she was tried (see CM 230379, Kenney, 1 BR (ETO) 13,17).

Special Defense Counsel

When asked who she desired to introduce as counsel, accused stated that she desired to be defended by the regularly appointed defense counsel and assistant defense counsel. She desired to introduce Captain Glenn V. Brunbaugh as special defense counsel. She also desired to introduce Colonel Jack W. Durant as "counsel for the defense." Colonel Durant was represented to be a member of the bar of the District of Columbia. Accused had made, before the trial, a formal request for Colonel Durant's services, which request had been denied by Headquarters Command, United States Forces, European Theater, on the ground that Colonel Durant was being "detained in arrest by the Theatre Provost Marshal" and was not available. Accused appealed from this denial pursuant to the provisions of paragraph 45a, Manual for Courts-Martial, 1928 (R. 3,4). Defense counsel stated that defense did not desire a continuance pending such appeal. On the second day of the trial, the appeal was denied by command of the Commanding General, United States Forces, European Theater, the letter denying the appeal stating,

> "Colonel Durant is now in confinement as a principle suspect in a case involving the larceny of property of great value. An extensive investigation has established the propriety of preferring court-martial charges against him and said court-martial charges are now in the process of preparation. Under such circumstances the decision of the officer exercising general court-martial jurisdiction over Colonel Durant to detain him in confinement is not deemed an abuse of discretion. The status of being in confinement is inconsistent with the performance of military duties. Thus it is believed inappropriate for Colonel Durant to be made available for assignment as special defense counsel as requested."

The defense took "issue" with the decision of the Commanding General (R. 63,64).

The Board of Review agrees with the Commanding General, United States Forces, European Theater. From a perusal of the pleadings in this case it appears that accused is charged in Specifications 1 and 2 of Charge II with having committed the crime of larceny in conjunction with Colonel Durant and another and in the Specification to Charge III she is charged with conspiracy to convert personal property with Colonel Durant and another. Although in another case one might understand and sympathize with a wife desiring to have her lawyer husband serve as her defense counsel, in this case the propriety of allowing him to do so was indeed questionable. The decision of the convening authority as to the availability of requested special defense counsel, and the decision of his immediate superior upon appeal, will not be reviewed except upon a showing of abuse of discretion (CM 307044, Landry). We find no such abuse of discretion here. The record of trial reveals that accused was defended most vigorously by the regularly appointed defense counsel, assistant defense counsel, and the special defense Counsel who was available and represented her at the trial.

Impeachment of Prosecution Witnesses

Defense objected to any testimony being offered against the accused "by a member of the Nazi Party; by a German national; as being incompetent testimony against a citizen of the United States" (R. 154). This objection, advanced in the trial of a case in occupied territory involving the theft of property of inhabitants thereof, would seem to be, and is, without basis in law or morals. Ordinarily, we would pass it by without comment, but the same objection has been made in so many other similar cases that we feel the time has come when we must take steps to strike down the theory behind it. As an occupant of enemy territory the United States has obligations under international law as well as rights and privileges. One of these obligations is that of preserving law and order in the occupied territory, of providing effective machinery for the redress of grievances and the punishment of wrongs (CM 302791, Kaukoreit). It is difficult to understand how this obligation could be met if none of the inhabitants whose legal rights we are bound to protect, even against the wrongdoing of our own nationals, were considered to be competent witnesses in a court of law. An inhabitant of occupied territory, even a member of a political party whose proven crimes we abhor, is not, in this day and age and under our standards of justice, beyond the protection of the law. (See Wharton's Criminal Evidence, 11th Ed., secs. 1156,1166; Wharton's Criminal Law, 12th Ed., sec. 177.)

Defense also attempted to cross-examine the witnesses Prince Wolfgang and Prince August Wilhelm as to their participation in the affairs of the Nazi Party. The law member consistently refused to permit such cross-examination, stating, in the case of Prince August Wilhelm,

"The objection of the prosecution as to the attack upon the credibility of a witness on the grounds of membership in the Nazi Party is sustained. This court cannot say that membership in a political party, regardless of its beliefs, or how little or how much we may be in sympathy with those beliefs, is an attack upon the personal trustworthiness of an individual. There are prescribed and proper ways for impeaching a witness; but this categorical attack upon an organization is not one of those proper methods. Attacking the general reputation for truth and veracity, or lack of understanding of the nature of an oath, or unwillingness to abide by a particular oath which has been administered, are proper methods."

(R. 99,100,115,146-148,151,152).

Like rulings, under the particular facts of the cases in which they were made, have been held to be error (CM 298201, Valenzuela, 24 BR (ETO) 29,32; CM 300091, King, 26 BR (ETO) 133,138; CM 300017, Combs, 25 BR (ETO) 301,305). In Commonwealth v. Sacco (255 Mass. 369, 151 N.E. 839, 856), the Supreme Judicial Court of Massachusetts, in holding that cross-examination relative to defendant's loyalty to the United States and his interest in anarchistic movements was proper, said,

"These questions as well as the question relative to the effect on his wife of his possible arrest and deportation for participation in movements inimical to the government, were within the rule that a witness may be cross examined in the discretion of the judge to test his accuracy, veracity or credibility, or to shake his credit by injuring his character, and for this prupose his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiocyncrasies, if they affect his capacity, his means of knowledge, powers of discernment, memory and description may all be relevant."

Every case, however, stands more or less by itself in Anglo-American jurisprudence and in the instant case we are not convinced that the law member abused his discretion in refusing to allow defense counsel to pursue this line of cross-examination. Even if there had been an abuse of discretion, the resulting error could not, in our opinion, have been prejudicial to the substantial rights of accused. There can be no doubt, from the testimony of witnesses other than those whose credibility was sought to be attacked, that a large cache of jewels was found in Kronberg Castle by accused and her cohorts and that Kronberg Castle was the Hesse family home. There would have been little occasion for prevarication by members of the Hesse family or by Prince Wilhelm on the main points of their testimony - ownership and identification - and even less ocassion for whatever ties with the Nazi Party they may have had to come into play.

Unlawful Search and Seizure

As stated in paragraph 3 of this opinion, defense counsel objected to the admission in evidence of Prosecution Exhibits 12,13,14, and 17 on the ground that they had been obtained by an unreasonable and unlawful search and seizure. The defense offered in evidence the depositions of Mrs. Eileen H. Lonergan (R. 327-337), and her husband, John C. Lonergan (R. 316-323), but they were excluded by the law member in so far as they dealt with the question of unlawful search on the ground that accused could not complain of a search of the premises of another (R. 325,327,338). We shall treat these depositions as an offer of proof. Both Mr. and Mrs. Lonergan stated in substance that on the evening of 3 June 1946 an armed guard was stationed at their door by the military authorities. The landlord, having become agitated over the presence of the armed guard, suggested that they see the District Attorney about the matter, which they did. The District Attorney refused to take any action to remove the armed guard. Mr. and Mrs. Lonergan then went to a "show" but after they had been there a while their son David had them "paged." They left the "show" and met Major Salb on a street corner and drove with him to their home in a "station wagon." When they arrived in front of their home they noticed the guards were being changed. Major Salb and his party entered the house with them and he informed them that he was looking for the "crown jewels." They then gave Major Salb "everything" that was in the house. They were both very much upset and, wanting to get the matter cleared up, they did not protest. Mrs. Lonergan admitted Major Salb and his party into her house "because they were all there and I was scared." She was not shown the note from accused until after she had turned over everything but the jewels.

Even if it were conceded, which it is not, that Major Salb's actions constituted a search of the Lonergan premises and that such search was unreasonable and unlawful because conducted under conditions amounting to implied coercion (see Amos v. United States, 255 U.S. 313), the accused is in no position to complain of such search. Immunity from unreasonable search, guaranteed by the Fourth Amendment to the Constitution, is a personal right and the legality of the search of premises can be raised only by the owner, lessee or lawful occupant of the premises searched, that is, by the person whose rights have been invaded (Coon v. United States, 36 F. (2d) 164; Safarik v. United States, 62 F. (2d) 892; Gibson v. United States, 149 F. (2d) 381; Cantrell V. United States, 15 F. (2d) 953; Hall v. United States, 150 F. (2d) 281; Nielson v. United States, 24. F. (2d) 802). Nor, if the legality of the seizure can be considered apart from the legality of the search, which is a doubtful proposition, can the accused be heard to say that the seizure of her goods, or goods in her constructive possession, was illegal, for she consented to such seizure in the note she gave Major Salb. When an individual consents to a seizure no question of unreasonable seizure under the Fourth Amendment arises (CM 258550, Shroyer, 38 BR 75,180; CM 290506, Acosta, 4 BR (ETO) 65,75; DeLapp v. United States, 53 F. (2d) 627). Furthermore, a search and seizure is not unreasonable so as to fall within the prohibition of the Fourth Amendment when it is conducted as a result of reliable information (CM 264149, Engelhardt, 42 BR 23,25; Turner v. Camp, 123 F. (2d) 840). Here, Major

Not so. Validity of Cantrell v. U.S.

Salb was armed with a note written by accused stating that she had confessed to the jewel theft and indicating that the jewels were located in the premises where he in fact found them. The ruling of the law member admitting in evidence Prosecution Exhibits 12, 13, 14 and 17 was correct.

The Confessions

Defense counsel objected to the admission in evidence of the two statements of accused made to Colonel Pierce (Pros. Exs. 18 and 19) on the ground that they had been obtained through undue pressure. It appears that she was arrested in the early morning hours of 3 June 1946 and was then taken to Fort Sheridan, where according to her testimony, she was not given an opportunity to sleep or eat. Later that morning she was taken to the office of Mr. Keeler and there she submitted voluntarily to a lie detector test. The results of this test were not made known to the court but shortly thereafter she made her first statement to Colonel Pierce. There was a sharp conflict of testimony as to whether, prior to the giving of this statement, she had been warned of her rights under the 24th Article of War and as to whether promises of immunity had been made to her. She was then returned to Fort Sheridan where she was put in a psychopathic cell. Having complained about her accommodations she was moved the next day to a private room in an isolation ward. On the third day of her arrest she made a second statement to Colonel Pierce in Mr. Keeler's office, the testimony again being conflicting as to whether she had been warned of her rights under the 24th Article of War.

Under the circumstances in this case, the Board of Review finds no impropriety in the first interrogation of accused having taken place so soon after her arrest and under conditions tending to indicate that accused may have been suffering to some undetermined extend from lack of sleep and food. Accused was suspected of having in her possession stolen jewels of great value and of having committed a crime of almost fantastic proportions. The authorities conducting the investigation of this crime had every right to believe that time was of the essence and that if they did not move swiftly their task would be greatly complicated by the disposition of the jewels by accused or her suspected accomplices. Although the results of lie detection tests generally have been held to be inadmissible in evidence (Frye v. United States, 293 Fed. 1013; People v. Becker, 300 Mich. 562; 139 A. L. R. 1174), a voluntary confession is not invalidated by the fact that during the interrogation a lie detector was used, and this is so even though as part of the test with the detector the accused had been charged with falsification (Commonwealth v. Jones, 341 Pa. 541; see also CM 313786, Howard). The disputed questions of fact as to the warning against self-incrimination and the making of promises of immunity having been resolved against her by the court, we are of the opinion that the first statement of accused was admissible as a voluntary confession.

Although the conditions surrounding her subsequent confinement, in the psychopathic cell, as shown by the record of trial were indeed regrettable, such conditions were immediately alleviated by Colonel Pierce as soon as they come to his attention and it was not until the day after accused had been moved to more congenial surroundings that she made the second statement. This statement we also deem to be voluntary, the court again having resolved aginst accused the question concerning the explanation of her rights under the 24th Article of War.

5. Charge I and its Specification

Accused's "terminal leave" orders were revoked on 24 May 1946 by order of the Secretary of War and she was further required by the same order of revocation to report to Reception Station #7, Fort Sheridan, Illinois, on 29 May 1946. Pursuant to these orders and also on 24 May 1946, The Adjutant General sent accused a telegram informing her that orders were being mailed "recalling" her to active duty effective 29 May 1946 and assigning her to the Reception Station at Fort Sheridan. In her confession and in her testimony on the witness stand accused admitted that she received The Adjutant General's telegram in Hudson, Wisconsin, on 29 May 1946 and that she did not report to the Reception Station, Fort Sheridan, as ordered. She was carried on the morning reports of that organization as absent without leave, effective 0001, 30 May 1946. The morning reports of that organization also show, and accused admits, that she was apprehended by military authorities in Chicago on 3 June 1946 and taken to Fort Sheridan. In her testimony, accused advanced as a reason for not complying with The Adjutant General's telegram that she thought it was in reply to her earlier request for further active duty, which duty she no longer desired. She went to Chicago on 1 June 1946 "to straighten it out" and called Fort Sheridan the next day but no one knew what she was talking about and she was told to "come out Monday." She admitted, however, that she had neglected to answer when she was "paged" in the Chicago station upon her arrival, although she "supposed" the military authorities were looking for her. The defense objected to the admission in evidence of the two extract copies of morning reports of the Fort Sheridan Reception Station (Pros. Exs. 5 and 6) on the ground that the person signing each morning report failed to indicate in what capacity he was acting in so signing them (R. 64, 65, 193). Prosecution Exhibit 5 was signed "Ernest E. Edwards" and Prosecution Exhibit 6 was signed "Walter P. Anderson."

The law member properly considered Prosecution Exhibits 5 and 6 as touching upon the corpus delicti of the offense of absence without leave for which the accused was here on trial (R. 194). There being nothing on the face of the two morning reports, as extracted, to show that the person signing them had no authority to do so, the presumption of regularity in the preparation of official documents applies (CM 303598, DeVito, 27 BR (ETO) 7, 10). All the elements of the offense of which accused was found guilty under Charge I and its Specification were effectively proved by accused's confession and by her testimony on the witness stand. The intent

of accused in failing to report to Fort Sheridan as ordered is immaterial, for intent is not an element of the offense of absence without leave (MCM, 1928, par. 126a).

Specification 1, Charge II

Accused was found guilty, under this specification, of the larceny, in conjunction with Colonel Durant and Major Watson, of certain specific items of jewelry and other chattels, the property of Prince Wolfgang of Hesse, of a total value of more than $50.00. The itemization appears to be based on the various inventories furnished by members of the Hesse family and by Herr Lange, the specification and inventories substantially corresponding as follows:

Specification (item numbers)	Inventories
1-3	Ex. 9g, House jewels
4-18	Ex. 9h, House jewels
19-24	Ex. 9, House jewels
68-73	Ex. 9f, Prince Cristoph
76-80	Ex. 9e, Prince Richard
47, 48, 50, 74, 81-87	Ex. 15A, Princess Margarethe
65-67	R. 163, Princess Sophia. testimony
25-33, 35, 46, 49, 51-64, 75, 88-89	R. 105, Prince Wolfgang
34	R. 140, Prince Wolfgang testimony

Although no discernible attempt was made at the trial to compare any of the various items contained in Prosecution Exhibit 12 (property found in accused's possession in Hudson, Wisconsin) with any particular item as described in the specification in question, it appears that the description in Prosecution Exhibit 14, as amplified by the photographs in Prosecution Exhibit 13, of the following articles in Prosecution Exhibit 12, which articles were identified by their owners or custodians as having been placed in the box, bear a close, if not identical, resemblance to the description of certain items in the specification:

Item number in Pros. Exs. 12 and 14	Identified by	Corresponding item number in Spec.
1	Prince Wolfgang	94
58	" "	34
61	" "	35
63	" "	45
72	" "	75

55	Prince Wolfgang	32
57	" "	31
54	" "	30
10	" "	61
13	" "	62
15	" "	64
24	" "	28
42	" "	59
183	Princess Margarethe	81
184	" "	82
185	" "	83
186	" "	84
187	" "	85
188	" "	86
189	" "	87
49	Princess Sophia	67

Also, although no direct testimony as to their general ownership was adduced at the trial, the following items in Prosecution Exhibit 12 appear to have been included in the specification:

Item number In Pros. Ex. 12	Description in Pros. Ex. 14 (See also Pros. Ex. 13)	Corresponding item No. in Spec.
7	Wrist watch, "Bulgari Boma," appearing to be diamond	95
8	Bracelet, with what appears to be three diamond horseshoes	98
19	Single clasp appearing to be diamond with blue stone	80
25	Pair of earrings, appearing to be diamond studded, with tear drop of dark blue stone	19
29	Pair of cuff links, circular in shape, with red surrounding what appears to be diamond in center	58
52	String of what appears to be pearls	26
60	Necklace, appearing to be gold, of solid chain link design	37
66	Bar pin (square knot) with what appears to be 2 diamonds and three blue stones	54
68	Bar pin, woven design, with what appears to be 2 diamonds and three blue stones	88
74	Pendant, heart shaped, white center stone, surrounded by stones appearing to be diamonds	43
75	Pendant, heart shaped, appearing to be gold, with cluster of stones appearing to be diamonds	44

79	Necklace, appearing to be pearls, with clasp studded with what a appear to be diamonds	24
80	Bracelet, appearing to be gold link, with what appears to be a pearl in a circular setting of stones appearing to be diamonds	99
84	Watch, open face, very thick, appears to be gold	55
85	Watch, small, pinkish face	56

As indicated above, the description of these items as found in the specification appears to have been taken from the inventories of the property placed in the box.

It is manifest, therefore, that accused had in her possession in Hudson, Wisconsin, some of the property which had been placed in the box buried in the basement of Kronberg Castle and that many of these items were adequately described in the specification under question. All the items listed in such specification, as affected by the execptions, were described therein substantially as they were described in the inventories of the property placed in the boc and there can be no doubt, from the testimony of Roy Carlton, that accused took control of the contents of the box immediately after it had been unearthed at her direction. The persons alleged to have acted in conjunction with her, Colonel Durant and Major Watson, then visited her frequently and some Bibles, which had been in the box, were found in accused's possession in Hudson, Wisconsin, in a container hearing the return address of Major Watson. In her pre-trial statement, accused admitted that she and her alleged confederates decided to keep all the "jewelry" so discovered, that she brought back to the United States approximately one-half of it and that the Bibles and some other items were mailed to her by Major Watson. Evidence of possession by accused of part of the property allegedly stolen, the c ircumstances indicating that such part was in fact stolen by her, coupled with proof that accused and her accomplices had access to it all, is a sufficient corroboration of her confession that she and her accomplices, acting together, had stolen the whole (CM 314092, Bishop; CM 257990, Mosser, 3 BR (ETO) 177, 185; CM 262039, Cochran, 4 BR (ETO) 321, 322). Accused is, of course, as criminally responsible for the deeds of those acting in conjunction with her as though she had committed such deeds herself (CM 303373, Caldwell, 17 BR (ETO) 69, 73).

Accused's contention (R. 298, 299) that since she was in charge of Kronberg Castle she should have been tried for the embezzlement of this property rather than for the larceny thereof is without merit, for as an officer of the Army she had, speaking technically, merely custody and not possession of whatever property may have come under her care as a result

of her official position. A conversion of such property to her own use would, therefore, constitute a larceny thereof (CM 252103, Selevitz, 33 BR 383, 394; CM 268478, Brown, 44 BR 291, 294; CM 275547, Garrett, 48 BR 77, 104). Ownership of the contents of the box was properly alleged to be in Prince Wolfgang of Hesse, for when he "took over the responsibility of the box" he acquired a special property interest therein (CM 244884, Tennant, 29 BR 63, 69). In a prosecution for larceny under the 93rd Article of War, ownership may be alleged to be in either the special or general owner (CM 187800, Michalowski, 49 BR 9; CM 266206, Heselwood, 43 BR 177).

Although the value of the property taken is not material in an officer case for the purpose of fixing the maximum length of confinement, paragraph 104 of the Manual for Courts-Martial, 1928, not applying to officers (CM 267247, Bewley, 43 BR 359, 362), such value does become material when considering the appropriate place of confinement, for an officer may not be sentenced to confinement in a penitentiary for larceny of property of a value of less than $50 (CM 259545, Rowe, 38 BR 365; D. C. Code, sec. 22-2202). The court found the property under consideration in this specification to have an aggregate value of "more than $50." Herr Mercher testified that he had seen the Hesse jewels and that the items listed on Prosecution Exhibits 7, 7e, 7f, 7g, and 7h (inventories of jewels belonging to the House of Hesse and Princes Cristoph and Richard) each had a value of over $50. He assigned values to the following items in Prosecution Exhibit 12 which were before the court and which were included in the specification:

Item number in Pros. Ex. 12	Description in Pros. Ex. 14 (See also Pros. Ex. 13)	Item number in Spec.	Value
52	String of what appears to be pearls	26	About $8,000
79	Necklace, appearing to be pearls, with clasp studded with what appear to be diamonds	24	About $12,000

Herr Mercher's testimony as to the specific market value of this jewelry was somewhat weakened by his admission on the stand that there had been no legal jewelry sales in Germany for several years. The court could conclude, however, that he was an experienced jeweler who had dealt extensively in international jewelry marts. His testimony at least tended to show that the necklaces referred to above, which he appraised in open court, contained real pearls and had a value well over $50.00. Although as a general rule the court may not infer, from a mere description or even an actual inspection, that certain property the value of which is in issue at the trial is worth a specific sum of money or is worth over $50 (CM 208481, Ragsdale, 9 BR 13), the law is not so rigid or whimsical as to forbid the members of

a court-martial, in an exceptional case, from drawing upon common experience in determining that the value of specific property, or a mass of property, of obviously great value exceeds the statutory limit of $50.00. This exception to the general rule has been applied in the case of automobiles (CM 262735, Kaslow, 41 BR 113, 126; CM 228274, Small, 16 BR 111, 115) and in the case of "a horse, two mules and a wagon" (CM 193003, Simkins, 2 BR 67, 72). In the instant case, we believe that the court was warranted in finding that the property listed in this specification, as affected by the exceptions, had an aggregate value of over $50.00.

Accordingly, the Board of Review is of the opinion that the evidence is sufficient to sustain the findings of the court as to Specification 1 of Charge II, in which findings we concur.

Specification 2, Charge II

Under this specification, accused was found guilty of the larceny of two envelopes containing jewels, the property of Prince August Wilhelm of Prussia. The evidence shows that shortly after his arrest by Allied military authorities at Kronberg, Prince August Wilhelm delivered to his cousin, Princess Sophia, for safekeeping, an envelope containing certain items of jewelry and other property. Princess Sophia, in turn, delivered this envelope to Herr Lange who opened it and placed the contents in five new envelopes, two of which contained jewels, which envelopes he put in a safe in Kronberg Castle. Accused, after the discovery of the box buried in the basement of the castle, ordered Herr Lange to turn over to her "everything which was still located in the castle," whereupon, Herr Lange surrendered to accused the envelopes and their contents belonging to Prince August Whilhelm. Accused was the officer in charge of the castle at this time. At the trial, Prince August Wilhelm identified certain items of jewelry in Prosecution Exhibit 12 as property belonging to him which he had given Princess Sophia for safekeeping. It is thus apparent that accused had in her possession in Hudson, Wisconsin, at least some of the Jewelry of Prince August Wilhelm which had been placed in the two envelopes by Herr Lange and surrendered by him to accused. It may be presumed therefore that she took all the jewelry contained in both envelopes (CM 262039, Cochran, supra; CM 229977, Proctor, 17 BR 259, 265).

Whatever may be said about accused's right to require Herr Lange to turn over to her "everything" which was still located in the castle over which she had charge, there can be no doubt that Herr Lange did not intend to give accused title to the envelopes and their contents. He merely delivered them to her in her official capacity and at her command, being somewhat at her mercy under the circumstances. As we have had occasion to say above, accused, as an officer of the Army, acquired at most only custody of the property coming under her control as officer in charge of the castle. When she converted such property to her own use she committed

a larceny thereof (CM 273826, Witmer, 9 BR (ETO) 237, 243; CM 275547, Garrett, supra).

No question of value of the property taken arises under this specification, for the court, in its finding of guilty thereof, excepted the allegation that such property was "of a total value of more than $50.00."

Specification 3, Charge II

Under this specification, accused was found guilty of the embezzlement of certain specific items of tableware and other miscellaneous articles, the property of the United States, of a total value of more than $50.00. In view of this stated aggregate value of over $50, we treat the allegation that the second group of items in this specification were each of a value of more than $50, of which allegation accused was also found guilty, as surplusage.

The description of the items listed in this specification follows closely, and appears to have been taken from, the description in Prosecution Exhibit 14 of various items contained in Prosecution Exhibit 12 (property found in accused's possession in Hudson, Wisconsin). Of the 44 items thus listed, as affected by the exceptions in the findings, all but seven (items 139, 149, 153, 154, 159, 166, 168) were identified at the trial, some by Princess Margarethe and others by Princess Sophia, as having once been located in Kronberg Castle, in the "Cottage" on the castle grounds, or as belonging to members of the Hesse family. As to the seven items which were not specifically identified at the trial, accused admitted in her supplementary pre-trial statement that all the items shown on "photographs #1 to #7" (Pros. Ex. 13, photographs of items contained in Pros. Ex. 12) were among the items taken by her from Kronberg Castle with the exception of Item 151, a sleigh, which was given to her by Frau von Bochmann. Item 151 was excepted by the court from the finding of guilty of this specification. There is ample evidence, therefore, that accused converted to her own use all the property listed in this specification, as set out herein.

Accused contends that she should not have been tried for embezzlement of this property on the ground that as an officer of the Army in charge of a castle requisitioned by the Army she did not have possession of the property in such castle (R. 307). In other words, accused relies on the proposition that embezzlement requires a showing of possession of the property allegedly embezzled and not mere custody thereof. With this proposition we cannot agree. Embezzlement is a purely statutory offense (Wharton's Criminal Law, 12th Ed., sec. 1258). In CM 262750, Splain, 4 BR (ETO) 197, 206, the Board of Review said:

"The old doctrine that when a person holds the 'custody' only of property as distinguished from 'possession' of it, his wrongful and unauthorized conversion of it constitutes the crime of larceny

and not embezzlement has been modified in the Congressional definition of the crime of 'embezzlement' as denounced by the 93rd Article of War. Under the current doctrine proof that accused had converted property under his care and control obviates the necessity of determining whether he had possession or merely custody."

The Splain case was followed in CM 258071, Rhodes, 4 BR (ETO) 391, 409, and we are thoroughly in accord with this definition of the crime of embezzlement. Accused's immediate superior officer, Major Lennox, testified that she was placed in complete charge of Kronberg Castle, including the "Cottage," and that it was her duty to safeguard all the property therein. Thus, she had the care of and control over the various items listed in this specification and her conversion of such items to her own use by taking them to the United States constituted an embezzlement.

The ownership of these items was laid in the United States. The headquarters unit to which accused belonged and which was apparently responsible for operating Kronberg Castle as a recreation center was described in the record as "Headquarters Command, Supreme Headquarters, Allied Expeditionary Forces." It is well known that this headquarters was an Allied organization and not exclusively under the supervision of the United States. Although there is some intimation in the record that personnel belonging to Headquarters Command, Supreme Headquarters, Allied Expeditionary Forces, were later shifted to Headquarters Command, United States Forces, European Theater, it does not appear, apart from Sergeant Carlton's assertion that at the time the box was found accused's organization was "USFET," when this shift took place, nor does it appear when, if ever, the function of operating Kronberg Castle was transferred to this latter headquarters unit. Nevertheless, it is obvious that the castle was, for all practical purposes, a United States Army installation at the time accused was stationed there as the officer in charge. Accused and her immediate superior officers, who were responsible for its operation, were all officers of the Army of the United States and several witnesses testified, without contradiction, that it was occupied by the "American" Army. Thus, the United States had at least a special ownership in the property in Kronberg Castle and in the adjoining buildings under the control of its officers (see CM 199737, Taft, 4 BR 163; CM 312273, Mascarella). In prosecutions for embezzlement as in prosecutions for larceny, under the 93rd Article of War, ownership may be alleged to be in either the special or general owner (CM 244621, Morrison, 28 BR 355, 361). Furthermore, in embezzlement cases, even if there be a mere erroneous legal conclusion on the part of the pleader as to the ownership of the property embezzled, such mistake of law will not constitute fatal error where accused is not misled thereby, his defense is not hampered and he is fully apprised by the language of the specification of the offense intended to be charged against him and actually proved at the trial (CM 276298, McNeil, 48 BR 287, 299; CM 293993, Thurber, 9 BR (ETO) 319, 327).

Accused could not have misunderstood the gravament of the offense charged against her in this specification, for it contained a recital that the property itemized therein had been "intrusted to her by the United States by virtue of her appointment as Officer in Charge of Schloss Friedrichshof, also known as Kronberg Castle."

Herr Mercher testified that Items 134 to 193 in Prosecution Exhibit 12, excluding Items 155 and 182-192, were of a total value of over $50.00. Accused was found guilty of having embezzled all except the following of the items thus assessed:

Item number	Description in Pros. Ex. 14
150	Collapsible cup, white metal, in leather case
151	Reindeer and sleigh, white metal
156	Fan, one side scene of woman sitting on hill
157	Fan, appears to be mother of pearl, inlaid with yellow metal, boat scene on one side (broken)
193	2 ear rings with diamond-like stone setting (stones do not belong to Mrs. Lonergan - ear-rings do)

Since all the articles which accused was found guilty of having embezzled under this specification were before the court, many of them being of obviously great value (see Pros. Ex. 13), for the reasons hereinbefore set out in the discussion of Specification 1 of this Charge we believe that the court was warranted in finding that such articles had an aggregate value of over $50.00. (See D. C. Code, secs. 22-1202, 22-1207, as to penitenitary confinement in officer embezzlement cases.)

The findings of the court, therefore, as to Specification 3 of the Charge II are supported by competent evidence and we find no reason to disturb them.

6. War Department records show that accused is 44 years of age and is married. She has one son, age 23, by a former husband from whom she was divorced and one adopted daughter, age 24. She attended the Immaculate Heart Academy, Saint Catherine Convent, Saint Paul, Minnesota, for 3-1/2 years and took an extension course from the University of Arizona for one year. Prior to her entry into the service she had been employed by the Phoenix Country Club, Phoenix, Arizona, as assistant manager at a salary of from $110 to $175 per month and then by the Quartermaster's Office, Fort Huachuca, Arizona, as a secretary at a salary of $1440 a year. On 23 February 1943 she was appointed a third officer in the Women's Army Auxiliary Corps and was promoted to the grade of second officer in that Corps on 2 July 1943. She was appointed and commissioned a temporary first lieutenant in the Army of the United States, Women's Army Corps, on 1 September 1943 and was promoted to the temporary grade of captain on 2 September 1944. She served in the European Theater from 19 July 1945 to 20 February 1946 and is entitled to wear the European-African-Middle Eastern

Service Medal, the World War II Victory Medal and the American Campaign Medal.

7. Consideration has been given to the plea for clemency on behalf of accused appended to the record of trial and signed by three members of the court, the regularly appointed defense counsel and assistant defense counsel and the special defense counsel.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors or irregularities 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 Article of War 61 or 93 and confinement in a penitentiary or other Federal correctional institution is authorized upon conviction of an officer of larceny or embezzlement of property of a value, in either case, of $50 or more.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

JAGK - CM 317327 1st Ind

WD, JAGO, Washington 25, D. C. March 19, 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 Captain Kathleen B. Nash Durant (L-918024), Women's Army Corps.

2. Upon trial by general court-martial accused was found guilty of absence without leave from 30 May 1946 to 3 June 1946 in violation of the 61st Article of War (Charge I and its specification) and of the larceny of 99 items of jewelry and other chattels, the property of Prince Wolfgang of Hesse, of a total value of more than $50 (Specification 1, Charge II), the larceny of two envelopes containing jewels, the property of Prince August Wilhelm of Prussia (Specification 2, Charge II), and the embezzlement of 44 items of tableware and other miscellaneous items, the property of the United States entrusted to her by virtue of her appointment as the officer in charge of Kronberg Castle, of a total value of more than $50 (Specification 3, Charge II), all in violation of the 93rd Articel of War. No evidence of any previous conviction was introduced. She was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Sometime in April 1945 the German castle of Kronberg, the home of the Hesse family, was occupied by the "American" Army and was used as a recreation center. In June of that year, accused was placed in complete charge of the castle, one of her duties being to safeguard all the property therein. On 6 November 1945, a wooden box containing jewels and other valuable property was found concealed under the concrete floor of the basement of the castle and accused immediately took possession of its contents. According to accused's confession, she and her two confederates decided to keep all this "jewelry" This property belonged to the House of Hesse and individual members thereof. It had been placed in the box and buried sometime in October 1944 under the personal direction of Prince Wolfgang of Hesse, the then acting head of the Hesse Family, who "took over the responsibility" thereof. Inventories covering most of the contents of the box had been

prepared by various members of that family and by one Herr Lange, the Chief of Administration of the Hesse household. These inventories formed the basis of the description of the items found in Specification 1 of Charge II.

Shortly after the discovery of the box, accused ordered Herr Lange to turn over "everything which was still located in the castle." Herr Lange thereupon surrendered to accused several envelopes containing property belonging to Prince August Whilhelm of Prussia which he had been keeping in a safe in the castle. Two of these envelopes contained jewelry and these are described in Specification 2 of Charge II.

Accused retured to the United States in February 1946 and on 9 March 1946 was placed on "terminal leave status" by orders of the Separation Center at Camp Beale, California. By the terms of these orders she was to revert to inactive status on 30 May 1946. These orders were revoked by order of the Secretary of War on 24 May 1946 and on the same date The Adjutant General sent her a telegram requiring her to report to Fort Sheridan, Illinois, on 29 May 1946. She received this telegram in Hudson, Wisconsin, on 29 May 1946. Accused did not report to Fort Sheridan as ordered and was carried on the morning reports of that organization as absent without leave, effective 0001, 30 May 1946. She was apprehended by the military authorities in Chicago, Illinois, on 3 June 1946.

Shortly after her arrest in Chicago and after she had confessed to having some of the jewels from Kronberg Castle in her possession, a cache of 193 items of jewelry and other miscellaneous articles, all except one of which items accused admitted were taken by her from the castle, was found in her sister's home in Hudson, Wisconsin. These items were displayed at the trial. Thirty-six of these items resembled the description of certain items in Specification 1 of Charge II, twenty-one of this number being specifically identified as belonging to various members of the Hesse family. Prince August Wilhelm of Prussia identified eight of these items, all jewelry, as his property and the evidence was clear that such jewelry was part of the contents of the two envelopes containing jewelry which were turned over to accused by Herr Lange and which form the subject matter of Specification 2 of Charge II. Of the 44 items of tableware and other miscellaneous items listed in Specification 3 of Charge II all were included agmong the items found in Hudson, Wisconsin, and of these 44 items all but seven were identified as once having been located in Kronberg Castle, in the cottage on the castle grounds, or as belonging to members of the Hesse family.

According to the testimony of an expert German jeweler who had considerable experience in the international jewelry trade, two pearl necklaces which were listed in Specification 1 of Charge II and which were before the court had a value of about $18,000 and $12,000 respectively.' The court, having seen at the trial some of the property listed in Specification 1 of Charge II and all of the property listed in Specification 3 of that Charge, much of such property in each case being of obviously great value, was warranted in finding as to each specification that the property listed therein, as affected

by the exceptions in the findings, was of an aggregate value of over $50. The court made no finding as to the value of the property listed in Specification 2 of Charge II.

4. Accused is 44 years of age and married. She has one son, age 23, by a former husband from whom she was divorced and one adopted daughter, age 24. She attended the Immaculate Heart Academy, Saint Catherine Convent, Saint Paul, Minnesota, for 3-1/2 years and took an extension course from the University of Arizona for one year. Prior to her entry into the service she had been employed by the Phoenix Country Club, Phoenix, Arizona, as assistant manager at a salary of from $110 to $175 per month and then by the Quartermaster, Fort Huachuca, Arizona, as a secretary at a salary of $1440 a year. On 23 February 1943 she was appointed a third officer in the Women's Army Auxiliary Corps and was promoted to the grade of second officer in that Corps on 2 July 1943. She was appointed and commissioned a temporary first lieutenant in the Army of the United States, Women's Army Corps, on 1 September 1943 and was promoted to the temporary grade of captain on 2 September 1944. She served in the European Theater from 19 July 1945 to 20 February 1946 and is entitled to wear the European African Middle Eastern Service Medal, the World War II Victory Medal and the American Campaign Medal.

5. Consideration has been given to the plea for clemency on behalf of accused appended to the record of trial and signed by three members of the court, the regularly appointed defense counsel and assistant defense counsel and the special defense counsel. Consideration has also been given to a letter in behalf of accused from Mr. Aaron Busch, New York, New York, addressed to the President, dated 6 February 1947.

6. There being nothing in the record of trial to justify the acts of accused and having in mind the almost fantastic proportions of the crime of which she has been found guilty, her gross violation of the trust reposed in her by the United States, and the tendency of her acts to bring grave discredit upon the honorable service she purported to represent, I recommend that the sentence be confirmed and carried into execution and that the Federal Reformatory for Women, Alderson, West Virginia, be designated as the place of confinement.

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

/s/ Thomas H. Green
THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mr. Busch to Pres.

(G.C.M.O. 110, 27 March 1947).

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

JAGK - CM 317354

8 NOV 1946

UNITED STATES v. Technician Fifth Grade DIMPSEY FOWLER (RA 38646993), Service Company, 67th Tank Battalion (attached to Company B, 67th Tank Battalion, Task Force Williwaw)	FORT ORD, CALIFORNIA Trial by G.C.M., convened at Fort Ord, California, 3 September 1946. Confinement at hard labor for three (3) months (suspended), forfeiture of $50 per month for three (3) months, and reduction to the grade of private.

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

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 upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technician Fifth Grade Dimpsey Fowler, Service Company, 67th Tank Battallion, Task Force Williwaw, did at Fort Ord, California, on or about 11 August 1946, with intent to do him bodily harm, commit an assault upon Staff Sergeant Lester L. Morgan by drawing and pointing at him a dangerous weapon to wit, a revolver.

He pleaded guilty to the Specification, except the words "with intent to do him bodily harm" and "by drawing and pointing at him a dangerous weapon, to wit, a revolver", substituting therefor the words "wilfully attempt to", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of violation of the 96th Article of War. He was found guilty of the Specification, except the words "with intent to do him bodily harm" and "by drawing and pointing at him a dangerous weapon, to wit, a revolver", substituting therefor the words "wilfully attempt to", of the excepted words, not guilty, of the substituted words, guilty, and not guilty of the Charge, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for three months, to forfeit $50 per month for a like period, and to be reduced to the grade of private.

The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof relating to confinement at hard labor. The result of trial was promulgated in General Court-Martial Orders No. 21, Headquarters Fort Ord, California, dated 15 October 1946.

3. The only question requiring consideration is whether the specification of which accused was found guilty states an offense under the Articles of War. By means of exceptions and substitutions the offense of which accused was found guilty is as follows:

> "In that Technician Fifth Grade Dimpsey Fowler, Service Company, 67th Tank Battalion, Task Force Williwaw, did at Fort Ord, California, on or about 11 August 1946, wilfully attempt to commit an assault upon Staff Sergeant Lester L. Morgan",

in violation of Article of War 96.

An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another (MCM, 1928, par. 149l). Thus, an attempt to assault constitutes an attempt to attempt. In Corpus Juris Secundum, Vol. 6, p. 940, it is stated that:

> "As an assault necessarily includes an attempt, and is, in itself, an attempt to commit a crime, it would seem there can be no such offense as an attempt to commit a simple assault."

The Board of Review has held that at common law there was no such offense as an attempt to commit a simple assault, and that a charge of attempting to commit a simple assault did not set forth an offense in violation of Article of War 96 (CM 274869, Dixon, 47 BR 349, and authorities cited therein).

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 L. Silverb, Judge Advocate

Carlos E. McAfee, Judge Advocate

[illegible], Judge Advocate

JAGK - CM 317354 1st Ind

NOV 13 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 Technician Fifth Grade Dimpsey Fowler (RA 38646993), Service Company, 67th Tank Battalion (attached to Company B, 67th Tank Battalion, Task Force Williwaw).

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. 360, Nov. 29, 1946)

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

JAGK - CM 317375

13 NOV 1946

UNITED STATES)	THIRD UNITED STATES ARMY
)	
v.)	Trial by G.C.M., convened at Munich, Germany, 21 August 1945. Dismissal, total forfeitures and confinement for eighteen (18) months. Confinement remitted.
)	
Captain WILLIAM L. GIBB, JR.) (0-525161), Staff and Administrative Reserve.)	

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

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

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

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

Specification 1: In that Captain William L. Gibb, Jr. did, at, to wit, Ansbach, Ober and Mittelfranken, Bavaria, Germany, on or about the 30 May 1945, wrongfully and unlawfully accept from Ludwig Hofer, Senior, a German civilian, the sum of Two Thousand (2000) Reichmarks, value of about Two Hundred Dollars (200.00), the said sum being in return for services rendered by the said Captain Gibb in his official capacity as a military government officer, United States Army.

Specification 2: In that Captain William L. Gibb, Jr. did, at Ansbach, Kreis Oberfranken, Bavaria, Germany, to wit, between about 1 May 1945 and to wit 4 June 1945, wrongfully violate a standing order by associating with German civilians, to wit, one Hanne Bohm upon terms of intimacy and for other than official reasons.

CHARGE II: Violation of the 94th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of Specification 1, Charge I, and guilty of Specification 2, Charge I, except the words "upon terms of intimacy and", and guilty of Charge I, and not guilty

of Charge II and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Commanding General, United States Forces, European Theater, confirmed the sentence, remitted the confinement and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the law and the evidence contained in the review by the Acting Theater Judge Advocate, European Theater, dated 7 January 1946.

4. War Department records show the accused to be 42-7/12 years of age and married. From 4 February 1916 to 19 March 1918 he served as a private in the 114th Infantry. After two months as an instructor in the Student Army Training Corps he was appointed a first lieutenant and then served from 17 December 1918 to June 1920 as an instructor in the Reserve Officers Training Corps at Pennsylvania State College. He received a BS Degree in architecture and engineering from the Carnegie Institute of Technology in 1923 and has been employed on many architectural and engineering projects in the United States and Haiti, earning a salary at the time of his entry into the service of $4660.00 per annum. On 12 June 1943 he was appointed and commissioned a captain in Specialist-Reserve, Army of the United States. He entered upon active duty 19 September 1943, and has been overseas in the European Theater since July 1944. His efficiency report for the period 1 July 1944 to 31 December 1944 is "Excellent" and for the period 1 January 1945 to 30 June 1945 is "Very Satisfactory."

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

Christy D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schlegel, Judge Advocate

JAGK - CM 317375 1st Ind

WD, JAGO, Washington 25, D. C. NOV 2 - 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 William L. Gibb, Jr. (O-525161), Staff and Administrative Reserve.

2. Upon trial by general court-martial this officer was found guilty of wrongfully accepting $200.00 from a German civilian in return for services rendered in his official capacity and of wrongfully associating with a German civilian in violation of a standing order, all in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

On 7 January 1946 the Commanding General, United States Forces, European Theater, confirmed the sentence, remitted the confinement, and forwarded the record of trial for action under Article of War 50½.

The record of trial was lost in transit and after much delay reached my office 29 October 1946.

3. A summary of the evidence may be found in the review of the Acting Theater Judge Advocate, European Theater, which was 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 as approved by the European Theater commander and to warrant confirmation thereof.

The accused was a member of Detachment E1B3, 3rd Regiment, Military Government, stationed at Ansbach, Germany. His duties included the control of displaced persons, the securing of food, clothing and other necessities for displaced persons, hiring of hotel employees, and supervision of the Postal, Telephone and Telegraph service. On 30 May 1945 he ordered Private First Class Louis Capello to take a truck and two German civilians to Bamberg, Germany. The accused and his German interpreter proceeded to Bamberg by a private car. While in Bamberg, Germany, the truck was loaded with about 980 pair of civilian shoes purchased by one of the civilians. Thereafter the parties went to Burgkunstadt, Germany, where the accused obtained seventy pair of shoes for the employees of the Postal, Telephone and Telegraph service in Ansbach and the German civilian purchased 540 pair.

All of the shoes were loaded on the truck and transported to Ansbach. While the shoes were being unloaded the accused asked the German civilian how many pairs of shoes he had purchased. The German showed him invoices for approximately 1300 pair of shoes. The accused then asked for 2600 German marks. The German civilian complained that 2600 marks was excessive as their prices were controlled and suggested 2000 marks. The accused agreed and at that time he received from the German civilian 2000 German marks which had a value of $200.00. About 4 June 1946 the accused gave his interpreter 1700 German marks and directed her to return them to the German civilian. He also told her to tell him that he (the accused) would send the other 300 marks later and for the civilian not to say anything about receiving the money. The civilian refused to accept the money. The accused testified that he was attempting to control all shoes coming into his area, as all shoes obtained at that time were to go to displaced persons and that the German civilian was the agency through which he was working.

Between 1 May 1945 and 4 June 1945 the accused visited a German civilian named Hanne Bohm at her home on numerous occasions. On these visits he stayed from thirty minutes to one hour. These visits were for other than official reasons. Although no improper or immoral actions were shown to have occurred, his conduct was contrary to orders as fraternization was prohibited by Theater orders. Orders prohibiting fraternization have now been rescinded.

4. This case was tried 21 August 1945. On 20 October 1945 the reviewing authority approved the sentence. On 7 January 1946 the Commanding General, United States Forces, European Theater, confirmed the sentence but remitted the eighteen months of confinement at hard labor. The record of trial was lost before it reached the Branch Office of The Judge Advocate General, European Theater. In October 1946 the record of trial was found somewhere in the European Theater and forwarded to this office, arriving here 29 October 1946. On 21 October 1946 the accused was released from the Wurzburg Rehabilitation Center upon completion of the full term of confinement adjudged by the court, less good time behavior allowance.

5. The accused is 46-7/12 years of age and married. He served over two years as an enlisted man in World War I. After the war he was commissioned a first lieutenant and was an instructor in the ROTC at Pennsylvania State College for one and one-half years. He received a BS degree in architecture and engineering from Carnegie Institute of Technology in 1923, and since then he has been employed on various engineering projects in the United States and Haiti. He entered upon active duty 19 September 1943 and has been overseas since July 1944. Efficiency reports for his overseas service are "Excellent" and "Very Satisfactory."

6. In view of the prior military record of the accused, the long period of time served in a rehabilitation center after the confinement adjudged by the court had been remitted and all the other circumstances of this case, I recommend that the sentence be confirmed but remitted.

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

CM 317375

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O.363, Dec 6, 1946)

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

JAGK-CM 317380

9 DEC 1946

UNITED STATES v. Privates First Class LESLIE L. CALVERT (36928027), and ESTON HENDERSON (34801207), both of Headquarters Company, 1st U. S. Infantry Division, APO 1.	)	1ST U. S. INFANTRY DIVISION Trial by G.C.M., convened at Regensburg, Germany, 19 August 1946. Each: Dishonorable discharge and confinement for life. Federal Reformatory.

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 soldiers named above.

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

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

Specification: In that Private First Class Leslie L. Calvert, Headquarters Company, First United States Infantry Division, APO 1, Regensburg, Germany, did at Regensburg, Germany, on or about 27 July 1946, forcibly and feloniously, against her will, have carnal knowledge of Irene Rauch (German civilian) Haaggasse 14, Regensburg, Germany.

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

Specification: In that Private First Class Leslie L. Calvert, Headquarters Company, First United States Infantry Division APO 1, Regensburg, Germany, on or about 27 July 1946, with intent to commit a felony, viz, rape, commit

an assault upon Elizabeth Dorsch, (German civilian) Fiedelgasse 11 Regensburg, Germany.

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

Specification: In that Private First Class Leslie L. Calvert, Headquarters Company, First United States Infantry Division, APO 1, Regensburg, Germany, did at Regensburg, Germany, on or about 27 July 1946, wrongfully, knowingly and without proper authority, apply to his own use one ¼ ton truck, bumper markings Hq 7, value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

Henderson

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

Specification: In that Private First Class Eston Henderson, Headquarters Company, First United States Infantry Division APO 1, did at Regensburg, Germany, on or about 27 July 1946, forcibly and feloniously, against her will, have carnal knowledge of Irene Rauch (German civilian) Haaggassa 14, Regensburg, Germany.

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

Specification: In that Private First Class Eston Henderson, Headquarters Company, First United States Infantry Division APO 1, did at Regensburg, Germany, on or about 27 July 1946, wrongfully and knowingly impersonate a Commissioned Officer of the United States Army, to wit state to Pfc. Donald R. Steinbach, 1st Military Police Company, 1st US Inf. Div., in a telephone conversation, that he, Pfc. Eston Henderson, was Captain James C. Maguire.

They pleaded not guilty to, and were found guilty of, the Charges and Specifications. No evidence of previous convictions was introduced. Each 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 as to each accused, designated the Federal Reformatory, Chillicothe, Ohio, 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 for more than one year by Title 22, section 2801, District of Columbia Code.

Chester E. Gilson, Judge Advocate.

[On Leave], Judge Advocate.

Gilbert E. Asbrook, Judge Advocate.

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

NOV 14 1946

JAGQ - CM 317422

UNITED STATES)	CAMP CAMPBELL, KENTUCKY
)	
v.)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 8 October 1946. Each: Dishonorable discharge and confinement for two (2) years. Each: Branch United States Disciplinary Barracks, Fort Knox, Kentucky.
Privates VERNER LONG (14041468), Company E and HARRY W. MILLER (36885272), Company C, both of 15th Infantry (then 11th Infantry).)	

HOLDING by 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 soldiers named above and submits this, its holding, to The Judge Advocate General.

2. At the outset it is observed that the Specification refers to three accused persons, Private Harry W. Miller, Private Verner Long and Private First Class Perry A. Zoulek. At the time that the case was heard Private First Class Perry A. Zoulek was not before the court. No attempt was made to change the Specification and throughout the trial reference is made to "accused" or "each accused". There was no finding or sentence as to accused Zoulek. It is therefore to be construed that the court was concerned only with the accused Miller and Long, irrespective of apparent inaccurate phraseology found in the record of trial.

3. Accused were tried on the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Perry A. Zoulek, Headquarters Company, Second Battalion, 11th Infantry, Private Harry W. Miller, Company "C", 11th Infantry, and Private Verner Long, Company "E", 11th Infantry, acting jointly and in pursuance of a common intent, did, at Nashville, Tennessee, on or about 14 August 1946, attempt to wrongfully sell or dispose of government property, to wit, one Brunner refrigerator unit SE786, type A, Camp Model R330, charge 5 lbs, Refrigerant Freon contract W-950-2M 40528842 of the value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of one previous conviction as to accused Miller was introduced and no evidence of previous convictions as to the accused Long was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, 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 five years. The reviewing authority approved the sentence, but remitted three years of the sentence to confinement of each accused, designated the Branch 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 pursuant to Article of War 50½.

4. Evidence for the Prosecution. At about 2300 on 14 August 1946, Mr. Sam McCullough, who operates a fruit stand at 920 - 8th Avenue North, Nashville, Tennessee, went out to a car that had stopped at his stand to see what they wanted. A soldier got out of the car and said that he had a refrigerator motor to sell and inquired if he wanted to buy one. Mr. McCullough told the soldier he had no use for it and went on about his business (R 6-7). At about that time a city detective, Mr. Buford Croley, who had been in the stand with Mr. McCullough, approached the car and made inquiry as to what kind of motor it was, and asked if he could see it (R 6-9). The soldier showed him the motor by raising the turtle back of the car (R 9). The reason that Mr. Croley made inquiry was that a frigidaire motor had been listed as missing and he thought he should check on this one (R 8). The soldier said he did not have a bill of sale, that it was purchased from some fellow in Russelville, Kentucky, and that it belonged to all three of them. There were two other soldiers in the car, who on being asked if it belonged to them, replied "yes" (R 9-10). Mr. Croley identified the two accused in the courtroom as the two persons in the car, and stated that the one who did all the talking with him relative to the motor was not present in court (R 9-11). He called the Military Police and the three were taken to the Office of the Provost Marshal (R 9-10). The testimony of Mr. Croley as to what transpired at the station is confusing and for that reason the pertinent portions thereof are set out:

> "Yes that is what they said, so then I called from the Patch [fruit stand] to headquarters to come after them, I told the MPs to come over, and the MPs came over there and took them to the Provost Marshall's office. At first they would not admit anything but that second one there did after we got to the office, he said that he knew he was in trouble as it was his car and that he was

caught with it and he said that he was going to confess, that he was going to tell the truth.

"Q The others did not make a statement?
"A No they denied it but the third one did, he told who he was and where he came from, he said that he did not want to withhold anything and he said 'I am ready to tell the truth and get it over with.' He said that the other two got the motor and put it in his car, and that he drove the car to where it was, but they put it in his trunk and that was about all he had to do with it. That was about all I know about it too, after the MPs got there I didn't have anything more to do with it, except I helped them carry the motor into the station, but I didn't take the statements or anything all I know is what he said to me, he just said he wanted to tell me the truth and that is what he said after he got to the station. I left immediately after we got the motor in the station. The next morning I came in and talked with the Provost Marshall and told him what had happened. Thats about all" (R 10).

* * *

"Yes, the second one there told me, he made the statement in my presence. He said that he was driving the car, the car was his and that he drove up and down the highway until the other fellows cleared the motor from the building and then they gave him the 'high sign' and then he drove up and they brought the motor out to his car and put it in, he said that he did not touch the motor but that he drove up and down the highway until they brought the motor out and they sit it on the highway and they then gave him the 'high sign' and he backed up and they put it in the car" (R 13).

* * *

"Q And you stated that the man, the second one from the end there, at the police station talked with you concerning the manner in which the motor was obtained?
"A Yes sir.

"Q Who was present when he made this statement to you and what, if anything, was said to him about his statement?
"A The MP was in there, the MP came to me and said this man was in my office and that he wanted to talk to me. And I went in there where he was and he said that he wanted to tell the truth. The MP was in there and he said 'I would rather talk to you alone' so the MP said 'Sit down over there' and

the two offices connected there, like this, and the MP went out there, and then when he started talking I said 'you come in here if you want to listen to this' then I told the MP that he wanted to tell the truth. That night there wasn't anybody there who could take the statement so we told him that he would have to wait until in the morning to do that, the MP told him that. Anyhow, I went back in the morning and they brought all three of the boys down and they made statements - but that one was the one that talked to me.

"Q Yes but which one did you say talked to you?
"A Him, the second one from the end.

"Q And when he made that statement to you was there anyone present?
"A Well, sir, not at first he said that he wanted to talk to me alone and he told me 'I might as well tell it all' and then I called the MP to come in and listen" (R 14, 15).

A piece of equipment in the courtroom was identified by Mr. Croley as similar to and resembling the motor the soldier had (R 11). His written statement which was introduced in evidence mentioned that "Pfc Perry A. Zeuleke was the soldier who tried to sell the Frigidaire Motor as he called it" (Pros. Ex. A).

Staff Sergeant Peter J. Fox identified accused Long as one of the three men he went to get at the City Police Station, Nashville, Tennessee, to take back to Camp Campbell. At the same time he took a motor, which he could not identify, back to Camp Campbell and turned it over to the Sergeant of the Guard. He examined the piece of equipment in the courtroom and stated "That does not look like it, sir" (R 15-16).

Sergeant Preston Richards, who was Sergeant of the Guard, 15th Infantry Regiment, identified accused Long as being brought in to him on 18 August 1946 by Sergeant Fox. A motor was also turned over to him, but on being questioned as to his ability to identify the motor said "No sir, I could not tell it from another one". There was a record made of the motor but it was torn up (R 18). It was entered in the property book as "—— electric alternating current motor K2024." (R 18).

Sergeant Lewis Cannon, Company E, 15th Infantry, testified that he brought certain equipment to the courtroom from the guardhouse the morning of the trial, and that the equipment in the courtroom had the

same serial number on it as the one he brought over (R 21). The property book from the guardhouse was introduced in evidence to show that on 18 August 1946 the entry relative to the motor was first entered (R 21; Pros. Ex. 1). There had been no other similar motor in the guardhouse supply room since 14 August 1946 and the motor had not been out of the room so far as Sergeant Cannon knows (R 20-21). He has no recollection as to the first time that he saw the motor or as to the entry in the property book (R 23-24).

The equipment in question was admitted in evidence as Prosecution Exhibit 2. It was identified by Mr. R. M. Fisher, connected with the Post Engineer's Office, who had charge of the equipment and its installation in the buildings. This particular piece of equipment "is a refrigerating Unit, a Brunner condenser Unit" (R 25). It was issued and intended for use by the military service. The records of his office showed that this piece of equipment was installed in building T-1342, and was last serviced in September of 1945. His records do not show the equipment as having been removed, sold, or disposed of in any way and, as far as his records show, it is still in that building (R 25-26). Mr. Fisher identified two other pieces of equipment in the courtroom as Brunner condenser Units. They were all equipped with Wagner motors being numbered K2024, such being a type number. The type number has nothing to do with the serial number, the serial numbers are different (R 29). The serial number of Prosecution Exhibit 2 is 270142 and is worth more than $50.00 (R 29).

5. No evidence was introduced by the defense. Each accused elected to remain silent.

6. Accused were found guilty of attempting wrongfully to sell or dispose of a Brunner refrigerator unit, of type described in the Specification, property of the United States furnished and intended for the military service thereof. The evidence sufficiently shows that at the place and about the time alleged accused and a third soldier were in an automobile in the rear compartment of which was a refrigerator unit of the general type described in the Specification. The third soldier offered to sell the unit to civilians who were present. The offer was not made in the immediate presence of the accused who remained sitting in the car.

One of the persons to whom the offer was made, having reached the conclusion that the property had been stolen, questioned the two accused and the third man concerning it. Each stated that the unit belonged to him or to the group. Thereafter one of the accused who was pointed out in court by a witness but who cannot otherwise be identified by the record of trial, made a statement indicating that both accused had stolen the unit and had placed it in the automobile. The record of trial being silent

as to which of the accused made this latter statement, it may not legally be attributed to either. To justify the consideration of that statement by an undisclosed accused as evidence against either or both of them, it would be necessary that the competent evidence in the record be sufficient to permit the adoption of a theory that the accused had joined in a common design and purpose as charged, and that the statement was therefore admissible against both of them as a statement made by a joint conspirator. However, there is no evidence in the record to warrant any such theory.

The only competent evidence suggestive of participation by accused in the offense lies in the proof that both were present at the scene and that both admitted an interest in the property involved. There is nothing to show that either accused did in fact encourage, induce, aid, or abet the third soldier in his attempt to negotiate a sale. The evidence arouses a suspicion that the attempt to sell the property was the result of concerted action by the three soldiers but suspicion is not enough to support a conviction. It has repeatedly been held that the mere presence of an accused at the scene of a crime is not in itself sufficient legally to substantiate his participation therein (Hicks v. U.S., 150 U.S. 442; CM 186749; 24 BR 273).

There being insufficient evidence on which to base a reasonable inference of participation by accused in the attempt to sell the property, the findings of guilty must fall.

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

Charles M. Dickson, Judge Advocate

Wayne Olivier, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 317422 1st Ind DEC 27 1946

WD JAGO, Washington 25, D. C. 12/27

TO: Commanding General, Camp Campbell, Kentucky.

1. In the case of Privates Verner Long (14041468), Company E and Harry W. Miller (36885272), Company C, both of 15th Infantry (then 11th Infantry), attention is invited to the foregoing holding by the Board of Review that the record of trial as to each accused 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 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 317422).

HUBERT D. HOOVER
Colonel, JAGD
Acting The Judge Advocate General

1 Incl
Record of Trial

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

JAGN-CM 317428 19 Feb. 1947

UNITED STATES v. Staff Sergeant WILLIAM A. SATTERWHITE (34807811), and Private First Class JACK CUNNINGHAM (36912460), both of Company E. 7th Infantry.	)))))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wiesbaden, Germany, 14 August 1946. Satterwhite: Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks. Cunningham: Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

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

Specification: In that S/Sgt William A. Satterwhite, Company E, Seventh Infantry, did, at Sontra, Germany, on or about 28 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Walter Stock, a human being by beating him on the head with a pistol.

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

Specification: In that Private First Class Jack Cunningham, Company E, Seventh Infantry, did, at Sontra, Germany, on or about 28 April 1946, with malice aforethought,

willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Walter Stock, a human being by beating him on the head with a pistol.

A common trial in the instant case was directed by the convening authority and was consented to by the Accused (R. 3). Each accused pleaded not guilty to the Charge and Specification preferred against him and each was found guilty of his respective Specification except the words "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Walter Stock, a human being by beating him on the head with a pistol," substituting therefor the words "with intent to do him bodily harm commit and assault upon Walter Stock by striking him on the head with a dangerous instrument, to wit, a pistol," of the excepted words not guilty and of the substituted words guilty. Each was found not guilty of the Charge but guilty of a violation of the 93rd Article of War. No evidence of previous convictions was introduced. The accused Satterwhite was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five (5) years. The accused Cunningham was sentenced to dishonorable discharge, forffeiture of all pay and allowances due or to become due and confinement at hard labor for one (1) year. As to each accused, the reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused. The only question considered in this determination is whether the action of the prosecution in calling the accused Satterwhite and Cunningham as witnesses for the prosecution constitutes fatal error. The evidence material to the consideration of this question is hereinafter summarized.

4. At the outset of the trial, the trial judge advocate called each accused as a witness for the prosecution and each witness testified as follows:

"Private First Class Jack Cunningham, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q: Will you state you name, grade, organization and station?
A: Private First Class Jadk Cunningham, Company E, 7th Infantry, 3rd Division.

Q: And station?
A: Stationed in Bebra, Germany.

Q: Do you know the accused Satterwhite?
A: Yes, sir.

Q: Will you state his full name and grade.
A: Staff Sergeant William A. Satterwhite.

Q: How long have you known him?
A: Approximately a year, sir.

Q: Is he in the military service?
A: Yes, sir.

Defense: No questions.

There being no further questions the witness was excused and resumed his seat.

****

Staff Sergeant William A. Satterwhite, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q: Will you state you name, grade, organization and station?
A: Staff Sergeant Willian A. Satterwhite, 34807811, stationed in Bebra, Germany.

Q: Do you know the accused Cunningham in this case?
A: Yes, sir, I do.

Q: Will you state his full name?
A: Private First Class Jack Cunningham.

Q: How long have you known the accused Cunningham?
A: Around a year.

Q: Is he in the military service?
A: Yes, sir, he is.

Defense: No questions.

There being no further questions the witness was excused and resumed his seat" (R. 7).

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Prior to the intorduction of the foregoing testimony, the prosecution did not inform the court or the accused whether the witness' testimony was to be used or restricted to proof of his own case or to that of his co-accused. The accused Cunningham was recalled as a witness for the prosecution and the record of trial reveals the following preliminary proceedings relevant to his testimony:

"Private First Class Jack Cunningham, a witness for the prosecution, was recalled, and after being reminded that he was still under oath, testified as follows:

Prosecution: Does the court desire to question the witness?

Apparently the court did not.

DIRECT EXAMINATION

Questions by prosecution:

Q: Cunningham, where were you on Sunday evening, 28 April, this year, at 2000 hours?

Defense: If it please the court this witness being tried in a common trial retains all the rights he would have if he was tried separately and there has been no showing as yet that he had elected to take the stand and testify.

Prosecution: If it please the court in a common trial it is as if each accused were tried separately and I am allowed to proceed on that theory and call either accused as a witness against the other, subject to his right to refuse to answer all questions which may incriminate him.

Law Member: The ruling of the court is that the witness may be used as a witness for the prosecution subject to his objection to any specific question, the answer to which may tend to incriminate or degrade him.

Defense: If it please the court I would like to ask Cunningham if he understands fully what the Colonel has just said.

Cunningham: No sir, I don't" (R. 11).

The Trial Judge Advocate then read the 24th Article of War to the witness and the President explained its meaning to him after which the

witness stated that he understood what was read. The trial then proceeded.

"Law Member: It is the ruling of the court that the witness refuse to answer any question which may tend to incriminate him as to any element of the offense charged which have been outlined to him by the president of the court. Subject to those limitations the witness may remain on the stand.

Q: Cummingham where were you on Sunday evening, 28 April 1946, at approximately 2000 hours?

Defense: I object as that incriminates the man if he places himself in that locality.

Law Member: Objection sustained.

Prosecution: May I request a five minute recess, please?

President: The court will recess for five minutes.

The court than took a five minute recess, after which all the members of the court, the personnel of the prosecution and the defense, both accused and the reporter, resumed their seats.

Prosecution: I would like to make several remarks before I resume my questioning, one that the objection by the defense was ill founded in that the right of the accused to object to a question as incriminating is personal <u>to the accused</u> and cannot be raised by counsel. In other words it is the accused's prerogative to raise that point or not as he sees fit and not that of counsel and also that the court may rule <u>that an accused,</u> even though he raises the objection of incrimination, the court may rule that the accused must answer the question if, in the opinion of the court the answer to the question can in no way possibly incriminate him.

Law Member: The court takes cognisance of that fact" (R. 12). (Underschoring supplied)

The prosecution thereupon proceeded to interrogate Cunningham who then testified, without exception or objection to any questions, in substance as follows: that on Sunday evening, 28 April 1946, at approximately 2000 hours, he was in Bebra, Germany, with the accused Satterwhite where they met a German civilian who was described as about 18 or 19 years of age, about 5 feet 11 inches tall, weighing about 170 pounds, having black

hair, wearing a field jacket with a "P" on one sleeve and a "W" on the other and wearing light green pants. That after meeting this German civilian they went to Satterwhite's room, stayed there about ten minutes, left there and later got into an army jeep driven by a Private First Class Miller who drove the trio to a railroad station at Sontra, Germany. He, Satterwhite and the German remained at this station about an hour and then all three left the station and started to walk back toward Bebra along the railroad tracks. The witness described the route of travel back to Bebra in detail and then testified to the correctness of Prosecution's Exhibit 1, being a map or sketch of the locus of the alleged offense, and penciled a line thereon representing the route of travel as described. The defense did not cross-examine the witness (R. 13-14).

Extra-judicial statements of the accused Satterwhite and Cunningham were admitted in evidence (Pros. Ex. 4, 33: Pros. Ex. 5, R. 34). Each accused took the stand and testified in his own behalf, admitted the assault upon the German but steadfastly averred facts in extenuation and in legal justification and excuse as a matter of self defense (R. 38-56, 56-66). The record is silent as to whether the prosecution entered into an arrangement with Cunningham, the defense or the court, following the preliminary discussion relating to Cunningham's examination as a witness for the prosecution, whereby he did so testify (R. 12).

5. The non self-incrimination clause of the Fifth Amendment of the Constitution of the United States provides:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

Article of War 24 provides, in pertinent part:

> "No witness before a military court * * * shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

The term "witness" as used in this Article includes without doubt an accused (Counselman v. Hitchcock, 142 U.S. 547; United States v. Kimball, 117 Fed. 156, 160). The phrase "to incriminate himself" is defined as follows: "to expose to an accusation or charge of crime; to involve oneself or another to criminal prosecution or the danger thereof" (Black Law Dict., 3d Ed., p. 946).

It has been held that the rights and immunities under Article of War 24 of an accused on trial before a court-martial are identical with

the rights and immunities of a defendant on trial before a Federal civil court (CM 273817, Johnson and Loper, 6 BR (ETO) 303; CM 312517, Kosydar et al., Vol. V, Bull. JAG 333).

In considering this observation, the following fundamental principle enunciated by our Federal Courts must be noted:

> "The garanty that a person shall not be compelled to be a witness against himself precludes a person from being subjected to an inquisition or called as a witness by the state in any judicial inquiry which has for its primary object the determination of that person's guilt or innocence of a given offense" (70 C.J., sec. 888, p. 734; Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746; Lees v. United States, 150 U.S. 476, 37 L. Ed. 1150, Twining v. New Jersey, 211 U.S. 78, 53, L. Ed. 97).

Both accused in the presence of the assembled court were called to the stand as witnesses for the prosecution and were subjected to the examinations above set forth. Since there is no indication in the record that the trial judge advocate had entered into an arrangement with each accused whereby either of them agreed or requested to appear and testify for the prosecution and since there was no showing that prior to the examination without visitation upon him of any prejudicial inference as a result of such refusal, it cannot be presumed that the appearance of either accused as a witness for the prosecution was in any sense voluntary. A consideration of the objections raised by the defense to Cunningham's testimony for the prosecution, hereinabove quoted, and of the prosecution's arguments preliminary thereto indicates conclusively the involuntary nature of such appearances. In CM 273817, Johnson and Loper, 6 BR (ETO) 305, the Board of Review ruled on the identical point here presented and ably summed up the consequential effect of the trial judge advocate's prohibited action.

> "When he (trial judge advocate) made the demand he placed them in the position of being compelled to testify for fear of adverse inference if they refused the demands. Their appearances on the witness stand were in no sense voluntary. Voluntary action presupposes feedom of choice.
>
> "The voie dire examinations of each accused could not neutralize or remove the prejudicial effect of the infringement of their rights. The examinations came after the trial judge advocate had violated their rights by his demand that they appear as witnesses. It was the demand which inflicted the injury. In fact the examination served to increase the compulsion visited upon

them rather than to alleviate it. The trial judge advocate, * * * and court exhibited their ignorance of this vital principle of criminal jurisprudence but such ignorance cannot excuse the violation of the rights of each accused not to 'be compelled to incriminate himself' (AW 24) or 'to be a witness against himself.' (Fifth Amendment)."

The trial judge advocate's contention and theory of trial procedure with respect to calling one accused as a witness for the prosecution as against the other in a common trial proceeding, on the assumption that each is being tried separately and therefore is a competent witness for such purpose under paragraph 114c, MCM, 1928, was in error and was highly prejudicial to the substantial rights of each accused.

Although in our military justice procedure it is understood that the trial of two or more accused in a common trial constitutes a separate trial as to each accused so tried, such procedure is prescribed only a a matter of convenience and military expediency and is not intended or contemplated to deprive either accused of any rights, privileges or immunities to which he might otherwise be entitled (par. 91b, TM 27-255, Military Justice Procedure). In this respect, the term "separate" as it is construed to describe a separate action of an accused in a common trial in military practice must be distinguished from trials of the type known and referred to as separate trials in civil practice. The distinction which is to be drawn is, that the separate trials of co-accused in a common trial in military practice are tried before the same court at the same time while the separate trials referred to in civil practice are tried before separate courts at different times. Thus in applying the provisions of the Manual for Courts-Martial, 1928, par. 114c, or the modern statutory rule of evidence in regard to the admissibility and competency of the testimony of conspirators, accomplices or co-acused as witnesses for the prosecution against a conspirator, accomplice or co-accused in a separate trial, such testimony of a co-accused as a witness for the prosecution against another co-accused is only admissible and competent when such witness is not being tried together with the accused against whom he is testifying (See par. 71b, MCM, 1928, with reference to purpose and common grounds for motion to sever).

In Winthrop's Military Law and Precedents, Second Edition, Vol. 1 and 2 (Reprint 1920), p. 335 and 336, the question here presented is resolved as follows:

"By the Act of Congress of March 16, 1878, c. 37, it is provided that upon criminal trials and proceedings before not only 'United States courts' and 'Territorial courts',

but also 'courts-martial and courts of inquiry,' the accused 'shall, at his own request, but not otherwise, be a competent witness.' And' - it is added - 'his failure to make such request shall not create any presumption against him.'

* * * *

"CO-ACCUSED AND ACCOMPLICES. Except when testifying at his own instance under the Act of 1878, above cited, a defendant in a criminal case is not regularly competent as a witness for or against a co-defendent unless he has been discharged from the record, - as by the entry of a nolle prosequi, - or unless, having been accorded a separate trial, * * * he has been duly acquitted or convicted. In military cases where the prosecution proposes to call upon a co-accused as a witness, the entry of a molle prosequi, though the more usual course, is not invariable: where this course is not pursued, and the w tness has testified in good faith on the trial, it is in general announced in the Order in which the proceedings in the case are passed upon that he is released from arrest, and further proceedings against him are discontinued."

In order to safeguard and make effective this constitutional guaranty against self-incrimination it has been uniformly held in Federal and State courts that the prosecution must not in open court, before the jury, call the accused to the stand as a witness (110 ALR, p. 101; 115, Fed. 972). In CM 312517, Kosydar et al, Supra, the Board of Review stated:

"Since the right against self-incrimination provided by the Fifth Amendment and A.W. 24 is so fundamental that its infringement is a lack of due process, the error in denying such right to accused cannot be cured merely by other clear and compelling evidence of guilt."

Considering the foregoing authorities, it must be concluded that the action of the trial judge advocate in calling the accused as witness for the prosecution to testify against each other was fatal error.

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

s/ Edward T. Johnson, Judge Advocate

s/ Joseph L. Brack, Judge Advocate

ON LEAVE (Taylor), Judge Advocate

Feb. 24, 1947

JAGN-CM 317428 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, N. Y.

1. In the case of Staff Sergeant William A. Satterwhite (34807811), and Private First Class Jack Cunningham (36912460), both of Company E, 7th Infantry, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommedn that the findings of guilty and the sentence as to each accused 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 317428)

s/ Thomas H. Green

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, D. C.

JAGH - CM 317485

13 JAN 1947

UNITED STATES	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 22 August 1946. Dismissal and total forfeitures
	)	
Major KEENE SAXON (0-206497), Corps of Military Police	)	

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 Charges and Specifications:

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

Specification: In that Major Keene Saxon, Ludwigsburg Detachment War Crimes Group, Judge Advocate Section, Third U. S. Army, did near Vaihingen, Germany on or about 9 June 1946, with intent to do him bodily harm, commit an assault upon Private First Class GLENN SHEEDER by shooting at him with a dangerous weapon, to wit; a pistol.

CHARGE II: Violation of the 96th Article of War. (Nolle Prosequi by appointing authority.)

Specification: (Nolle Prosequi by appointing authority.)

He pleaded not guilty to and was found guilty of Charge I and its Specification. 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 two (2) years. The reviewing authority approved the sentence, remitted the confinement adjudged and purported to suspend, pending good behavior, the sentence to dismissal and total forfeitures except so much as provides for forfeiture of $100.00

per month for six (6) months, and purported to direct the execution of the sentence as thus modified. Inasmuch as the reviewing authority did not have the authority to order the execution of the sentence to dismissal under Article of War 48, he did not have the authority to suspend the execution of the sentence to dismissal and total forfeitures under either Article of War 51 or Article of War 52. The reviewing authority's purported action is treated by the Board of Review as a recommendation to the confirming authority that the sentence to dismissal and total forfeitures be suspended during good behavior.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Third United States Army Judge Advocate dated 26 September 1946.

4. The accused is 46 years of age, married, and has two children. War Department records show that he is a graduate of the Washburn College Law School and has practiced law in Topeka, Kansas, since 1923. During World War I he served as a private in the 130th Field Artillery, 35th Division. He held a commission as a second lieutenant, Infantry Reserve from 1924 until 1928. He was commissioned a first lieutenant, Army of the United States and assigned to the Corps of Military Police on 13 June 1942. He was appointed captain, Army of the United States on 10 March 1944 and major, Army of the United States on 31 December 1945. He attended the Provost Marshal General's School and took the Service Staff Course at Command and General Staff School in 1944. Since March 1945 the accused has served as a War Crimes Investigating Officer and was assigned successively to 12th Army Group, Seventh Army, Third Army, and United States Forces European Theater. All of his efficiency ratings are either excellent or superior.

5. No communications pertaining to clemency are attached to the record of trial. However the review of the Staff Judge Advocate contains the following statement:

> "Twenty enlisted men and civilian employees of the War Department in the Ludwigsburg Detachment of War Crimes Group submitted a plea for clemency, stating that the accused has always conducted himself in such a manner as to command complete respect and admiration of those officers and enlisted men working with him. Another petition for clemency was submitted by Major John W. Brooks and Mr. Noel E. Story, counsel for the defense. Col. C. E. Straight, Deputy Theater Judge Advocate for War Crimes, submitted a plea for clemency, stating that at all times prior and at all times subsequent to the alleged incident the accused has conducted himself as an officer and a gentleman. He further stated that the accused has performed faithful and effective service in connection with war crimes operations in this Theater."

As indicated above the reviewing authority's action, wherein he purported to suspend pending good behavior the sentence to dismissal and total forfeitures except so much as provides for forfeiture of $100.00 per month for six (6) months is regarded as a recommendation to the confirming authority that the sentence be thus modified.

6. 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 total forfeiture are authorized upon a conviction of a violation of the 93rd Article of War.

A. H. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Thomas J. Smith, Judge Advocate

JAGH - CM 317485

FEB 2 1947

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 Major Keene Saxon (0206497), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of assaulting an enlisted man with intent to do him bodily harm by shooting at him with a pistol, in violation of Article of War 93. 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 two (2) years. The reviewing authority approved the sentence, remitted the confinement, purported to suspend, pending good behavior, the sentence to dismissal and the total forfeitures except so much as provides for forfieture of $100.00 per month for six (6) months, and purported to direct the execution of the sentence as thus modified. Inasmuch as the reviewing authority did not have authority to suspend the execution of the sentence to dismissal, nor to order the execution of the sentence as modified, his action is regarded as a recommendation for clemency.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the law and the evidence in the case. 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.

During the night of 7 June 1946 two enlisted men, Technician Fifth Grade Lussier and Private First Class Sheeder, were driving a semi-tractor on a narrow by-pass in the vicinity of Stuttgart, Germany. They had left a trailer loaded with small arms ammunition at a transient billet and were looking for a place to eat. They approached an open passenger car with the top down driven by the accused and attempted to pass it on the left. The accused pulled to the left thus forcing the two enlisted men to halt the semi-tracter. The accused who appeared to have been drinking, left his car, holding his pistol in his hand, and demanded to see the soldiers' travel orders. After examining the papers the accused put them in his pocket. A discussion ensued and the accused told the enlisted men that he would follow them to Stuttgart and arrange to get them something to eat. They turned back toward Stuttgart and after they reached the "autobahn" the accused drove alongside the semi-tractor and signaled for the two soldiers to stop by blowing his horn, whereupon both vehicles came to a halt.

The accused remained seated in his car and shouted for the men to get out, which they did. The accused pointed his gun at the soldiers and demanded the pistols which they were wearing. An argument ensued during the course of which the accused cocked his pistol without pulling the slide back. The gun discharged near Sheeder's face. Sheeder jumped over the side of the car and seized the accused's right hand. During the struggle the pistol again was discharged as it was pointing downward, wounding the accused in the leg. Sheeder forced the accused to release his gun and then struck him in the face two or three times, took the two pistols which the accused had taken from the two soldiers, and jumped out of the car as the accused started to drive away.

In his own behalf, the accused testified that he stopped the semi-tractor without a trailer because he was suspicious of the circumstances. After the two enlisted men had explained that they had left their trailer at a transient billet and were looking for a place to eat, he ordered them to proceed to Stuttgart where he intended to check on their story and arrange to get them something to eat. He followed the semi-tractor but en route he became suspicious that the men were not leading him back to their equipment. He halted the tractor on the "autobahn" and when the two soldiers had dismounted he asked them twice where their trailer was located but they did not answer. He did not ask the men to surrender their weapons and he kept his pistol in his holster. Sheeder struck the accused in the mouth and accused then attempted to draw his pistol. Sheeder leaned over the door and they grappled for it. Both Sheeder and the accused were holding the gun when it discharged. The weapon was jerked out of accused's hand, and when he realized he was free he drove off.

The court was presented with two versions of the incident, both of which were plausible, and elected to believe the version given by the two enlisted men.

4. No communications pertaining to clemency are attached to the record of trial. The Review of the Staff Judge Advocate, however, contains the following statement:

> "Twenty enlisted men and civilian employees of the War Department in the Ludwigsburg Detachment of War Crimes Group submitted a plea for clemency, stating that the accused has always conducted himself in such a manner as to command complete respect and admiration of those officers and enlisted men working with him. Another petition for clemency was submitted by Major John W. Brooks and Mr. Noel E. Story, counsel for the defense. Col. C. E. Straight, Deputy Theater Judge Advocate for War Crimes, submitted a plea for clemency, stating that at all times prior and at all times subsequent to the alleged incident the accused has conducted himself as an officer

and a gentleman. He further stated that the accused has performed faithful and effective service in connection with war crimes operations in this Theater."

As indicated above the reviewing authority's action, wherein he purported to suspend pending good behavior the sentence to dismissal and total forfeitures except so much as provides for forfeiture of $100.00 per month for six (6) months is regarded as a recommendation to the confirming authority that the sentence be thus modified.

5. In view of all the circumstances of this case including the recommendation for clemency, the reviewing authority's action and the accused's excellent previous record, I recommend that the sentence be confirmed, but that so much of the sentence to forfeitures be remitted as is in excess of a forfeiture of one hundred dollars ($100.00) per month for three (3) months, and that the sentence as thus modified be carried into execution, but that the portion thereof adjudging dismissal be suspended during good behavior.

CM 317485

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 98, March 18, 1947).

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

JAGH - CM 317526 04 FEB 1947

UNITED STATES	)	WESTERN BASE SECTION
v.	)	Trial by G.C.M., convened at Paris, France, 25 and 26 July 1946. To be hanged by the neck until dead.
Private First Class JOHN D. McCLELLAN (33674374), Company G, 291st Infantry Regiment	)	

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

1. The record of trial in the case of the above-named soldier 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 92nd Article of War.

Specification: In that Private First Class John D. McClellan, Company G, 291st Infantry Regiment, United States Forces, European Theater, did, at or near Chateau Coupigny, France, on or about 3 September 1945, forcibly and feloniously, against her will, have carnal knowledge of Dolores Selembier.

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

Specification 1: In that Private First Class, John D. Mc Clellan, Company G, 291st Infantry Regiment, United States Forces, European Theater, did, at or near Suippes, France, on or about 16th September 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Heidelberg, Germany, on or about 21 October 1945.

Specification 2: In that Private First Class, John D. Mc Clellan, Company G, 291st Infantry Regiment, United States Forces, European Theater, did, at or near Mannheim, Germany, on or about 29 October 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 21 December 1945.

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

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

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

Specification: In that Private First Class, John D. Mc Clellan, Company G, 291st Infantry, having been duly placed in confinement in the Paris Detention Barracks on or about 23 January 1946, did, at Paris, France, on or about 31 January 1946 escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. 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 disapproved the findings of guilty of Charge III and its Specification, approved the sentence and forwarded the record of trial for action under Article of War 48.

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

a. As to Charge I and its Specification: On the night of 2-3 September 1945, the accused and another soldier attended a dance at Mareuil en Brie, which is about three miles from Chateau Coupigny (R 20, 23, 29, 33). They had a jeep and were giving rides to the boys (R 34, 51). Between 0100 and 0230 hours, Andre Germe left the dance (R 21). While walking toward Orbais L'Abbaye, he overtook Dolores Salembier and Christianne Bernier, both of whom had also been to the dance and were walking home (R 21, 27, 29, 41). The three had walked together for about 80 meters when an American jeep stopped in front of them (R 21, 29). The accused was driving the jeep and was accompanied by another soldier (R 21, 29, 30, 98) and the pair asked the three young people if they wanted a ride (R 22, 29). The girls entered the jeep voluntarily (R 23), but when Andre Germe started to step in, the soldiers pushed him back (R 22, 30, 46). Dolores, who is about four feet, seven and one-half inches tall, entered the jeep first, followed by Christianne (R 30, 51). All four sat in the front seat, with Dolores sitting next to the driver (accused) and Christianne next to the other soldier, who was taller than the accused (R 30-31, 45, 48-49). The soldiers asked Christianne and Dolores their ages (R 46), to which Dolores replied that she was thirteen years old and Christianne gave her age as

eleven (R 46). Dolores testified that "they put their hands to our inners" (R 46, 98) and Christianne that the tall soldier tried to put his hand between her legs, but she pushed it back (R 98). They then drove to Chateau Coupigny, where accused made Dolores get out of the jeep (R 31, 46). Accused took Dolores away from the jeep and held her (R 31-32), although she attempted to release herself and shouted in a loud voice (R 32). When accused put her on the ground, she pushed him and struggled to defend herself. She testified that "After that he came in by the leg of my pants * * * putting his penis in my vagina" and that she screamed (R 47). Christianne was being held by the taller soldier (R 48-49), who tried to make her fold her legs, but she stiffened herself, struggled and escaped (R 48, 100). The taller soldier then held Dolores' arms and put his hand on her mouth, while accused raped her. Accused struck her (R 48). Dolores was then raped by the taller soldier, after which accused raped her again. She was raped three times (R 49). While it was happening, the lights of the jeep were off (R 55). Dolores then picked up her shoe and ran away (R 49). She saw the taller soldier vomiting. He was falling asleep, and accused was shaking him (R 62). She hid behind a wall until the accused and the taller soldier drove away (R 49-50, 55). She then went home (R 50), arriving at about 0345 hours on 3 September, and told her mother she had been "taken" by two Americans (R 41). At that time, she "was full of blood with blue spots on the face and on the thighs" (R 42). The blood was "in her pants up to the waist" (R 42) and she had a cut inside her mouth (R 50) and was weeping (R 42). Her mother washed her and put her to bed. The next day, she saw a doctor, who sent her to a hospital, where she remained for about three weeks (R 50).

It was stipulated by the prosecution, the defense and the accused that if Doctor Andre Broutin, a physician practicing at Orbais L'Abbaye, were present, he would testify that he examined Dolores Salembier on 3 September 1945; that his examination revealed that the girl was a virgin prior to the incident which occurred shortly before his examination; that he found extensive and serious bruises at the opening of the vulva and peri-vaginal lacerations, one of which reached almost to the anus, and that at the opening of the anus there was an anterior tear and lesions of the sphincter (R 17, 65; Pros Ex 4).

In a voluntary pre-trial statement, which was properly admitted into evidence, the accused stated he attended a dance about 4 September 1945 and drank heavily of cognac and champagne. While driving back to camp, he and his companion passed two French girls, stopped and picked them up. One of the girls sat on accused's lap and the other sat between accused and his companion. The latter, who was driving, parked the jeep in a lane near some woods. When they stopped, the girl who was sitting on accused's lap jumped from the jeep and ran. The driver took the other girl out into a field. She did not return to the jeep. When accused got out of the jeep, he was sick and vomited. When the driver returned, he helped accused into the jeep and they returned to camp (R 67; Pros Ex 5).

b. As to Specification 1, Charge II: By duly authenticated extract copies of morning reports, properly admitted in evidence over the objection of the defense, (R 15) it was shown that accused absented himself without leave on 16 September 1945 (R 15; Pros Ex 2, 3). In his pre-trial statement, accused admitted that he went absent without leave on 14 September 1945 and was apprehended in Heidelberg on 20 October 1945 (R 67; Pros Ex 5).

c. As to Specification 2, Charge II: An extract copy of the guard report of the Seventh Army Stockade, showing that, on or about 1 November 1945, accused escaped from that stockade, was offered in evidence and admitted over objection by the defense (R 13; Pros Ex 1). A CID agent testified that, on 21 December 1945, he apprehended the accused in London, at which time accused was dressed in civilian clothes, but said he was a soldier (R 17-18, 65). In his pre-trial statement, accused admitted that he escaped from the Seventh Army Stockade on 29 October 1945, went to Munich and thence to London, where he was apprehended after working for about two weeks, and that the civilian clothing he was wearing was purchased second-hand in London (R 67; Pros Ex 5).

d. As to the Additional Charge and its Specification: On or about 10 January 1946, accused was placed in confinement at the Paris Detention Barracks (R 16). On 31 January 1946, accused escaped from confinement in the company of six other prisoners (R 11).

4. After having been properly advised of his rights as a witness, the accused elected to be sworn and testified that he is twenty-six years of age (R 69), married, and has three children (R 70). He completed two and one-half years of high school and attended night school for about five months (R 70). Prior to entering the service, he lived in Pittsburgh, Pennsylvania, where he worked as an electric crane operator in a steel mill (R 69-70). He entered the service on 12 June 1943 and went overseas on 15 July 1944, going to France in August 1944 (R 70). He is entitled to four campaign stars, and has never been tried by court-martial before, nor been in trouble, either as a civilian or as a soldier (R 71). While at Camp Baltimore, accused was permitted to use a jeep (R 71). On or about 29 August 1945, a Mlle Fety, who lived in Orbais and whom accused knew well, asked him to attend a dance at Orbais three or four days later (R 72). At about 1700 hours on the night of the incident, accused and an acquaintance named Lennie drove to Orbais by jeep (R 72-73). They were unable to locate Mlle Fety (R 72). After drinking heavily of champagne, wine, schnapps, and cognac (R 72-73), they went to the dance at Mareuil, three and one-half kilometers from Orbais. They went back to Orbais, but were still unable to find Mlle Fety, so returned to Mareuil, and at 0130 hours started back to camp (R 73). On the way back, and after they had gone about two miles from Mareuil, they changed places and Lennie drove (R 73-74, 94). Both of them were drunk (R 74). On the way from Mareuil to Orbais, they passed

some children. Lennie stopped the jeep, backed up to the children and asked them to get in the car (R 74, 90). The two girls got in voluntarily, and all four sat in the front. Lennie drove away before the boy who accompanied the two girls was able to get in the jeep (R 74). Accused heard no question as to the ages of the girls, but speaks almost no French (R 82, 87). He kept his hand on the windshield in order to keep the girl who was sitting on his knees from falling out (R 74, 85, 88). Accused was surprised when Lennie did not make a turn in the highway, but went on a small road (R 74). He saw Lennie and Dolores go about five or six yards from the jeep and heard her shout in protest (R 75, 82). He saw Lennie and the girl on the ground, but heard no further shouts, only conversation (R 75, 82,83). The girl with accused got out of the jeep, but accused held her by the wrist (R 86) until she tried to get away, and accused let her go and she went away (R 75, 86, 90). He sat down beside the jeep and tried to vomit but was unable to do so. Later, he heard Lennie calling him (R 75). As he was going toward Lennie, accused stumbled over a rut and fell, losing consciousness for fifteen or twenty minutes (R 75, 86, 92). He was wakened by Lennie, who shook his shoulder and flashed a light in his face (R 75). Lennie helped him back in the jeep and they drove back to camp (R 75-76, 86). Lennie stated that the girl was a virgin and he was surprised to have found one in France (R 76). Accused knew that the victim had not acquiesced, at least at first (R 76, 83), but Lennie stated that she had consented after the first time (R 76). At the camp, accused and a Sergeant DeGesso saw Lennie with blood on his trousers. Accused was told by a CID agent that accused's shorts had been found in his barracks bag and that a laboratory test showed the blood on them to be identical with that on Dolores' underclothing (R 84, 94). The blood on accused's shorts was the result of having had intercourse with Mlle Fety while she was menstruating, or from a cut on his foreskin during such intercourse (R 85, 96). The accused did not have intercourse with Dolores (R 86-87) nor did he place his hand on her person in any way (R 88). He did not place his hand over her mouth (R 92). Accused worried about the case, became sick and went to the hospital (R 78). Lennie urged accused to "go over the hill," which he did, agreeing to stay "AWOL" for six months, so Lennie could be redeployed. Accused went to Germany and was apprehended in Heidelberg, from where he was sent to the Seventh Army Stockade at Mannheim (R 78). He escaped from the stockade and went to Frankfurt (R 79). On 28 November 1945, he went to Antwerp, and from there to England, where he got a job in London as a carpenter. He had been in London about twelve days when he was picked up. He was then confined in the Paris Detention Barracks, and sent to the hospital for treatment of syphilis. Two days after he returned from the hospital, he escaped from the Paris Detention Barracks by dropping over a wall (R 79). He returned to England and was picked up by the British CID as an American deserter (R 80). While in England, he used the name William M. Wright (R 88).

Mlle Fety testified that she became accused's mistress, after meeting him about a year before the trial, and saw him often prior to 15 September (R 95). In the early part of September she had intimate relations with him. On one such occasion she was menstruating, and on that occasion, accused was wearing khaki shorts, but she did not notice whether or not the shorts became soiled with blood (R 96).

5. The Specification of Charge I avers that the accused raped Dolores Salembier.

Rape is the carnal knowledge of a female by force and without her consent (MCM, 1928, par 148b).

Concerning the use of force and lack of consent, the victim stated that the accused and another soldier attacked her, held her by the arms, took her into a field, where each had carnal knowledge of her against her will. She testified that she tried to scream and call for help but was prevented from doing so by one of the soldiers placing his hand over her mouth. The testimony of the victim's mother regarding the victim's appearance and the condition of her clothing on her return home shortly thereafter, all corroborate the testimony of the victim that she did not consent and that in the accomplishment of the act by the accused, force was employed. It appears that she resisted to the extent of her ability under the circumstances.

The medical testimony as well as the testimony of the victim sufficiently proved that penetration of the vagina was effected. The violence visited upon the victim necessitated medical treatment for a period of about three weeks.

The victim's identity of the accused as her assailant was corroborated by the testimony of the victim's twelve and one-half year old companion who saw accused force her away from the jeep in which they both had been riding.

Accused admitted having been at the scene of the crime with another soldier, but denied having committed the crime. He testified that the soldier with him was on the ground with the victim about five or six yards away. In going toward them, he stumbled and fell, losing consciousness for approximately fifteen or twenty minutes. The victim, however, testified that both the accused and his companion raped her.

The only defense offered by the accused was that of mistaken identity. His testimony was that the victim of the assault was confused in her identification of the soldier who had assaulted her. He told a fantastic tale of a soldier known to him only as "Lennie," who, as a casual acquaintance, accompanied the accused on the night in question. According to the accused, it was Lennie who committed the crime, but the accused was persuaded by Lennie's pleas to desert, thereby attracting attention to himself as the

guilty party and permitting Lennie to be redeployed and discharged. That any person would so jeopardize himself for a casual acquaintance is incredible, and in view of the positive identification by the victim of the assault, together with the equally positive testimony of her companion that the accused, and not Lennie, was driving the jeep when it stopped to pick up the two girls, it must be concluded that the story was conceived by the accused as a convenient fiction, designed to confuse the court.

Although the accused testified that he was under the influence of alcohol during the night in question, the facts disclose that he was capable of driving, talking, walking, of handling the girl, and of physically accomplishing all the acts involved in the offense as shown. His testimony indicates that he remembered in great detail all of the events before and after the rape. All of the facts indicate that accused was not so intoxicated as not to know what he was doing. The law is well settled that voluntary drunkenness does not constitute an excuse for the crime of rape and does not destroy the responsibility of the accused for his misconduct (1 Wharton's Criminal Law (12th Ed) sec 66, p 95, CM 298814, Prairichief (21 BR (ETO) 129, 134)).

Accordingly the Board of Review is of the opinion that the accused's guilt of rape is established by clear and convincing evidence.

6. Specification 1, Charge II avers that the accused deserted the service of the United States at Suippes, France, on or about 16 September 1945 and that he remained absent in desertion until he was apprehended at Heidelberg, Germany, on or about 21 October 1945.

The desertion alleged in the specification is established by extract copies of morning reports, by the pre-trial statement of the accused, and by his testimony at the trial. Accused testified that he left because he was suspected of a crime, that he agreed with "Lennie" to remain away for six months in order that the latter might have an opportunity to be redeployed, and that "Lennie" gave him money to assist him in escaping. These facts, together with his apprehension in another country, at a considerable distance, furnish ample proof from which the court could infer an intent to remain away permanently.

Specification 2, Charge II avers that the accused deserted the service of the United States at or near Mannheim, Germany, on or about 29 October 1945, and that he remained absent in desertion until he was apprehended in London, England, on or about 21 December 1945.

The prosecution attempted to establish the initial absence by Prosecution Exhibit 1, an extract copy of the guard report of the Seventh Army Stockade which was admitted in evidence over objection by the defense. It showed that on or about 29 October 1945, accused was confined in the Seventh Army Stockade and that on or about 1 November 1945, he escaped from confinement. The extract copy is authenticated by Second Lieutenant Frank B. Pataky,

who certified that he is the personnel officer of the Seventh Army Stockade. He did not certify that he was the legal custodian of the guard report. In the absence of a showing that Second Lieutenant Pataky was the official custodian of the guard report, the extract copy thereof was improperly admitted over objection (MCM, 1928, par 116b, p 120).

However accused's guilt of desertion was otherwise satisfactorily established by the testimony of the apprehending officer who on 21 December 1945, apprehended the accused in London, while accused was dressed in civilian clothes, the accused's confession wherein he stated "I was sent to 7th Army Stockade at Mannheim from which I escaped on 29 October 1945" (Pros Ex 5) and by accused's testimony in his own behalf (R 79). The duration of accused's absence, his apprehension in London while dressed in civilian clothes and his admitted activities during the period involved, support the inference of intent not to return.

7. The Specification of the Additional Charge avers escape from confinement on or about 23 January 1946.

On or about 10 January 1946 the accused was confined in the Paris Detention Barracks.

Ample proof of the escape from confinement alleged in the Additional Charge and its Specification was furnished by the testimony of the Prison Officer and the First Sergeant of the Paris Detention Barracks. This offense, also, was admitted by the accused in his testimony (R 79).

8. The defense objected to the shackling of the accused during the trial (R 10), but the court ruled that one hand should remain shackled to the chair. During the time that the accused was on the stand, he was unshackled. It appears from the review of the staff judge advocate that the trial was held within the confines of the Paris Detention Barracks, and it was therefore not permissible for the court-room to be protected by armed guards. While it is the general rule that an accused should not appear before the court in irons, such restraint is permissible where there is "reasonable apprehension of an attempt to escape" (Winthrop's Military Law and Precedents, 2nd Ed (1920 Reprint), p 169). Inasmuch as the accused testified that he had twice escaped from confinement, it can hardly be said that the court erred in taking precautions against a third such incident. The Board of Review is, therefore, of the opinion that the shackling of the accused was reasonable and proper, and did not constitute a violation of his substantial rights.

9. The accused is 27 years of age, married, and the father of three children. The accused testified that he completed two and one-half years of high school and attended a night school for about five months. Prior to entering the service he lived in Pittsburgh, Pennsylvania, where he worked as an electric crane operator in a steel mill and as a brakeman on a railroad. He was inducted on 12 June 1943 and went overseas on 15

July 1944, going to France in August 1944. He is entitled to four campaign stars.

10. The Board of Review has given careful consideration to accused's request for clemency dated 30 July 1946, addressed to the reviewing authority and to his request for a rehearing dated 5 August 1946, addressed to the Commanding General, United States Army Forces, European Theater and which was forwarded to the reviewing authority, before he took his action. The Board has also given consideration to the following communications pertaining to clemency: letter from Mr. and Mrs. Gus McClellan, Whitaker, Pennsylvania, parents of the accused, postmarked 7 August 1946; copy of an undated letter from Mr. and Mrs. Gus McClellan, addressed to the President, and letter from Mrs. Ada L. McClellan, Whitaker, Pennsylvania, wife of the accused, and inclosures thereto which were transmitted through The Adjutant General's Office.

11. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and to support the 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.

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip A. Smith, Judge Advocate

JAGH - CM 317526 1st Ind

WD, JAGO, Washington 25, D. C. MAR 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 First Class John D. McClellan (33674374), Company G, 291st Infantry Regiment.

2. Upon trial by general court-martial, the accused was found guilty of rape of a 13 year old French girl, in violation of Article of War 92; of desertion from 16 September 1945 to 21 October 1945 and from 29 October 1945 to 21 December 1945, in violation of Article of War 58; and of two offenses of escape from confinement, in violation of Article of War 69. He was sentenced to be hanged by the neck until dead. All members of the court present at the time the vote was taken concurred in the sentence. The reviewing authority disapproved the findings of guilty of one of the offenses of escape from confinement (Charge III and Specification), approved the sentence and forwarded the record of trial for action under Article of War 48.

3. After trial, the accused requested a new trial, on the grounds that he was improperly and inadequately defended. He attacked his defense counsel as unprepared, inexperienced and incapable; complained that he was not assigned the defense counsel he requested, was not permitted to testify to some facts which would have been in his favor, that witnesses requested by him were not produced; and alleged bitter feelings between the trial judge advocate and defense counsel, which resulted in the accused "being used as a pawn in a game between them." He also stated that his defense counsel did not object to the accused being kept shackled throughout the trial. These complaints were carefully investigated by the reviewing authority, and the report of that investigation, attached to the record of trial, shows that they were without foundation.

4. Careful consideration has been given to accused's request for clemency dated 30 July 1946, addressed to the reviewing authority and to his request for a rehearing dated 5 August 1946, addressed to the Commanding General, United States Army Forces, European Theater and which was forwarded to the reviewing authority, before he took his action. Consideration has also been given to the following communications pertaining to clemency: letter from Mr. and Mrs. Gus McClellan, Whitaker, Pennsylvania, parents of the accused postmarked 7 August 1946; copy of an undated letter from Mr. and Mrs. Gus McClellan, addressed to the President; and letter from Mrs. Ada L. McClellan, Whitaker, Pennsylvania, wife of the accused, and inclosures thereto which were transmitted through The Adjutant General's Office.

5. The rape committed by the accused was violent and brutal and the resultant injuries required hospitalization of the victim, a girl of 13 years of age, for a period of three weeks. Accused was apparently drunk. 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 accused, that the sentence as thus commuted be carried into execution, and that a United States penitentiary be designated as the place of confinement.

6. 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 the recommendation into effect, should it meet with your approval.

CM 317526

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Draft ltr for sig S/W
3 - Form of action

(G.C.M.O. 134, April 16, 1947).

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

JAGK - CM 317535

20 NOV 1946

UNITED STATES	CONTINENTAL DIVISION AIR TRANSPORT COMMAND
v.	Trial by G.C.M., convened at Long Beach Army Air Field, Long Beach, California, 16 September 1946. Dismissal.
First Lieutenant IRVING J. WEILERT (O-691426), Air Corps	

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 61st Article of War.

Specification: In that First Lieutenant Irving J. Weilert, Squadron "B", 556th Army Air Force Base Unit, did, without proper leave absent himself from his Station at Long Beach Army Air Field, Long Beach, California, from about 25 June 1946 to about 18 July 1946.

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

Specification 1: In that First Lieutenant Irving J. Weilert, ***, did, Burbank, California, on or about 22 June 1946, with intent to defraud, wrongfully and unlawfully make and utter to Ladd's Cocktails, Burbank, California, a check in words and figures as follows, to wit:

Long Beach, California, June 22 1946 No.

Long Beach Branch
Security - First National
Bank of Los Angeles
102 Pine

90-115
12

Pay to the order of
Cash - - - - - - - - - - - - - - $10.00
100
Ten and no/100 - DOLLARS

556th AAFBU
Long Beach

s/Irving J. Weilert
1st Lt A.C. O-691426

and by means thereof, did fraudulently obtain from said Ladd's Cocktails $10.00, he, the said First Lieutenant Irving J. Weilert, then well knowing that he did not have and not intending that he should have sufficient funds on deposit in the Long Beach Branch, Security-First National Bank of Los Angeles, Long Beach, California, for the payment of said check.

NOTE: Specifications 2 to 25 inclusive differ materially from Specification 1 only in the date, amount and person receiving the check as indicated below.

Spec.	Date of Check	Amount of Check	Person receiving check
2	4 July 1946	$ 20.00	Ladd's Cocktails, Burbank, Calif.
3	3 July 1946	20.00	" " " "
4	26 June 1946	10.00	" " " "
5	25 June 1946	10.00	" " " "
6	25 June 1946	10.00	" " " "
7	27 June 1946	10.00	" " " "
8	27 June 1946	20.00	" " " "
9	26 June 1946	10.00	" " " "
10	28 June 1946	20.00	" " " "
11	30 June 1946	20.00	" " " "
12	1 July 1946	20.00	" " " "
13	29 June 1946	20.00	" " " "
14	5 July 1946	60.00	Winstead Market, Burbank, Calif.
15	11 July 1946	25.00	" " " "
16	9 July 1946	20.00	" " " "
17	24 June 1946	20.00	Long Beach AAF Post Exchange
18	27 May 1946	10.00	Ambassador Grill, Long Beach, Calif.
19	30 May 1946	40.00	" " " " "
20	25 May 1946	5.00	" " " " "
21	25 May 1946	5.00	" " " " "
22	21 May 1946	25.00	Jack Lasley's, Long Beach, Calif.
23	18 May 1946	25.00	" " " " "
24	14 June 1946	10.00	6th Ferring Group Officers Mess, Long Beach, Calif.
25	10 June 1946	120.00	Laurence Jeweler's, Long Beach, Calif.
26	(Finding of not guilty.)		

He pleaded guilty to the specification and Charge I and guilty to each specification of Charge II except the words "with intent to defraud" and "Fraudulently" and guilty to Charge II. The court directed that the plea of "guilty" to Specification 26, Charge II, be changed to "not guilty." He was found guilty of the Specification and Charge I, guilty of Specifications 1 to 25, inclusive, Charge II and Charge II, and not guilty of Specification 26, Charge II. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provided

for dismissal from the service and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

As to the Specification and Charge I.

The accused was absent without leave from his station at Long Beach, California, from 25 June 1946 to 18 July 1946 (Pros. Ex. 1).

As to Specifications 1 to 26, inclusive, of Charge II and Charge II.

It was stipulated that the accused executed and delivered the checks described in Specifications 1 to 26, inclusive, Charge II, to the persons alleged therein and that at the time of issuing these checks the accused maintained a bank account with the Bank of America, Cherry and Anaheim Branch, Long Beach, California. On 1 April 1946 the account contained $56.56 and until 5 April 1946 contained more than $50.00, from 6 April 1946 to 11 April 1946 less than $30.00 and on 8 May 1946, $6.56 (R.25). In April 1946 the accused also had a banking account with the Security First National Bank of Los Angeles, which account was without funds on 7 May 1946, but reopened 19 June 1946 with a balance of $142.00. This account was reduced to $6.00 the next day, after which it remained below $50.00 until closed 10 August 1946 (Pros. Exs. 29,30). The prosecution produced witnesses who identified each check and who stated that each check was returned from the bank not paid. The check relative to each specification and the page wherein it was introduced into evidence is as follows:

Spec. No.	Page where check was introduced in evidence.	Exhibit No.
1	45	11
2	46	12
3	47	13
4	48	14
5	48	15
6	49	16
7	50	17
8	50	18
9	50	19
10	50	20
11	50	21
12	50	22
13	50	23
14	40	8
15	42	9
16	42	10
17	30	4

18	60	24	
19	60	25	
20	60	26	
21	60	27	
22	36	6	
23	36	7	
24	64	28	
25	32	5	
26	27	3	(Finding of not guilty.)

The check described in Specification 26 was drawn on the Bank of America. Those described in Specifications 1 to 25 inclusive were drawn on the Security-First National Bank of Los Angeles, Long Beach Branch. The checks varied in amount between $5.00 and $120.00 and totaled $565.00.

4. For the defense.

By cross-examination of witnesses, produced by the prosecution, the defense established that prior to trial the accused had paid or made good each check.

The accused elected to be sworn as a witness and testified that he enlisted 30 September 1943 at the age of nineteen years. He was sent to Fort Niagara for basic training and later transferred to Mitchel Field, Long Island. Upon being selected to be a flying cadet he was sent to San Antonio, Texas, for classification and completed cadet training on the Gulf Coast. After graduation he was sent to the Second Air Force phase training in B-24's. He went to the European Theater of Operations in November 1943 and was based in Italy, where he flew seventeen missions as a co-pilot and thirty-three missions as a first pilot. On 5 June 1944 he was promoted to first lieutenant. He signed Category I and applied for a commission in the regular Army (R. 95,96). War Department AGO Form 66-2 shows that the accused is entitled to wear the American Theater ribbon, 1 overseas stripe for ten months overseas service, the Distinguished Flying Cross, the Air Medal with five Oak Leaf Clusters and the EAME ribbon with two bronze stars. (Def. Ex. A).

5. The accused pleaded guilty to absence without leave from 25 June 1946 to 18 July 1946. This fact was also shown by extract copies of the morning report from his organization.

Specifications 1 to 25 inclusive of Charge II allege that with intent to defraud accused wrongfully and unlawfully issued the described checks fraudulently obtaining money thereby, well knowing that he did not have and not intending to have sufficient funds in the drawee bank for the payment of same. He pleaded guilty to these specifications except the words "with intent to defraud" and "Fraudulently." By this plea the accused admitted drawing the checks and obtaining money thereby wrongfully and well knowing and not intending to have sufficient funds to pay the same.

The question as to whether accused at the time of issuance of the checks had the intent to defraud was one of fact for the sole determination of the court, and in view of the evidence, and of accused's complete indifference to the status of his banking account when he negotiated checks amounting to more than $500.00, the Board of Review is of the opinion that the finding by the court that he did have such an intent is fully warranted by substantial evidence (CM ETO 1803, Wright, 5 BR ETO 315).

5. War Department records show that the accused is 23 years of age and married. He enlisted in the Army Air Forces at Fort Niagara, New York, on 30 September 1942. After receiving the required preliminary training at various air installations he was at Randolph Field, Texas, on 30 August 1943 commissioned a second lieutenant, Air Corps (AUS). On 7 June 1944 he was promoted to first lieutenant. He has been awarded the Distinguished Flying Cross, the Air Medal with five Oak Leaf Clusters, and two Bronze Stars for the Italian Campaign and Air Offensive in Europe. Three efficiency ratings in his record show an average numerical rating of 3.13 or slightly above very satisfactory.

6. Three members of the nine-man court-martial and the defense counsel signed and attached to the record a recommendation for clemency requesting that the dismissal be disapproved and that a portion of the pay of the accused be forfeited for such period as may be deemed proper.

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 at 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.

Charles H. Silverb, Judge Advocate

On Leave, Judge Advocate

Gilbert E. Schmyd, Judge Advocate

JAGK CM 317535 1st Ind

WD, JAGO, Washington 25, D. C. DEC 2 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 First Lieutenant Irving J. Weilert (O-691426), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for 23 days in violation of Article of War 61 and of unlawfully and wrongfully issuing checks (25 specifications) with intent to defraud and obtaining money thereby knowing that he did not have and not intending that he should have sufficient funds in the drawee bank to pay said checks, in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provided for dismissal from the service 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 record shows that the accused was absent without leave from 25 June 1946 to 18 July 1946, a period of 23 days. Between 18 May 1946 and 11 July 1946 the accused wrote 25 checks in amounts ranging from $5.00 to $120.00, and in the aggregate amount of $565.00. These checks were returned by his bank unpaid. One check was to his local post exchange, one to the officers' mess, one to a jeweler, three to a grocery store, six to restaurants, and 13 to a cocktail bar. All checks were paid by the accused prior to trial.

4. Three members of the nine-man court-martial and the defense counsel recommended clemency and requested that the dismissal be commuted to a forfeiture of a portion of the accused's pay for an appropriate period.

5. The nature of the offenses of which accused was convicted is such that confirmation of the sentence is justified but in view of the youth of accused (23 years), and his very creditable combat record - he participated in 50 missions in the course of air operations in Italy

and Europe - I recommend that upon confirmation of the sentence the execution thereof be suspended during good behavior.

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

CM 317535

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 366, December 9, 1946)

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

MAR 31 1947

JAGQ - CM 317541

UNITED STATES v. First Lieutenant KARL K. KOCHENOUR (0-1058286), Air Corps.	UNITED STATES ARMY FORCES MIDDLE PACIFIC Trial by G.C.M., convened at APO 958, 4 October 1946. Dismissal.

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

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

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

Specification: (Finding of not guilty).

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

Specification: In that First Lieutenant Karl K. Kochenour, Headquarters United States Army Forces Middle Pacific, a married man, did at APO 957 on or about 3 September 1946, wrongfully have sexual intercourse with Georgia Hall, a woman not his wife.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge II, and of Charge II, and not guilty of the Specification, Charge I and of Charge I. No evidence of previous convictions was introduced at the trial. 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. The evidence for the prosecution in support of the Charge and the Specification of which the accused was found guilty may be summarized as follows:

On 3 September 1946, the accused was a married man and the father of two children (R 6, 7, 9; Ex. B). He was assigned to Quarters No. 106, Schofield Barracks, Territory of Hawaii, APO 957 (Ex. A). During December 1945 accused became acquainted with a Miss Georgia Hall, and this acquaintanceship grew into a deep attachment (R 21, 25; Ex. B). Miss Hall was a frequent visitor at accused's quarters prior to 3 September 1946. One witness testified that she either went there "quite often or else she resided there." (R 23). At about 2100 hours, 3 September 1946, the accused was in his quarters in the company of Miss Hall and another officer and his wife (R 6, 17). At about 2400 hours, 3 September 1946, Major Charles H. Fair, Provost Marshal, APO 957, accompanied by two other officers, two noncommissioned officers, and Mrs. Jane Kochenour, wife of the accused, entered Quarters No. 106. The party proceeded to the upper story and Major Fair opened the door to one of the bedrooms, and switched on the lights. The accused and Miss Hall, both nude, were lying in bed. Miss Hall was lying in the arms of the accused (R 8, 29). The two children of accused were lying on mattresses or blankets on the floor of a rear bedroom (R 9).

4. The only witness for the defense was Colonel E. P. Crandell, Adjutant General's Department, Army Forces Middle Pacific, APO 958. He testified that he had known the accused since June 1946, and that the accused had been working under his supervision, performing his duties in an outstanding manner. He further stated that the accused had been consistently rated "excellent" or "superior", and during the previous year all of his efficiency ratings had been "superior" (R 30). The accused remained silent, after explanation of his rights by the defense counsel (R 31).

5. The court accepted in evidence, over the objection of the defense, a written statement made by the accused on 4 September 1946 (R 9, 10; Ex. B). This statement sets forth that the accused married when he was nineteen, after having first lived with his wife in a common law status. He had much difficulty in keeping employed and his wife was often forced to work. For a long period he and his wife had had little love for one another, but remained married for the sake of the children. In December 1942 he enlisted in the Army and in September 1945 arrived in Hawaii. The accused's wife arrived in Hawaii in April 1946.

6. In the light of the evidence adduced in support of the specification and Charge II the action of the court in finding the accused guilty thereof was fully warranted. The accused was found in bed with a woman not his wife. Both were nude. "The act of sexual intercourse may be inferred from the man and woman occupying the same bed and room, occupying the same room, being seen together in bed, or being found partially disrobed in the same room." (2 C.J.S., sec. 24). The accused's wife and two young sons lived at the quarters when this offense occurred

and accused's amorous conduct toward Miss Hall around his quarters was observed by neighboring families. This act of sexual intercourse with a woman not his wife had escaped the bounds of private affairs and was conduct of a nature to bring discredit upon the military service.

7. The accused officer is 31 years of age, having been born on 26 December 1915 in Pennsylvania. He graduated from high school in Harrisburg, Pennsylvania, but did not attend college. He was employed from time to time by the Goodyear Tire and Rubber Co. as a shipping clerk, by the Harrisburg Steel Corporation as a sand blast operator, by a contracting company as a labor supervisor, and immediately prior to entry into military service by the Massachusetts Bonding and Insurance Company as an insurance adjuster. He was inducted into the military service on 7 December 1942. He attended the Antiaircraft Artillery Officers Candidate School, Camp Davis, North Carolina, and on 5 August 1943 was appointed a temporary Second Lieutenant, Army of the United States. His Army General Classification Test Score was 134. On 18 June 1945 he was promoted to First Lieutenant. He departed from continental United States on 30 August 1945 and arrived in Honolulu, T.H., on 10 September 1945.

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 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. Hume, Judge Advocate

Carlton E. Schenken, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 317541 1st Ind APR 8 1947

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 Karl K. Kochenour (O-1058286), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the offense of adultery (Charge II), 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 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 is a married man, with two children. He occupied public quarters at Schofield Barracks, Territory of Hawaii, with his wife and children. He had formed an attachment for a Miss Georgia Hall, a woman not his wife, and at about midnight, 3 September 1946, he and Miss Hall were found in bed in one of the bedrooms of his quarters. Both were nude. He was seen in this situation by a party of six people, including his wife.

5. His record as a civilian appears clear, and has been good while upon active military duty. The circumstances surrounding this offense, however, indicate a lack of suitable character for service as an officer. His conduct with Miss Hall previous to this offense had been the subject of comment among his neighbors and an enlisted man has recently been convicted by general court-martial of wrongfully having sexual intercourse in accused's quarters with accused's wife (CM 317542, Abramson). The accused appears to have been aware of his wife's conduct but took no action to stop it.

6. 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 145, May 2, 1947)*

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

JAGH - CM 317544

5 FEB 1947

UNITED STATES	)	CONTINENTAL BASE SECTION
v.	)	Trial by G. C. M., convened at Bad Nauheim, Germany, 13 August 1946. Dismissal
Captain JOHN L. STICKLEY (0-453549), Corps of Engineers	)	

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 95th Article of War.

Specification: In that Captain John L. Stickley, Headquarters, 343rd Engineer General Service Regiment, was, at or near Mannheim, Germany, on or about 25 May 1946, in the Enlisted Men's Club and public streets of Mannheim, Germany, drunk and disorderly while in uniform.

He pleaded guilty to the Specification and not guilty to the Charge, but guilty of a violation of the 96th Article of War. After the introduction of all the evidence, the pleas of guilty were withdrawn upon motion of the defense and pleas of not guilty to the Charge and its Specification were entered. He was found guilty of the Specification except the words "and public streets of" and not guilty of the Charge, but guilty of a violation of the 96th Article of War. Evidence of two 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 only so much of the sentence as provided for dismissal 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 the law contained in the review of the Continental Base Section Judge Advocate dated 24 September 1945.

4. The accused is 32 years of age, married and has one child. War Department records show that he is a high school graduate and that he attended Purdue University for two years, pursuing a Civil Engineering course. Prior to entering the Army he was in the insurance business. He was inducted in May 1941, and after attending the Engineer Officer Candidate School, he was commissioned a second lieutenant, Army of the United States, on 24 January 1942. He was promoted to first lieutenant on 12 June 1942 and to captain on 15 February 1943.

The accused was rated unsatisfactory as an assistant regimental S-2 for the period from 26 August 1944 to 29 September 1944. He was rated 3.4 (very satisfactory) as a personnel officer from 1 July 1944 to 31 December 1944.

On 17 November 1944 the accused was found guilty by a general court-martial of being disorderly in a public place while in uniform, of drinking with enlisted men and of behaving himself with disrespect toward a superior officer, all in violation of Article of War 96. He was sentenced to be reprimanded and to forfeit $150 of his pay for six months. The reviewing authority approved the sentence and ordered it carried into execution (GCMO # 43, Hq, Seventh US Army, 4 Dec 44).

On 30 October 1945 he was found guilty by a general court-martial of being drunk and disorderly while in uniform in violation of Article of War 96. He was sentenced to be reprimanded and to forfeit $100 of his pay for three months. The reviewing authority approved the sentence and ordered it carried into execution (GCMO # 1, Hq, Third US Army, 5 Jan 46).

On 29 April 1946 he was found guilty by a general court-martial of wrongfully striking a woman in the face with his fist and of being drunk while in uniform, in violation of Article of War 96. He was sentenced to pay the United States a fine of $1000. The reviewing authority approved the sentence and ordered it carried into execution (GCMO # 129, Hq, Third US Army, 19 Jul 46).

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting any substantial right 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 finding of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

A. Gottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 317544 1st Ind

WD, JAGO, Washington 25, D. C. FEB 26 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 John L. Stickley (O-453549), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in an Enlisted Men's Club in Mannheim, Germany, in violation of Article of War 96. Evidence of two 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 only so much of the sentence as provided 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 review of the Staff Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the law and the evidence in the case. 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.

The accused was the company commander of Company F, 343d Engineer General Service Regiment, stationed at Mannheim, Germany. On the evening of 25 May 1946 he entered the enlisted men's club of his company. He was drunk when he entered the club and after sitting at the club's bar for a time, he began to chastise the enlisted men for improper wearing of their uniforms. He seized them by their clothing and shook them vigorously. Eventually he challenged one of the enlisted men to go outside with him, presumably to engage in a fight in the presence of several soldiers and German civilians. A sergeant of the accused's company went to the officers' quarters and reported the accused's actions to a company officer. The latter went to the club where he observed the accused in a disheveled state and talking boisterously. He saw the accused seize an enlisted man by the shirt collar and shake him vigorously.

4. The accused has three previous convictions for similar offenses. Accordingly, I recommend that the sentence as modified by the reviewing authority be confirmed and 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.

CM 317544

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 73, March 10, 1947).

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

JAGK - CM 317562

9 JAN 1947

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Bamberg, Germany, 22 August 1946 and 4 September 1946. Sentence: To forfeit $100 of his pay per month for five months.
Captain LEONARD D. F. STAFFIERI (0-290053), Coast Artillery Corps.	)	

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

2. Accused was tried upon the following charges and specifications:

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

Specification: In that Captain Leonard D. F. Staffieri, Headquarters United States Constabulary, did, at Bamberg, Germany, between 15 April 1946 and 8 July 1946 unlawfully cohabit with Franziska Dill, a woman not his wife.

CHARGE II: Violation of the 94th Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to both charges and specifications. He was found guilty of the Specification of Charge I, except the words "unlawfully cohabit with Franziska Dill, a woman not his wife," substituting therefor the words "have illicit sexual relations with one Franziska Dill while she was employed by him in an official capacity, thereby bringing discredit upon the military service," and not guilty of Charge I but guilty of a violation of Article of War 96. He was found not guilty of Charge II and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to forfeit $200 of his pay per month for five months. The reviewing authority approved the findings except the words "while she was employed by him in an official capacity," approved the sentence but remitted so much thereof as is in excess of $100.00 per month for five (5) months, and ordered execution of the

sentence as thus modified. The result of trial was promulgated in General Court-Martial Orders No. 45, Headquarters, United States Constabulary, dated 14 October 1946.

3. For the purposes of discussion, it may be assumed that the evidence introduced by the prosecution, uncontradicted by the defense, was sufficient to establish that on at least five occasions accused was guilty of having illicit sexual relations with the woman with whom he was alleged to have unlawfully cohabited. The court, however, determined that it was insufficient to sustain the allegations of unlawful cohabitation, finding by exceptions and substitutions that the accused was guilty of the presumably lesser included offense of having illicit sexual relations. The question is therefore presented as to whether the offense of having illicit sexual relations is a lesser offense included in the charge of unlawful cohabitation. If illicit sexual intercourse is one of the elements of proof necessary for a conviction for unlawful cohabitation, then the court's finding may be upheld. Otherwise accused has been convicted of an offense not charged and not included in the one charged.

The word "cohabitation" is discussed in 14 Corpus Juris Secundum at page 1312:

> "COHABITATION. A derivative of 'cohabit,' with the same origin and large signification. Cohabitation may be lawful or it may be illicit, and, as sometimes employed, has a very disgraceful meaning. Also, it has been said that cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time, but that the term implies continuity; and in its usual sense implies some degree of publicity, since two persons cannot secretly live together. In its primary sense, the word has been defined as meaning the act or state of dwelling together, or in the same place with another, living together; and in its secondary sense, as meaning a living together as husband and wife, or as man and wife; living together, claiming to be married, in the relationship of husband and wife; a condition or status of the parties, a status resembling that of the marital relation; and in a particular connection, has been held to mean habitual concubinage or lying together. In particular connections, it has been said that the term does not simply mean the gratification of the sexual passion, but to live or dwell together, to have the same habitation, to live in the same house, and while, as commonly understood, the term implies sexual intercourse, it seems that sexual intercourse is not necessarily implied, as the word does not even include necessarily the occupying of the same bed."

In CM 254722, Grimstad, 35 BR 341, the Board of Review, in quoting from United States v. Musser (7 Pac. 389,390), said,

> "As defined by lexicographers, 'cohabit' means to dwell with

or to reside together. It may mean residing *** in the same family, or the dwelling together in lawful wedlock. This would be lawful cohabitation. Or it may mean the dwelling of a man and woman together ostensibly and apparently in wedlock, when, in fact or in law, no marriage exists; and, without proof of adultery or fornication, this would be unlawful cohabitation."

In the case of United States v. Cannon (7 Pac. 369, 4 Utah 122) the court said:

"The primary meaning of 'cohabit' is to dwell with, (con, with, and habere, to dwell;) and at the present day it is generally held to mean to dwell or live together as husband and wife, or to dwell or live together in the same company, place, or country.

* * *

"That learned author, Mr. Bishop, says that he knows of no legal authority or usage that would embrace sexual intercourse in the word 'cohabitation', ***. The authorities of the appellant on this point do not shake the position that cohabitation does not include sexual intercourse. The word does not even include necessarily the occupying the same bed."

And in Bishop v. Brittain Inv. Co. (229 Mo. 699; 129 S.W. 668) the court adopted Webster's definition of "cohabit" as follows:

"Defining 'cohabit' (Webster's New International Dict., tit. cohabit) we find the following: 'To dwell or live together as husband and wife. In the United States at the common law, marriage is presumed when a man and woman have cohabited permanently together, being reputed by those who know them to be husband and wife, and admitting the relationship.'"

and the court stated "The act of cohabiting does not necessarily imply coitus." (See conflict of authorities on this question in 7 Words & Phrases, pp. 557-559.)

It appears, therefore, that by the weight of authority, although illicit sexual intercourse may be implied, it is not necessary to show such relation in order to establish unlawful cohabitation. Illicit sexual relation or intercourse is therefore an offense separate and distinct from unlawful cohabitation (CM 211260, Grochwiak, 10 BR 50).

When a court by exceptions and substitutions finds an accused not guilty of the offense alleged but guilty of some other offense not necessarily included therein it, in effect, finds the accused guilty of an offense for which he was not brought to trial. It is, of course, fundamental that such action is illegal and such a finding can afford no basis for a sentence (CM 199063, Martin, 3 BR 323).

4. For the reasons stated the Board of Review holds the record of

trial legally insufficient to support the findings of guilty and the sentence.

Clinton D. Gilvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Fitzhugh, Judge Advocate

JAGK - CM 317562 1st Ind

WD, JAGO, Washington 25, D. C. JAN 4 1947

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 Captain Leonard D. F. Staffieri (O-290053), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty 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 the accused have 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. 26, February 3, 1947).

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington25, D. C.

JAGK - CM 317576

3 JAN 1947

UNITED STATES	EUROPEAN AIR TRANSPORT SERVICE (PROV)
v.	Trial by G.C.M., convened at Salzburg, Austria, 27, 28 and 29 August 1946.
First Lieutenant VINCENT C. FURAN (0-685313), Air Corps	Dismissal and confinement for one (1) year.

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

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 on the following charges and specifications:

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

Specification: In that 1st Lieutenant Vincent C. Furan, 442nd Troop Carrier Group, did at USAF STATION SALZBURG on or about 10 July 1946 feloniously and unlawfully kill Wilma Kurz by wantonly and recklessly operating and flying a certain United States Army airplane into and against her, thereby inflicting on her mortal wounds of which she did then and there die.

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

Specification 1: In that 1st Lieutenant Vincent C. Furan, ***, did at USAF STATION SALZBURG on or about 10 July 1946 in violation of AAF Regulation 60-22 wrongfully and without proper authority, take off and fly a government aircraft without filing a proper clearance.

Specification 2: In that 1st Lieutenant Vincent C. Furan, ***, did, at USAF STATION SALZBURG on or about 10 July 1946 wrongfully and without proper authority take as passengers in a government aircraft on two separate flights, Gudrun Kipper and Wilma Kurz, both Austrian civilians.

Specification 3: In that 1st Lieutenant Vincent C. Furan, ***, did, at USAF STATION SALZBURG on or about 10 July 1946 wrongfully and without proper authority engage in dangerous and low flying, that is, buzzing, in violation of AAF Regulation 60-16.

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification and Charge I; guilty of Specifications 1 and 2 of Charge II, and guilty of Specification 3 of Charge II except the words, "that is, buzzing" and guilty of Charge II. 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 one year. The reviewing authority approved the sentence, recommended that the confinement be remitted, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

On 9 July 1946 the accused attended a party at the Officers' Club of the United States Air Force Station, Salzburg, Austria. This party was attended by most of the enlisted men and officers of the station, as well as by two Austrian civilian girls Gudrun Kipper and Wilma Kurz (R. 21,48,49). Sergeant Morris K. Hankey, Gudrun Kipper, Wilma Kurz and the accused left the Officers' Club and went to the room occupied by the accused where they remained until about 5:30 a.m., 10 July 1946, drinking cognac, beer and Coca Cola (R. 22,49; Pros. Ex. B). About 5:30 a.m., 10 July 1946, they left the room of the accused and proceeded to the United States Air Force field near Salzburg, Austria. The party traveled to the field in a jeep. The accused dismounted from the jeep, after which Sergeant Hankey drove the remainder of the party to one end of the runway of the field. He parked the jeep on the taxi strip about ten feet from the edge of the runway. The accused taxied an L-5 Government airplane to the end of the runway near the jeep (R. 22,49; Pros. Ex. 13). He then took Wilma Kurz for a ride in the plane. After a ride of approximately ten minutes he landed the plane and upon the request of Wilma Kurz he then took Gudrun Kipper for a ride in the plane (R. 23,49; Pros. Ex. 13). While the accused was giving Gudrun Kipper a ride in the plane, Sergeant Hankey was seated in the jeep and Wilma Kurz was standing alongside the jeep (R. 23,54). The accused flew the plane low over the field. As the plane attempted to pass over the jeep the landing gear struck the top of the jeep and also struck Wilma Kurz, killing her instantly (R. 22,50,54,58; Pros. Ex. 13). Sergeant Hankey saw the plane just before it collided with the truck. He ducked and avoided injury (R. 54). The landing gear of the plane was damaged in the collision. The accused instructed Gudrun Kipper to protect herself as the plane landed. He then landed the plane and went immediately to the jeep (R. 49). The accused in a statement made 10 July 1946 described the events of the morning as follows:

> "On 9 July 1946 at about 2100 hours I came into a farewell party being given at the Airport. During the course of the evening I had a few drinks and at the close of the party at about 0100 hours, 10 July 1946, two girls and Sgt. Hankey wished to continue for a little while. I invited them up to my room. There we had a bottle of cognac and coca cola and beer. At about 0530 hours or 0545 hours I don't know how it came about we decided to go flying.

I told Sgt. Hankey that I had to test flight the ship before Burgess took it. The Sgt., the two girls and myself proceeded in a jeep to the plane. I got into the plane and the jeep left for the other end of the field. I taxied down there, checked the plane, and was told that the girls wanted to fly. One of them got in and the Sgt. took out the stick. I took off and flew around for about ten minutes and then landed. Then the other girl wanted to go up also. She got in and I took off again. As I was flying low the landing gear of my plane, an L-5, struck the jeep. I pulled up saw that the left wheel of my landing gear was damaged and then looked down and saw that the jeep also was damaged. I explained to the girl the safest position to sit in and came in and landed. I jumped out and ripped the first aid kit off the plane. I started to run to the jeep and a truck driven by Pvt Tipton came and picked me up. We drove to the jeep and there I saw that the jeep was wrecked and that there was a girl lying alongside of it. I knew she was dead. Lt. Burgess and Flight Officer Witz arrived. I didn't tell them I flew the plane or had the accident. I took a jeep to go to Headquarters to call Capt. Adams and I met McCurdy who told me the Capt. had already been called." (R. 4, Pros. Ex. 13)

The body of Wilma Kruz was taken to a morgue in Salzburg, Austria, where an autopsy was performed by an Austrian physician. Wilma Kurz died of a crushed skull. The injury came from above and was of such force that death occurred immediately (R. 39,58,59).

Regulations of the Field required a written clearance form to be filed with the operations office prior to any flight from the field. The accused was the station operations officer. The station operations officer was without authority to permit flights without this written clearance. Captain William P. Adams, Jr., the commanding officer of the field, testified that he made a search of the operations office and was unable to find a flight clearance or any other writing to indicate that the accused was going to fly this plane. The accused stated to Captain Adams that he took the plane to "test hop it" because it was scheduled to be transferred to Munich (R. 8,12,13). Captain Adams did not give the accused authority to take any Austrian civilian as a passenger in a Government aircraft on 10 July 1946, nor was any such authority given by a higher headquarters (R. 12).

The prosecution entered into evidence Army Air Force Regulations 60-22, dated 12 May 1945; 60-16D, dated 20 September 1944; Army Regulations 95-90 dated 24 July 1942, and Flying Regulations of the United States Air Force Station, Salzburg, Austria, dated 1 May 1946 (Pros. Exs. 1,2,3,4). These regulations pertain to the flying of and the carrying of passengers in Government aircraft.

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

Captain Richard M. Reuben, Medical Corps, observed the accused about 10:00 p.m., 10 July 1946, at which time the accused was extremely upset,

nervous and very anxious. He made a complete examination five or six days after 10 July 1946, at which time the examination was negative with the exception of a rapid pulse and slightly wet hands (R. 69,70).

Corporal Edward D. Gintert was in charge of the weather station at Salzburg on 10 July 1946 and testified that at 6:00 a.m. on that day the wind was southeast at four miles per hour and at 6:30 a.m. the wind was one mile per hour. Ceiling at 6:00 a.m. was estimated at 3500 and 6:30 a.m. 3000. Visibility at 6:00 a.m. was six miles and at 6:30 a.m. five miles with a light rain. Ceiling and visibility were above the minimum for flying (R. 73,74).

First Lieutenant Billy J. Burgess testified that on 9 July 1946 there was only one L-5 airplane at Salzburg and that on that day he flew the L-5, at which time the air speed indicator was reading too fast and the motor had a tendency to cut out.

Sergeant Hankey testified that on 9 July 1946 he replaced the tail wheel on the L-5 and charged the battery. He did not check the air speed indicator (R. 83).

Captain Adams was recalled as a witness for the defense and testified that in his opinion a pilot should land a plane in the direction indicated by the "T" on the field and that if the wind had a velocity of one mile per hour a pilot would be justified in landing in either direction (R. 82).

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

5. As to the Specification of Charge I and Specification 3, Charge II

The undisputed evidence discloses that an L-5 plane piloted by the accused struck and killed Wilma Kurz, and that said plane was being operated contrary to Army Air Force Regulations 60-16D, 20 September 1944, which regulation was in force at the time of the incident. Paragraph 1a of this regulation provides:

> "a. Reckless Operation. No aircraft will be operated in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground." (Pros. Ex. 2)

Manslaughter is defined in Federal law as follows:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary - upon a sudden quarrel or heat of passion. Involuntary - in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (Criminal Code, Sec. 274, 18 U.S. 453).

"Involuntary manslaughter is homicide unintentionally caused *** by culpable negligence in performing a lawful act ***

* * *

"Instances of culpable negligence in performing a lawful act are: Negligently conductint target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger; believing, but without taking reasonable precautions to ascertain that it could not be discharged; *** (par. 149a M.C.M. 1928)."

In CM 218240, Howard (12 BR 17), and CM 310352, Brunke, it was held that the action of an accused in operating a plane in a culpably negligent manner which caused the death of a human being constituted manslaughter.

The Board of Review is of the opinion that the evidence clearly shows that the accused was operating the plane in violation of Army Air Force Regulations 60-16, as alleged in Specification 3 of Charge II and that at this time he was culpably negligent in operating the plane, without authority, in an unauthorized manner and without due caution and circumspection, resulting in the death of Wilma Kurz as charged in the Specification, Charge I.

As to Specifications 1 and 2 of Charge II.

The evidence shows that on 10 July 1946 the accused flew a Government plane without first filing a clearance for said flight with the operations officer as required by Operations Memorandum No. 15-1, Headquarters USAF Station Salzburg, 1 May 1946. This regulation reads in part:

"Local Flight Clearance

1. A local clearance will be filed with base operations before making any flight within the local area. ***"

In flying this plane the accused carried on one trip Wilma Kurz and, on another trip, Gudrun Kipper, both Austrian civilians, as passengers without obtaining the authorization required by paragraph 1, Army Regulations 95-90, 24 July 1942, which reads in part:

"1. Authorization.-a. Commanding officers of Army Air Forces stations or higher authority in the chain of command are authorized to permit personnel of the following categories to ride as passengers in Army aircraft under their control in the following circumstances: ***"

6. War Department records show the accused to be 30-1/12 years of age and married. He graduated from high school and attended Esterville Junior College for one year. Prior to his entry into the Army he was employed by a meat packing company, earning one hundred twenty-five dollars per month. Between September 1934 and August 1936 he served 14 months in the South Dakota

National Guard. He entered the Army 12 May 1942 and after basic training became an aviation cadet. He was appointed and commissioned a temporary second lieutenant, Army of the United States, on 19 July 1943. He received a temporary promotion to first lieutenant 15 November 1945. He holds the Air Medal with one Oak Leaf Cluster. His efficiency report for the year 1945 is excellent. This officer's personnel placement questionnaire shows a civilian conviction in 1937 on a charge of breaking and entering. The Secretary of War granted a waiver so that the accused could be commissioned. On 10 February 1945 the accused was tried by a general court-martial and found guilty of wrongfully discharging a pistol in a tent. He was sentenced to be restricted to the limits of his post for one month and to forfeit $75.00 of his pay.

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 93 and 96.

Christy T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 317576 1st Ind

WD, JAGO, Washington 25, D. C. JAN 14 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 Vincent C. Furan (O-685313), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of manslaughter in violation of Article of War 93; of wrongfully flying a Government airplane without filing a proper clearance; of wrongfully taking Austrian civilians as passengers in a Government airplane on two separate occasions; and of wrongfully engaging in low flying in violation of regulations, all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, recommended that the confinement be remitted and forwarded the record of trial for action under the provisions of Article of War 48.

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

The evidence shows that about 6 a.m., 10 July 1946, following an all-night drinking party, the accused took a Government airplane without filing a clearance therefor and with unauthorized Austrian civilians as passengers flew this plane at a lower altitude than permitted by regulations. During one flight over the airfield the aircraft struck a jeep parked on the taxi-strip and killed an Austrian girl who was standing by the jeep and who only a short time before had flown with the accused as a passenger.

4. The accused is 30-1/2 years of age and married. Prior to his entry in the Army he had one conviction in civil court for breaking and entering. The Secretary of War "waived this conviction" before he was commissioned. He entered the Army 12 May 1942 and was commissioned a second lieutenant, Air Corps, 19 July 1943, upon completion of aviation cadet training. On 15 November 1945 he was promoted to first lieutenant. He holds the Air Medal with one Oak Leaf Cluster. On 10 February 1945 he was convicted by general court-martial for wrongfully discharging a pistol in a tent. The homicide committed by the accused amounts to involuntary manslaughter.

5. In a letter dated 27 November 1946 to The Judge Advocate General, General Carl Spaatz, Commanding General, Army Air Forces, states that in

his opinion the offenses of which the accused were convicted are of such nature as to warrant dismissal and recommends that that portion of the sentence be confirmed and carried into execution.

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.

CM 317576

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr CG, AAF, 27 Nov 46

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 21, February 3, 1947).

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

JAGQ - CM 317630

JAN 16 1947

UNITED STATES v. Private DONALD J. RICHEY, 35987047, Battery B, 56th Antiaircraft Replacement Training Battalion, Fort Bliss, Texas	ANTIAIRCRAFT ARTILLERY SCHOOL FORT BLISS, TEXAS Trial by G.C.M., convened at Fort Bliss, Texas, 4 September and 15 October 1946. Dishonorable discharge and total forfeitures.

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

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 to be 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 4 September and 15 October 1946 upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Donald J. Richey, Battery B, 56th Antiaircraft Replacement Training Battalion, Fort Bliss, Texas, did, without proper leave absent himself from his organization at Fort Bliss, Texas, from about 2 September 1945 to about 31 July 1946.

The accused pleaded 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 and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and ordered it executed. The result of trial was published in General Court-Martial Orders No. 44, Antiaircraft Artillery School, Fort Bliss, Texas, 31 October 1946.

3. No discussion of the evidence is required since the only question presented by the record is whether or not the court was legally constituted.

4. By first indorsement dated 22 August 1946 the charges in this case were referred for trial to a general court-martial appointed by paragraph 1, Special Orders No. 177, Headquarters Antiaircraft Artillery School, Fort Bliss, Texas, 31 July 1946. On 4 September 1946 this court convened for the trial of accused in this case with the following members present:

"Lt. Col.	JAMES D. PETERSON President	ORD
Lt. Col.	WILLIAM H. HUBBARD	CAC
Maj.	JOHN E. CONNOR, JR. Law Member	CAC
Maj.	GERALD A. SLUSSER	MC
Maj.	MATTHEW A. HUTMAKER	CAC
Capt.	ROBERT B. JAFFA	CAC
Capt.	GEORGE T. MACKLIN, JR. Members	CAC
Capt.	FORREST B. TILSON Trial Judge Advocate	CAC
1st Lt.	MORRIS H. SACHS Asst Trial Judge Advocate	INF
Maj.	ROBERT A. MOORE Defense Counsel	CAC
Capt.	ROBERT E. BOUGHN Asst Defense Counsel"	CAC

After the court had been properly organized and the members thereof sworn, the accused was duly arraigned. At 1:30 pm, on the same day, before the prosecution had rested its case, the court directed an adjournment to enable the trial judge advocate to make certain corrections in his documentary evidence. The court adjourned to meet at the call of the president.

On 11 September 1946, Special Orders No. 212, same headquarters, were published, paragraph 1 of which contained a detail for a new court-martial and included the following paragraph:

> "All unarraigned cases in the hands of the Trial Judge Advocate of the General Court-Martial appointed by paragraph 1, Special Orders No 177, this Headquarters, 31 July 1946, as amended by paragraph 15, Special Orders No 192, this Headquarters, 17 August 1946, will be brought to trial before the court hereby appointed."

On 15 October 1946 the court met pursuant to adjournment at which time the following proceedings were had (R 7):

"Fort Bliss, Texas
October 15, 1946

The court met, pursuant to adjournment at 1:30 o'clock p.m. and the assistant trial judge advocate announced that, inasmuch as this was a new court, meeting pursuant to a new order and amendments, he would read said order and amendments, as follows:".

The trial judge advocate then read paragraph 1, Special Orders No. 212 and the amending orders thereto, after which the record of trial continues:

"The organization of the court, pursuant to SO 212, as amended, at Fort Bliss, Texas, October 15, 1946, was as follows (R 9):

Present

Lt. Col.	WERNER L. LARSON President	CAC
Lt. Col.	CHARLES E. KENNEDY	ENGRS
Lt. Col.	DONALD L. LEWIS Law Member	CAC
Maj.	GERALD A. SLUSSER	MC
Maj.	GEORGE R. MITCHELL, JR	CAC
Capt.	ROBERT B. JAFFA	CAC
Capt.	GEORGE T. MACKLIN, JR	CAC
Capt.	ROBERT J. MILLER Members	CAC

Absent

Col.	JOHN H. MADISON (Transferred)	CAC
Lt. Col.	JAMES D. PETERSON (On authorized leave)"	ORD

It is to be observed that this court panel listed as present, three officers, Major Gerald A. Slusser, Captain Robert B. Jaffa and Captain George T. Macklin, who were members of the court appointed by paragraph 1, Special Orders No. 177 and who were present in court and sworn when accused was arraigned on 4 September 1946. After challenges were disposed of the record of trial continues: "The new members of the court were then sworn" (R 10). The personnel of the prosecution, Captain Forrest B. Tilson and 1st Lt. Morris H. Sachs were also appointed in paragraph 1, Special Orders No. 177 and were present in court and sworn when the accused was arraigned. They were likewise appointed personnel of the prosecution in paragraph 1, Special Orders 212 and were present in court when the latter court convened.

It is thus evident that the personnel of the prosecution and three members of the court which assumed jurisdiction of the case following the adjournment of 4 September 1946, and thereafter pronounced the sentence, Major Slusser, Captain Jaffa and Captain Macklin were not sworn.

5. It is apparent from the record that the court considered the proceedings of 15 October 1946 a continuation of the proceedings already had in the case, and assumed that the new personnel were merely added members of the court appointed by Special Orders No. 177 before which the accused had previously been arraigned. However, there is no basis whatever for this assumption since the record is clear that the proceedings of 15 October 1946 were conducted by an entirely different court, namely, the court appointed by paragraph 1, Special Orders No. 212, although three members of the former court and the personnel of the prosecution, were also members of the latter. The assumption that an order which on its face purports to create a general court-martial de-novo, may be treated as an amending order adding new members to a court previously appointed, when the order itself contains no reference to the previous court, cannot be justified. It is also to be noted that this case was never referred to the court appointed by Special Orders No. 212, which, on 15 October assumed jurisdiction over it. While this fact of itself might not invalidate the proceedings if the court was otherwise properly constituted and had jurisdiction of both the person and the offense, the conclusion is inescapable in the instant case that three members of the court, and the personnel of the prosecution, appointed by Special Orders No. 212 which pronounced the judgment were not sworn. Hence such court was not properly constituted and the proceedings of 15 October 1946 including the findings and the sentence were wholly invalid.

6. In the case of Private Arthur A. Zakrzewski (CM 317906), recently considered by the Board of Review, charges of desertion against the accused were referred for trial to a general court-martial which convened to hear the case on 1 October 1946. After the arraignment a continuance was granted and the trial was not resumed until 21 October 1946. On 14 October 1946, a new general court-martial was appointed by a special order which contained the usual clause transferring certain unarraigned cases to the court thus appointed. When trial of Zakrzewski was resumed on 21 October 1946 the court appointed on 14 October assumed jurisdiction of the case. The personnel of this court included four officers who previously participated in the trial as members of the court to which the case was originally referred, and five additional officers, but only the five new officers were sworn. The case then went to judgment on the theory that the proceedings were merely a continuation of the proceedings already had. It is, therefore, evident that in the Zakrzewski case the Board of Review had before it for consideration, the identical question presented in the instant case, namely, was the court which pronounced the judgment, legally constituted? In that case the Board of Review concluded that as four members of the court were not sworn, the court was not legally constituted. The same conclusion must be reached in the case under consideration.

6. For the reasons stated the Board of Review holds that the record of trial is legally insufficient to sustain the findings and sentence.

W. A. Johnson, Jr., Judge Advocate

Charles M. Dickson, Judge Advocate

Francis E. Dreher, Judge Advocate

JAGQ - CM 317630 1st Ind

WD, JAGO, Washington 25, D. C. JAN - 4 1947

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 Donald J. Richey (35987047), Battery B, 56th Anti-aircraft Replacement Training Battalion, Fort Bliss, Texas.

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

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

2 Incls
1. Rec of Trial
2. Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 32, February 11, 1947).

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

JAGK - CM 317631

9 JAN 1947

UNITED STATES	EIGHTH ARMY
v.	Trial by G.C.M., convened at Hqs. 8th Army, APO 343, c/o Postmaster, San Francisco, California, 23 and 24 July 1946. HART & IRISH: Dishonorable discharge and confinement for seven (7) years. LEWIS: Dishonorable discharge and confinement for five (5) years. EACH: Penitentiary.
Private CLEO E. HART (34628506) and Staff Sergeant WILLIAM A. IRISH, JR. (32968979), attached unassigned 258th Replacement Company, 4th Replacement Depot, and Private First Class DOWL J. LEWIS (36478509), 610th Port Company, 495th Port Battalion, Transportation Corps.	

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Cleo E. Hart, attached unassigned 258 Replacement Company, Fourth Replacement Depot, APO 703, Staff Sergeant William A. Irish, Jr., attached unassigned 258 Replacement Company, Fourth Replacement Depot, APO 703, and Private First Class Dowl J. Lewis, 610 Port Company, 495 Port Battalion, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 27 March 1946 knowingly and willfully misappropriate and wrongfully apply to their own use and benefit one 1½ ton truck, serial number 3309676, of the value of about $2125.00, property of the United States furnished and intended for the military service thereof.

Specification 3: In that Private Cleo E. Hart, ***, Staff Sergeant William A. Irish, Jr., ***, and Private First Class Dowl J. Lewis, ***, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 27 March 1946, knowingly and willfully misappropriate and wrongfully apply to their own use and benefit one 1/4 ton truck, serial number 20601556, of the value of

about $1051.00, property of the United States furnished and intended for the military service thereof.

Specification 4: (Finding of guilty disapproved by reviewing authority).

Specification 5: (Finding of not guilty).

Specification 6: In that Private Cleo E. Hart, ***, Staff Sergeant William A. Irish, Jr., ***, and Private First Class Dowl J. Lewis, ***, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 6 April 1946, knowingly and willfully misappropriate and wrongfully apply to their own use and benefit one 1/4 ton truck, serial number 2061706, of the value of about $1051.00 property of the United States furnished and intended for the military service thereof.

ADDITIONAL CHARGE AGAINST Private Cleo E. Hart: Violation of the 61st Article of War.

Specification: In that Private Cleo E. Hart, ***, did, without proper leave, absent himself from his organization and station at Fourth Replacement Depot, APO 703, from about 17 March 1946 to about 16 April 1946.

ADDITIONAL CHARGE AGAINST Staff Sergeant William A. Irish, Jr.: Violation of the 61st Article of War.

Specification: In that Staff Sergeant William A. Irish, Jr., ***, did, without proper leave, absent himself from his organization and station at Fourth Replacement Depot, APO 703, from about 10 March 1946 to about 16 April 1946.

Each accused pleaded not guilty to all charges and specifications. Each accused was found not guilty of Specifications 1 and 5, Charge I, and guilty of Specifications 2,3,4, and 6 of Charge I and Charge I, and the accused Hart and Irish were found guilty of the Additional Charge and Specification against each of them. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, the accused Hart and Irish each to be confined at hard labor for seven years, the accused Lewis to be confined at hard labor for five years. The reviewing authority disapproved the finding of guilty of Specification 4 of Charge I; approved the sentence as to each accused, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement for each accused, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to

support the findings of guilty of the Additional Charge and Specification as to the accused Hart, and legally sufficient to support the findings of guilty of the Additional Charge and Specification as to the accused Irish, but not legally sufficient to support the findings of guilty of Specifications 2,3, and 6 of Charge I and Charge I as to all of the accused. In view of this holding, discussion will be limited to that portion of the record of trial considered legally insufficient.

4. Specifications 2, 3 and 6 of Charge I each allege that the accused acting jointly and in pursuance of a common intent did at Yokohama, Japan (on dates indicated below), knowingly and willfully misappropriate and wrongfully apply to their own use and benefit certain trucks (as indicated below) (of the value as indicated below), property of the United States, furnished and intended for the military service thereof.

Spec.	Date of offense	Description of property	Value
2	27 March 1946	1-1/2 ton truck serial No. 3309676	$2125.00
3	27 March 1946	1/4 ton truck serial No. 20601556	$1051.00
6	6 April 1946	1/4 ton truck serial No. 2061706	$1051.00

In support of these allegations the prosecution established by competent evidence that the trucks described in the three specifications were issued by the 191st Ordnance Base Depot Company, Yokohama, Japan, upon presentation of requisitions. It was further shown by the evidence that the companies whose names appeared upon the requisitions were not and had never been in Japan. Likewise it was shown that the persons signing the requisitions had never been stationed within Japan. By stipulation it appears that each truck has a value of more than $50.00.

On 29 March 1946 the vehicle described in Specifidation 2 was found unattended in an alley one block west of Ginza Street in Tokyo, Japan. On 16 April 1946 the vehicle described in Specification 3 was found abandoned in an alley one block west of Ginza Street in Tokyo, Japan. On 18 April 1946 the vehicle described in Specification 6 was impounded by the Military Police.

On 18 April 1946 each accused made a statement to a member of the Criminal Investigation Division. Each accused admitted that the three accused had been associating together and that they had prepared requisitions and had procured vehicles from an Ordnance depot in Yokohama, Japan. The accused Irish stated that about the third week in March 1946 they drew three vehicles, a jeep and two trucks. The trucks were stolen from them. They drew a truck about the first week in April which was impounded by the Military Police. On 15 April 1946 they drew two jeeps. The accused Lewis stated that they drew a jeep and a 1-1/2 ton truck. He parked the truck about a block from a restaurant where it was picked up by the Military Police. The accused Hart stated that they

prepared a requisition for a 1-1/2 ton truck and a jeep and then drew these vehicles from an Ordnance organization in Yokohama. About 15 April 1946 they drew two more jeeps.

It thus appears that the vehicles described in Specifications 2,3 and 6, Charge I, were issued by the 191st Ordnance Base Depot Company, Yokohama, Japan, upon fraudulent requisitions. These vehicles were found parked or abandoned in Tokyo, Japan. The accused each admitted the drawing of vehicles from an unspecified Ordnance company in Yokohama and using them for their own private enterprise. Nowhere in the record does it appear that the accused requisitioned or had in their possession or control the particular vehicles described in Specifications 2, 3 and 6 of Charge I. It is not sufficient to show merely that the accused misapplied Government vehicles to their own use, it must be shown that the vehicles misapplied were the identical vehicles described in the specifications of the charge. (CM 314174, Agens; CM 314758, Bickham; CM 317168, Pitts; CM 313965, Holley.)

The Board of Review is therefore of the opinion that the evidence is insufficient to warrant the inference that the accused misappropriated the particular vehicles mentioned in Specifications 2, 3 and 6 of Charge I.

4. The record of trial is legally sufficient to support the findings of guilty of absence without leave as to the accused Hart and Irish in violation of Article of War 61. The offense of absence without leave is not punishable by confinement in a penitentiary, Federal reformatory or correctional institution (AW 42; CM 223054, Langanki, 13 BR 347).

5. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Specifications 2, 3 and 6 of Charge I and Charge I as to each accused and legally insufficient to support the sentence as to the accused Lewis, but legally sufficient to support the findings of guilty of the additional charges and specifications as to the accused Hart and Irish and legally sufficient to support only so much of the sentence as to Hart and Irish as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor in a place other than a penitentiary, Federal reformatory or correctional institution for a period of seven years.

Clinton D. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Hatchett, Judge Advocate

FEB 3 1947

JAGK CM 317631 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Eighth Army, APO 343, c/O Postmaster, San Francisco, California

1. In the case of Private Cleo E. Hart (34628506), Staff Sergeant William A. Irish, Jr. (32968979), attached Unassigned 258th Replacement Company, 4th Replacement Depot, and Private First Class Dowl J. Lewis (36478509), 610th Port Company, 495th Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge I and Specifications 2, 3 and 6 thereunder as to each accused, disapproval of the sentence as to the accused Lewis, and designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution in the cases of Hart and Irish, you will have authority to order the execution of the sentences.

2. In view of the nature of the offenses of which accused Hart and Irish stand properly convicted, it is recommended that the period of confinement as to each be reduced to one year.

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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 317631).

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 317641 5 FEB 1947

UNITED STATES	)	HEADQUARTERS CAMP CAMPBELL
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 8 October 1946. Dismissal and total forfeitures
First Lieutenant EDWARD G. MARSHALL (0-1825024), Infantry	)	

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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Edward G. Marshall, Antitank Company, Seventh Infantry, did, without proper leave, absent himself from his organization at Camp Campbell, Kentucky, from about 0001 hours 11 August 1946 to about 23 August 1946.

He pleaded guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service 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: Without objection by the defense, an extract of Special Orders No. 179, Headquarters, Fifth Infantry Division, Camp Campbell, Kentucky, dated 30 July 1946, was received in evidence as Prosecution's Exhibit 1 (R 6). The pertinent portions thereof read as follows:

"14. PAC TWX ALABC Hq Second A dtd 28 Jun 46 following Os are placed on TDY w/Co D 8th Tng Bn 2d Rgt Ft Knox Ky as Adm Detail for 5th Inf Div Trps now attending Basic Tk Course that sta. WP by rail. Upon completion TDY return to proper sta Cp Campbell Ky. TCNT. TDN. 701-1452 P 432-02 A 2170425 S 15-056.

RANK	NAME	ASN	BR	ORGN
WP o/a 4 Aug 46 and return o/a 10 Aug 46				
1ST LT	EDWARD G MARSHALL	01825024	Inf	2d Inf Regt

* * *"

Also without objection by the defense, an extract copy of the Morning Report of the Anti-Tank Company, Second Infantry Regiment, Camp Campbell, Kentucky was received into evidence as Prosecution's Exhibit 2 (R 6), which read in pertinent part as follows:

"* * *

"Marshall, Edward G. (Inf) 0-1825024 1st Lt
Above Officer fr TDY to AWOL effective 0001 hours
11 Aug 46

* * *"

It was stipulated and agreed by and between the prosecution, the defense and the accused that the accused entered the Station Hospital at Fort Knox, Kentucky, on 23 August 1946 (R 7).

4. Evidence for the defense: The accused's commanding officer, Captain Dale R. Greenlief, who signed the charges as accuser, testified that the accused was a good officer. During the time he was assigned to his company, the accused had done a good job and operated as efficiently as possible and that the accused's services had been satisfactory since his return to Camp Campbell (R 7). The witness stated that he would be willing to have the accused returned to his company after the trial (R 8).

The accused after having been advised of his rights as a witness elected to remain silent (R 8).

5. In view of the accused's plea of guilty and the absence of any action on the part of the defense inconsistent with his plea, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty.

6. Although no evidence of previous convictions was presented to the court, there is on file in the Office of The Judge Advocate General a record of trial of the accused by a general court-martial which convened at Camp Joseph T. Robinson, Arkansas, on 28 July 1944. In that case the accused was

tried for absence without leave from 7 July to 18 July 1944 in violation of the 61st Article of War. He pleaded guilty to, and was found guilty of, the Specification and Charge. He was sentenced to be restricted to the limits of the camp for six months and to forfeit $70.00 per month for a period of six months. The period of restriction was reduced to three months by the reviewing authority and the sentence, as thus modified, was ordered executed. On 31 October 1944, the unexecuted portion of the sentence, pertaining to restriction, was remitted. Evidence of this conviction could have been considered by the court in the instant case (par 79c, MCM, 1928).

7. The accused is thirty-six years old and unmarried. He is a native of Chicago, Illinois, and attended grade and high schools there. He took evening classes at Franklin University, Columbus, Ohio, after leaving high school. He was employed as a freight checker and dispatcher just before entering the Army in May 1942. After induction, he served as an enlisted man until appointed a second lieutenant, Army of the United States, on 23 April 1943, when he was graduated from the Tank Destroyer Officer Candidate School, Camp Hood, Texas. He was promoted to first lieutenant, Army of the United States, on 16 December 1945. The accused served in the Mediterranean and European Theaters from December 1944 until June 1945, when he returned to the United States. He is authorized to wear the European Theater ribbon with two campaign stars and the World War II and Army of Occupation medals. He was awarded the Silver Star Medal for gallantry in action.

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. 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 and forfeitures are authorized upon conviction of the 61st Article of War.

A. J. Lotenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip A. Smith, Judge Advocate

JAGH - CM 317641 1st Ind

WD, JAGO, Washington 25, D. C. FEB 2 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 Edward G. Marshall (0-1825024), Infantry.

2. Upon trial by general court-martial, this officer was found guilty of being absent without leave from 11 to 23 August 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 of the sentence. I concur in that opinion.

The accused was a member of an organization at Camp Campbell, Kentucky, He was placed on temporary duty at Fort Knox, Kentucky, on 4 August 1946 with orders to return to his proper station on or about 10 August 1946. He was absent without leave from Camp Campbell from 11 to 23 August 1946. On the latter date, he entered the Station Hospital, at Fort Knox, Kentucky.

The accused had been convicted previously of absence without leave from Camp Joseph T. Robinson, Arkansas, from 7 to 18 July 1944, in violation of Article of War 61.

In view of the nature of the offense, however, and all the circumstances of the case, I recommend that the sentence be confirmed, but commuted to dismissal and a reprimand and that the sentence as thus commuted be carried into execution but that the portion thereof adjudging dismissal be suspended during good behavior.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 72, March 10, 1947)

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TITLE

DATE	BORROWER'S NAME	EXT.