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OF THE ARMY

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VOL. 70

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Judge Advocate General's Department

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Volume 70

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

JAGH - CM 320518

17 JUL 1947

UNITED STATES	)	FLYING DIVISION, AIR TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Randolph Field, Texas, 5 and 21 February 1947. Each: Dismissal
Captain CHARLES M. RUCKER, III (0-751845), Air Corps and First Lieutenant HARRY W. CHERNIK (0-703453), Air Corps	)	

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

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

As to Accused Rucker:

CHARGE: Violation of the 94th Article of War.

Specification: In that Captain Charles M. Rucker, III, Air Corps, did, at or near Fort Sam Houston, Texas, on or about 24 December 1946, feloniously take, steal, and carry away the following described articles:

Nomenclature	Amount	Price
Class H 014, 511700, Tire 900 x 16, 8 ply mud and snow.	5	$170.85
Class H 014, 519266, Tube 900 x 16.	5	17.35
Wheel assembly, 900 x 16.	5	46.35

(2)

of the total value of $234.55, property of the United States furnished and intended for the military service thereof.

As to Accused Chernik:

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Harry W. Chernik, Air Corps, did, at or near Fort Sam Houston, Texas, on or about 24 December 1946, feloniously take, steal, and carry away the following described articles:

Nomenclature	Amount	Price
Class H 014, 511700, Tire 900 x 16, 8 ply mud and snow.	5	$170.85
Class H 014, 519266, Tube 900 x 16.	5	17.35
Wheel assembly, 900 x 16.	5	46.35

of the total value of $234.55, property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to the respective Specification and Charge. The findings of the court as to each accused were as follows:

"Of the Specification: Guilty, except the words 'feloniously take, steal and carry away,' substituting therefor the words 'wrongfully take and carry away,' of the excepted words not guilty, of the substituted words guilty.

"Of the Charge: Not Guilty, but guilty of violation of the 96th Article of War."

Evidence of no previous convictions was introduced. Each accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to pay to the United States a fine of One Thousand Dollars ($1000), and to be confined at hard labor for three (3) years. The reviewing authority approved only so much of the sentence, as to each accused, as provides 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 the law contained in the review of the Flying Division, Air Training Command Judge Advocate, dated 18 February 1947.

4. a. At the time of the commission of the offense of which he has been convicted, accused Rucker was single and was 25 4/12 years of age. He was graduated from the University of Arkansas in 1943, became a member of the Enlisted Reserve Corps, 2 February 1943 and was commissioned a second lieutenant, Army of the United States (Air Corps) on 31 July 1943. On 22 July 1944 he was promoted to the rank of first lieutenant and on 17 February 1945, to the rank of captain. He served in the South and Western Pacific from 20 December 1943 to 28 June 1945. He has been awarded the Air Medal with three Oak Leaf Clusters and the Purple Heart Medal, and is authorized to wear the Philippine Liberation Ribbon with two stars, and the Pacific Theater Ribbon with five campaign stars. His only efficiency rating of record (1 July 1944 to 31 December 1944) shows a rating of excellent.

On 12 May 1945, he was punished under the provisions of Article of War 104, by a reprimand and forfeiture of fifty dollars of his pay, for drunkenness and being absence without leave for a period of three hours.

b. Accused Chernik was single and was 22 3/12 years of age at the time of the commission of the offense. He was graduated from high school in 1943, became a member of the Enlisted Reserve Corps 18 February 1943, commissioned a second lieutenant, Army of the United States (Air Corps) on 24 December 1943 and promoted to the rank of first lieutenant on 20 September 1945. He served in the Mediterranean Theater of Operations for eighteen months, returning to the United States on 29 May 1945. He completed twelve combat mission, was shot down over Hungary on 2 July 1944 and was a prisoner of war until 29 April 1945. He has been awarded the Purple Heart Medal.

On 1 December 1946, he was punished under the provisions of Article of War 104, by a reprimand and forfeiture of fifty dollars of his pay, for disorderly conduct.

5. The Board has given consideration to the following communications which recommended clemency on behalf of the accused, Captain Rucker: A letter from Honorable Tom Stewart, United States Senate, dated 21 March 1947, addressed to the Secretary of War and a letter from Honorable Jere Cooper, House of Representatives, dated 19 March 1947, also addressed to the Secretary of War.

6. The court was legally constituted and had jurisdiction of the persons and of the offense. 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 of guilty and the sentence, as to each accused, and to warrant confirmation of the sentences, as approved by the reviewing authority. A sentence to dismissal is authorized upon a conviction of a violation of Article of War 96.

E. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 320518 1st Ind

WD, JAGO, Washington 25, D. C. AUG 1

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Charles M. Rucker, III (0-751845), Air Corps and First Lieutenant Harry W. Chernik (0-703453), Air Corps.

2. Upon trial by general court-martial these officers were found guilty of wrongfully taking and carrying away property of the United States furnished and intended for the military service, in the total amount of $234.55, in violation of Article of War 96. No evidence of previous convictions was introduced. Each accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of One Thousand Dollars ($1000), and to be confined at hard labor for three (3) years. The reviewing authority approved only so much of the sentence, as to each accused, as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Flying Division, Air Training Command Judge Advocate, dated 18 February 1947, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence as approved by the reviewing authority, as to each accused, and to warrant confirmation thereof. I concur in that opinion.

4. At approximately 1:30 in the afternoon of 24 December 1946, the accused secured permission from the guard at the Surplus Motor Pool, Fort Sam Houston, Texas, to look over the surplus vehicles parked there. The guard testified that Captain Rucker made a statement to Lieutenant Chernik that "This would be a good night to get some tires." Both accused at this time appeared to be normal and not under the influence of liquor.

At approximately 1:00 a.m. on the night of 24-25 December 1946, the "roving" guard at the Surplus Motor Pool noticed a car parked in the vicinity and upon approaching it he saw a man jump over the fence, which was around the area, and saw the parked car driven away. Upon investigation the guard noticed that the spare tires on some of the ambulances parked in the motor pool had been "tampered with." The guard reported the incident to the Military Police headquarters. At about 1:30 a.m., 25 December, an investigation revealed that the spare wheels and tires had been removed

from eight of the ambulances and that while three of the assemblies were still in the vicinity of the vehicles five of them were missing. Several hours later an officer's blouse with Lieutenant Chernik's name in it was found along the back road of the post and in the same vicinity, about ten feet off the side of the road, was found a complete wheel assembly of the same type as used on ambulances.

On the morning of 25 December at about 8:50 a.m., a military policeman stopped a Buick car on the post, which answered the description of the one seen parked in the vicinity of the motor pool early that morning. Captain Rucker was driving the car and Lieutenant Chernik was a passenger. The former was dressed in civilian clothes and the latter had on "pinks" which were dirty and soiled. The two accused were taken to Military Police Headquarters and from information given by them and with their assistance, the remaining four assemblies were found along the roadside in the vicinity of Fort Sam Houston.

At the trial both accused elected to be sworn as witnesses and the testimony of Captain Rucker, which was in general corroborated by the testimony of Lieutenant Chernik, was substantially as follows: At about eleven o'clock on the morning of 24 December 1946, the two accused went to the Fort Sam Houston Motor Pool to look over some surplus equipment. He denied that he made the statement, "This would be a good night to get some tires." They went to a party that afternoon and after drinking a considerable amount of whiskey left at about eight o'clock in the evening. He remembered that they removed tires from the vehicles as a "Christmas joke" but did not remember how many they removed or where the vehicles were. He also remembered leaving the area, when lights from another vehicle flashed on them, and then dumping the tires off on the side of the road.

Two witnesses for the defense testified that the accused were drunk on the evening of 24 December.

5. a. At the time of the commission of the offense of which he has been convicted, accused Rucker was single and was 25 4/12 years of age. He was graduated from the University of Arkansas in 1943, became a member of the Enlisted Reserve Corps, 2 February 1943 and was commissioned a second lieutenant, Army of the United States (Air Corps) on 31 July 1943. On 22 July 1944 he was promoted to the rank of first lieutenant and on 17 February 1945, to the rank of captain. He served in the South and Western Pacific from 20 December 1943 to 28 June 1945. He has been awarded the Air Medal with three Oak Leaf Clusters and the Purple Heart Medal, and is authorized to wear the Philippine Liberation Ribbon with two stars, and the Pacific Theater Ribbon with five campaign stars. His only efficiency rating of record (1 July 1944 to 31 December 1944) shows a rating of excellent.

On 12 May 1945, he was punished under the provisions of Article of War 104, by a reprimand and forfeiture of fifty dollars of his pay, for drunkenness and being absence without leave for a period of three hours.

b. Accused Chernik was single and was 22 3/12 years of age at the time of the commission of the offense. He was graduated from high school in 1943, became a member of the Enlisted Reserve Corps 18 February 1943, commissioned a second lieutenant, Army of the United States (Air Corps) on 24 December 1943 and promoted to the rank of first lieutenant on 20 September 1945. He served in the Mediterranean Theater of Operations for eighteen months, returning to the United States on 29 May 1945. He completed twelve combat missions, was shot down over Hungary on 2 July 1944 and was a prisoner of war until 29 April 1945. He has been awarded the Purple Heart Medal.

On 1 December 1946, he was punished under the provisions of Article of War 104, by a reprimand and forfeiture of fifty dollars of his pay, for disorderly conduct.

6. The Board has given consideration to the following communications which recommended clemency on behalf of the accused, Captain Rucker: A letter from Honorable Tom Stewart, United States Senate, dated 21 March 1947, addressed to the Secretary of War and a letter from Honorable Jere Cooper, House of Representatives, dated 19 March 1947, also addressed to the Secretary of War.

7. In view of the creditable combat record of accused, I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and forfeiture of $100 per month for four months, and as thus commuted be carried into execution, as to each accused.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 272, 22 Aug. 1947 , Chernick).

(G.C.M.O. 273, 22 Aug. 1947 , Rucker).

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

JAGK - CM 320530

5 JUN 1947

UNITED STATES	XII TACTICAL AIR COMMAND
v.	Trial by G.C.M., convened at AAF Station, Neubiberg, Germany, 7 and 25 January 1947. Dismissal and total forfeitures.
Captain MAX RAITHEL (O-735922), Air Corps	

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

---

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

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

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

Specification: In that Captain Max Raithel, 2010th Labor Supervision Co. (Prov), APO 178, U.S. Army, did, at Lechfeld Army Air Base on or about 7 November 1946, with intent to do bodily harm, commit an assault upon Captain Don L. McDowell, 2010th Labor Supervision Co. (Prov), by willfully and feloniously drawing a loaded pistol on the said Captain Don L. McDowell.

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

Specification 1: In that Captain Max Raithel, ***, did, at Lechfeld Army Air Base on or about 7 November 1946, wrongfully and unlawfully carry a concealed weapon, viz, a colt revolver, cal 32, serial #I97796.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and its specification, guilty of Specification 1, Charge II, not guilty of Specification 2, Charge II, and guilty of Charge II. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, remitted the confinement, and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the Prosecution

Between 10 p.m. and 12:30 a.m., 6-7 November 1946, Captain D. L. McDowell was at the Lechfeld Officers Club, Augsburg, Germany, with Lieutenants Jones, Fabry, Cox and two German girls (R. 8,10,12,18). During the evening the accused approached Captain McDowell at the bar and started to argue with him about one of the girls in the party. The argument ended with an apology from accused (R. 8). Later in the evening the accused went to Captain McDowell's table and again started an argument, at which time Captain McDowell asked the accused to leave. Captain McDowell asked the accused to leave a second time and then assisted him away from the table. The club closed at about 12:30 a.m., at which time the accused appeared to be very mad and stated to Captain McDowell, "This is it, either I'm going to get you or you're going to get me." They argued a short time and the accused again apologized (R. 8, 9).

After the club closed Captain McDowell and his party went to Captain McDowell's room for a drink (R. 8). First Lieutenant Malcolm C. Sharp roomed with accused. About 12:30 a.m., 7 November 1946, the accused came into their room, secured and loaded a pistol. The accused put the pistol in his pocket and left the room. He appeared to be intoxicated and fell down as he left the room. Lieutenant Sharp awakened Lieutenant Campbell and they followed the accused upstairs (R. 14,15).

Captain McDowell started to leave his room and saw the accused "standing at the door with a mean look on his face." Lieutenant Mayer walked up to accused and asked him "what he was up to." The accused said, "You big son-of-a-bitch, you keep out of this or I'll take care of you, too." Lieutenant Mayer pushed the accused "in a playful way, just flexed his fingers against his chest like that (indicating motion) and shoved Captain Raithel backwards." The accused fell against the wall, at which time he took a pistol from his left hand pocket. When Captain McDowell saw the pistol he grabbed it with his right hand and struck the accused with his left hand. He wrenched the gun from the accused and threw it into the bathroom. They fought and the accused was knocked down (R. 8). Captain McDowell first saw the gun when it was being withdrawn from the pocket of the accused. The gun was at an angle of about 45° to the floor and pointing at his feet when he closed with the accused (R. 11,12).

Lieutenant Jones secured the gun, a Colt .32, from the bathroom and found it to be fully loaded (R. 13,19,26).

Lieutenant Sharp was of the opinion that the accused was drunk and testified that the accused had been drinking continuously for three weeks prior to this occasion (R. 17). Captain McDowell had been drinking during the evening but was not drunk (R. 8,18,20).

4. For the Defense

The accused was warned of his rights as a witness and elected to testify in his own behalf. He testified that he was right-handed and wrote his name with his right hand (Def. Ex. A) and then with his left hand (Def. Ex. B). He is 28 years of age. He entered the Army as an aviation cadet 23 January 1942 and was commissioned a second lieutenant, Air Corps, Bombardier, on 2 January 1943. After receiving his commission he had several assignments before being assigned to the 398th Bomber Group, Geiger Field, Washington. He went overseas with his unit in April 1944 and remained overseas until November 1944. While overseas he flew 28 missions. After his return to the United States for rest and recuperation he was assigned to various posts in the United States for duty. In February 1945 he was at Keesler Field. His work was not sufficient to keep him busy and he drank excessively. A psychiatrist suggested a return to overseas duty and combat. He made three attempts to secure overseas duty and on 20 June 1946 he received his assignment for overseas duty. He was assigned to the Casey Jones Project, a high altitude photographic project and made six flights as a bombardier. These six flights were his only duty since his return to the European Theater of Operations. For a month prior to 7 November 1946 he had no duties. During this time his drinking habits increased. At approximately 10 p.m., 6 November 1946, he saw Captain McDowell at the bar of the club, at which time he asked Captain McDowell why he had gone away for the week-end with a certain female. He did not remember any other conversations with Captain McDowell at the club. Upon his return to his quarters he heard a party upstairs in the barracks. He went upstairs and saw Captain McDowell, Lieutenant Fabry and Fraulein Anish Keller, after which he went back to his room. He took out his gun, loaded it and again went upstairs. He had an argument with Lieutenant Mayer and Lieutenant Mayer pushed and hit him. He remembered nothing from the time he was hit until he was taken to the hospital. He went upstairs in order to get Fraulein Anish Keller out of the billet and off the Base. He was going to use the gun "just for appearance sake" to intimidate Captain McDowell's party in order to remove the girl from the premises. He intended to remove her by force if necessary. He loaded the gun because anyone could glance at it and tell whether or not it was loaded (R. 29-40). The accused further stated that he had no intention of drawing the gun on Captain McDowell or anyone. In his opinion the gun was in his right front pocket. The only explanation he could give as to why he had the gun in his hand was that when he was pushed by Lieutenant Mayer the gun could have been propelled from his pocket and he grabbed it to keep it from hitting the floor (R. 38).

5. The evidence clearly shows an assault by the accused upon Captain McDowell. This assault was made with a loaded pistol. The only question requiring discussion is whether or not the accused intended at the time of the assault to do Captain McDowell bodily harm. The intent in such cases is determined from the facts and circumstances of the case (MCM, 1928, par. 149n, p. 180; CM 256247, Evans, 36 BR 241; CM 267877, Williams, 44 BR 143, 148).

The evidence discloses that during the evening of 6 November 1946 on

two separate occasions the accused accosted Captain McDowell at a club in Augsburg, Germany, and started an argument over a girl. The club was closed about midnight and as Captain McDowell was leaving the accused stated to him, "This is it, either I'm going to get you or you're going to get me." Within thirty minutes of making this statement the accused went to Captain McDowell's quarters where according to his own testimony he saw Captain McDowell, a lieutenant, and a German girl named Anish Keller. The accused then went to his quarters, secured a pistol, loaded it and returned to the quarters of Captain McDowell. At this time he intended to forcibly remove the girl from the quarters and post. The accused and Captain McDowell were standing face to face in the doorway when Lieutenant Mayer intervened and asked the accused what he wanted. The accused replied, "You big son-of-a-bitch, you keep out of this or I'll take care of you too." Lieutenant Mayer pushed the accused, at which time the accused started to draw a pistol from his pocket. The pistol barrel was raised to about a 45 degree angle from the floor and it pointed at Captain McDowell's feet. Thereupon Captain McDowell disarmed the accused.

In Johnson v. State (132 Ark. 128; 200 S.W. 982) appellant had been convicted of an assault with intent to kill. He had drawn a pistol upon his victim with intent to kill him but before he was able to present it in the attitude of firing the weapon was seized by the person assailed. In upholding the conviction the court said:

> "Mere preparation for an assault does not complete the offense, but any overt act in partial execution of the design to make an assault completes the offense. The drawing of a deadly weapon if so intimately connected with its use that it cannot be said to be merely a preparation for the use, but is a part of the use itself, (is) such an act (as) constitutes an assault when accompanied by evidence of an intention to immediately use the weapon."

The pistol in accused's hand being loaded the assault was committed with a dangerous weapon and we believe the circumstances indicate a present intention on the part of the accused to do bodily harm to Captain McDowell, which intention failed only because of timely action on the part of Captain McDowell.

6. War Department records show the accused to be 28-7/12 years of age and unmarried. He is a high school graduate. Prior to his entry into service he was a sales clerk and meter man. From 24 January 1942 to 2 January 1943 he was an aviation cadet. On 2 January 1943 he was commissioned a second lieutenant, Air Corps Reserve, and ordered to active duty. He received temporary promotions to first lieutenant on 27 November 1943 and to captain 16 February 1946. On 31 May 1944 he received the Air Medal for meritorious achievement while participating in sustained bomber combat operations over enemy occupied territory. He received Oak Leaf Clusters to the Air Medal on 28 June 1944, 23 July 1944 and 22 September 1944. He was awarded the Distinguished Flying Cross 11 October 1944 for extraordinary achievement as a bombardier on B-17 airplanes on a number of combat bombardment missions over Germany between 6 May 1944 and 10 October 1944. He is

entitled to wear the EAME Theater Ribbon with four battle stars. His efficiency reports for the year 1945 are all "Excellent." He was tried by general courts-martial at Keesler Field on 17 February 1945 for disorderly conduct in station under such circumstances as to bring discredit upon the military service in violation of Article of War 96 and for disrespectful behavior towards his superior officer while in the presence of enlisted men in violation of Article of War 63. He was sentenced to receive an official reprimand, to be restricted to the limits of Keesler Field for two months and to forfeit $75.00 of his pay per month for six months. The reviewing authority approved the sentence but reduced the restriction to one month and the forfeiture to $75.00 per month for two months.

7. The court was legally constituted and had jurisdiction over accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence as approved by the reviewing authority. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96.

Chesty D. Gibson, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert B. Sprague, Judge Advocate

JAGK - CM 320530 1st Ind

WD, JAGO, Washington 25, D. C. JUN 16 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 Max Raithel (0-735922), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of assault with intent to do bodily harm, in violation of Article of War 93, and of carrying a concealed weapon, 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, remitted the confinement, and forwarded the record of trial pursuant to 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 as approved by the reviewing authority and to warrant confirmation thereof.

About 10:00 p.m. on the night of 6-7 November 1946 the accused approached a Captain McDowell at the bar in the Lechfeld Officers Club, Augsburg, Germany, and started an argument about a German girl. Later in the evening he renewed the argument at Captain McDowell's table. About 12:30 a.m., 7 November 1946, upon the closing of the club the accused appeared to be angry and stated to Captain McDowell, "This is it, either I'm going to get you or you're going to get me." After the club closed Captain McDowell and the members of his party went to Captain McDowell's quarters for a drink. The accused returned to his quarters and then to Captain McDowell's room where he saw several officers and a German girl named Anish Keller. The accused went to his room, secured and loaded a pistol, and returned to Captain McDowell's room. He met Captain McDowell at the door of the room and as they faced each other a Lieutenant Mayer came to the door and asked "what he was up to." The accused said, "You big son-of-a-bitch, you keep out of this or I'll take care of you, too." Lieutenant Mayer pushed the accused and as the accused staggered backwards he pulled the pistol from his pocket and succeeded in raising it to an angle of about 45°. The loaded pistol was pointed at Captain McDowell's feet. Captain McDowell "closed" with accused and prevented the accused from further using the pistol. Accused was rather drunk.

The record also shows that accused was found guilty by general court-

martial at Keesler Field on 17 February 1945 of disorderly conduct in station, in violation of Article of War 96, and of disrespectful behavior towards his superior officer while in the presence of enlisted men, in violation of Article of War 63. For these offenses he was reprimanded, restricted to Keesler Field for one month and forfeited $75 of his pay per month for two months.

4. War Department records show that the accused is 28-7/12 years of age and unmarried. He is a high school graduate. Prior to his entry into the Army he was a sales clerk and meter man. On 24 January 1942 he entered the Army as an aviation cadet and was commissioned a second lieutenant, Air Corps Reserve, 2 January 1943. He was promoted to first lieutenant 27 November 1943 and to captain 16 February 1946. He holds the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross, all for action over Germany and enemy occupied territory. He participated in 28 combat missions.

5. In view of all the circumstances of the case, I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 234, 26 June 1947).

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

JAGN-CM 320542

UNITED STATES	)	11TH AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters 11th A/B Division
Private ROBERT B. SANDFORD	)	Artillery, APO 468, 21 December
(6559378), Battery A,	)	1946. Dishonorable discharge
675th Glider Field Artillery	)	and confinement for five (5)
Battalion.	)	years. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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 charged with and was found guilty of nine Specifications, each of which, excepting for changes in the description of the property sold, its value, the date of sale, and the purchaser, is substantially in words and figures as follows:

> "In that Private Robert B. Sandford, Battery A, 675 Glider Field Artillery Battalion, APO 468, c/o Postmaster, San Francisco, California, did, at Yonezawa, Honshu, Japan, on or about 25 July 1946, unlawfully sell to Masao Kimura, a Japanese national, one can of cherries of the value of about $1.06, issued for use in the military service of the United States."

All in violation of Article of War 84. 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 ten years. The reviewing authority reduced the period of confinement to five years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration is the designation of a United States Penitentiary as the place of confinement.

Article of War 42 does not authorize penitentiary confinement in this case since the period of confinement, as authorized by paragraph 104c, MCM, 1928, for any of such offenses does not exceed one year.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, at a place other than a penitentiary, Federal reformatory or correctional institution.

Edward T. Johnson, Judge Advocate.

Joseph T. Brock, Judge Advocate.

James S. Bailey, Judge Advocate.

JAGN-CM 320542 1st Ind.

WD, JAGO, Washington 25, D. C.

TO: Commanding General, 11th Airborne Division Artillery, APO 468, c/o Postmaster, San Francisco, California.

1. In the case of Private Robert B. Sandford (6559378), Battery A, 675th Glider Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence, provided a place other than a penitentiary, Federal correctional institution or reformatory is designated as the place of confinement.

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

(CM 320542).

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 320548

13 APR 1947

UNITED STATES v. Private ROBERT L. REFSNIDER (RA 33620028), Company C, 382nd Military Police Battalion, APO 751	)	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremerhaven, Germany, 31 January 1947. Dishonorable discharge and confinement for one (1) year. The Branch United States Disciplinary Barracks

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 83rd Article of War.

Specification: In that Private Robert L. Refsnider, Company "C" 382nd Military Police Battalion, did, at Bremerhaven, Germany, on or about 1 January 1947, through neglect, damage by negligently driving into the side of a building, a ¾ ton, 4x4, truck of the value of over $50 issued for the Military service of the United States.

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

Specification: In that Private Robert L. Refsnider, Company "C" 382nd Military Police Battalion, APO 751, being on guard as a roving patrol at Bremerhaven, Germany, on or about 1 January 1947, was found drunk on duty.

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

Specification: In that Private Robert L. Refsnider, Company "C", 382nd Military Police Battalion, APO 751, did, at Bremerhaven, Germany, on or about 1 Jnuary 1947, operate a ¼ ton, 4x4 truck, Military Property belonging to the United States, while drunk.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The first question presented by the record is whether the evidence is legally sufficient to support the court's finding of guilty of Charge I and its Specification.

4. The evidence for the prosecution pertinent to the Specification of Charge I is summarized as follows:

On the evening of 31 December 1946, the accused, a military policeman, was on duty as the driver of a military police jeep patrol in Bremerhaven. At about 10:30 p.m. the accused was seen in the jeep outside the Tug Boat Inn in Bremerhaven by two military policemen of another jeep patrol (R 11, 13). At this time accused was alone and shortly thereafter he drove away from the Tug Boat Inn (R 9, 12).

The testimony of several witnesses shows that the accused was drunk, or at least under the influence of intoxicating liquor, while operating the jeep (R 11-12, 22). In the opinion of one of the military policeman he drove "a little bit fast" and they decided to follow him (R 12, 14). The testimony as to what took place thereafter is that of these two military policemen. Private McLaughlin testified as follows (R 12):

"Q. What did you do then?

"A. My driver said, 'You better follow him,' so we turned our vehicle around and started following him.

"Q. When Pvt. Refsnider turned on Rickmerstrasse approximately how far back from him were you?

"A. Just a couple of inches back of him.

"Q. Did you lose sight of him for a moment when he went around the corner?

"A. We did,sir.

"Q. When you came around the corner did you see Pvt. Refsnider again?

"A. We saw the vehicle on the sidewalk.

"Q. Did you stop?

"A. Yes, sir. We saw the merchant marine hold on to his knee and he was saying his knee was hurting him and Pvt. Refsnider was in his vehicle.

"Q. In what condition was Pvt. Refsnider in?

"A. Well, he was leaning over the wheel. He was pretty drunk."

Private First Class Wells testified as follows (R 14):

"Q. When he left the Tug Boat Inn did he drive in a normal manner?

"A. We left first and went around the building and he went behind us. We turned left and he went straight through. We followed him and he made a right hand turn and when we got there we saw a jeep upon the sidewalk."

He then testified that Refsnider did not appear hurt but that he acted "like he was dizzy," and witness then took charge of accused's jeep (R 14).

The defense, in cross-examination of Private McLaughlin introduced a prior sworn statement of the witness for the purpose of showing a prior inconsistent statement (R 13). In the statement the witness had referred to accused as "knocked out" rather than "pretty drunk." Included in the statement was the sentence "After his jeep hit the building the jeep bounced back."

Technician Third Grade Walter, 85th Tank Maintenance Company, testified that a jeep, U.S.A. No. 20656231 was received at the ordnance shop on 16 January 1947 (R 24-25). He testified to the damage then found and to the cost of repairs (R 25). It was stipulated that the registration number of the jeep accused was driving "on or about 1 January 1947" was U.S.A. No. 20656231.

5. The evidence fails to establish that any accident occurred, on the date alleged, other than that accused's jeep was driven on to the sidewalk. There are no facts shown from which it can be inferred that accused drove the vehicle into the side of a building as alleged, or that the jeep was damaged on this particular evening. The statement contained in McLaughlin's prior sworn statement, that the jeep hit the building was plainly based on hearsay, as it is clear from their sworn testimony that neither he nor Private First Class Wells saw the accident occur. Furthermore, the statement was introduced only as a prior inconsistent statement for the purpose of impeaching the witness. The evidence that the jeep was in a damaged condition on 16 January 1947, over two weeks after the alleged accident is not sufficient to prove that accused negligently drove the vehicle into the side of a building on 31 December or that he damaged the vehicle on that occasion, as alleged.

Accordingly, the Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty of Charge I and its specification.

6. It now becomes necessary to determine what punishment is authorized for the two remaining offenses of which accused stands convicted under Charge II and Charge III and the specifications thereof. The offense under Charge II is that of being found drunk on guard duty and that under Charge III is that of operating a motor vehicle while drunk. It is clear from the specifications and the evidence introduced that the guard duty alleged consisted of accused patrolling the city in a jeep, as its driver. The two specifications, therefore, allege offenses that are but different aspects of the same act. Paragraph 80a, Manual for Courts-Martial, 1928 (Cor. 4-20-43) provides in pertinent part:

> "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in the most important aspect."

This provision is not advisory or discretionary merely, but a mandatory rule of limitation (CM 317423, Haswell (1946), citing CM 313644, Carson and other cases). The Table of Maximum Punishments authorizes confinement at hard labor not to exceed six months and a forfeiture of two-thirds pay per month for a like period for the offense of being drunk on guard duty. By the Code of the District of Columbia, Title 40, Section 609 (b), the punishment for a first offense of driving a motor vehicle while under the influence of intoxicating liquor is a fine of $500 or imprisonment for six months or both. Since the maximum punishment authorized for each offense is the same, it is unnecessary in this case to decide which of the two offenses charged is the most serious aspect of the accused's drunkenness, but the rule quoted above prevents a

punishment in excess of the authorized maximum for either. The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and a forfeiture of two-thirds of accused's pay per month for six months.

7. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Charge I and the specification thereof, legally sufficient 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 involves confinement at hard labor for six months and forfeiture of two-thirds of the accused's pay per month for a like period.

A. Hottenstein, Judge Advocate

Ulrich A. Dolf, Judge Advocate

Philip J. Smith, Judge Advocate

JAGH - CM 320548 1st Ind

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. Refsnider (RA 33620028), Company C, 382d Military Police Battalion, APO 751, I concur in the foregoing holding by the Board of Review, and for the reasons stated recommend that the findings of guilty of Charge I and its specification be disapproved and that only so much of the sentence be approved as involves confinement at hard labor for six (6) months and forfeiture of two-thirds of the accused's pay for a like period. Thereupon you will have authority, under the provisions of Article of War 50½, to order the execution of the sentence as modified.

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

(CM 320548).

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.

JAN 26 1947

JAGQ - CM 320567

UNITED STATES	)	THE ARTILLERY CENTER
v.	)	Trial by G.C.M., convened at Fort Sill, Oklahoma, 24 February 1947. Dismissal and total forfeitures.
Major ROBERT H. CAMERON (0-304818), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 Major Robert H. Cameron, Headquarters, 5th Field Artillery Group, (Then Headquarters, 1st Field Artillery Observation Battalion), did, without proper leave, absent himself from his station at Fort Sill, Oklahoma, from about 1 February 1947 to about 3 February 1947.

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

Specification: In that Major Robert H. Cameron, Headquarters, 5th Field Artillery Group, (Then Headquarters, 1st Field Artillery Observation Battalion), was, at Lawton, Oklahoma, on or about 17 January 1947, in a Public Place, to wit, Lawton, Oklahoma Police Station, drunk and disorderly while in uniform.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification and guilty of the Specification of Charge II. Of Charge II he was found not guilty, but guilty of a violation of the 96th Article of War. Evidence of one previous conviction by general court-martial 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 pursuant to the provisions of Article of War 48.

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

As to the Specification of Charge I.

A duly authenticated extract copy of the morning report of accused's organization, Headquarters and Headquarters Battery, 1st Field Artillery Observation Battalion, for 22 January 1947 shows that accused departed from his organization on an emergency leave for five days effective 22 January 1947 (Pros. Ex. A; R. 6). Accused's emergency leave was extended for an additional five days effective 27 January 1947 (Pros. Ex. B; R. 7). The accused failed to return from emergency leave on 1 February and was carried as "Emerg lv (5 days) to ext (5 days) to AWOL 0001, (1 Feb 47)" on the morning report of his organization for 1 February 1947 (Pros. Ex. C; R. 7). On 3 February 1947, while in an absent without leave status, he was relieved from assignment to the First Field Artillery Observation Battalion and assigned to Headquarters 5th Field Artillery Group (Pros. Ex. D; R. 7). The morning report of the latter organization shows that the accused returned to a duty status as of 1400 hours, 3 February 1947 (Pros. Ex. E; R. 8).

As to Specification of Charge II.

At approximately 2100, 17 January 1947, accused and his wife entered the Police Station at Lawton, Oklahoma, for the purpose of obtaining a statement from a certain police officer regarding the arrest of two enlisted men (R. 9, 11, 18-24). Four police officers testified that accused "slammed" his brief case on the desk; demanded to see officer Farris; talked in a loud voice; staggered when he walked, and in their opinion was intoxicated (R. 8, 9, 10, 18, 25-35). His uniform was wrinkled and his shirt tail was "partially out" (R. 9, 10, 18, 32).

Technician Fifth Grade Thompson who was on duty as a military policeman in the station when accused entered testified that accused was "drunk and pretty loud" and "had to take hold of things" to walk downstairs (R. 36). In his opinion accused "created a disturbance" (R. 33).

4. Evidence for the Defense.

Mr. Stetfield, operator of a skating rink, testified that accused came to his place of business about 2200, 17 January 1947, to obtain a statement relative to the arrest of the enlisted men, and he was not

intoxicated, disorderly or loud (R. 45-47).

Accused was advised of his rights as a witness and elected to testify under oath (R. 37) that his wife had been ill since 1 December 1946 and has been treated in three hospitals for her mental condition (R. 40). On the advice of the Post Surgeon who had examined his wife, he secured a five-day leave for the purpose of taking her to Brooke General Hospital, Fort Sam Houston, Texas, and when he was advised that she could only remain there for a limited period he wired for and received a five-day extension on his leave in order to take her to the Coin Campbell Sanitarium, Oklahoma City, Oklahoma (R. 38-40). After completing the trip to Oklahoma City, he returned to his proper station on 2 February 1947 and reported for duty at 1400, 3 February 1947 (R. 39, 40). He had been under a mental strain because of worry over his wife's condition, could not eat or sleep; "lost all track of time" and did not realize his leave expired on 1 February 1947 (R. 41). He served three years overseas, principally in Germany and had no "time off" (R. 41, 42).

First Lieutenant Nisley, M.C., psychiatrist at the Station Hospital, Fort Sill, testified that he examined accused's wife on 18 January 1947, found that she was entering the "maniac phase of depressive psychosis" and consequently was in need of immediate hospitalization (R. 44, 45).

5. The evidence establishes beyond any doubt the offenses charged. Accused does not deny his absence without leave (Spec. of Charge I) and while it is apparent that there are extenuating circumstances such evidence is in mitigation and not defense of the offense charged. The testimony also shows that accused was intoxicated in a public place and caused a disturbance therein (Spec. of Charge II). Five witnesses testified that in their opinion he was "drunk", loud and boisterous and had difficulty in walking from the front of the room to the military police desk in the basement. The court found that his conduct did not violate the 95th Article of War but was in violation of Article of War 96.

While no issue of insanity was raised at the trial accused was examined by a psychiatrist at the Station Hospital, Fort Sill, Oklahoma, on 4 February 1947 and found to be sane and responsible although "highly nervous and unstable".

6. War Department records show accused to be 36 years of age and married. He graduated from high school in 1928 and from Alabama Polytechnic Institute in 1933. He entered on active duty 23 July 1940 as a First Lieutenant (Res); was promoted to Captain, 29 December 1942 and to Major, 19 May 1944. His efficiency reports disclose ratings of very satisfactory and excellent from 1940 to 30 June 1944. For the periods of 1 July to 31 December 1944 and 1 January to 13 April 1945, he was rated unsatisfactory and re-classification proceedings were instituted but accused returned to the United States on an emergency leave and no final action was taken in the proceedings. On 7 January 1947, he was convicted by a general court-martial of two offenses of being drunk and disorderly and sentenced to forfeit $150.00 pay per month for two months.

7. 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, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st and 96th Articles of War.

W H Johnson Jr., Judge Advocate

Joseph J Stern, Judge Advocate

E E Schenken, Judge Advocate

JAGQ - CM 320567 1st Ind JUL 15 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 Major Robert H. Cameron (0-304818), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 1 February to 3 February 1947, in violation of the 61st Article of War, and of being drunk and disorderly in uniform in a public place, in violation of the 96th Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that on the evening of 17 January 1947 accused, in connection with his military duties was in the police station in Lawton, Oklahoma, in an intoxicated condition and created a disturbance by "slamming" his brief case on the desk, demanding to see a certain police officer, talking in a loud voice and "staggering" down the steps to the room occupied by the military police. He obtained an emergency leave on 22 January 1947 for the purpose of taking his wife to a hospital, and after receiving one five-day extension of his leave he was two days late in reporting back to his proper station.

Accused's wife was "entering the maniac phase of maniac depressive psychosis" and accused was advised by the Post Surgeon on 18 January 1947 to hospitalize her immediately. He testified that he obtained the emergency leave for this purpose but was so worried over her condition that he lost "all track of time" and did not realize his leave had expired.

A psychiatric examination of accused on 4 February 1947 resulted in the conclusion that although he was "highly nervous and unstable"

he was sane and responsible for his acts. In view of the above diagnosis and correspondence received regarding accused's mental condition he was transferred to Brooke General Hospital for observation and report by a Board of Medical Officers with respect to his mental responsibility. The Board made its report on 21 April 1947 and found that accused could distinguish right from wrong, adhere to the right and cooperate intelligently in his defense.

5. War Department records show that accused is 36 years of age and married. He graduated from high school in 1928 and from Alabama Polytechnic Institute in 1933. He entered on active duty 23 July 1940 as a First Lieutenant (Res); was promoted to Captain, 29 December 1942 and to Major, 19 May 1944. His efficiency reports contain ratings of very satisfactory and excellent from 1940 to 30 June 1944. For the periods of 1 July to 31 December 1944 and 1 January to 13 April 1945 he was rated unsatisfactory and re-classification proceedings were instituted but accused returned to the United States on an emergency leave and no final action was taken in the proceedings. On 7 January 1947 he was convicted by a general court-martial of two offenses of being drunk and disorderly and sentenced to forfeit $150.00 pay per month for two months.

6. Consideration has been given to a letter from Senator Lister Hill, dated April 29, 1947; copy of a letter from Honorable Georgia L. Lusk, dated March 17, 1947, to The Adjutant General; copy of a letter from Doctor Joseph H. Taylor to The Adjutant General; copy of a letter from Doctor N. D. Frazin to The Adjutant General, dated March 15, 1947, and a copy of a telegram from the father of accused to Senator Hill.

7. By a continued course of conduct, culminating in the present trial by general court-martial (for offenses one of which occurred just ten days subsequent to his conviction by general court-martial for identical offenses), accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

7 Incls
1. Record of Trial
2. Form of action
3. Ltr fr Sen Hill, dtd Apr 29/47
4. Cy ltr fr Hon. Lusk, 3/17/47
5. Cy ltr fr Dr. Taylor
6. Cy ltr fr Dr. Frazin, 3/15/47
7. Cy telegram fr father of accused

(G.C.M.O. 279, 22 Aug. 1947)

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

JAGK - CM 320578

13 JUN 1947

UNITED STATES	MILITARY DISTRICT OF WASHINGTON
v.	Trial by G.C.M., convened at Army Medical Center, Washington, D. C., 3 March 1947. Dismissal.
Captain KENNETH M. HIMES (0-1575360), Quartermaster 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 officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Kenneth M. Himes, QMC, did, at Washington, District of Columbia, on or about 1 August 1946, with intent to deceive, injure and defraud, wrongfully and unlawfully make and utter to Master Sergeant Arthur V. Rush, Junior, a certain check, in words and figures, as follows, to wit:

BLUE RIDGE SUMMIT, PA. 1 Aug 19 46 No. _____

THE FIRST NATIONAL BANK of Blue Ridge Summit 60-1629 / 3

Pay to the order of Sgt Rush ---------- $9.00

Nine and no/100 ---------- DOLLARS

_____ Capt Kenneth M. Himes

in payment of a certain debt then due and owing, he, the said Captain Kenneth M. Himes, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Blue Ridge Summit, Pennsylvania, for the payment of said check.

Specification 2: In that Captain Kenneth M. Himes, QMC, did, at Washington, District of Columbia, on or about 9 September 1946, with intent to deceive, injure and defraud, wrongfully and unlawfully make and utter to Christ A. Nitsakes, doing business as Market Tavern, at Washington, District of Columbia, a certain check, in words and figures, as follows, to wit:

BLUE RIDGE SUMMIT, PA. 9 Sept 19 46 No.

THE FIRST NATIONAL BANK
of Blue Ridge Summit

60-1629
3

Pay to the
order of Cash $ 15.00

Fifteen and no/100 ---------- DOLLARS

Capt Kenneth M. Himes

and by means thereof, did fraudulently obtain cash or merchandise, or merchandise and cash, of the value of about $15.00, he, the said Captain Kenneth M. Himes, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Blue Ridge Summit, Pennsylvania, for the payment of said check.

Specification 3: (Finding of guilty disapproved by reviewing authority).

Specification 4: In that Captain Kenneth M. Himes, QMC, being indebted to Mrs. Nora Hoffmeister, in the sum of about $164.50 for rent and incidentals, which amount became due and payable on or about 1 June 1946, did, at Washington, District of Columbia, from about 1 June 1946 to 17 December 1946 dishonorably fail and neglect to pay said debt.

Specification 5: (Finding of not guilty).

Specification 6: In that Captain Kenneth M. Himes, QMC, being indebted to Flight Lieutenant Kenneth A. D. Inglis, Royal Air Force Delegation, in the sum of about $32.00, for a loan, which amount became due and payable on or about 1 September 1946, did, at Washington, District of Columbia, from about 1 September 1946 to 17 December 1946 dishonorably fail and neglect to pay said debt.

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

Specification: In that Captain Kenneth M. Himes, Quartermaster Corps, did, without proper leave, absent himself from his station at Walter Reed General Hospital, Army Medical Center, Washington, District of Columbia, from on or about 6 January 1947 to on or about 10 January 1947.

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

Specification: In that Captain Kenneth M. Himes, Quartermaster Corps, did, at Washington, District of Columbia, on or about 30 December 1946, with intent to deceive, injure, and defraud, wrongfully and unlawfully make and utter to Dennis Calvert a certain check, in words and figures as follows, to wit:

N 15-3 P Dec 30 19 46 No.

First National Bank, Blue Ridge, Summit, Pa.

Pay to the Order of Dennis Calvert $30.00

Thirty and no/100 ---------- Dollars

Capt. Kenneth M. Himes

and by means thereof did fraudulently obtain from Dennis Calvert about $30, he, the said Captain Kenneth M. Himes, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Blue Ridge Summit, Pennsylvania, for the payment of said check.

He pleaded guilty to Additional Charge I and its specification but not guilty to the remaining charges and specifications. He was found guilty of all charges and guilty of all specifications thereto except Specification 5 of the original charge, of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority disapproved the finding of guilty of Specification 3 of the original charge, approved the sentence, but remitted the forfeitures and confinement adjudged and forwarded the record of trial pursuant to Article of War 48.

3. For the Prosecution

Charge, Specification 1

On some date in July 1946 the accused executed and delivered to Master

Sergeant Arthur V. Rush, Jr., Headquarters and Headquarters Detachment, Central Intelligence Group, Washington, D. C., a check in the amount of $9.00 drawn on the First National Bank, Blue Ridge Summit, Pennsylvania. The check postdated 1 August 1946 was given to cover a pre-existing debt of $4.00 and a further advance of $5.00. It was returned by the drawee bank marked "Not sufficient funds." Master Sergeant Rush was reimbursed the $9.00 sometime in November (R. 21-25, Pros. Ex. 1).

Specification 2

Christ A. Nitsakes, proprietor of a lunchroom at 472 K Street, N.W., Washington, D. C., identified a check in the sum of $15 which he testified accused gave him on or about 9 September 1946 in exchange for cash in the amount shown. The check was drawn on the bank mentioned in Specification 1 and was dishonored and returned with the notation, "Not sufficient funds." Mr. Nitsakes had never been reimbursed his loss and had not seen accused subsequent to the transaction until the day of trial (R. 41-42; Pros. Ex. 5).

Specification 4

There was received in evidence the deposition of Mrs. Nora B. Hoffmaster, proprietress of the Locust Grove Inn, Blue Ridge Summit, Pennsylvania, who stated that from 2 February 1946 to 20 July 1946 the accused was her tenant and had agreed, at the beginning of the tenancy, to pay her the sum of $15.00 per week. She stated that although requested of him, the accused had never paid her for any period of the tenancy. On 1 June 1946 the amount due and owing her was $164.50. On motion of the defense the 9th, 10th, 11th and 12th interrogatories and answers thereto of Mrs. Hoffmaster's deposition were stricken from the record. This testimony related to an alleged check not in issue(R. 39-40, Pros. Ex. 4).

Specification 6

Flight Lieutenant Kenneth Andrew David Inglis, RAF, a witness for the prosecution, stated that prior to July 1946 he and accused rented a room together, each agreeing to pay half of the rent. The witness further stated that he paid the rent including accused's part each week for seven weeks and that accused had agreed to reimburse him for half the amount, or $42.00, but that except for $10 paid him in September no further payments were made by accused. Sometime in August accused "presented" him with a check for $42.00 but that it was worthless and he could not cash it. Lieutenant Inglis had "broached the subject" to accused on several occasions but had not received satisfaction of the debt (R. 30-35).

Additional Charge I and its Specification

Although accused pleaded guilty to absence without leave as alleged

in this specification there was received in evidence extract copy of the morning report of 9901st TSU, SGO, Detachment of Patients, Walter Reed General Hospital for 10 January 1947 showing accused absent without leave for the period 6 January to 10 January 1947 (R. 14, Pros. Ex. 1).

Additional Charge II and its Specification

Mr. Dennis Calvert, catering manager, Hotel 2400, Washington, D. C., identified a check in the sum of $30.00 dated 30 December 1946 and drawn on the First National Bank, Blue Ridge Summit, Pennsylvania, which he stated the accused executed and delivered to him in exchange for cash. The check was returned "Not sufficient funds" and Mr. Calvert, who had endorsed the check personally, reimbursed the hotel and sustained the loss, for which he was never paid. The check was received in evidence as Prosecution Exhibit 6 (R. 43-46).

The prosecution offered in evidence the deposition of Mr. Melvin C. Bolan, Cashier, First National Bank, Blue Ridge Summit, Pennsylvania, with the proper indorsement of defense counsel showing that the interrogatories had been submitted to him before they were taken. In his deposition Mr. Bolan identified accused's signature on the checks mentioned in the evidence by comparison of his signature, as it appeared on his signature card at the bank, and stated that accused did not have sufficient funds on deposit to meet payment thereof when they were presented. The last deposit by accused had been made on 3 July 1946. The defense objected to such testimony, contending that the cashier had not been qualified as an expert, but withdrew such objection as to all the checks except the one given to Sergeant Rush in the sum of $9.00. The court overruled the objection (R. 35, Pros. Ex. 3).

4. For the defense

The accused, at his request, and being cognizant of his rights as a witness, elected to testify in his own behalf. He related domestic difficulties culminating in his wife's securing a divorce in December 1946 and being granted custody of their child. He had made an allotment to her in the sum of $150.00 per month. He maintained a residence at Blue Ridge Summit, Pennsylvania, and was commuting from Washington to such place. The indebtedness incurred with Mrs. Hoffmaster was for the family's rent. Accused stated that he had made some arrangements with his commanding officer, Major Pohlman, to liquidate his debts, but he did not know what debts had been paid. The last payment he had received from the finance officer was on 1 December 1946 and accused asserted that until July (1946) he had deposited money in the bank. He did not know, until the checks which were introduced in evidence had been returned by the bank, that he did not have funds on deposit sufficient for their honor. The accused admitted owing the debts alleged but stated that he intended to pay "these people." He asserted that he had been drinking excessively from July to December 1946 (R. 48-53).

On cross-examination accused admitted that when he gave the check to Dennis Calvert (Spec., Chg. II) he knew that he did not have funds sufficient to meet payment thereof. He had intended "taking it up." He stated that his total pay and allowances amounted to about $370.00, but asserted that he also maintained a home in Grosse Point, Michigan, and had sent some money to that place, but he could not recall the amounts, which were "small." He did not use any part of his December pay to liquidate any of his debts because he had bought some presents and "went out New Years Eve." Accused admitted occupying a room with Flight Lieutenant Inglis and acknowledged owing the flight officer $32.00. In response to a question by the court, accused stated that he had promised Major Pohlman that he would set aside $50 or $60 per month to satisfy his debts and that he did this for two months, the remainder of his pay being used for "entertainment" (R. 48-62).

No further evidence was presented by the defense.

The court, on its own motion, called Lieutenant Colonel Beverly Smith, Chief, Neuropsychiatric Service, Walter Reed General Hospital. Colonel Smith had studied accused's case history and interviewed him several times. He stated that accused was not psychotic, that he was sane, knew the difference between right and wrong and was able to adhere to the right and that he was able to participate intelligently in his defense. He stated further that accused had an antisocial personality, meaning that "the man does not conform to the usual demands that society places upon him to behave." Considerable drinking and other factors, including lack of financial responsibility, contributed to render him antisocial (R. 64-67).

5. The action of the court in overruling the defense objection to the testimony of the bank cashier was in no manner prejudicial to accused's rights. Ordinarily a bank cashier, by virtue of his duties, is competent to render an opinion regarding the source of handwriting by a comparison of specimens. The party offering the witness should, however, affirmatively show by proper questions and answers the qualification of the witness (Wharton's Criminal Evidence, Vol. II, p. 1700). If there be any doubt that Mr. Bolan was properly qualified, it is sufficient to state that accused admitted giving all the checks alleged in the specifications, and with the exception of the $9.00 check given Sergeant Rush he acknowledged that the indebtedness for which they were given was unsatisfied as of the time of trial.

Although hospitalized for a portion of the time within which the offenses are alleged to have been committed, there is no evidence in the record tending to show that accused was legally irresponsible for any of his acts or conduct. To owe money is no offense but the failure of an officer to make payment under circumstances impugning his honor and integrity is a violation of Article of War 96 (Winthrop's Military Law and Precedents, Reprint, p. 715; CM 274930, Curley, 47 BR 375,383). The testimony of Mrs. Hoffmaster and Flight Lieutenant Inglis show that although accused at various times made promises to pay all or part of the debts due them he exhibited total

disregard to such creditors, using his money for what he described as entertainment. He admitted that heavy drinking consumed much of his salary. Under the facts and circumstances from which these obligations arose, and accused's failure to pay them or make reasonable effort to satisfy the parties, the court was fully justified in finding that accused's neglect and failure was of a dishonorable nature.

The accused admitted giving all the checks set forth in the pleading and admitted that each was returned from the drawee bank unsatisfied. Except for the $30 check given to Mr. Calvert on 30 December 1946, which accused admitted giving with knowledge that he did not have sufficient funds on deposit to meet payment thereof, there is not sufficient evidence upon which to base an inference that the other checks were given "then well knowing that he did not have and not intending that he should have sufficient funds *** for the payment of said check." In fact the record fails to show the condition of his account at the time he gave the checks to Master Sergeant Rush and to Mr. Nitsakes. Although the issuance of a check against an account which is in fact insufficient at the time of issuance to meet payment of such check, or which is nonexistent or will be insufficient upon prompt presentment for payment because of prior outstanding checks which will deplete the account, is presumptive evidence of fraud, the maker being charged in the ordinary case with knowledge of the condition of his account, the inference of fraud must be based on some proof of the actual condition of the account at the time the check or checks was given. Here is where the record is silent in respect to the checks dated 1 August 1946 and 9 September 1946. Nevertheless, as a matter of military law, the utterance of checks, without maintaining sufficient funds on deposit to provide for the payment upon presentation, in itself constitutes conduct discreditable to the military service in violation of Article of War 96, regardless of intent to defraud or guilty knowledge (CM 249232, Norren, 32 BR 95, 102-103, 4 Bull, JAG 341). We conclude, therefore, as to the check given Master Sergeant Rush on or about 1 August 1946, and the check given Mr. Nitsakes on or about 9 September 1946, the record is legally insufficient to support the findings that such checks were made and uttered with intent to deceive, injure and defraud.

6. War Department records show that accused is 33 years of age, and was inducted into the Army of the United States as a private on 3 April 1941. Prior thereto he had been employed in a clerical capacity with the Ford Motor Company and as a salesman with the Coca-Cola Company. On 3 July 1942 he was commissioned a second lieutenant, AUS, at the Quartermaster School, Camp Lee, Virginia. On 31 August 1942 he was promoted to first lieutenant and on 29 October 1945 to captain. An efficiency report dated 31 December 1945 gave him a numerical rating of 5.5, or superior, and a similar report dated 31 December 1946 rated him as unsatisfactory.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the

trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 4 and 6 thereunder, legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 of the Charge as involves findings that on the dates alleged the accused wrongfully and unlawfully made and uttered the described checks to the parties alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof, in violation of Article of War 96, legally sufficient to support the findings of guilty of Additional Charges I and II and their specifications, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61 or 96.

Chester B. Silvis, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stengel, Judge Advocate

JAGK - CM 320578 1st Ind

WD, JAGO, Washington 25, D. C. 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 Kenneth M. Himes (0-1575360), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of unlawfully making and uttering three checks with intent to defraud (Specifications 1 and 2 of the Charge; Add'l Chg. II and Specification); of dishonorably failing to pay a debt of $164.50 for rent and incidentals owed to his landlady (Specification 4 of the Charge); of dishonorably failing to pay a $32.00 debt owed to a flight officer of the Royal Air Force (Specification 6 of the Charge), all in violation of Article of War 96; and of absence without leave from 6 January to 10 January 1947, in violation of Article of War 61 (Additional Chg. I and Specification). 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 disapproved the finding of guilty of dishonorably failing to pay one of the debts (Spec. 3 of the Charge), approved the sentence, but remitted the confinement and forfeitures 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. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 4 and 6 thereunder (dishonorable failure to pay debts), legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 of the Charge (making and uttering fraudulent checks) as finds that accused wrongfully and unlawfully made and uttered the described checks to the parties alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof; and legally sufficient to support the sentence and to warrant confirmation of the sentence.

On some day in July 1946 accused executed and delivered to Master Sergeant Arthur V. Rush a check dated 1 August 1946 in the sum of $9.00 and drawn on the First National Bank, Blue Ridge Summit, Pennsylvania. The check was dishonored by the drawee bank but Rush was reimbursed the amount thereof in November 1946. On 9 September accused procured Mr. Christ A. Nitsakes, a tavern operator in Washington, D. C., to cash a check for him in the sum of $15.00. The check was dishonored and Mr. Nitsakes was never reimbursed his loss. Prior to 1 June 1946 the accused became indebted to Mrs. Nora Hoffmaster, Blue Ridge Summit, Pennsylvania, in the sum of $164.50

for rent. Although he promised on various occasions to make payment thereof no part of the debt was ever paid. On or about 1 September 1946 accused became indebted to Flight Lieutenant Kenneth A. D. Inglis, Royal Air Force, in the sum of $32.00 by reason of a rental agreement. Although payment was requested of accused several times, the debt was never paid. On or about 30 December 1946 the accused executed to Mr. Dennis Calvert, Hotel 2400, Washington, D. C., a check in the sum of $30.00, and received cash therefor. The check was dishonored by the drawee bank and Mr. Calvert was never reimbursed for his loss. Accused testified that he knew he did not have sufficient funds in bank to pay this check, but expected to meet it. The accused pleaded guilty to absence without leave for the period 6 January 1947 to 10 January 1947. The record indicates that sometime in October 1946 he was attached to the Detachment of Patients, Walter Reed General Hospital. He had experienced domestic difficulties and his wife procured a divorce in December 1946. Medical testimony produced in the case indicates that he was at all times mentally responsible for his acts but possessed an antisocial personality marked by financial irresponsibility and heavy drinking.

Attached to the record of trial are numerous letters from persons requesting collection of worthless checks and relating circumstances showing that such persons, including enlisted personnel, have been victimized by accused's misconduct. In an efficiency report dated 31 December 1946 it is stated, "He has been exceedingly unreliable even under close supervision."

I recommend that only so much of the findings of guilty of Specifications 1 and 2 of the Charge be approved as finds that accused, on the dates alleged, wrongfully and unlawfully made and uttered the described checks to the parties alleged and did fail to maintain a balance to his account in the drawee bank sufficient to meet payment thereof in violation of Article of War 96; and that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 244, 10 July 1947).

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

JAGK - CM 320580

26 JUN 1947

UNITED STATES v. Private First Class JULIAN J. JEFFERSON (42059801), 3420th Ordnance Medium Automotive Maintenance Company.	CONTINENTAL BASE SECTION Trial by G.C.M., convened at Munich, Germany, 28 and 29 January 1947. To be hanged by the neck until dead.

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

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

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

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

Specification: In that Private First Class Julian J. Jefferson, 3420th Ordnance Medium Automotive Maintenance Company, did, in conjunction with Private Herbert Brown, 657th Ordnance Ammunition Company, at or near Munich, Germany, on or about 25 June 1946, with malice aforethought, wilfully, feloniously, deliberately, unlawfully and with premeditation, kill one Hans Habermann, a human being, by shooting him with a pistol.

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

Specification 1: In that Private First Class Julian J. Jefferson, 3420th Ordnance Medium Automotive Maintenance Company, having been duly placed in confinement in Post Stockade 514th Quartermaster Group Flak Caserne, on or about 18 April 1946, did, at Flak Caserne on or about 26 April 1946 escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private First Class Julian J. Jefferson, 3420th Ordnance Medium Automotive Maintenance Company, having been duly placed in confinement in Post Stockade 514th Quartermaster Group Flak Caserne, on or about 29 June 1946, did, at Flak Caserne, on or about 20 August 1946 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. All the members of the court-martial present at the time the sentence was adjudged concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. This is a trial upon rehearing. At the original hearing the accused was convicted upon Charges and Specifications identical with those set forth herein. He was sentenced to be hanged by the neck until dead. The reviewing authority, upon advice of his staff judge advocate and after due consideration, disapproved the sentence and ordered a rehearing before another court thereafter designated and which heard this case.

4. Evidence for the Prosecution.

Angela Weiss, a German civilian residing at Leonhardsbach, Germany, testified that for several months prior to 25 June 1946 she had been a friend of the accused, whom she called "Joe" Jefferson, and Herbert Brown, both U.S. soldiers on duty in Germany. At about 1710 hours on the evening of 25 June 1946, Miss Weiss, the accused and Brown were at the home of "Mrs. Rempel" located near the Autobahn leading from Munich to Ingolstadt. The accused and Brown were drinking schnapps and Mrs. Rempel, her daughter and Miss Weiss were drinking coffee. Brown became infuriated at Mrs. Rempel because she "was supposed to have insulted me [Miss Weiss]". A brawl ensued after which the men left, Brown carrying some blankets and accused carrying some blankets and a bag. Miss Weiss accompanied the men to a nearby latrine but the two men returned to the Rempel house to get some cigarettes which Brown asserted he had left behind. They remained at the house about five minutes and then started back to the latrine to rejoin Miss Weiss. As they left the house the second time, accused had a pistol in his hand and fired several shots into the house. Brown also had a pistol, smaller than that of the accused and when they rejoined Miss Weiss, Brown stated, "I will go to the Autobahn and make a man caput." Miss Weiss stated that she tried to restrain Brown but that he "pushed me aside and followed Jefferson who was already walking ahead, to join him." Miss Weiss remained to the rear, Brown "caught up" with accused near the Autobahn

and the two men were standing on the same side of the highway with Jefferson to the right of Brown when the witness saw headlights of a car approaching. Brown signaled for the car to stop but was unsuccessful and this car proceeded on toward Munich. Another car, proceeding in the same direction approached and stopped. Brown opened the door on the right side of the car, "leaned" inside, shouted something in English which the witness could not understand and then she heard a shot. Someone in the car cried out for help and then a second shot was heard. Brown came out of the car, turned around and called to the witness, "Snookie, come here". Miss Weiss stated that she became frightened and ran away behind the bridge. One or two minutes elapsed between the firing of the two shots. Later, the witness got in a truck with some colored soldiers and made her way to the apartment of her sister in the town of Leonardsbach. On the following morning accused came to the apartment and told Miss Weiss that "Brown shot so quickly that it was a dream to him." She asked accused whether the "man" was dead and he replied "the man is dead" but she could not remember whether he said that "Jefferson or Brown killed the man". When relating that the man was dead accused made a gesture with his hand, which the witness reinacted before the court and which is described on page 16 of the record as follows:

> "Pros: Let the record indicate that the witness made a motion of pointing the pistol toward the ground and pulling the trigger.
>
> "Def: No objection." (R. 7-17).

Miss Weiss examined two pistols which were exhibited to her by the trial judge advocate. She stated that the larger one looked like Jefferson's and that the smaller one could have been Brown's because it had no magazine in it. By stipulation of the parties duly signed and agreed to by the accused there was introduced in evidence a map of Reichsbahnlager III, the area identified as covering the scene of the crime, including the bridge and highway leading from Ingolstadt to Munich (R. 20; Pros. Ex. 1).

On cross-examination, Miss Weiss admitted that she was a prisoner of the military authorities, that she had known Brown for about seven months, and that they had quarreled at times "about jealousy" but although she had known accused for about six months she had never found him to be quarrelsome. At the request of defense counsel, the witness marked the numeral "4" at the place on the map (near the latrine) where she testified that she was standing when the shooting occurred. The defense then queried, "You couldn't see Brown and Jefferson then, when the shots

were fired, could you?" To which the witness replied, "The last shot was fired close at the place where I stood, fired by Jefferson." (R.21) (It is not entirely clear if the witness referred to the shooting at the Rempel house or out on the Autobahn.)

Upon redirect examination Miss Weiss testified that she had seen Brown's pistol in the afternoon before the shooting and that "he had a hook and with this he had to push the expended shell out of the gun" (R. 23).

At about midnight on 25 June 1946, and in the course of his official duties, Corbinian Druck, a German policeman assigned to the 9th District, Munich, went to Reichsbahnlager III and made an investigation of an incident which had been reported. He was accompanied by another police officer and at about 0100, officers "Steve and Wagner" arrived. The policemen found an automobile, known as an "Audi", a dead body, five or six "nine millimeter shells", half of which were expended and the other half unexpended. The witness indicated on Prosecution Exhibit 1 the position of the car and the body, identified Prosecution Exhibits 5 and 7 as being a picture of the dead body and the Audi, respectively (R. 24-27).

Johan Wagner, also of the Ninth District Police, Munich, identified Prosecution Exhibit 5 as the dead man he and policeman Druck found at the time and place heretofore mentioned and he also recognized Prosecution Exhibit 7 as being a photograph of the "Audi car of that driver." On motion of the defense, the statement "that driver" was stricken from the record as being a conclusion of the witness not based on actual knowledge (R. 28-29). By agreement of counsel, and the written consent of accused there was introduced in evidence as Prosecution Exhibit 2 the following stipulation:

> "It is stipulated by and between the Prosecution and the Defense, with the consent of the Accused, that if Clement Steve, German civilian policeman assigned to the 9th Station in Munich, Germany, were present in court he would testify under oath as a witness as follows:
>
> "That on 26 June 1946 in the course of his official duties he relieved German civilian policeman Wagner as guard over the body of Hans Habermann at the bridge buttress on the Autobahn leading from Munich to Ingolstadt and near the Reichbahnlager III, and remained on guard over the body until Joseph Grammal and one Niederhofer of the Bavarian Red Cross, Munich, Germany, placed the body in an ambulance at about

1845 hours on said date and took same to the Institut Fur Gerichtliche Medizin und Kriminalist Der Universitat in Munich, Germany. He then delivered the Audi automobile, License No. 118274, marked on the left door, 'MGE Bavaria 274,' to the Headquarters of the 508th Military Police Battalion in Munich, Germany.

"Signed and agreed to at Munich, Germany, this 28 day of January, 1947." (R. 30).

Josef Leister, a criminal inspector of the Munich police, testified that on the morning of 26 June 1946 he made an investigation of an "incident" in the vicinity of Reichsbahnlager 3 in Munich, Germany. When he arrived he found a car of the military government, which had been driven by one Habermann, standing near the bridge. He then examined the dead body. He stated that Prosecution Exhibit 5 was a true picture of the dead body he found and that from the inside pocket of the dead man's jacket he removed a German driver's license, car registration certificate and card-pass or vehicle pass. These papers were received in evidence, without objection, as Prosecution Exhibit 3 (R. 31, 32). The German driver's license describes the person of Hans Habermann of Munich, Germany. The car registration certificate describes an "Audi" (auto union) and states that the vehicle is the property of the United States Military Government, Bavaria, APO 403, U.S. Army. The "card-pass" which is entitled, "Military Government of Germany, Temporary Registration" contains the following: "Name: Habermann, Hans; Age: 38; Sex: Mannlich; Permanent Address: Munchen, Kaufingerstrasse 5/III; Occupation: Kaufmann." With the foregoing information the inspector tagged the body for further identification and notified his widow in order that burial arrangements could be made (R. 33). Joseph Graml, ambulance driver for the Bavarian Red Cross arrived at the scene at about 1400 hours 26 June 1946, "picked up" the dead body of Hans Habermann and took it to the "Institut fur Gerichtliche, Medizin und Kriminalistik, Der Universitat, Munich," where Dr. Wolfgang Laves performed an autopsy. The result of this autopsy was described by Dr. Laves as follows:

"Q. What did you find as a result of such autopsy?
A. I found as a result of this autopsy, several wounds, and two sorts of wounds. One group was to be described as shot wounds, and a second group of wounds were lacerated wounds and cut wounds and so on. And all these wounds were located at the head and at the neck of this Habermann.

"Q. Was there more than one gunshot wound?
A. Yes, there were two gunshot wounds.

"Q. Will you describe those in detail, please?
A. One wound was situated at the left side of the chin and the surroundings of this wound I found powder burns and powder traces in the skin. This wound was combined with a wound channel crossing the superficial parts of the neck and the bullet had left the body at the left side of the neck some centimeters below the left ear.

"Q. Was that wound fatal?
A. That wound was not fatal. And there was to be found a second shot wound. This wound entered below the left — the bullet had entered the body below the left ear and had left the skull some centimeters over the right ear. The wound channel had crossed the basis of the skull and the brain, left part of the brain we call medulla oblongata — that is the line between the brain and the spinal cord. This part was cut off by this bullet, if it is allowed to describe it in this manner. And at the entrance of this wound I could not find powder traces. This wound had caused the death. *** " (R. 36).

The doctor was of the opinion, although he could not say definitely, that the so-called "superficial wounds" or scratches on the head and neck were the result of a struggle which ensued between the first, or non-fatal shot, and the second or fatal shot. Both bullets had entered the left side of the victim's head. On cross-examination, Dr. Laves stated that he could not determine the caliber of the bullets due to the elasticity of the skin and the shattered condition of the skull bones, however, he was of the opinion that death had been instantaneous "after the second wound" (R. 36-40).

Ernest J. Brady, 13th Military Police CID, testified that at about "4:15" on 26 June he investigated the incident on the Autobahn near Reichsbahnlager III in Munich. He found the dead body of a civilian. Near the body he found a 7.65 millimeter pistol containing an empty shell casing, 4 blankets, a raincoat, a musette bag containing a camera, leather case and other items. On the ground nearby he also found an expended 9 millimeter shell casing. There were blood stains about the car and one of its windows was "smashed."

By reference to Prosecution Exhibit 1 (map of the area) the witness explained to the court the exact position of all the items he described. Mr. Brady examined the Rempel house and removed a 7.65 millimeter projectile from the floor. He also removed a 9 millimeter projectile from a beam. He had to "dig" the projectiles out. The German policeman who accompanied him found two empty 9 millimeter shell casings on the ground near the house.

The witness stated that he found an enlisted man's pass made out to Julian Jefferson in the musette bag heretofore mentioned. The pass was properly identified and without objection was received in evidence as Prosecution Exhibit 4 (R. 48).

The following exhibits which were offered by the prosecution were also identified by Mr. Brady and without objection were received in evidence:

Prosecution Exhibit 5. Picture of the dead body of Hans Habermann (R. 48).

Prosecution Exhibit 6. Close view of the head of Hans Habermann (R. 49).

Prosecution Exhibit 7. Photograph of "Audi" automobile (left hand drive, two door type) with markings "MGE Bavaria 274" (R. 49).

Prosecution Exhibit 8. Photograph of some (GI) blankets and a raincoat (R. 49).

Prosecution Exhibit 9. Photograph of the "Rempel" house with "holes" in the window (R. 50).

Prosecution Exhibits 10 and 11. Photographs of "bloodstains" identified by the witness as being on the Autobahn highway (R. 50-51).

Prosecution Exhibit 12. Box type camera with markings "EHO" in an imitation leather case (R. 52).

Prosecution Exhibit 13. Guernica automatic pistol, 7.65 mm No. 70196 without clip. The witness identified this pistol and testified that when found the empty shell casing therein was firmly "jammed" (R.53).

Prosecution Exhibit 14. Herstal automatic pistol, 9 mm No. 10785 without clip. The witness testified that "5 minutes later I asked Mr. Jefferson if this was his pistol and he identified the pistol as being his pistol" (R. 54).

Prosecution Exhibit 15. Pistol clip (fully loaded) containing 9 mm ammunition (R. 54).

Prosecution Exhibits 12 to 15 inclusive were withdrawn at the conclusion of the trial.

On cross-examination Mr. Brady admitted that he was not a ballistic expert, his knowledge concerning the caliber of the projectiles he "dug out" of the Rempel house having been obtained from a report he received from a CID ballistic expert (R. 56). Upon redirect examination, Brady produced a box containing three expended shell casings, each marked on the bottom "9mm 1944" and which were identified as having been found in front of the Rempel house. These items were received in evidence, without objection, as Prosecution Exhibit 16 (R. 57). The witness identified and there was received in evidence without objection as Prosecution Exhibit 17, the 7.65 mm projectile which he stated he had "dug" from the floor of the Rempel house. In like manner, there was received in evidence as Prosecution Exhibit 20, the 9 mm projectile which the witness testified he saw "Mr. Chandler bore out with a stick from the beam in the Rempel house." (R. 58).

Prosecution Exhibits 18 and 19 were the 7.65 mm expended shell casing found in the pistol of similar caliber (Pros. Ex. 13) near the body of Habermann and the 9 mm expended shell casing also found nearby (R. 57, 58).

Kirt Meurer, a German police officer, testified that he accompanied an American military police to the home of the "family Kein, at Grosslappen 42" on 29 June where they arrested accused and removed a pistol from his "left side" (R. 61, 62). It was stipulated that if First Lieutenant James B. Percival, 508 Military Police Battalion, were present he would testify that on 29 June 1946 he was duty officer and that the accused and a Herstal 9 mm automatic pistol, Serial No. 10785, were delivered to him at Military Police Headquarters (R. 66). It was also stipulated that Hans Miller, if present, would testify that he knew Hans Habermann, a civilian employee in the Military Government motor pool, and that on 29 June he saw his dead body and also witnessed the burial thereof in a cemetery (R. 67). It was further stipulated that the projectile Agent Brady removed from the floor of the Rempel house was 7.65 mm and that the projectile he removed from the beam of the house was 9 mm (R. 63, 64). By still another stipulation it was agreed that if Hans Huber were present he would state that on 25 June 1946 he was the dispatcher at the civilian motor pool, Military Government of Bavaria, Munich, Germany, that on said date he dispatched Hans Habermann, an employee of the military government on a trip to Ingolstadt and return using an Audi automobile, License No. 118274, marked "MGE Bavaria 274" and that this was the same vehicle shown in Prosecution Exhibit 7. He also would state that Prosecution Exhibit 5 was a picture of Hans Habermann (R. 60; Pros. Ex. 22).

Prosecution Exhibit 21, the testimony it was agreed would be given by Mrs. Rempel were she present in court is set forth in detail as follows:

"That on 25 June 1946 Private Julian Jefferson was at her home at Reichsbahnlager III, Munich, Germany. Private Herbert Brown and Angela Weiss also came to her home on this date. Brown became angry with her about something she said regarding Angela Weiss, and Brown slapped her in the face and also slapped her 17-year old daughter. Brown, Jefferson and Angela Weiss then left her home and shortly thereafter Jefferson returned for some cigarettes he and Brown had left in this house. While Jefferson was in the house Brown re-entered the house and hit Otto Klassen in the head with a pistol and then shot her husband with the pistol. Brown and Jefferson then left and immediately thereafter 4 shots were fired outside of the house, two of which shots came through the window in the house. She then left the house to go to a neighbor and at that time saw Brown, Jefferson and Angela Weiss walking toward the Autobahn. A short time later she heard three shots fired from the direction of the Autobahn where Brown, Jefferson and Angela Weiss had gone." (R. 59).

Without objection there were received in evidence certified copies of the guard reports of the 514 Quartermaster Group (TC) for the dates 25 April 1946 and 19 August 1946 showing accused from confinement to escape on the dates mentioned (R. 67, 68; Pros. Exs. 26-27).

Evidence for the Defense.

The defense called Captain William M. Harris, MC, 98 General Hospital, who testified that he had examined "a soldier by the name of Brown," and that in his opinion Brown was insane both at the time of the alleged offense and at the time of the examination (Nov. 1946). Captain Harris described in detail Brown's condition and stated that he was suffering from schizophrenia (R. 69-72). The accused, after having his testimonial rights duly explained, elected to remain silent (R. 73).

5. Accused is presumed to have been sane at the time of the offenses charged against him and no question as to his sanity was at any time raised. Should there have been any suspicion as to accused's sanity, the reviewing authority was fully authorized to suspend action on the charges pending the consideration of a report of medical officers convened under appropriate Army regulations (par. 35c, MCM, 1928). Our consideration of the record is therefore predicated on the assumption that the accused was, at the time of the alleged offenses, so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from

wrong and to adhere to the right and that at the time of the trial he possessed sufficient mental capacity to understand the nature of the proceedings and to intelligently cooperate in his defense. (pars. 78a, 112a, 63, MCM 1928; see also par. 2, War Department Technical Bulletin (TB Med. 201) 1 October 1945.) Insanity being a personal defense, the question of Brown's mental condition was immaterial on the issue of accused's criminal responsibility for the homicide herein, and this is so whether accused be considered an aider and abetter or a principal in the first degree. Evidence of Brown's insanity, however, was properly admitted by way of supplying the court with a complete picture of the res gestae.

The evidence shows, without contradiction, that on the evening of 25 June 1946 the accused and Brown were each armed with pistols and both the circumstantial and direct proof are such as to leave no doubt but that accused's pistol was 9 mm and Brown's weapon was 7.65 mm. Brown's pistol "jammed" after every shot, that is to say, the shell casing swelled in the breach and the gun would not, of itself, eject the casing. Brown carried a "hook" or ram to expel each casing. Both 9mm and 7.65 mm projectiles were found imbedded in parts of the Rempel house where the witnesses described the events preceding the killing of Hans Habermann. When Brown and accused left the house, after the brawl, Brown announced that he was going to the autobahn and "make a man Kaput." This is a German expression for killing someone. Angela Weiss attempted to restrain Brown while accused walked ahead, indicating more than passive cooperation. They reached the side of the highway and took positions a few feet apart and parallel with the highway. Jefferson was to the right of Brown so that, considering the direction of traffic (vehicles operate on the right side in Germany) Brown stood between Jefferson and any approaching vehicle. Brown signaled an approaching car to stop. It failed to stop. Hans Habermann, returning to Munich in his automobile in the performance of his duties with the Military Government, saw Brown's signal and stopped. The right door of his sedan was opened and Brown leaned inside. The evidence indicates that Habermann was unarmed. Screams for help were heard in German. A shot was fired. Shortly thereafter a second shot was fired, although Mrs. Rempel stated there were three shots fired at this time. Habermann had a non-fatal pistol wound on his left chin and neck and some scratches on his neck. Another bullet had penetrated his brain and caused sudden death. All of this leads very conclusively to the belief that Brown fired the first shot (non-fatal), grappled with the deceased, and that accused fired the fatal or second shot, for it is to be remembered that Brown was obliged to perform the cumbersome feat of ejecting the shell casing after each firing of his piece. The 7.65 mm pistol found at the scene of the tragedy contained no magazine, and an empty shell casing

remained in the breach of this pistol. No other 7.65 shell casing was found at the place of the crime. The pistol taken from accused when he was apprehended was 9 mm and several empty shell casings of similar caliber were found at the scene of the crime. When the door of the car was opened Habermann obviously turned his face and body to the right facing the soldiers and therefore exposed the left side of his face and head to attack. We think the foregoing was the prosecution's theory of the case and it is adequately borne out by the evidence. If accused fired the fatal shot, no further discussion would appear to be necessary to show a brutal, wholly unprovoked murder. That accused was at the place of the crime standing beside Brown is adequately shown by eyewitnesses. These witnesses related the brawls, disorders and shootings by accused and Brown immediately preceding the killing of Habermann. The circumstantial evidence appears to be compelling that accused fired the fatal shot while Brown was grappling with Habermann.

> "Circumstantial evidence is not resorted to as a secondary or inferior species; i.e., because there is an absence of direct evidence. It is admissible even when there is direct evidence. There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of an eyewitness, who is absolutely trustworthy in every respect, may be more convincing than the contrary inferences that appear probable from circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness." (MCM, 1928, par. 112b, p. 111.)

But if it be considered that accused did not fire the fatal or even any shot, he is none the less guilty of murder. Even under such a theory of the case, the evidence conclusively shows that accused was an aider and abettor who, under both Federal and military law, is treated as a principal. (See Sec. 332, Fed. Crim. Code, 18 USCA 550; CM 320062, Yentzer; CM 285969, Sanders, 10 BR (ETO) 255, 256; CM 295677, Keech, 28 BR (ETO) 22, 28; Winthrop's Mil. Law and Precedents, Reprint, p. 108.)

The introduction in evidence of the guard reports for the periods alleged showing entries of confinement to escape was sufficient to make a prima facie case of escape from confinement as alleged in each specification under Charge II.

6. The charge sheet shows that the accused is 22 years of age and has no allotments to dependents. He was inducted at Camp Upton, New York, on 13 December 1943.

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

Chester D. Silvers, JUdge Advocate

On Leave, Judge Advocate

Gilbert E. Lehmann, Judge Advocate

JAGK - CM 320580 1st Ind

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 opinion of the Board of Review in the case of Private First Class Julian J. Jefferson (42059801), 3420th Ordnance Medium Automotive Maintenance Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, and that a U. S. penitentiary be designated as the place of confinement.

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

3 Incls
1. Record of trial
2. Drft ltr sig USW
3. Form of Ex action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 250, 15 July 1949)

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

JAGH - CM 320600

1 JUL 1947

UNITED STATES v. Captain PETER W. HUTCHESON, Jr. (O-1544527), Medical Administrative Corps	)	EASTERN PACIFIC WING PACIFIC DIVISION, AIR TRANSPORT COMMAND Trial by G.C.M., convened at Fairfield-Suisun Army Air Base, California, 15 February 1947. Dismissal, total forfeitures, and confinement for one (1) year

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

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

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

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

Specification 1: In that Captain Peter W. Hutcheson, Jr, Squadron "G", 1504th Army Air Forces Base Unit, Eastern Pacific Wing, Pacific Division, Air Transport Command, Fairfield-Suisun Army Air Base, California did, at the Station Hospital, 1504th Army Air Forces Base Unit, Fairfield-Suisun Army Air Base, California, on or about 4 October 1946, feloniously embezzle by fraudently converting to his own use One Hundred-fifty and no/100 ($150.00) Dollars of lawful money of the United States, the property of the Station Hospital Fund, intrusted to him as custodian for the use and benefit of the Hospital patients and enlisted personnel of Squadron "G", by the Commanding Officer.

Specification 2: (Disapproved by the reviewing authority).

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

Specification 1: In that Captain Peter W. Hutcheson, Jr, Squadron "G", 1504th Army Air Forces Base Unit, Eastern Pacific Wing, Pacific Division, Air Transport Command, Fairfield-Suisun Army Air Base, California, did, at the Station Hospital, 1504th Army Air Forces wrongfully and dishonorably neglect his duties as an Officer and as Custodian of the Station Hospital Fund by wrongfully taking One Hundred-fifty and no/100 ($150.00) Dollars in lawful money of the United States from said Fund and substituting therefore his personal check, in words and figures as follows, to wit:

EXCHANGE NATIONAL BANK

TAMPA, FLA 4 Oct 1946 NO _____
Pay To The Order of Cash $ 150 oo/xx
One Hundred and fifty and no/100 ---------- DOLLARS
Peter W. Hutcheson, Jr
Capt MAC O-1544527

in the amount of One Hundred-fifty and no/100 ($150.00) Dollars, he the said Captain Peter W. Hutcheson, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the Exchange National Bank, Tampa, Florida for the payment of said check.

Specification 2: In that Captain Peter W. Hutcheson, Jr., Squadron "G", 1504th Army Air Forces Base Unit, Eastern Pacific Wing, Pacific Division, Air Transport Command, Fairfield-Suisun Army Air Base, California did, at the Station Hospital, 1504th Army Air Forces Base Unit, Eastern Pacific Wing, Pacific Division, Air Transport Command, Fairfield-Suisun Army Air Base, California on or about 10 October 1946, without the permission of the Custodian, 2d Lt Lawrence J. Pasake, wrongfully and dishonorably take Seventy-five and no/100 ($75.00) Dollars in lawful money of the United States from the said Station Hospital Fund cash box and substituting therefore his personal check, in words and figures as follows, to wit:

NATIONAL BANK OF COMMERCE

SAN ANTONIO, TEXAS 10 Oct 1946 NO _____
Pay To The Order Of Cash $ 75 oo/xx
Seventy - five and no/100 ---------- DOLLARS
Peter W. Hutcheson Jr
Capt MAC O-1544527

in the amount of Seventy-five and no/100 Dollars, he the said Captain Peter W. Hutcheson, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Commerce, San Antonio, Texas for the payment of said check.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and Specification 1 thereof, guilty of Specification 2 of Charge I with exceptions and substitutions, guilty of Charge II and Specification 1 thereof and guilty of Specification 2 of Charge II except the words "without permission of the custodian, 2d Lt. Lawrence J. Pasake." Evidence of one previous conviction for absence without leave from 21 to 28 March 1946 was properly 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 a period of one year. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was identified as being in the military service. He was stationed at Fairfield-Suisun Army Air Base, California, at the time of the commission of the alleged offenses. Colonel Pazdral, commanding officer of the station hospital, at that post, stated that he appointed accused custodian of the hospital fund (R 22) and identified the order by which accused was appointed (R 22) and the order relieving him (R 23). These two orders were admitted in evidence (R 23) and show that accused was appointed mess officer and custodian of the hospital fund on 31 August 1946 (Pros Ex D) and that he was relieved of these duties on 9 October 1946 (Pros Ex E).

A statement showing the assets, liabilities, net worth, capital and income account of the hospital fund for the period 1 October to 8 October 1946, inclusive, together with a certified true copy of a certificate of transfer dated 8 October 1946 was admitted in evidence as Prosecution Exhibit H (R 26). That part of the certificate signed by the accused stated that the attached statements were a complete and accurate record of the status of the hopital fund. That part of the certificate signed by Lieutenant Pasake, accused's successor, stated, "I am satisfied as to the accuracy of the statements of the Hospital Fund and accept the custodianship from Peter W. Hutcheson, Captain, MAC, as of close of business 8 October 1946."

Colonel Pazdral testified that he did not have personal knowledge of the exact date the certificate was signed by Lieutenant Pasake (R 26).

A signed statement of Second Lieutenant Lawrence J. Pasake was admitted in evidence as Prosecution Exhibit C, pursuant to an oral stipulation that he would so testify if present in court (R 20). Therein he stated that on 9 October he was officially designated custodian of the hospital fund vice Captain Hutcheson and had been informed of this assignment by Major Donald F. Babb, prior to that date. He checked the books on either 9 or 10 October 1946 and found the fund in good condition. The accused left the station for the Presidio of San Francisco on 13 October 1946. At that time the certificate of transfer had not been signed by the accused although it did contain his (Lt. Pasake's) signature. He further stated that during the period from 9 October to 13 October he was kept busy with two other jobs.

Corporal Jesse C. Schrock, who was discharged prior to the trial, had been assigned to the hospital as mess clerk, and maintained the hospital fund records and books (R 21). His deposition which was admitted and read in evidence (R 17; Pros Ex B) showed that as mess clerk he had access to the hospital fund cash box and safe. On a date which he could not remember, he found a $75.00 check bearing the signature of Captain Peter W. Hutcheson, Jr., with a note attached, in the hospital fund safe (R 18).

Major Babb testified that on Monday morning, 14 October 1946, Corporal Schrock called his attention to this check and note (R 22). On Tuesday morning Corporal Schrock brought the check to the attention of Lieutenant Pasake (R 21; Pros Ex C). On the following Wednesday or Thursday Lieutenant Pasake received a telephone call from Captain Hutcheson who stated that he had cashed a check for $150.00 and that it "probably would bounce back." The accused was informed of the $75.00 check and asked what he proposed to do about it. He replied that he would make it good the following Friday (R 21; Pros Ex C).

On 21 October Lieutenant Pasake and Corporal Schrock visited the Bank of America and there found in the hospital fund account, a check dated 4 October 1946 and bearing the signature of Captain Peter W. Hutcheson, Jr. It was made payable to cash and the amount thereof, $150.00, had been charged against the hospital fund account (R 19-21; Pros Exs B, C).

Colonel Pazdral testified that he had not authorized Captain Hutcheson to cash checks for himself or other officers from the hospital fund. However, it was the custom to accept officers' checks in payment of mess bills (R 25).

Corporal Schreck in his deposition testified on cross interrogatory that one check "was cashed by the accused in my presence and the other * * * was cashed without my knowledge" (R 20).

A check in the amount of $150.00 dated 4 October 1946 drawn on the Exchange National Bank of Tampa, Florida, bearing the signature of Captain Peter W. Hutcheson, Jr., was identified by Colonel Pazdral and admitted in evidence, with "no objection" by the defense (R 23-24; Pres Ex F).

A check in the amount of $75.00 dated 10 October 1946 drawn on the National Bank of Commerce, San Antonio, Texas, bearing the signature of Captain Peter W. Hutcheson, Jr. with an attached note stating "Corporal Schreck: Don't deposit this until I get my bank statement—will let you know—Captain Hutcheson," was admitted in evidence with "no objection" by the defense, after being identified by Colonel Pazdral (R 24-25; Pros Ex G).

The $150.00 check which was returned by mail by the Bank of America marked "no funds" was turned over to Lieutenant Pasake. He gave this check, together with the $75.00 check and attached note, to Colonel Pazdral (Pros Exs B, C).

It was stipulated that the account in the name of Lieutenant Peter W. Hutcheson, Jr., with the Exchange National Bank of Tampa, Florida, had been closed on 17 July 1943 and that there were no funds on deposit to cover the $150.00 check written on 4 October 1946 when it was presented for payment on 15 October 1946 (R 36; Pros Ex J).

A letter from the National Bank of Commerce, San Antonio, Texas, identified by Major Donald F. Babb, was admitted in evidence with "no objection" by the defense (R 29) as Prosecution Exhibit I. This letter states that the "account of Peter W. Hutcheson Jr. with us was closed on April 10, 1946."

First Lieutenant Sidney L. Halem, Budget and Fiscal Officer, 1504th Army Air Forces Base Unit, testified that he audited the hospital fund account in late November or early December 1946 (R 9). At this time he found a $75.00 check and note in the fund. He also found a receipt signed by Major Babb for a $150.15 dishonored check (R 10). The report of audit was admitted in evidence as Prosecution Exhibit A (R 11). Page 2 of the audit listed two irregularities, the dishonored check for $150.00 and the check for $75.00. Page 4 of the audit listed under "other expenses" dishonored checks in the amount of $239.40. This was explained by the witness as consisting of $14.25 in dishonored checks given in payment of bills by transients, Major Babb's receipt for the $150.00 check with a fifteen cent bank charge, and the $75.00 check signed by Captain Hutcheson that had not been presented for payment.

Lieutenant Pasake, in his statement, stated that on 22 October 1946 he received $225.00 from the accused to reimburse the fund but that this money was returned by him (R 20-21). On 2 December 1946 the accused gave Major Babb $225.00 to reimburse the fund and it was accepted (R 30).

Major Donald K. Hudson testified that he was the investigating officer in this case. After advising the accused of his rights under Article of War 24, certain questions were propounded and answered (R 31). A copy of the questions and answers was read to the court, without objection by the defense. Accused stated to the investigating officer that although the order relieving him of the custodianship was published on 9 October, he did not sign the certificate of transfer, required by Army Regulations 40-590, until after he had returned from the Presidio in November and that he continued his work as mess officer after 9 October. During this time he had access to the safe and it was not necessary for him to unlock it when he cashed the last check. The check dated 4 October was shown to him by Major Hudson and the accused admitted that it bore his signature and that it was cashed by him while he was the official custodian of the hospital fund (R 33). Major Hudson further testified that he remembered showing accused the check dated 10 October 1946 in the amount of $75.00 with the attached note and the accused admitted that it was his check and bore his signature (R 34-35). The accused also admitted that he wrote the note and that he did not have funds in the bank to cover either check, but that he was going to make them good (R 33).

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

Lieutenant Allen R. Pike testified that the accused gave him $225.00 at the Presidio on 22 October 1946 to deliver to Lieutenant Pasake, custodian of the hospital fund. The defense introduced an affidavit made by the witness which was accepted as Defense Exhibit 1 (R 37). It stated that "Said sum was to reimburse the fund for two personal checks that the said Captain Hutcheson had cashed with money from the fund" (R 38). Lieutenant Pike delivered this money to Lieutenant Pasake.

Major Donald F. Babb, as a character witness for the accused, testified that he had known him since 27 August 1946, that the manner of performance of his duties had been very good, and that the accused had done excellent work in all his assignments (R 38).

Lieutenant Jechiel Herchfus testified that he had known the accused since September 1946, had been with him socially on many occasions and had never seen him acting disorderly. The accused always conducted himself as an officer and a gentleman (R 40).

Lieutenant Thomas G. Wilkins testified that he knew the accused intimately at Greenville, South Carolina, during May, June, and July 1946. He stated that the accused was a fine person as a friend and a good example of a gentleman (R 44).

The accused, after being advised of his rights by the court, elected to make an unsworn oral statement (R 46). He stated that the certificate of transfer was not signed by Lieutenant Pasake until 14 October 1946, after he (accused) had left and reported to the Presidio, and that he did not sign the certificate of transfer until after he returned during the latter part of October or the first part of November. He continued acting as mess officer and custodian of the hospital fund through Saturday noon, 12 October 1946.

5. Under Specification 1 of Charge I, the accused was convicted of embezzlement on or about 4 October 1946 of the sum of $150.00 lawful money of the United States, the property of the station hospital fund intrusted to him as custodian. The evidence of record shows conclusively that while accused was custodian of the hospital fund he took the sum of $150.00 from the fund and replaced it with his personal check. Accused admitted that he cashed the check with money from the fund and also admitted that, at the time, he knew he had no account in the drawee bank. The evidence further shows that the check was deposited in the hospital fund account in the Bank of America and was returned unpaid.

The mere taking of the money temporarily for accused's personal use, even if his worthless check had not been substituted therefor, would have established embezzlement.

> "The act of a custodian of (company funds) in borrowing them for even temporary personal use constitutes the offense of embezzlement. The fraudulent conversion, which is the essence of the offense of embezzlement, exists in such case despite the fact that accused may have intended to return the money" (CM 192530, Brown, 1 BR 383; Dig Op, JAG 1912-40, Sec 451 (18)).

Accused's tender on 22 October 1946, and the later repayment on 2 December 1946, of the amount of the check constituted no defense. The evidence therefore supports the findings of guilty of Specification 1 of Charge I.

Specification 1 of Charge II alleges that the accused committed the same acts which in substance form the basis of the embezzlement charge in Specification 1 of Charge I, in violation of Article of War 95. The discussion as to the evidence with respect to Specification 1 of Charge I is equally applicable to this specification and need not be repeated.

Though in substance the same transaction is alleged in each specification, the nature of the two charges is different and it was proper to allege the embezzlement as a violation of Article of War 93 and the acts of the accused as conduct in violation of Article of War 95. The Manual for Courts-Martial states:

> "This article (Article 95) includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding article" (MCM 1928, par 151, p 186).

The same principle is applicable where the funds embezzled belonged to the station hospital fund and therefore accused's acts constitute a violation of both Article of War 93 and Article of War 95.

It is noted that Specification 1 of Charge II alleges that accused "did, * * * neglect his duties" by (1) wrongfully taking $150.00 from the hospital fund and (2) by substituting therefor his personal check with insufficient funds in the drawee bank. It may be questioned whether the phrase "did, * * * neglect his duties" is a proper allegation since his acts amounted to a misfeasance rather than to a nonfeasance. In any event the specification alleges two acts (1) wrongfully taking the money and (2) substituting therefor his worthless check. It may be questioned also, whether the specification is duplicitous and misleading as to what is intended to be charged as a violation of Article of War 95, by setting forth as offenses therein the embezzlement of the $150.00 and the cashing of a bad check. The specification in fact alleges both acts as simultaneous parts of one transaction, which is alleged as one charge of "conduct unbecoming an officer and a gentleman." It does not, therefore, appear that the specification is duplicitous. Even if it were, there was no objection made to the specification and the record of trial does not show that accused was in any way mislead or his substantial rights prejudiced thereby. The allegations that the accused knew he did not have funds in the bank and did not intend that he should have, were supported by the evidence. Therefore, since it was alleged and proved that accused cashed his worthless check from the fund of which he was custodian, knowing that he had insufficient funds in the bank to meet it, if presented for payment, and without intending that he should have, it is the opinion of the Board that he is guilty of a violation of Article of War 95.

<u>Specification 2 of Charge II</u> has a relation to Specification 2 of Charge I similar to that of Specification 1 of Charge II to Specification 1 of Charge I. Specification 2 of Charge I, however, charged the accused with the larceny, on or about 10 October 1946, of the sum of $75.00, the property of the station hospital fund, in violation of Article of War 93. Under this specification the accused was, by exceptions and substitutions, found not guilty of larceny but guilty of embezzlement. Because of the

variance between the findings and the allegation, the findings of guilty of Specification 2 of Charge I were disapproved by the reviewing authority.

Specification 2 of Charge II alleges the same acts which formed the basis of the larceny charge, but as acts constituting conduct unbecoming an officer and a gentleman in violation of Article of War 95. This specification alleges that the accused "did * * * on or about 10 October 1946, without the permission of the Custodian, 2d Lt. Lawrence J. Pasake, wrongfully and dishonorably take Seventy-five and no/100 ($75.00) Dollars in lawful money of the United States from the Station Hospital Fund cash box and substituting therefore his personal check, * * * then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Commerce, San Antonio, Texas for payment of said check." The court found the accused guilty except the words "without the permission of the Custodian, 2d Lt. Lawrence J. Pasake."

The same question with respect to duplicity arises in this specification as was discussed above with respect to Specification 1 of Charge II. As in the latter, this specification also, in effect, alleged one transaction of which the two acts were contemporaneous parts, as a violation of Article of War 95, and therefore it does not appear in fact duplicitious. In any event, as stated with respect to Specification 1 of Charge II, there was no objection and the record does not disclose that the accused was mislead in any way or that his substantial rights were prejudiced thereby.

While it is true the accused was found not guilty of larceny but guilty of embezzlement under Specification 2 of Charge I, this was not a finding that accused did not wrongfully take the money from the station hospital fund cash box. The disapproval of the findings of guilty of embezzlement under Specification 2 of Charge I was apparently based upon the variance between the allegation and findings by the court, and not because of any failure of proof. While the acts alleged under Specification 2 of Charge II may be substantially those forming the basis of the larceny, or of the embezzlement as the court found it to be, under Specification 2 of Charge I, the two specifications do not charge offenses of the same nature. While either larceny or embezzlement may also constitute an offense under Article of War 95, a finding of not guilty of either is not necessarily inconsistent with a finding that accused is guilty of an offense, where he is also charged, under Article of War 95, with certain acts constituting conduct unbecoming an officer and a gentleman, even though the same transactions may have formed the basis of both charges. In considering the legal sufficiency of the findings of guilty of Specification 2 of Charge II, the only questions are, first, whether the facts alleged in Specification 2 of Charge II do or do not allege conduct unbecoming an officer and a gentleman, and second, whether the facts were proved by competent evidence.

It is noted that Specification 2 of Charge II did not include the allegation that accused was custodian of the fund, as did Specification 1 of Charge II. It did allege a taking "without the permission of the custodian," but of this allegation accused was, by exceptions, found not guilty. Apparently this phrase was excepted because the court thought the evidence showed that accused was in fact still custodian of the fund on 10 October 1946. Whatever the reason for this exception, the specification now stands as if the excepted words had not been in the specification originally. In view of the finding of the court the taking of the money from the cash box cannot be considered wrongful and dishonorable as alleged, upon the ground that it was taken without permission. It must be found wrongful and dishonorable for some other reason. The striking of the allegation as to lack of permission is otherwise immaterial, if the allegations as they stand after the exception, still allege conduct unbecoming an officer and a gentleman. In the opinion of the Board, the allegations remaining, that the accused "did * * * wrongfully and dishonorably" take $75.00 from the station hospital fund cash box and substitute therefor his personal check, knowing that he did not and not intending that he should have sufficient funds in the bank for payment of the check, allege acts constituting conduct unbecoming an officer and a gentleman.

There remains for consideration whether the evidence supports the findings of guilty. It was shown that the accused did, on or about 10 October 1946 take $75.00 from the hospital fund and substitute therefor his personal check, well knowing that he had no account in the drawee bank. The evidence is clear that accused had been relieved as custodian of the fund at the time of the alleged offense, but that it had not been officially transferred to the new custodian. Therefore, whether accused was technically custodian or not, it would appear that he was still charged with the responsibility of the funds intrusted to him and thus he would be guilty of embezzlement even if he intended to borrow the money only temporarily. The only real effect of substituting the check, with attached note, for the money taken would be to acknowledge the taking at the time and show an intent to return the money. In the Brown case, cited above, it was stated that the borrowing of money from a fund for a temporary personal use by the custodian of the fund constituted an embezzlement and that the fraudulent conversion existed despite the fact that accused may have intended to return the money. On the other hand, if accused be considered as in no sense the custodian on 10 October, his acts were equally reprehensible, for then the evidence shows that he took the cash from a fund intrusted to the care of another, and substituted his worthless check therefor. Whether or not larceny could be established, in view of the showing of intent to return the money, clearly his acts constituted a violation of Article of War 95. As previously stated, we cannot consider the accused's acts wrongful and dishonorable because of any lack of permission, in view of the effect of the court's finding of not guilty with respect to the words "without permission of the custodian." There is no evidence showing that accused was given permission to cash the check from

the fund in question and even though he had been given such permission, since his check was drawn on a bank in which he knew that he had no account, his act would still be conduct unbecoming an officer and a gentleman. Therefore, it is the opinion of the Board that the evidence supports the allegations that accused's acts were wrongful and dishonorable and in violation of Article of War 95.

6. The accused is 33 years old. Prior to his enlistment in the Regular Army, in 1940, he was employed by the Miami Herald, Miami, Florida, on its advertising staff, for four and one-half years. He has one brother who enlisted in the Regular Army in 1940 and two brothers who enlisted in the Navy. The accused enlisted in the Regular Army on 3 October 1940. He was stationed at McDill Field, Tampa, Florida, for fourteen months. During this time he was advanced from private to staff sergeant. He was then transferred to Drew Field, Tampa, Florida, where he remained for eleven months, working in the Surgeon's office as chief clerk and instructor in medical administration. He instructed both officers and enlisted men in this subject and acquired the rank of technical sergeant before leaving for officer candidate school in November, 1942. He was commissioned as a second lieutenant on 10 February 1943, and thereafter he was promoted to the grade of first lieutenant on 7 August 1944 and to captain 1 June 1945. After he was commissioned in February 1943 he returned to Drew Field. In March 1943 he was transferred to the Birmingham Army Air Base where he was detailed as hospital adjutant. During these assignments he received a "superior" rating for six months of the time and "excellent" for fourteen months. He departed for overseas duty on 27 May 1945 as commanding officer of a medical supply platoon which was a part of the 92d Air Depot Group. This unit was stationed on Okinawa and was returned to the United States in December 1945. After being processed for reassignment he spent approximately six weeks at the Greenville, South Carolina Army Air Base and was then transferred to Fairfield-Suisun Army Air Base. At the former base he was absent without leave from 21 to 28 March 1946, and was convicted for that offense by a general court-martial and was sentenced to restriction for one month, forfeiture of $50 per month for three months and a reprimand. His efficiency rating for the period 1 January to 30 June 1946 was "excellent" and for the period 1 July to 31 December 1946, "very satisfactory." He has been awarded the Good Conduct Medal, Asiatic-Pacific Theater Ribbon, American Defense Ribbon and the American Theater Ribbon.

7. Attached to the record of trial is a letter to the reviewing authority dated 21 February 1947 from Colonel A. J. Bird, Jr., GSC, the president of the court, recommending clemency and stating that the testimony at the trial gave him the opinion "that it was very possible that Captain Hutcheson did intend to reimburse the hospital fund" and that in his opinion "Captain Hutcheson is not a confirmed thief or embezzler."

There is also attached to the record of trial a letter to the reviewing authority dated 18 February 1947, from Colonel Nuel Pazdral, MC, Surgeon, AAF Station Hospital, Fairfield-Suisun Army Air Base, California, accused's commanding officer and the accuser in this case, in which he urges clemency and in support thereof states "Captain Hutcheson almost immediately repaid the sum of money involved, has continued to perform his duties in an exemplary manner though under the mental stress of the impending trial, and it is felt is the type of individual who has suffered a great deal of mental punishment by merely being tried, regardless of the actual sentence."

The Board has also considered the following communications, all of which urge clemency on behalf of accused: Letter to the President, dated 31 March 1947 from Mrs. Elizabeth M. Bannon, accused's mother-in-law, with inclosures; letter to the Secretary of War, dated 17 April 1947 from the Honorable Dwight L. Rogers, House of Representatives, inclosing a letter dated 12 April 1947, with inclosures, from Mr. P. W. Hutcheson, the accused's father; letter to the Under Secretary of War, dated 4 June 1947 and a letter to The Adjutant General dated 17 April 1947, both from the Honorable Emory H. Price, House of Representatives; letter to The Adjutant General dated 18 April 1947, from Senator Spessard L. Holland, inclosing a copy of the letter, with inclosures, from Mr. P. W. Hutcheson above referred to; letter to The Adjutant General, dated 11 April 1947 from Senator Claude Pepper.

On 4 June 1947 Mr. Vincent J. Augliere of Washington, D. C. and the Honorable Emory H. Price, House of Representatives appeared before the Board of Review on behalf of the accused.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95, and dismissal, total forfeiture, and confinement at hard labor for one year are authorized upon conviction of a violation of Article of War 93.

[signature], Judge Advocate

[signature], Judge Advocate

[signature], Judge Advocate

JAGH - CM 320600 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Peter W. Hutcheson Jr. (O-1544527), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement of $150.00 on or about 4 October 1946 (Spec 1, Chg I) and the embezzlement of $75.00 on or about 10 October 1946 (Spec 2, Chg I), from the hospital fund of the Station Hospital, Fairfield-Suisun Army Air Base, in violation of Article of War 93, and guilty of dishonorable neglect of duty by taking from the fund $150.00 on 4 October 1946 and substituting therefor his worthless check, and of wrongfully and dishonorably taking $75.00 from the cash box of the fund on 10 October 1946, substituting therefor his worthless check, in violation of Article of War 95 (Chg II, Specs 1, 2). He was sentenced to dismissal, total forfeitures, and confinement at hard labor for one year. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge I, 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 approved findings of guilty and the sentence and to warrant confirmation thereof. I concur in that opinion.

The accused on 4 October 1946 was custodian of the station hospital fund, of the Station Hospital, Fairfield-Suisun Army Air Base, California. On that date he took for his personal use $150.00 from the fund and deposited in the fund his personal check in a like amount drawn on a bank in which he had no account. On 9 October 1946 he was relieved as custodian and a new custodian was appointed. The actual transfer of the fund was not accomplished until approximately a week later. On 10 October the accused took $75.00 out of the fund cash box and deposited in its place his personal check drawn on another bank in which he likewise had no account.

The first check was deposited in the bank in which the fund account was kept, and was later returned unpaid and charged against the account. The second check was not deposited. The accused, upon placing the second check in the cash box, attached to it a note telling the corporal, who acted as clerk, to hold the check until accused received his bank statement. When the new custodian learned of the latter check, he brought it

to accused's attention. Accused said he would pay it and told the new custodian about the $150.00 check, stating that it would probably be returned unpaid. About 22 October 1946, after the $150.00 check had been returned unpaid, the accused tendered $225.00 to cover both checks.

4. The accused is 33 years old. Prior to his enlistment in the Regular Army, he was employed by the Miami Herald, Miami, Florida, on its advertising staff, for four and one-half years. He enlisted in the Regular Army on 3 October 1940, and acquired the rank of technical sergeant before enrolling for officer candidate school in November, 1942. He was commissioned in the grade of second lieutenant on 10 February 1943 and thereafter was promoted to the grade of first lieutenant on 7 August 1944 and to captain on 1 June 1945. After he was commissioned in February 1943 he was sent to Drew Field. In March 1943 he was transferred to the Birmingham Army Air Base where he was detailed as hospital adjutant. During these assignments he received a "superior" rating for six months of the time and "excellent" for fourteen months. He departed for overseas duty on 27 May 1945 as commanding officer of a medical supply platoon. This unit was stationed on Okinawa and was returned to the United States in December 1945. After being processed for reassignment he spent approximately six weeks at the Greenville, South Carolina Army Air Base and was then transferred to Fairfield-Suisun Army Air Base, California. At the former base he was absent without leave from 21 to 28 March 1946, and was convicted for that offense by a general court-martial and was sentenced to restriction for one month, forfeiture of $50.00 per month for three months and a reprimand. His efficiency rating for the period 1 January to 30 June 1946 was "excellent" and for the period 1 July to 31 December 1946, "very satisfactory." He has been awarded the Good Conduct Medal, Asiatic-Pacific Theater Ribbon, American Defense Ribbon and the American Theater Ribbon.

5. Attached to the record of trial is a letter to the reviewing authority dated 21 February 1947 from Colonel A. J. Bird, Jr., GCS, the president of the court, recommending clemency and stating that the testimony at the trial gave him the opinion "that it was very possible that Captain Hutcheson did intend to reimburse the hospital fund" and that in his opinion "Captain Hutcheson is not a confirmed thief or embezzler." There is also attached to the record of trial a letter to the reviewing authority dated 18 February 1947, from Colonel Nuel Pazdral, MC, Surgeon, AAF Station Hospital, Fairfield-Suisun Army Air Base, California, accused's commanding officer and the accuser in this case, in which he urges clemency and in support thereof states "Captain Hutcheson almost immediately repaid the sum of money involved, has continued to perform his duties in an exemplary manner though under the mental stress of the impending trial, and it is felt is the type of individual who has suffered a great deal of mental punishment by merely being tried, regardless of the actual sentence."

Consideration has also been given to the following communications, all of which urge clemency on behalf of accused: Letter to the President, dated 31 March 1947 from Mrs. Elizabeth M. Bannon, accused's mother-in-law, with inclosures; letter to the Secretary of War, dated 17 April 1947, from the Honorable Dwight L. Rogers, House of Representatives, inclosing a letter dated 12 April 1947, with inclosures, from Mr. P. W. Hutcheson, the accused's father; letter to the Under Secretary of War, dated 4 June 1947 and a letter to The Adjutant General dated 17 April 1947, both from the Honorable Emory H. Price, House of Representatives; letter to The Adjutant General dated 18 April 1947, from Senator Spessard L. Holland, inclosing a copy of the letter, with inclosures, from Mr. P. W. Hutcheson above referred to; letter to The Adjutant General, dated 11 April 1947 from Senator Claude Pepper.

On 4 June 1947 the Honorable Emory H. Price, House of Representatives and Mr. Vincent J. Augliere of Washington, D. C. appeared before the Board of Review on behalf of the accused.

6. I recommend that the sentence be confirmed, but that the term of confinement be reduced to six months, that the sentence, as thus modified, be carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

7. Inclosed is a form of action designed to carry 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. 283, 22 Aug. 1947).

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

JAGH - CM 320618

3 Apr 1947

U N I T E D S T A T E S v. Private GEORGE A. GARDNER (33898567), Attached Service Company, 2101st Area Service Unit	)	SECOND ARMY Trial by G.C.M., convened at Fort George G. Meade, Maryland, 26 February 1947. Dishonorable discharge and confinement for three (3) years. The Branch United States Disciplinary Barracks

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private George A. Gardner, Attached Service Company, 2101st Area Service Unit, then a member of Company E, 1342nd Service Unit, Holabird Signal Depot, Baltimore, Maryland, did, at Holabird Signal Depot, Baltimore, Maryland, on or about 24 March 1944, desert the service of the United States and did remain in desertion until he was apprehended at Baltimore, Maryland on or about 27 October 1946.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification thereof. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably dicharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings of guilty of the specification as finds the accused guilty of desertion at the time and place alleged, terminated in a manner unknown on 27 October 1946. He reduced the period of confinement to three years, designated The Branch United States Disciplinary Barracks, New

Cumberland, Pennsylvania, or elsewhere as the Secretary of War may direct as the place of confinement, and withheld the order directing the execution pursuant to Article of War 50½.

3. The substantial question presented by the record is whether the accused was afforded a fair trial in view of the introduction by the defense counsel, of highly inculpatory evidence, which would have been incompetent in the absence of a stipulation on the part of the defense counsel.

4. The initial unauthorized absence and the termination of the absence on the respective dates alleged were sufficiently proved by duly authenticated extracts copies of morning reports which were received in evidence without objection by the defense (R 6; Pros Exs 1, 2). The prosecution rested without having presented any proof of apprehension as alleged.

Thereupon the record shows the following proceedings:

"DEFENSE: I would like to point out to the court that the charge states that the accused was apprehended and that the prosecution has not proved that he was apprehended. I would like to refer to delinquency report of the 61st MP Platoon. Any objection?

"PROSECUTION: The prosecution will stipulate with the defense that if Staff Sergeant Lynn S. Bard, 61st MP Platoon, were present this morning he would testify this morning in substance as set forth in the report of arrest.

"DEFENSE: It is stipulated by the prosecution and the defense that if Staff Sergeant Lynn S. Bard, 61st MP Platoon, were present in court he would testify in substance that just what is found on the delinquency report is right.

"PROSECUTION: Does the accused consent to that stipulation?

"ACCUSED: Yes, sir. It is agreeable to me, sir.

"PROSECUTION: The prosecution confirms the stipulation.

"PRESIDENT-LAW MEMBER: Report of Arrest, dated 27 October 1946, and relating to the accused will be admitted in evidence and read to the court.

Defense Exhibit A was properly identified and read to the court.

"DEFENSE: The defense rests." (R 7).

Defense Exhibit A contains the following relevant entries:

"REPORT OF ARREST

Unit	Location	Record of Arrest No.
61st MP Platoon 2nd Army	Holabird Signal Depot	

To	Date
	27 October 1946

Name (last,first,middle initial)	Army Serial No.	Grade
Gardner, George A	33898567	Pvt

Organization	Post, Camp, or Station
Unasgd	Holabird Sig Depot, Balto, Md.

Date of Arrest	Time	Place of Arrest or Incident	Address of Arrest
27 Oct 46	0810	City Jail	Balto, Md.

Race	Color of Eyes	Color of Hair	Complexion	Height	Weight	Other Identification
Col	Brown	Black	Dark	6'1"	169	Age 21

How Dressed		Condition of Clothing	Check one of the following:
Combat Jacket	Civil Clothes	Fair	

Under Influence of Liquor Yes X No (Remarks, if any)

Surrendered to Military Police

Surrendered to Civil Authorities

Offense or Incident
AWOL

X Apprehended by Military Police

Description of Offense or Incident (Use reverse side if necessary)
While on duty this date we were dispatched to the Balto City Jail and received subj who has completed serving a sentence of 60 days for assault. He has been absent since approx 2 years. Subj was inducted at 5th Regt Armory November 1943. Mother, Mary Gardner resides 1037 W Vine St., Balto, Md. Father, Geo Gardner, resides 745 Redwood St. Balto, Md. Subj states that he worked for Hervales Maryldn Ship Cleaning C6, Key Highway. Subj states he worked under the name of John Gray. Subj did not have a draft card. He had 12.12 in cash.

NAMES OF ARRESTING MILITARY (OR CIVIL) POLICE

Name (last,first,middle initial)	Grade	Serial No	Organization
Bard, Lynn S	S/Sgt	RA 33875200	61st MP Platoon

Witnesses

* * * * *

5. Ordinarily, a presumption of regularity in the performance of their duties by officers responsible for the administration of military justice may be indulged (MCM 1928, par 112a; p 110). It may ordinarily be presumed that defense counsel performed his duty (CM 201527, Foutz, 6 BR 157). But this presumption is rebuttable and disappears when the fact is shown to be otherwise (CM 297700, Carmansciano, 13 BR(ETO) 263, 272 (4 Bull JAG 174); CM 297170, Woods, 13 BR (ETO) 37). In this case it plainly appears that the defense counsel did not perform his duties properly.

It is apparent that there was nothing in the Report of Arrest which could possibly be considered as beneficial to the accused in any way. On the other hand, the references to a recent completion of a jail sentence on conviction of an assault, the use of an assumed name during the unauthorized absence and his apprehension in civilian clothing was seriously detrimental to the accused.

It is also obvious that the Report of Arrest would have been incompetent evidence in the absence of the stipulation, and it is doubtful that Sergeant Bard, if present, would have been able to show that the statements of the accused had been voluntarily made, or that other matters contained in the report were not hearsay.

The introduction of such inculpatory evidence, which would otherwise be incompetent, on the initiative of the defense counsel, whose solemn obligation and serious responsibility are to represent the interest of an accused, amounts to a violation of his duty to "guard the interests of the accused by all honorable and legitimate means known to the law" and "to represent the accused with undivided fidelity, and not to divulge his secrets or confidence" (MCM 1928, par 45b, p 35).

Instead of guarding the interests of the accused, the defense counsel, in effect became a self-appointed prosecutor of the accused. Apparently under a misapprehension as to the nature of his functions and duties, he attempted to supply proof of allegations contained in the specification which the prosecution had not been able to adduce. In doing so he removed from the minds of the court any conceivable doubt as to the accused's guilt of desertion.

The Board of Review has uniformly held that the infringement of the right to counsel provided by Articles of War 11 and 17 is prejudicial error.

In CM 194977, Elberson, Allen, Hughes, and Kozo, 2 BR 177, the defense counsel in a joint trial moved for a severance on the grounds that the defense of three of the accused would be antagonistic to that of the fourth accused, Kozo. He stated:

> "If it please the court in the case of three of the accused, the defense intends to have the accused take the stand, and the testimony they will give on the stand is seriously prejudicial to the other accused."

The law member overruled the motion and the case proceeded to trial. The defense counsel conducted a defense for three of the accused by attempting to prove that the accused Kozo was solely responsible for the commission of the offense alleged.

In holding the record of trial legally insufficient to support the findings of guilty and the sentence as to Kozo, the Board of Review stated:

> "It is thus clear that the defense counsel was nothing other than a self-imposed prosecutor as far as the rights and privileges of accused Kozo were concerned and the latter was deprived of counsel guaranteed to him under the express provisions of the 11th and 17th Articles of War, and paragraphs 6, 43, and 45, Manual for Courts Martial. The latter paragraph in part defines the duties of a defense counsel in the following language:
>
> > 'He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; . . . . . to represent the accused with undivided fidelity and not divulge his secrets or confidence.'
>
> "* * * the defense counsel utterly and wholly failed to perform this duty as the accused Kozo, although he should not be held responsible since he properly attempted to secure a severance. Obviously it would be prejudicial error to try an accused under military law without a defense counsel; hence, all the more reason for error when it is clearly shown that the appointed defense counsel acted as a prosecutor in fact. * * *"

In our opinion the conduct of the defense counsel in the present case was more flagrant than that of the defense counsel in the Elberson and Kozo case, for at least the latter found himself upon the horns of a dilemma in view of the court's refusal to grant a severance, and he resolved his predicament by protecting the interests of the majority of the accused involved. In the instant case we can not find any justification for the defense counsel's action. The circumstances as shown by the record indicate more than a lack of skill or zeal on the part of the defense counsel. His conduct borders on a lack of good faith.

In CM 316970, Howard, 26 BR (ETO) 197, the defense counsel, in effect impeached the credibility of the accused in the course of an argument in support of a plea in bar on the grounds that the accused was mentally incapable of cooperating in his own defense. The defense counsel commented:

> "He (the accused) told me two or three stories, more of which agree with one another. I can't even say that they are plausible."

In holding that the defense counsel conduct amounted to prejudicial error the Board of Review stated:

> "* * * It is incumbent upon the Board of Review, as well as other military justice authorities, to insure that every accused before a court martial receives a fair trial."
>
> "The right to counsel is fundamental."
>
> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. * * * He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect" * * * Powell v. Alabama, 287 U.S. 45, 69, 77 L. Ed. 168, 170, 84 ALR 527, 540 (1932)/

'A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexities, or his own ignorance or bewilderment' (Williams v. Kaiser, ___ U.S _____, 65 Sup. Ct. (Adv. Rep.) 363 (1945), and authorities cited therein).

"The right to counsel means the effective assistance of counsel (Avery v. Alabama, 308 U.S. 444, 84 L. Ed. 377 (1940); Amrine v. Tines (C.C.A. 10th, 1942) 131 F (2nd) 827; CM ETO 4564, Woods; CM ETO 4756, Carmisciano, IV Bull. JAG 173).

"The general rule in the civil courts, as stated in Corpus Juris Secundum, is as follows:

'As a general rule, a new trial may be granted where the incompetency of counsel is so great that accused in prejudiced and prevented from fairly presenting his defense, and a new trial sometimes is granted because of some serious error on the part of such attorney in the conduct of the case; and in this respect accused's application will be treated more favorably when the attorney is one appointed by the court than when the attorney is one selected by himself. However, unless accused is prejudiced and thereby deprived of a fair trial, a new trial does not necessarily follow from either the attorney's incompetency or his neglect' (23 CJS, sec 1443, pp. 1158, 1159).

"The Acting The Judge Advocate General once wrote:

'The rule of the courts of common law, both civil and criminal, that a party has no relief against errors, omissions, or poor judgment of his counsel, can have but a limited application in court-martial practice, where the majority of counsel are not learned in the law, and where it is the duty of every one connected with the administration of military justice, and not least my own, to see that the rights of every accused are adequately protected' (Op. Acting JAG filed with CM 200989, Osman, 5 B.R. 11, 28, at pp. 39-40 (1933))."

The Board concluded:

"* * * The evidence is strong that the accused committed the crime or murder, * * * But the compelling evidence rule ordinarily applied to determine whether an error is harmful can not properly be applied under the present circumstances * * * This error on counsel's part is so grave that it stains, the entire record and trial and it cannot be wiped out by a mere weighing of the evidence admitted."

In CM 297170, Woods, 13 BR (ETO) 37 and CM 297700, Carmisciano, the Board of Review held that a conviction can not be supported in the absence of the effective assistance of counsel.

The declaration of the United States Supreme Court concerning the denial of the right to have effective assistance of counsel appears to be applicable in this case:

"* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial (Glasser vs U.S., 315, US, 60, 76).

It was held in the Glasser case that denial of the defendant's rights to have effective assistance of counsel guaranteed by the Sixth Amendment required that the verdict of guilty be set aside. It may be noted that the defendant, Glasser, was an attorney and had served as an assistant United States Attorney in the prosecution of criminal cases in United States District Courts for four years.

It can not be implied from the foregoing authorities that a conviction should be set aside in every case where the record discloses mistakes or lack of skill on the part of the defense counsel, particularly in cases where the prepondenance of inculpatory evidence is overwhelming, and where even the most skilled counsel can do but little for the accused (CM 317691, Plummer, 1st Ind). But where the disloyalty or gross carelessness of defense counsel directly aids the prosecution, the conviction should be set aside.

In the instant case the evidence of guilt adduced by the prosecution is strong, despite the fact that it shows no circumstances other than an unauthorized absence from 24 March 1944 until 27 October 1946. Although the court would certainly have been justified in inferring an intention to desert from the proof that the accused was absent without leave for some two years and eight months, it is not inconceivable that the court might have found the accused guilty of absence without leave in violation of Article of War 61 in the absence of other inculpatory circumstances showing an intention to remain permanently absent (See CM 313593, Sawyer; CM 317120, Berry). But the defense counsel's improper conduct in introducing, by stipulation, otherwise incompetent evidence of such inculpatory circumstances removed the possibility of finding of guilty of the lesser

included offense. Thus defense counsel directly aided the prosecution.

In our opinion the defense counsel's action seriously prejudiced the accused's substantial rights. Not only was the accused denied the effective assistance of counsel, but instead his counsel became a self-appointed prosecutor. The rights of counsel is so fundamental that its infringement amounts to a lack of due process which can not be cured by clear and compelling evidence of guilt (CM 194997, Elberson, et al, 2 BR 173, 178; CM 297170, Woods, 13 BR (ETO) 37; CM 297700, Carmisciano, 13 BR (ETO) 263; CM 316970, Howard, 26 BR (ETO) 197; CM 315877, Ellis).

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

D. Hottenstein, Judge Advocate

W.A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 320618 1st Ind 28 Apr 1947

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Second Army, Baltimore 2, Maryland

1. In the case of Private George A. Gardner, 33898567, Attached Service Company, 2101st Area Service Unit, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated recommend that the findings of guilty and the sentence be disapproved.

2. Upon disapproval of the sentence, you will have authority, under Article of War 50½, to direct a rehearing.

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

(CM 320618)

1 Incl
Record of trial

s/ Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGN-CM 320623

U N I T E D S T A T E S v. Private First Class FEDERICO BATO (10305900), Headquarters Battery, 1st Battalion, 24th Field Artillery, Philippine Scouts.	)	PHILIPPINE RYUKYUS COMMAND Trial by G.C.M., convened at APO 74, 22, 23 October and 5 November 1946. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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 81st Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

CHARGE II: Violation of the 82nd Article of War.

Specification: In that Private First Class Federico Bato, Headquarters Battery, 1st Battalion, 24th Field Artillery, Philippine Scouts (AUS), was, at or near Dagupan, Pangasinan, Luzon, Philippine Islands, on or about 15 September 1944, acting as a spy in and about native establishments and governmental buildings in Pangasinan, Luzon, Philippine Islands, for the purpose of collecting material information in regard to the membership and operations of guerilla forces, associated with the military forces of the United States, with intent to impart the same to the enemy.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and the Specification thereunder, not guilty of the Specification of Charge II, not guilty of Charge II, but guilty of a violation of Article of War 96:

> "In that Private First Class Federico Bato, Headquarters Battery 1st Battalion, 24th Field Artillery, Philippine Scouts (AUS), did bring discredit upon the military service of the United States by willfully and wrongfully aid and abet the enemy through accepting employment, wearing the uniform and bearing arms of the Kempei Tai Military Police, from about May 1944 to about March 1945, while acting in the capacity of agent and interpreter."

He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp McQuaide, California, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The only aspect of the case requiring consideration by the Board of Review is whether the substitutions made by the court with respect to Charge II, and the Specification thereunder, were permissible.

The Manual for Courts-Martial, paragraph 78c, provides in pertinent part:

> "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."

Findings of an offense different from that charged are authorized only when the offense is lesser than and necessarily included in the offense charged. The reason for the rule rests in the axiomatic principle that an accused cannot lawfully be convicted of an offense with which he has not been charged (CM 229477, Floyd, 17 BR 149, 152). It is clear that an offense is not charged unless all its elements are charged. In the present case, the accused is charged with spying, the essential elements of which are that accused at a certain time and place within our zone of operations, acting clandestinely, or under false pretenses, obtained, or attempted to obtain, information with intent to communicate such information to the enemy (MCM, 1928, p. 157).

The accused was found guilty of aiding the enemy by accepting employment, and wearing the uniform and bearing arms of the Kempei Tai Military Police while acting in the capacity of agent and interpreter. The offense found was distinct from and not included in that charged.

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.

Edward J. Johnson, Judge Advocate.

Joseph P. Breck, Judge Advocate.

Francis [illegible], Judge Advocate.

MAY 9 1947

JAGN-CM 320623 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster, San Francisco, California

1. In the case of Private First Class Federico Bato (10305900), Headquarters Battery, 1st Battalion, 24th Field Artillery Philippine Scouts, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated.

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

(CM 320623).

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 320662

UNITED STATES v. Sergeant CECIL E. McCOY (RA 39760022) and Private ALBERT H. HENNESSEY (RA 15069436), Headquarters and Base Service Squadron, 559th Air Service Group	)	FIRST AIR DIVISION Trial by G.C.M., convened at APO 239, 18 January 1947. Each: To be hanged by the neck until dead.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Sergeant Cecil E. McCoy, Headquarters and Base Service Squadron, 559th Air Service Group, and Private Albert H. Hennessey, Headquarters and Base Service Squadron, 559th Air Service Group, acting jointly and in pursuance of a common intent, did, at APO 239, on or about 18 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Corporal Stephen T. Moore, a human being, by shooting him with a carbine caliber .30 rifle.

Each accused pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions as to Sergeant McCoy was

introduced. As to Private Hennessey, evidence of one conviction by summary court-martial, for absence without leave, was considered. Each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

It was stipulated that both accused were in the military service and assigned to Headquarters and Base Service Squadron, 559th Air Service Group, APO 239.

On the night of 18 December 1946, Second Lieutenant William Chavez was on duty as Duty Officer of the 1391st Military Police Company stationed at Okinawa. At about 2330 hours shortly after he had inspected the guard, accused McCoy who appeared to be very excited was brought to him and reported that a man had been shot on the beach near the NOB Ammunition Dump (R 7-8, 24). As a result of McCoy's statements, Lieutenant Chavez and Sergeant William V. Newton, a member of the 1391st Military Police Company, accompanied and directed by McCoy, drove to Ishikawa Beach, near the NOB Ammunition Dump. Because it was very dark at that time Lieutenant Chavez and Sergeant Newton were unable to see anything at the beach except tire tracks (R 8, 25). Upon being questioned by Lieutenant Chavez that night accused McCoy stated that he had been forced, at gun point, by a person unknown to him to accompany this person and the deceased to the beach, where the unknown person had then shot deceased (R 9, 24).

The next morning First Lieutenant Howard Strom, 1391st Military Police Company, the Wing Provost Marshal of the 316th Wing, accompanied by Sergeant Newton, Sergeant Joseph A. Casarez and two other military policemen took accused McCoy back to White Beach, where they found the body of the deceased, lying face upward and covered with blood (R 13, 22, 25). Two wounds were found in the body, one close to the armpit and the other below the shoulder blade (R 18, 23). The body was dressed in khaki shirt and trousers and combat boots, with no belt or cap (R 13). When accused McCoy saw the body he was very upset, ran off, covered his eyes and cried (R 17, 23, 27). Lieutenant Strom was told by accused McCoy that the missing clothing would be found in a latrine at 559th Air Service Squadron (R 14). Accused McCoy accompanied Lieutenant Strom to the latrine and assisted in the removal of a cap, a clip of carbine ammunition, a fountain pen cap, a roll of dental floss, two handkerchiefs, a belt and a jacket (R 14, 28; Pros Ex 5). They then went about two or three blocks from the latrine toward another unit's area, where they found a billfold and some personal papers (R 14, 29; Pros Ex 6), which accused McCoy stated had been kicked there by accused Hennessey (R 19). Sergeant Newton recovered the carbine from a spot near the Bisha Gawa River which had been described by the accused McCoy as the place he had thrown it. He turned the carbine over to Captain Sheffield (R 26; Pros Ex 7). At the scene of the shooting

he also picked up some expended cartridge cases which he gave to Sergeant Casarez (R 25; Pros Ex 4).

It was stipulated that a body found on White Beach on or about 18 December 1946 was that of Corporal Stephen T. Moore (R 6a).

On the evening of 18 December, Technical Sergeant William Robb, Corporal Donald Ketcham, Corporal Donald F. Houdek and Corporal Stephen J. Aquilina were playing cards in the quonset occupied by the deceased, Moore. At about 2200 or 2215 hours accused McCoy, accused Hennessey, and the deceased entered the quonset. Accused McCoy walked to deceased's bunk and picked up a carbine and handed it to accused Hennessey. Accused Hennessey asked if there were any ammunition for the carbine. The deceased took a clip of ammunition from a cabinet and gave it to Hennessey (R 31, 37, 44). As the three walked out, Hennessey loaded the carbine (R 44, 48). The carbine belonged to accused McCoy who had left it in deceased quarters on the preceding Sunday (R 38).

On the afternoon before Corporal Moore was killed he had asked Corporal Ketcham to take care of his personal belongings and write his "folks" if anything happened to him. Deceased did not impress the witness as joking, nor did he think deceased was "dead serious" (R 41). Deceased said nothing that would indicate any fear of accused McCoy (R 42) and they had been "buddies" (R 38). Sergeant Robb testified that accused Hennessey plainly had had a few drinks but was not drunk (R 33). He could see no indications that deceased or accused McCoy had been drinking (R 35). Corporal Houdek also testified that accused Hennessey appeared to have been drinking, but was in good humor and not "mad" at anyone (R 46). Earlier in the evening Sergeant Robb, Corporal Ketcham, and Corporal Houdek had seen deceased wearing a pistol, but did not see it on him at this time (R 32, 37, 45).

Sergeant Ivan L. Zeiglemann testified that he saw accused McCoy and Hennessey and the deceased at about 2115 or 2130 hours on the evening of 18 December 1946, in front of the squadron orderly room. Deceased was with them and accused Hennessey asked witness to go for a ride, but witness refused (R 49). Witness was not more than three feet from accused Hennessey and did not notice any odor of alcohol. Accused Hennessey appeared to be sober. Witness saw accused Hennessey again at about 2330 hours the same evening at the 989th Engineer Mess Hall, and noticed no change in accused Hennessey's condition. Accused Hennessey voluntarily said to witness, "If anyone asks where I've been, you don't know" (R 50).

Corporal Anthony Tabar testified that on the evening of 18 December 1946 at about 1830 hours, accused McCoy, accused Hennessey, and deceased entered the NCO Club, where witness worked as a bartender (R 55). While there, Hennessey ordered between two and five drinks of whiskey, some of which were double shots (R 57-58). Accused Hennessey asked witness for

the use of witness's jeep, and said he would return it in a few minutes. The two accused left with deceased after 1900 hours and returned without deceased shortly after 2300 or 2330 hours, at which time they returned the jeep. Shortly thereafter, accused Hennessey asked to use the jeep again, and witness "thinks" accused McCoy was with him (R 56). About midnight, witness saw accused Hennessey at the mess hall and accused Hennessey stated that the jeep was back. He did not at this time see McCoy (R 56-57).

Private First Class James L. Frank testified that on 18 December 1946 at about 2225 hours, accused Hennessey drove a jeep up to the barracks where witness lived, and asked witness to get a Private William H. Gaddis out of bed. Witness gave the message to Gaddis and Gaddis told witness, "If he wants to see me tell him to come in the barracks and see me." Witness relayed the message to accused Hennessey (R 53). The jeep was then driven from the front to the rear of the barracks (R 54).

Private William H. Gaddis testified that between 2215 and 2300 hours on one night, the date of which he was unable to recall, accused Hennessey came to the witness's quonset and invited him to go for a jeep ride (R 59-60). Hennessey told the witness that McCoy was in the jeep and wanted to see the witness. Hennessey urged him to go with a buddy of his. The witness asked if Moore were along to which Hennessey replied, "No." The witness, thereupon refused to go along. Gaddis stated that he was not on friendly terms with McCoy at that time (R 60) although they had been good friends previously (R 62). Their quarrel had arisen out of the circumstances of an investigation concerning accused's connection with a stolen jeep. A few days before the incident to which he had testified, the witness had ridden with McCoy in a stolen jeep (R 60). Thereafter he was questioned by Lieutenant Strom relative to the stolen jeep.

Later Gaddis, who shared a wall locker with McCoy, found his equipment on his bed. When he asked McCoy why he had thrown his equipment on the bed, the latter replied, "There's a lot of rats around here" (R 60). A few days later McCoy again accused the witness of "ratting" on him. As a result of this quarrel the witness, who had been quartered in the same quonset with McCoy, moved to different quarters (R 61). Before moving out of the quarters, he had knocked McCoy down (R 64).

On cross-examination Gaddis stated that the investigation with respect to the stolen jeep was prompted by his volunteering information to a Lieutenant Gallagher, whose jeep was missing, that the witness had seen a jeep on the line which looked like Lieutenant Gallagher's (R 63).

Shortly after Gaddis moved out, McCoy told a Private First Class Merle D. Mayo, who lived in the same quonset, that if Gaddis had slept there one more night, he (McCoy) would have "shot Gaddis to death" (R 66-67).

Lieutenant Strom questioned accused McCoy on or about 10 December 1946 in connection with the alleged theft of the jeep (R 10-11). He also questioned the deceased, who stated that accused McCoy had taken the jeep and that deceased had painted the jeep to conceal its identity so that accused McCoy might use it (R 11). Deceased's statement was reduced to writing but deceased stated, "I am afraid to sign the statement - I am afraid for my life" (R 12).

Captain James R. Sheffield, Commanding Officer of the 1391st Military Police Company, testified that he investigated the charges and specifications against the two accused (R 68). After witness had advised accused McCoy of his rights under Article of War 24, accused McCoy stated that he had been at the NCO Club with deceased and an unknown man, that the unknown man had forced accused McCoy and deceased at gun point to accompany him to the beach, where the unknown man had shot deceased (R 68-69). The statement was reduced to writing but not signed by accused McCoy (R 69, 73; Pros Ex 11). Later, accused McCoy was again warned of his rights under Article of War 24 and made a second statement, which he signed (Pros Ex 12).

The accused McCoy also made a third statement, after having been warned again of his rights under Article of War 24 (Pros Ex 13). Accused Hennessey, after having been warned of his rights under Article of War 24, made a statement which he signed (Pros Ex 14).

Although it appeared from the testimony of Captain Sheffield that on the day the accused McCoy made his second and third statements he was at the military police office all day, from about 0800 until nearly 0200 hours the next morning (R 74), and was possibly interrogated during most of this time, both of accused McCoy's statements and the statement of accused Hennessey were admitted in evidence without objection (R 73).

Accused McCoy's second statement (the first which he signed) (Pros Ex 12) reads as follows:

> "Around 1900 Moore and I went to 559th NCO Club where we ran into Hennessey who was talking to two other men behind the bar. Moore and I were going to buy a beer apiece and go to a stage show at the Griffen theater. Hennessey said let me buy you men a drink. We said 'No thank you', but he told the bartender to set them up. We then waited for drinks to be mixed. We took our drinks and went over and sat down at a table. Hennessey came and sat down beside us. We sat drinking & talking about the stage show when a cook, Sgt Ledder came over and sat down and started talking to Hennessey. We finished our drinks and were getting up to leave when Hennessey said, "The show doesn't start until 1930'. He said 'I'll buy you another drink'

and we said 'Okay, its your money'. At that time another Sgt & Cpl, both unknown, brought up seats and starting talking. Conversation finally got around to the Court-Martial that I am to have. Sgt Ledder got up & left the table at that time. Hennessey asked me if I had yet got a defence council. I said 'no' I havent heard anything about it. He said 'I know an officer who will help to defend you. I asked him who it was, and he replied; 'Col Elders of the 301st Fighter Wing. Hennessey said that this Col helped him out of a Gen Court-M in the States. I said Im not up against a General Court and he said I know it, but you ought to get him anyway. I said I don't know much about this Court business but if it take a Col to help you beat a General Court-Martial, all I need is a Lt. I went on to explain that I had given a complete confession about the whole business. I said I was going to get punished no matter who helped to defend me. He said we will go over there tomorrow morning and see this Col and I replied OK, no harm in it. The Sgt and Cpl got up and left and Hennessey ordered some more drinks. I said 'I don't want anymore as I cannot hold it. He said 'one more and we will all three go to the show. He gave Moore money to go to the bar and buy more drinks. Hennessey said 'I heard you would never have been caught if it hadn't been for Moore and Gaddis. I said I don't know anything about it' and he replied 'well I do, and I aim to help you out. I said I don't need any help and he was getting pretty drunk and wouldn't take no for an answer. He said 'lets go down to the barracks, after we finish a few more drinks, and see Gaddis. I said 'no need in that,' to which he replied, 'we will go anyway'. The conversion shifted to him bragging about all the Court Martials had beaten, I then said 'its your life not mine'. Moore returned with drinks and we started talking about Manila because Moore was supposed to go down there soon. Somebody came into the club saw Hennessey and went to the bar and brought back some more drinks. Moore spoke up and said 'if we're going to see that show we better take off'. Hennessey said 'Ok'. We drank our drinks and at the same time Hennessey got up and left. We went out the front door and started down towards the show and came upon Hennessey parked there in a jeep. He said 'climb in and we'll drop over to a quonset and get some cigarettes. We arrived over there and Hennessey shouted to Pfc James Frank to tell Gaddis to come outside. I said 'whats the deal' and Hennessey replied, 'this is the deal' and pulled out a 45. I said 'take it easy Hennessey, you just drunk and I want to get out of here if your going to start getting rough because I'm in enough trouble as it is. He said 'shut up, and get

back in'. He turned around and headed for the back of the quonset and said 'just a minute, I want to get some cigarettes.' He then went into the quonset and the next thing I heard was Hennessey cussing Gaddis trying to get him to get out of his sack. Gaddis said 'no'. Hennessey then came outside and said 'lets go and find some Gook women. Moore was a ladys man and he said 'yes, lets go'. I said 'no, I'm restricted to the area. Hennessey said 'you're going McCoy, no arguement'. I said 'I guess I had better, but you must be back by 2200 for I must sign in at that time.' We took off and Moore said 'lets drop by the shack, I want to pick up some stuff.' We went to the shack and Cpl Aquilina, T/Sgt Robb, and Cpl Jolliff were playing cards. They said 'are you going to the stage show', to which either Moore or Hennessey replied 'no'. I picked up a carbine, that was mine, in his locker and Moore said 'we may need this'. We then went outside climbed into the jeep and took off. Hennessey said 'I know a good place, so we said 'ok'. We went route 20, turned left at route 5 and headed for NCB, turned left at NCB, went up a road I have never been on before. We stopped about 3 blocks down to urinate. Moore, at that time was riding back. He started to get back into the back seat when Hennessey pointed the carbine at him and said 'get in front, and your McCoy sit on the outside. Moore said 'whats the deal, and Hennessey said 'shut up', and do as your told'. We then proceeded down this road which I later found out was route 8. We went past the Marine's barracks and started climbing a tall hill. We got to the top and made a right turn down another road that I have never been on before. We went as far as the road would go and came out on a big coral reef. Hennessey said 'they (women) should be around here somewhere. I climbed out, Moore behind me. I heard Hennessey pull back the breach on the carbine, and said 'Moore, get in front of the jeep and lay your 45 on the hood and back off towards that big rock.' Hennessey said 'McCoy (at the same time he was pointing the gun at me) search him'. I said 'Hennessey, what is this, a joke', to which he replied, 'shut up McCoy and do as your told'. I then proceeded to take the articles out of Moore's pockets and throw them on the ground. Hennessey said 'put them (articles) in your pockets, I don't want to leave anythin laying around'. I said 'you stupid fool, what are you trying to pull'. He said 'shut up and take off his jacket and belt. Moore then started crying and I was getting scared. Moore said 'McCoy do something', and I said I will get over there and try to make him wise up and not point a gun at a man'. Hennessey heard that and ran up, stuck the gun in my ribs and said

'move off McCoy'. I started cussing and pleading with him not to pull a stunt like this. He replied, 'this guy squealed on you and only one way out for squealing.' I said 'hell no, I squealed on myself'. Hennessey said 'climb into the jeep'. By this time Moore was crying very much and I was so scared I could hardly move. I started walking toward the jeep and I heard Hennessey say 'get on that rock Moore, and do it right away'. Moore at the same time was pleading with Hennessey to knock it off. I then put my left leg in the jeep and at the same time looked up and saw Hennessey standing approximately 20 feet away from Moore and taking aim with the carbine he had in his hands. I hollered 'no', and just as I did, Hennessey fired a shot. I jumped back into the seat. I was so scared and at the same time I heard Moore let out a yell as if wounded. I jumped up quickly and saw Moore laying across this rock and then he started rolling down the side of this rock while at the same time he fired approximately 5 more shells at him. Hennessey jumped in the jeep, laid the carbine by his right leg, and said, McCoy, you say anything about this and you're going to get the rest of these bullet in your gut. I was glancing off to where Moore was last seen and I could not see him.

I figured that he probably did not get hit, and ran out into the water or up the beach. Hennessey started the jeep, turned around and took off, at the same time almost running off into the water, as he was going at terrific rate of speed. Hennessey kept saying 'McCoy, I have been around quite a bit so I don't want you to let a word of this out, or it will be your last word.' I was going to string along with him until I had a chance to get away and notify the MP's, so I said 'Ok'. We raced back over the same route we came over. I was indulged in putting in my memory, local land marks, as we came back to the area. Hennessey said 'I need some cigarettes, lets drop over to the PX'. I said 'its closed, you couldn't buy any anyhow as No. 2 punch on PX card is not yet valid. He said 'I'll get some anyway', so we drove up to the PX and he took out his 45 and said 'watch this'. He started banging on the door. No one answered, and he was cussing and making a lot of noise. I said 'I've got some cigarettes in my quonset. He said 'go get them, don't stand around here'. I went over to the orderly room to see what time it was. It was almost 2145, I signed in and proceeded to my quonset, got a pack of cigarettes and headed back towards the PX. I said 'Hennessey I'm supposed to be in my barracks now for I'm restricted to quarters from 2200 until 0600 in the morning. He said 'forget it, I want to get rid of this stuff'. We started back down the area road and he

stopped in front of my quonset and he said 'go in and mess up your bunk so it will look like you have been sleeping there.' I went in and the man sleeping next to me was the only one there and he was not asleep. We did not speak to each other and I messed up my bunk went out and got back in the jeep. I said, 'I can't be gone long, because Capt. Cain probably has someone keeping an eye on me and I'm not going ot disobey his order. The time then was about 2150. He said get in and we went down to route 20 by the Red Cross, turned left, went down route 20 towards 316th Bomb Wing, turned in on route 126, and proceeded to route 1. All the time he was driving at a terrific rate of speed. We did not speak until we arrived at the traffic circle where he made a left turn instead of a right turn. I said 'Whats the idea' to which he replied, 'just a short cut, in a hurry to get back. He then slowed down when he turned to the left of the pavement towards the Baily Bridges. He then said, 'take the clip out of the carbine and give it a heave', I did so. We went down to the Baily Bridges turned around at the 301st sign and started back over the Japanese bridges. Hennessey slowed downed and said 'McCoy, heave it into the water.' I threw it and it went into a tree and I did not hear it hit the water. We took off up the hill and back over the same route that we had just came down on. We went back to the area and pulled up behind the 559th NCO club, pulled up, got out and he said, 'come on in', we'll have a drink. I said 'no', I've had enough for tonight, I want to go and hit the sack'. He struck his hand into his jacket pocket and pointed the gun at me and said 'come on in'. I said 'wait a minute' let me get over the shakes, as I was scared to death. We waited a couple of minutes and then went in, where several men, whose names I do not know, were practicing on various musical instruments. Hennessey then went over to the manager of the club, who's name was Red, and said 'give us a couple of drinks, Red'. Red went behind the bar and poured out a couple of drinks. I went over and sat down.

"Hennessey brought my drink to me, laid his drink on the piano, and started dancing with a Cpl, whos name I do not know. We stayed there about 10 minutes, and all the time Hennessey was dancing and singing, I was watching a man play the drumms. Hennessey then said 'I'll see you down to your barracks, McCoy. I replied, 'good deal', so we went outside and climbed into the jeep and went down the road towards the Officer's club. I asked him, 'where are you going?, I don't live down there'. He said, 'we will get rid of this stuff, (meaning, Moore's effects).

We went down the road and turned to the right on the road that goes to the 22nd Bomb Group. He went about 30 feet, turned the jeep around and parked it. He said, 'Give me his wallet'. I started taking the stuff out of my pockets and laying it on the seat. He said, 'you're to damn slow, take off your jacket and give it to me.' I took it off and handed it to him. He took Moore's wallet and took the money out of it. He said, 'one for you and one for me', etc until he had the money devided in half. He said, 'you take it, you might need it.' I replied, 'no, I don't want anything thats in this jeep'. He said, 'see this, (meaning the 45) and I said 'yes', and he said 'take the money then'. I picked it up, and stuck into my pocket. He then climbed out of the jeep and started burning Moore's papers that were in his wallet. He then picked up a handful of articles and gave them a toss. He said, 'where is the nearest latrine, to which I replied 'lets go back to the area'. He said, 'Ok' and I also wanted to run into somebody that I knew, so that I could have a good chance of getting away from him. We went down to the latrine in the Hq Sq area and Hennessey searched Moore's pockets of his field jacket, then dumped it down the latrine. He was still holding my field jacket and looking in the pockets to see if there was anything in there. He said, 'McCoy, lay everything out on the floor that you have in your pockets. I did so. He started handing the articles back to me as he checked them over. He then took and laid his aricles out on the floor and started putting back into his pockets what he knew didn't belong to Moore. He then threw the stuff he had left over down the latrine. He said, 'Come on McCoy, lets go up to the mess hall'. I said, 'No, I have to get back to my quonset. He again stuck his hand into his pocket and made like he was pointing the weapon at me and said, 'you and I are going to the mess hall and get something to eat'. All I said was 'damn it', so we got back into the jeep and went up to the Engineers mess hall, where he started talking to Sgt Ziegelwan, who was standing at the door. I went in, took a tray had chow served to me, and sat down at my table, at which Lt. Hansen, the mess Officer and the O.D. were eating. I almost had a chance to speak to the OD but Hennessey saw me and came rushing over and said, 'well hello McCoy, long time no see'. He got hold of my hand and started squeezing it very hard and sat down, and started eating. When we got out outside he grabbed me by the shoulders and punched me in the back with what I thought was the gun he was carring, and said, 'McCoy, you crazy bastard, don't ever try that again.' I said, 'what are you talking about?' He said, 'climb into the jeep, you and I are going for a little

ride. We drove out of the area and turned left on route 20. He went slow, as far as the Perimeter road and at the same time was threatening me, if I ever tried anything like that again. I then said, 'I don't know what you're talking about. He turned right on Perimeter road and in about 5 or 10 feet stopped. He then said, 'McCoy, 'get your ass out of here, and remember this, I will kill you if you breath another word about this'. A vehicle was approaching us up route 20, so he said, 'see you around'.

"He took off up Perimeter road. I turned around and ran towards the approaching vehicle, turned on my flashlight and hailed him down. The driver was an officer, whom I do not know and I said, 'drive me to the MP's as fast as you can. He said, 'whats the matter.' I said, 'I don't know as yet, just get me down to the MP's right away. We came up to the MP orderly room where we were meat by an MP and I climbed out of the vehicle which I was riding in which was a W/C. I asked this MP that was sitting in the jeep if Lt. Strom, Lt. Rogers or Capt Sheffield was around. He said, 'I don't know, but we'll soon find out.' He asked me 'what was the trouble', and I said, 'there had been a shooting.' This MP turned around and ran up the hill, while at the same time another vehicle drove up and I heard somebody holler to and ask, 'whats the matter'. This MP said, 'its Lt. Chavez the Duty Officer'. I raced back down the hill and started to explain to him the best I could about what had happened. I was scared to death and I don't think he or Sgt Newton knew what I was talking about at first. I finally quieted down and got out that there had been a shooting. He asked, 'where', and I said, 'down by NCB'. I said a few words that I do not remember."

Accused McCoy's third statement (Pros Ex 13) reads as follows:

"We drove to the beach, where Pvt. Hennessey stopped, got out, came around to my side where he said, 'give the gun to me'. I reached over Moore's legs and handed him the gun. He pulled back the bolt of the gun and said, 'get out Moore'. I climbed out, walked about 8 feet from the jeep. Moore climbed out and Hennessey told Moore to put his hands over his head which Moore did. 'Get in front of the jeep, he said,' and then said, 'McCoy, take the gun out of his pocket.' Moore said, I dont have a gun. Hennessey said, I know you do because I saw it at the club tonight. I walked over, felt around Moore's hips and it was in his right hand pocket. I reached in and took it

from his pocket. At the same time Hennessey said, Lay it on the hood. I laid the gun on the hood. Hennessey then said, McCoy, back away. I backed up about 6 or 7 feet. Hennessey then said, Moore, move over by that rock, which he did and at the same time Hennessey moved up to the front of the jeep. Hennessey then said, McCoy, search him. I walked over, started taking the things out of his pocket and threw them on the ground. Hennessey said, Put them in your pockets which I did. He then said, 'Take off his hat and coat and belt', which I did. He said OK and moved back towards the jeep. Hennessey said, Moore, get up on that rock. I looked up and saw that he had the carbine at his shoulder, and was taking aim. He fired, one shot, and I said, 'You hit him'. Moore then started rolling or running off this rock, and I said, 'watch him, he's getting away. He then fired approximately 4 or 5 times more, which I do not know if they hit Moore or not. We then climbed into the jeep, Hennessey laying the carbine between both of us. He then said, Oh! Oh!, I forgot something. He reached out over the front of the windshield and picked up the (.45) and climbed back in and put it in his left hand field jacket pocket. He then. He turned the jeep around and started back over the same route we had come over at a terrific rate of speed, between 50 and 60 MPH. We went back to the 559th area, over the same route that we came down. We went into the 559th area and up to the NCO club, where Hennessey and myself went into the club where we bumped into 'Red', the club mgr. Hennessey said, we had a little trouble. He mentioned that this had been a wreck between two M. P. jeeps, and that we almost ran into them. He said, look what I got out of it, holding up Moore's field jacket, and I'm sure that he also showed him the 45. He said to 'Red', fix us a couple of drinks. We stayed in the club for about 10 minutes. I was watching a drummer play the drums, and Hennessey was dancing with a Cpl. I do not know. We left the club, turned left by the 559th Officers club, and turned right again at the road that leads to the 22nd Bomb Group. Hennessey went about 20 or 30 feet, turned around and stopped. He then said, Empty the stuff out of your pockets and lay them on the seat of the jeep, which I did, Hennessey first picked up the wallet, took the money out and started dividing it. He then took all of the papers and articles out of the wallet, picked up some matches, handed the things to me and said, burn them. I took one match off, struck it and lit the rest of the matches, and then set fire to the papers belonging to Cpl. Moore. At that same time a vehicle was coming up the road in the 22nd Bomb Group area. I dropped the papers to the ground, and then kicked them to the side of

the road. This vehivle stopped, and the person that was in it said, 'Having any trouble'? We both tried to speak at the same time. I said, 'we are having light trouble, and I did not understand what Hennessey said'. The vehicle then moved away. Hennessey said, lets go to the mess hall. We agreed to go to the mess hall., and get a cup of coffee. When we had finished eating,, we got up and left the mess hall and got in to the jeep, and I said, I had better be getting back to the area. Hennessey said, OK. We stopped by the orderly room, where I signed in, looking at the clock on the wall. The clock said, (09:45) so I was going to write 11:45 P.M, knowing that the clock was wrong, but knowing that it was almost 24:00 I signed the sheet to read 20:50, so that persons would thind I had been been in that area. I falsified this record, because I did not want anybody to know I was out of the area. I left the orderly room, walked towards my quanset, and Hennessey was moving down the road behind me. I went in, and messed up my bunk, for the same reason that I had falsified the sign in book. I left the quanset, went out and got into the jeep and we drove off. I said, 'We will have to get rid of this gun. Hennessey said, we will go to the circle, and dump it in. I said, OK. We went to the circle. After we got off the circle we drove about 75 or 80 feet and Hennessey said, take the clip out and give it a toss, which I did. We then went down to the bridges, turned around and he said, throw the gun in the water, which I did. We proceeded back to the quanset area, where he drove to our latrine. We went inside and he threw Moore's field jacket in the latrine. He then laid out a few more articles, that he had and he mentioned, have you got anything else in your pockets. 'OK', I said, I'll see. I had a comb, and I dropped it in the latrine. Hennessey also dropped a few articles in which I did not know what they were. We left the latrine, got in the jeep and Hennessey said, I'm going to take the jeep back. We drove back out, onto route 20, where he let me off. I then started walking back to my area. I stopped off at the Matterial Latrine. I stayed there approximately 30 minutes. I got up and went into the shower room, took off my jacket and washed my hands and face. I then went to my quanset, where I got a pack of cigaretts, and started back towards route 20. I crossed the road in front of Third Echelon. No sooner did I get out on the road, than a vehicle was coming up the road. I left my flashlight on and waved the vehicle down. The driver was an officer and he asked me, what was wrong. I said, 'I don't know yet, but drive me to the 1391 M. P. Co. in a hurry, which he did. When we arrived, we came

upon an M. P. I asked him, If Capt Sheffield, Lt. Strom or Lt. Rogers was around. He said, I dont know, but I will soon find out. He asked me what the trouble was, I said, 'A man has been shot. I knew who the man was, and who the man was that shot Cpl. Moore. I withheld the name of the man who did the shooting. I did not wish to mention his name because I did not want to squeal on him. The M. P. started toward the officers quarters and a jeep drove up., and somebody hollered to us. The M.P. said, Is Lt. Chavez the duty officer. I did not explain to him in clear words at first what had happened. He then said, Where did it happen? I said, 'By NCB. We then got into the jeep, and took off. Lt. Chavez started down towards the Kadena runway, I said, 'Not this way to NCB. The Lt. said, this is a short cut. All along the route the Lt. and the Sgt. were questioning me as to who it was, when did it happen, and who the man was? The only answer's I gave them were No, and I dont Know, which was an untruth, because I knew that If I said it was, Hennessey, that he would involve me and that my part of the crime would be known. I directed Lt. Chavez to the area where the shooting occurred. We could not find any trace of Moore after searching arround for approximately half an hour or 45 minutes. The Lt. said, we, will go back, make out a report and return tomorrow morning. After we had gotten in the jeep I mentioned to go down to where Moore lived and see if he had come in, because if he had come in, he would implicate me in an attempt to murder him. We went down to Moor'es shack, where we woke most of the men up and asked them if Moore had returned. They said No. The Lt. told Cpl. Aquilina to phone the MP's as soon as Moore came in. We went back to the station, where the Lt. made out a report and questioned me about the same thing as we were going to the scene of the shooting. I still did not give him an answer as to who the man was, for I knew If I did, Hennessey would involve me, and my part of the crime would be known. I told the Lt. and the Sgt. that Hennessey had threatened me, to kill me, if I told anything about it, which is an untruth. I said, 'I did not want to go back to the area that night, as if Hennessey found out that I had said anything about it, he was armed; and that I did not know what he would say or do about it. The Lt. told the sgt. to fix me a bunk in his quanset, because I wanted protective custody. In the statement I made the next morning I deliberately lied, in trying to establish an alibi.

"Q. Sgt. McCoy, did you at any time threaten the life of one Pvt. Gaddis of the 559th A. S. G?

"A. Yes, I did.

"Q. To whom did you threaten the life of one Pvt Gaddis?
"A. Hennessey.
"Q. Did you, on last Sunday afternoon, take a gun (a carbine) and leave it in Cpl. Moore's quanset?
"A. Yes.
"Q. Why did you take the carbine to Moore's shack, Sgt. McCoy.
"A. I left the carbine in Moore's shack because I had to leave in a hurry and did not think to take it with me.
"Q. Was Moore killed with your carbine, Sgt. McCoy?
"A. Yes.
"Q. Did you make three false statements attempting to establish an alibi?
"A. Yes.
"Q. Did you at any time try to stop Hennessey from committing Murder?
"A. No.
"Q. Did Hennessey point a gun at you earlier in the evening, or prior to the shooting of Moore?
"A. No, not that I know of.
"Q. Did you, Sgt. McCoy, try to tell anyone of this incident, before you made your report to the 1391 M. P. Co?
"A. No."

Accused Hennessey's statement (Pros Ex 14) reads as follows:

"Last night at approximately 2000, Cpl Moore, Sgt McCoy, and I were at the 559th NCO club. We were all talking and drinking. We talked about the jeep deal Sgt McCoy was in trouble over. Cpl Moore was boasting about Gaddis being in on it too and I told him that he shouldn't talk. I ask Sgt McCoy who gave him the idea about the jeep in the first place and he said Cpl Moore. I ask Sgt McCoy to go out to the latrine with me and there I told him that Gaddis and Moore were talking about him, and we decided that we had better get rid of him (Moore). We went inside, drank a little more beer and I told Tony, the bartender that I was going to use the jeep. We all went out and crawled into the jeep. We went to get Gaddis. Gaddis said that he did not want to go. We left and Sgt McCoy said take him down to the weather station. I did not know what he was going for. I drove him down and Sgt McCoy went inside and got a carbine. Cpl Moore and I went in also. We stood inside the door. We all three went out to the jeep and proceeded to the country where Sgt McCoy had told me to go. I drove down to a beach close to Ishikawa. Sgt McCoy handed me the gun and said, 'Let get rid of him'. I told Cpl Moore to get out of the jeep. He got out with his

hands up. Sgt McCoy took a .45 pistol from Moore and laid it on the jeep hood. Sgt McCoy took Moore's belt, cap, and field jacket. I shot Cpl Moore. We went back to the jeep. Sgt McCoy told me a .45 was on the hood. I picked it up and put it in my pocket. We came back to KAAB. Sgt McCoy said, 'Drive down to the Bailey bridges and we will ditch the gun. We drove down and Sgt McCoy threw the gun over the side of the bridge. We came back to KAAB. We went to the Eng. mess hall and ate. After we got through we went to the NCO club where we left the jeep. We went inside the NCO club, I thanked Tony for use of the jeep and asked Red for a couple of shots of whiskey. He gave them to us. We left the club. I went back to my quarters and went to bed. I left McCoy as he was heading for his quarters.

"I forgot one thing that I will add now. After we left the Bailey bridges we came back to KAAB, went through my area to a latrine, and threw some of Moore's belongings into the latrine. We got rid of the wallet by throwing it alongside the road. As we were on the road he gave me $35 of the money taken out of Moore's wallet. At this time we went to the mess hall and ate."

* * *

"Q. Do you remember going to the NCO Club at 1830, the opening time of the club, on the night of 18 December 1946?
"A. Yes, that is correct.

"Q. Did Moore and McCoy come in there soon after you got there?
"A. Right after the show started, about 0730.

"Q. What was the first contact you had with them?
"A. At the bar. They had just come in, we all went back to my table.

"Q. When did you and McCoy talk over the idea of getting rid of McCoy, if you did?
"A. We went outside the club to urinate. I told McCoy that I thought Moore was against him. He said, 'Well, the only thing I can see is just get rid of him.' I said, 'I can get a jeep.' He said, 'OK, you get it.'

"Q. Had you ever talked prior to this time with McCoy about getting rid of Moore?
"A. No. One time (I believe it was the next evening after the MP's had him for questioning about the jeep) we met at the latrine. I said, 'McCoy I hear you are in a lot of trouble.' He said, 'Yes, God-damn, I would like to kill Gaddis.' That same evening I told Gaddis that a

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Sgt friend of his would like to kill him. He replied, 'McCoy isn't going to kill nobody.'

"Q. Did you see a gun on Cpl Moore in the Club?
"A. Yes, I saw one, he had it in his belt.

"Q. What time would say it was when you left the club?
"A. It was around 2015.

"Q. Did all three of you go out and get in the jeep together?
"A. Yes.

"Q. Where did you go from there?
"A. I don't think I can rightly remember. I don't think we went directly over to Gaddis' barracks. It was all like a dream.

"Q. Who or what gave you the idea to go and get Gaddis?
"A. McCoy. I remember knowing one time when we turned into 559th area and was driving by unit personnel that McCoy said, 'Let's go get Gaddis.'"

* * *

"Q. Whose idea was it to go over to the Weather Station?
"A. McCoy. He said drive down to Moore's quarters.

"Q. What was Moore saying all this time?
"A. He did not say anything. He didn't know what was going on.

"Q. What do you mean.
"A. It was all mixed up that night. It was like a dream.

"Q. You knew that you and McCoy were planning to get rid of Moore while you were riding around.
"A. I tell you it was like a dream. I didn't know where I was at. I knew that we were going to get rid of him after we went to the weather station and got the carbine, but I didn't know I was going to do the shooting.

"Q. Well, who did you think was going to do the shooting?
"A. McCoy.

"Q. Did McCoy pick up the gun at the Weather Station and give it to you?

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"A. I don't remember him giving it to me, maybe he did and maybe I took it. I don't remember much at the weather station.

"Q. Do you remember asking if there was any ammunition for the gun?
"A. No, sir, I didn't.

"Q. What do you think happened there?
"A. I just remember leaving there.

"Q. Where did you go from there?
"A. We went down to a beach near Ishikawa."

* * *

"Q. What happened after you stopped on the beach?
"A. McCoy was sitting on the right of me. He jumped out and said, 'Let's get it over with.' I told Moore, 'Get out Moore.' Moore got out of his side after I got out on the left side. I walked around in front of the headlights. McCoy gave me the gun and I had it at port arms and McCoy had Moore backing up after he took the gun from his pocket and threw it on the hood of the jeep. He backed him over by the rocks and stripped him down. I walked back to the left side of the jeep. McCoy walked back to the right side. Moore did not say anything. He looked like he didn't know what it was all about. Sgt McCoy said let it go or something like that. I remember I rapidly fired but I don't know how many times. I got back in the jeep. McCoy took the carbine and I took the .45 off of the hood. We drove straight back to the Base."

The court was cautioned that Prosecution Exhibits 12 and 13 should be considered as evidence against accused McCoy only, and that Prosecution Exhibit 14 should be considered as evidence against accused Hennessey only (R 78).

Captain Sheffield identified Prosecution Exhibit 6 as a billfold and papers given to him by Lieutenant Strom and the witness testified that he turned them over to the trial judge advocate (R 71). The witness also testified that he had delivered to the trial judge advocate the pen and pencil set (R 71; Pros Ex 8), the empty shell cases which were picked up at the scene of the shooting (R 71; Pros Ex 4), the cap, jacket, and belt (R 71; Pros Ex 5), $150.35 in Military Payment Certificates and coins which were given to witness by the two accused (R 72; Pros Ex 9), and the pistol which was identified by the accused as having been taken from deceased (R 72-73; Pros Ex 10).

It was stipulated by and between the prosecution, the defense and the accused that Corporal Stephen T. Moore died of a gunshot wound producing laceration of the liver with hemo-peritoneum, that he died on or about 18 December 1946 and within a year and a day from the time of receiving such gunshot wound, and that Prosecution Exhibits 4, 5, 6, 7, 8, 9, and 10 were tagged by Captain Sheffield and given to the trial judge advocate as of 3 January 1947 (R 76).

4. After having been duly apprised of their rights as witnesses, both accused elected to remain silent, and the defense offered no evidence.

5. On arraignment the defense counsel suggested that the court inquire into the mental condition of the two accused and stated, "that during the entire time in which the defense counsel has been working with the accused, he had felt continually that due to the mental conditions of both of the accused he has not been afforded the opportunity to give a proper defense * * * due to (their) mental condition" (R 4). By stipulation the defense offered into evidence a letter dated 14 February 1946, by Mrs. Rebecca A. Hennessey, the contents whereof are pertinent to accused Hennessey only (R 4a, 4b; Def Ex A). This letter apparently written to accused Hennessey's commanding officer with respect to an erstwhile absence without leave states in relevant part:

> "* * * I have a paper here from a medical examiner Mather Field Sacramento Calif on this paper says occasional episodes of mental confusion and frequent attacks of jitters while he was home he just could not sit still, * * *" (Def Ex A).

The law member ruled that the presumption of sanity as to the accused had not been overcome (R 4b).

The legal standard of mental responsibility under military law is stated in the Manual for Courts-Martial as follows:

> "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (5th subpar of par 78a, p 83, MCM 1928).

The standard for determining mental responsibility in military law includes not only the concept involved in the traditional right and wrong test, but also the more liberal concept involved in the so-called irresistible impulse test. The first concept recognizes that a person

without appreciation of rightness or wrongness of an act cannot have a criminal mind or formulate a criminal intent. The second concept recognizes that, if a person, because of mental illness, is deprived of the power of choice or volition, he does not possess the mental attitude and freedom of choice essential to criminal responsibility (par 2, Tech Bull, MED 201, WD, 1 Oct 45). The mental responsibility of the accused is a question of fact, and the burden is upon the prosecution to prove beyond a reasonable doubt that he is mentally responsible for the offense. He is presumed, however, to have been in fact sane at the time of the offense until a reasonable doubt as to his sanity at that time appears from all the evidence. This presumption merely supplies in the first instance the required proof of the capacity of the accused to commit the crime charged, and authorizes the court to assume at the outset that he is mentally responsible for his act. When evidence tending to prove that the accused was not mentally responsible for the alleged offense is introduced either by the prosecution or by the defense, or, in an appropriate case, on the court's own initiative, and such evidence creates a reasonable doubt as to the sanity of the accused, he is entitled to an acquittal (CM 294675, Minnick, 26 BR (ETO) 11); the burden, however, of producing evidence of insanity is not upon the prosecution, but upon the defense (MCM 1928, par 112a, p 110; Davis vs. U. S., 160 U.S. 469; Davis vs. U. S., 165 U.S 375; Hotema vs. U. S., 186 U.S. 413; CM 314876, Rollinson).

In our opinion the statements contained in Mrs. Hennessey's letter fail to establish a reasonable doubt as to accused Hennessey's mental responsibility. No evidence was introduced by the defense tending to show that either accused was, at the time of the alleged offenses either incapable of distinguishing right from wrong or adhering to the right. Neither was any competent evidence introduced tending to show that either accused lacked sufficient mental capacity to intelligently conduct or cooperate in his own defense.

Accordingly we are of the opinion that the law member properly denied the defense's motion that inquiry be made as to the mental condition of the accused.

6. Both accused stand convicted of a specification which alleges that the accused "acting jointly and in pursuance to a common intent, did, * * * with malice aforethought, willfully, feloniously, unlawfully, and with premeditation kill one Corporal Stephen T. Moore, a human being, by shooting him with a carbine caliber .30 rifle."

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

> "* * * Malice * * * is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. * * * malice is implied from any deliberate or cruel act against another, however sudden" (Commonwealth v. Webster, 5 Cush 296; 52 Am Dec 711).

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

The circumstances shown by the record of trial establish that the two accused agreed that Corporal Moore should be killed, probably in revenge for his part in supplying evidence against McCoy with respect to the theft of Lieutenant Gallagher's jeep. Accused Hennessey, in his confession, admitted that while they were at the NCO Club earlier in the evening, he and McCoy agreed they should "get rid" of Moore. By his own admission he fired the fatal shots. The "corpus delicti" of the offense necessary to permit consideration of the confessions of both accused was clearly established. The Manual for Courts-Martial states that the corpus delicti is sufficiently shown in the case of a charge of an unlawful homicide by "evidence of the death of the person alleged to have been killed, coupled with evidence of circumstances indicating the probability that he was unlawfully killed" (MCM 1928, par 114a, p 115). The finding of Moore's body on a lonely beach and the establishment that the cause of death was by shooting fully established that he was probably unlawfully killed. As to accused Hennessey therefore, all the evidence, excluding accused McCoy's statements, clearly and conclusively proves his guilt of the offense of premeditated murder.

In his statements, accused McCoy did not specifically mention any prior agreement or understanding with Hennessey to "get rid" of Moore. But all the circumstances, as shown by his own statements as a whole and the testimony of other witnesses, shows that there was such an understanding. Further, it is well settled that:

> "All who are present concurring in a murder are principals therein, and the death, and the act which caused it, is in law the act of each and all. There is no distinction in

(106) the regard of the law in the degrees of their guilt, or the measure of their punishment, or the nature of their offense, founded upon the nearness or remoteness of their personal agency respectively" (State v. Jenkins, 94 Am Dec 1932, 14 Richardson's Law 215; CM 248793, Beyer et al, 50 BR 21, 37).

The motive for the crime was principally McCoy's. Whether McCoy agreed with Hennessey at the club, as stated by Hennessey, or whether at some later time he fell in with Hennessey's plan is immaterial. The evidence is clear that he did assist in such a plan.

The evidence shows that it was McCoy who picked up his own carbine and handed it to Hennessey. The record shows no contemplated use for the weapon other than that to which it was put. If, as stated by McCoy in his confession, the two accused and Moore were planning to look for girls they hardly needed to be armed. Since the only articles which were apparently obtained on the occasion of the visit to Moore's quarters were the carbine and the ammunition, it is reasonable to infer that the real purpose of that visit was to obtain the weapon with which the killing was perpetrated. McCoy admitted that upon arrival at the beach he handed the carbine to Hennessey. He also admitted that he disarmed Moore while Hennessey kept the carbine pointed at Moore, and that he removed Moore's effects, his jacket and his belt. Although McCoy's second statement is replete with self serving declarations that he was compelled by Hennessey to perform these acts at the point of a gun, in his third statement he admitted that Hennessey did not point a gun at him at any time prior to the shooting. In that statement he also admitted that he did not at any time try to stop Hennessey from killing Moore. If he had any real desire to prevent Hennessey from shooting Moore, it would appear that he could have done so when he had possession of Moore's pistol. Moreover, his active and voluntary participation in the killing may be inferred from that portion of his third statement wherein he said:

> "He (Hennessey) fired, one shot, and I said, 'You hit him.' Moore then started rolling or running off the rock, and I said, 'Watch him, he's getting away.'"

The evidence thus supports the conclusion that McCoy voluntarily aided and abetted Hennessey in the murder of Moore, thus establishing his guilt as a principal (18 USC 550).

7. The charge sheet discloses that accused Hennessey was 24 years of age when the offense was committed. He was inducted into the Army of the United States on 31 July 1941 and honorably discharged on 2 November 1945. On 23 January 1946, he enlisted in the Regular Army for three years.

Accused McCoy is shown on the charge sheet as being 19 years of age at the time of the commission of the offense. It appears, however, from a certified copy of his birth certificate, submitted by his father, that he was born on 6 February 1930, and was therefore 16 years of age when the offense was committed. He was inducted into the Army of the United States on 27 September 1945 and honorably discharged 30 January 1946. On 31 January 1946, he enlisted in the Regular Army for three years.

Prior to trial, on 24 and 26 December 1946, each accused was given a mental examination by Captain Jerome B. Katz, Medical Corps. The reports of these examinations which are included among the papers attached to the record of trial indicated that in the opinion of the medical examiner accused McCoy "displays evidence of mild poorly formed psychopathic traits and psycho-neurotic disturbances. * * * There is no evidence of psychosis." In his opinion accused Hennessey "presents evidence of mild psychopathic traits in the field of emotionality and in alcoholism * * *" but no evidence of psychosis. As to each accused the medical examiner stated both at the time of the examination "and at the time the offense was committed, (1) the accused knew the difference between right and wrong; (2) had the capacity to keep from doing wrong, and (3) at the present time has the mental ability to understand the nature of the proceedings against him, and can do what is necessary to present his defense."

8. On 16 June 1947 the Honorable William G. Stigler, House of Representatives and on 19 June 1947 the Honorable Charles K. Fletcher, House of Representatives appeared before the Board of Review on behalf of the accused McCoy. The Board has given careful consideration to arguments urged at these hearings.

The Board has also given careful consideration to numerous communications pertaining to clemency on behalf of the accused which have been referred to the Board and which are summarized below:

<u>On behalf of accused McCoy</u>: Letters to the President from the Honorable Elmer Thomas, United States Senate, with inclosures thereto; the Reverend Gardner Freeman, Esserville, Virginia; Seaman Second Class M. C. Emerson (Rdm) USN; Mr. Clyde E. Palmer, Editor and Publisher of the News-Times Publishing Company, El Dorado, Arkansas; the Honorable John L. McClellan, United States Senate; Mr. Roy E. DeMent, Plainview, Texas; and a telegram to the President from Mrs. Daisy Hanna, Coronoda, California.

Letters to The Adjutant General from the Honorable Elmer Thomas, United States Senate; Seaman Second Class M. C. Emerson (Rdm) USN; and a telegram to The Adjutant General from Mrs. Ruby Lee Hines, San Diego, California, mother of accused McCoy.

Letters to The Judge Advocate General from Mr. Edwin G. McCoy, Sr., father of accused; the Honorable Elmer Thomas, United States Senate; the Honorable W. F. Norrell, House of Representatives; the Honorable Oren Harris, House of Representatives; the Honorable J. W. Fulbright, United States Senate; the Honorable Glen D. Johnson, House of Representatives; the Honorable Mike Monroney, House of Representatives; the Honorable Carl Albert, House of Representatives; the Honorable E. H. Moore, United States Senate; the Honorable Charles K. Fletcher, House of Representatives; the Honorable William G. Stigler, House of Representatives; Mr. Elmer H. White;

Mr. and Mrs. F. H. Blackford; Dr. Helene K. Graff; Mrs. Susie Mashburn; Mrs. H. Meyers; Mr. Clyde E. Palmer; and Mr. R. E. Faulkner.

On behalf of accused Hennessey: Letters to the President from the Reverend Gardner H. Freeman, Esserville, Virginia; the Reverend Joseph B. Hennessey, Akron, Ohio, brother of accused Hennessey; and letter from Mr. C. C. Long, Akron, Ohio.

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

_____, Judge Advocate

Waldemar A. Solf, Judge Advocate

[illegible], Judge Advocate

JAGH - CM 320662 1st Ind

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

TO: The Secretary of the Army

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 Cecil E. McCoy (RA 39760022) and Private Albert H. Hennessey (RA 15069436), Headquarters and Base Service Squadron, 559th Air Service Group.

2. Upon trial by general court-martial, the two soldiers named above were found guilty of the murder of a fellow soldier, in violation of Article of War 92. No evidence of prior convictions was introduced as to accused McCoy. Evidence of one previous conviction by summary court-martial was introduced as to accused Hennessey. Both were sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentences, and forwarded the record of trial for action under Article of War 48.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of murder and the sentence to death in the case of each accused, and to warrant confirmation of the sentences.

Accused took a fellow soldier, whom they suspected of giving information against accused McCoy, to a lonely beach in Okinawa, and there shot and killed him. Accused McCoy disarmed the victim and removed the contents of his pockets and part of his clothing, and stood by while accused Hennessey shot him to death. It appears from a certified copy of accused McCoy's birth certificate, submitted by his father, that he was only 16 years of age at the time of the commission of the offense. The accused Hennessey was 24 years of age. In view of the age of accused McCoy, and the evidence that both accused had been drinking, I recommend that the sentence as to each accused 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 each accused, and that the sentences as thus commuted be carried into execution. I further recommend that an appropriate United States penitentiary be designated as the place of confinement as to each accused.

4. At the request of my office both accused were examined subsequent to trial by a Board of Medical Officers to determine their mental responsibility. The Board found that both accused were, at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong and to adhere to the right, and that at the time of their trial, they were able to understand the nature of the proceeding against them and to participate in their own defense.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 Record of trial
2 Draft ltr sig Sec of the Army
3 Form of action

(G.C.M.O.(Dept of the Army) 25, 20 Oct. 1947)

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

JAGK - CM 320669

11 JUL 1947

UNITED STATES	)	THE INFANTRY CENTER
	)	
v.	)	Trial by G. C.M., convened at Fort Benning, Georgia, 18 December 1946. Dismissal and total forfeitures.
	)	
First Lieutenant HENRY E. BERENDSEN (O-1315768), 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. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Henry E. Berendsen, 17th Company, Student Training Regiment, The Infantry School, Fort Benning, Georgia, did, at 17th Company, Student Training Regiment, Fort Benning, Georgia, on or about 11 November 1946, with intent to deceive Captain William V. Church, officially report in writing to the said Captain William V. Church, that he the said Lieutenant Henry E. Berendsen had inspected the Mess Hall of 17th Company at the morning, noon and evening meals on 11th November 1946, which report was known by the said Lieutenant Henry E. Berendsen to be untrue in that the said Lieutenant Henry E. Berendsen was in fact not in the Mess Hall of 17th Company at any meal on 11th November 1946.

He pleaded not guilty to and was found guilty of the charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, recommended that the sentence be commuted to a reprimand and a forfeiture of $50 of accused's pay per month for four months and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 8 November 1946, and again on 9 November, accused was advised by his company commander that he was to be mess check officer on 11 November 1946. The mess check officer was required to be present at the organization mess at each of the three meals served during his tour of duty in order to make a sanitary inspection of the mess facilities and to generally supervise the operation of the mess. He was also required to fill out a mimeographed report form for each meal, detailing the results of his inspection. These forms, upon completion, were submitted to the company commander who, in turn, forwarded them to the battalion commander. The mess check officer was permitted to make arrangements for a brother officer to take over his duties provided the company commander knew of the substitution (R. 7-9).

Accused was not present at any of the three meals served on 11 November 1946, nor was any other officer (R. 20-26). On the morning of 12 November, the company commander received three mimeographed report forms covering the three meals served on 11 November, each form being filled out over the signature of accused indicating that he had inspected the mess on each occasion. These forms were addressed, "To: Commanding Officer, 1st Bn * * *" Accused, when asked by the company commander why he was not present for mess check on 11 November, replied that "he just didn't make it." (R. 10-13; Pros. Exs. 1-3).

Evidence for the Defense

From September 3 until at least 5 November 1946, mess check officers were appointed by a roster coming from battalion headquarters and officers from other organizations as well as the company officers served in that capacity. The mimeographed report forms were placed on the first sergeant's or company clerk's desk and it was understood that they went directly to the battalion commander without passing through the company commander's hands. Several mess check officers had "missed" mess check during that period (R. 30-34). Accused, having been informed of his rights as a witness in his own behalf, elected to remain silent (R. 39).

4. Although the mess check reports accused is charged with having falsified were addressed to the battalion commander, the evidence tends to establish that such reports were, in practice, submitted to the company commander for his information before being forwarded by the latter to the battalion. Hence, the specification properly alleges and the proof sufficiently shows that accused made the false official reports in question with intent to deceive his company commander (CM 224049, Burnham, 14 BR 45, 48). Such conduct is, of course, a violation of the 96th Article of War (par 152a, MCM 1928).

5. War Department records show that accused is 28 years of age and is unmarried. He is a high school graduate and in civilian life worked as a demonstrator of air conditioning equipment and as a bell hop and clerk in various hotels. He entered the military service on 15 October 1940 as an enlisted man. In March 1942 he left the United States and served in the Hawaiian Islands with the 165th Infantry Regiment as an instrument corporal in a mortar platoon. He returned to the United States in December 1942 for the purpose of attending the Infantry Officers' Candidate School at Fort Benning, Georgia. Graduating from this school, accused was, on 26 March 1943, appointed and commissioned a second lieutenant in the Army of the United States. He again left the United States in January 1944 and served in the Mediterranean Theater of Operations with the 168th Infantry Regiment where he engaged in the Naples-Foggia, Rome-Arno, North Appennines and Po Valley campaigns. He was promoted to the grade of first lieutenant on 16 July 1944, and was awarded the Combat Infantryman's Badge on 31 August 1944. Accused returned to the United States in November 1945.

6. The court was legally constituted and had jurisdiction over accused and of 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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Alistair D. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

[illegible], Judge Advocate

JAGK - CM 320669 1st Ind

WD, JAGO, Washington 25, D. C. JUL 24 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 Henry E. Berendsen (O-1315768), Infantry.

2. Upon trial by general court-martial this officer was found guilty of having made a false official report with intent to deceive his company commander in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, recommended that the sentence be commuted to a reprimand and a forfeiture of $50.00 of accused's pay per month for four months and forwarded the record of trial for action under Article of War 48.

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

Accused was detailed by his company commander to act as mess check officer in the organization mess on 11 November 1946. As mess check officer, it was accused's duty to attend each of the three meals served that day and to fill out a mess check form for each meal indicating the efficiency with which the mess was being conducted. Accused did not attend any of the meals served on 11 November, but on 12 November the company commander received three completed mess check forms, signed by accused, covering the meals served on 11 November, indicating that accused had performed his assigned duties.

4. Accused is 28 years of age, and is unmarried. He is a high school graduate and in civilian life worked as a demonstrator of air conditioning equipment and as a bell hop and clerk in various hotels. He entered the military service on 15 October 1940 as an enlisted man. In March 1942 he left the United States and served in the Hawaiian Islands with the 165th Infantry Regiment as an instrument corporal in a mortar platoon. He returned to the United States in December 1942 for the purpose of attending the Infantry Officers' Candidate School at Fort Benning, Georgia. Graduating from this school, accused was, on 26 March 1943, appointed and commissioned a second lieutenant in the Army of the United States. He again left the

United States in January 1944 and served in the Mediterranean Theater of Operations with the 168th Infantry Regiment where he engaged in the Naples-Foggia, Rome-Arno, North Appennines and Po Valley campaigns. He was promoted to the grade of first lieutenant on 16 July 1944, and was awarded the Combat Infantryman's badge on 31 August 1944. Accused returned to the United States in November 1945.

5. Although the making of a false official report has always been considered a grave military offense, that offense is here exhibited in its more minor aspects. For this reason, and in view of accused's past clear record, his considerable period of faithful service and the recommendation of the reviewing authority, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 pay per month for four months, and that as thus modified the sentence be ordered executed.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 313, 29 Aug 1947).

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

JAGH - CM 320670

17 JUL 1947

UNITED STATES	)	12TH INFANTRY DIVISION (PS)
	)	
v.	)	Trial by G.C.M., convened at Camp O'Donnell, Tarlac, P.I., 18 February 1947. Dismissal, total forfeitures, and confinement for one (1) year.
Second Lieutenant JOSE A. YUMANG (O-1896431), Field Artillery	)	

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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Jose A. Yumang, Battery "C", 88th Field Artillery Battalion (PS), did at Camp O'Donnell, Tarlac, Luzon, Philippine Islands, on or about the 4th day of October 1946, knowingly attempt to misappropriate one (1) bag of sugar of about seventy (70) pounds and five (5) cans of coffee of about twenty (20) pounds each, of the total value of about $36.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant Jose A. Yumang, Battery "C", 88th Field Artillery Battalion (PS), did at Camp O'Donnell, Tarlac, Luzon, Philippine Islands, on or about 3 October 1946, unlawfully give a wrongful order to Sgt. Golris, Actg Mess Sergeant, Service Battery, 88th Field Artillery Battalion, to wit, "Sgt Golris give me five (5) cans of coffee and one (1) sack of sugar. Place them in a garbage can and load them in the trash truck. Be sure to take them to my house in Capas", or words to that effect, well knowing that said order was unlawful, compromising his position as an officer and gentleman.

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

3. This is a trial upon a re-hearing ordered by the appointing authority. The evidence for the prosecution is substantially as follows:

On 4 October 1946, at about 12:30 in the afternoon a trash truck was being loaded in front of the mess hall of the 88th Field Artillery Battalion, Camp O'Donnell, Philippine Islands (R. 7, 8). The Battalion Supply Sergeant saw the Mess Sergeant taking several cans of coffee from the mess hall and loading them on the truck (R. 8). An inspection disclosed that there were five cans of coffee and one bag of sugar on the truck (R. 7, 8, 9) and that they were property of the United States, furnished for the military service (R. 7, 9). Corporal Golris, the mess sergeant, was the driver of the truck and Sergeant De Vera was riding in the front seat (R. 7).

Corporal Golris testified, through an interpreter, that on 3 October 1946 he was mess sergeant of the 88th Field Artillery Battalion, and that, on either the 2nd or 3rd of October, accused asked for some coffee. Golris "gave" the coffee to accused and was told by accused to place it inside the garbage can in front of the mess hall (R. 9). Golris put the coffee and one sack of sugar in the garbage can, placed trash on top of the sugar and loaded the garbage can on the truck. This was done on the 3rd or 4th of October. Accused spoke to Golris in English, and told Golris to take the coffee and sugar to accused's house at Capas, Tarlac (R. 10). In answer to a question asked by the defense counsel Golris stated that he had been to accused's house on one previous occasion, "because I was ordered by Lieutenant Yumang to bring coffee and sugar to his house". He found the house by asking a lady "whether that is the house of Lieutenant Yumang." (R. 11).

Sergeant De Vera testified that on 4 October 1946 at about 12:30 in the afternoon he was in the mess hall of the 88th Field Artillery Battalion, and that he heard accused tell Corporal Golris to take four cans of coffee and sugar to accused's home in Capas, Tarlac. While Golris was loading the coffee and sugar, witness told him "you should not do this, because it might be caught outside" (R. 12).

4. The accused, having been apprised of his rights as a witness elected to be sworn and testified that at about 8 a.m. on about 3 October 1946, he saw Golris on the sidewalk in front of the mess hall (R. 13), and asked him for a can of coffee. Accused stated that he would pick up the coffee at the end of the week and admitted that he intended to take it home for his own use (R. 14). He further stated that he did not give Golris an order to take the coffee and sugar to his home (R. 14). On 3 October, Golris came to accused and told accused that he had delivered

coffee to accused's wife at Capas, but did not say how much. Accused did not report this to anyone (R. 15). When he met Golris in front of the mess hall on 3 October, accused asked "if he could spare me a can of coffee to which he said, yes sir" (R. 15). He was battery mess officer during the period in question and had access to the mess hall, but asked Golris if he could spare a can of coffee because accused intended to use it for his own use. He knew he was doing something wrong when he asked for the coffee (R. 16). Accused did not report the delivery of the coffee to his home on 3 October because he was afraid he would "get in trouble" (R. 16).

Mrs. Yumang, wife of the accused, testified that on 3 October a soldier dressed in fatigue clothes brought four cans of coffee to her house in Capas and said that it was for sale. She further stated that she did not buy the coffee (R. 17). After both sides had rested, the law member ruled that the testimony of Mrs. Yumang, as to events occurring at her home, should be disregarded by the court (R. 25).

Captain Theodore Baltes, Executive Officer of the 88th Field Artillery Battalion, testified that, in his opinion, accused was honest and that he would be willing to have accused in his organization (R. 19). Witness was appointed investigating officer of the incident and, in the course of his investigation, questioned Sergeant De Vera, who testified under oath that he was not present when the sugar and coffee were taken from the mess hall and that he knew nothing of the accused's being implicated. At a subsequent investigation, Sergeant De Vera stated that he was present and heard accused order Golris to take coffee and sugar to his home in Capas (R. 19). The initial investigation of the charges against accused was made by witness on or about 7 October 1946, at which time witness questioned Sergeant De Vera under oath. The second investigation was made on 12 November 1946.

Sergeant De Vera was recalled as a witness for the defense, and testified that both he and Corporal Golris originally came from the Province of Pangasinan. When asked whether he did, or did not, tell Captain Baltes that he knew about the case, when questioned by him on 4 October 1946, De Vera was first silent, then testified "I did not because I was very busy that day and I didn't talk to him" (R. 21). When asked what he had told Captain Baltes when the latter came to him to get a statement on 4 or 5 October, De Vera testified that "I told him all about the case and all that happened that date. I told him I saw Lieutenant Yumang come into the mess hall and commence speaking to Sergeant Golris" (R. 21).

Captain Baltes was recalled and testified that on or about 5 October, when he first talked to Sergeant De Vera, the latter said that he did not hear Lieutenant Yumang give any order to Golris and De Vera did not say he was present when the alleged order was given (R. 22). He further testified that during the subsequent investigation, on or about 12 November, De Vera said he had heard accused give the order to Golris (R. 22, 23).

5. At the request of the court, Corporal Golris was recalled and testified that accused told him to put the coffee and sugar on the truck on 2 or 3 October, at about lunch time, and that he put the coffee in

the garbage can on the same day, after accused left. He further stated that Sergeant De Vera was present when accused told witness to give him the sugar and coffee (R. 25).

6. a. Charge I (Attempted Misappropriation of Government Property). Misappropriation means devoting to an unauthorized purpose (MCM, 1928, par. 150i).

> "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. (MCM, 1928, par. 152c)
>
> "An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to but falling short of its consummation. There must be an apparent possibility to commit the crime in the manner specified. (CM 267160, Collier, 43 BR 341, 347)."
>
> "* * * there must be the intent accompanied by an overt act extending beyond mere preparation. (CM 194441, Mauro, 2 BR 145, 149)"

Corporal Golris and Sergeant De Vera testified that accused "asked" or "ordered" Golris to put four cans of coffee and one sack of sugar on the trash truck and take them to accused's home. The accused, on the other hand, testified that he asked Golris for a can of coffee, and told him he would pick it up on the weekend. If the story told by the two enlisted men is true, the attempt to misappropriate the coffee and sugar was complete, for the order or request was the only action required on the part of the accused to consummate the transaction, and but for the discovery of the supplies being loaded on the truck, they would have been delivered to accused's quarters. If, however, the truth is represented by accused's testimony, that he merely told Golris he would pick up the coffee, which he had asked for, on the weekend to transport it to his quarters, the attempt was not complete, for no overt act beyond mere preparation was, in fact, committed by him.

In accordance with the principle that on the question of credibility, the findings of the court, which had the opportunity both to see and hear the witnesses, while not conclusive, are entitled to considerable weight (Dig. Ops. JAG, 1912-40, Sec. 395 (56); CM 153479), the Board of Review attaches importance to the fact that the court in this case has, by its findings, accepted the testimony of the two enlisted men and rejected the conflicting testimony of the accused. Consideration must also be given

to the fact that accused, by his own testimony, admitted that he was, at or about the time in question, concerned with wrongfully obtaining for his own use certain coffee, property of the United States, and that he made this known to the mess sergeant, Corporal Golris.

While in this case the Board of Review is authorized to judge of the credibility of witnesses and determine, for itself, the controverted questions of fact, there appear no substantial grounds for disturbing the findings of the court.

There is presented for consideration whether the action of the law member, in excluding the testimony of Mrs. Yumang, was improper and, if so, whether it was prejudicial to the substantial rights of the accused. The incident covering which she testified was not related to the offenses herein charged but it is to be noted that Corporal Golris, on cross examination, stated that he had been to accused's house on a prior occasion "Because I was ordered by Lieutenant Yumang to bring coffee and sugar to his house." The accused, on direct examination, testified that on 3 October 1946, Golris came to him and stated that he had delivered coffee to accused's wife at Capas. Since her testimony, apparently, was intended to refute the statement of Golris it should not have been excluded.

Notwithstanding the erroneous ruling of the law member as to Mrs. Yumang's testimony, it is the opinion of the Board that the substantial rights of accused were not injuriously affected thereby.

According to her testimony, a person, whom she did not know, came to her house at Capas on 3 October 1946 and inquired of her maid whether accused lived there. She further testified that this person had four cans of coffee which he offered for sale, but which she did not buy.

Other than Corporal Golris' testimony that he asked a lady "whether that is the house of Lieutenant Yumang" when he delivered the coffee and sugar to accused's home in Capas, there is no evidence of record indicating that the person described by Mrs. Yumang as the one offering coffee for sale on 3 October, was Golris. It is inconceivable that the court would believe that the mess sergeant, without the permission of the mess officer, would choose the home of the latter as a place for carrying on black market activities, and especially that he would select the mess officer's wife as a prospective customer. If the court did not believe that the person she described was Golris, then the exclusion of her testimony cannot be said to injuriously affect the rights of accused.

On the other hand, if the court, based upon Mrs. Yumang's testimony, believed that Golris had permission to go to accused's house on 3 October for the purpose of engaging in the illegal sale of government property thereat, the exclusion of her testimony was advantageous to accused.

In view of the above the Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification.

b. Charge II (Giving a Wrongful Order). Under the specification of this charge accused stands convicted of "unlawfully giving a wrongful order to Sergeant Golris, Acting Mess Sergeant, Service Battery, 88th Field Artillery Battalion, to wit: 'Sergeant Golris give me five (5) cans of coffee and one (1) sack of sugar. Place them in a garbage can and load them in the trash truck. Be sure to take them to my house in Capas,' or words to that effect."

The discussion under Charge I, above, relative to the findings of the court, when the testimony submitted was in substantial conflict, is also applicable to this charge and therefore need not be repeated.

In CM 252620, Watterson, 34 BR 99, accused was charged with wrongfully ordering an enlisted man under his command to take foodstuffs, property of the United States, to accused's car. The record disclosed that the accused "asked" the enlisted man to "get him a couple of turkeys" and, that the soldier carried the turkeys, with other foodstuffs, to the accused's car. It was there held that the specification alleged an offense under Article of War 95 and that the record of trial was legally sufficient to support the finding of guilty. (See also CM 247303, Prattsmith, 30 BR 315, 319; CM 237521, Withington, 24 BR 23).

"Abuse of authority over soldiers * * * by requiring or influencing them to do illegal acts," is cited by Winthrop at page 716, Military Law and Precedents, 1920 Reprint, as a violation of Article of War 95.

From the foregoing, it is the opinion of the Board that the findings of guilty of Charge II and its specification are supported by the evidence.

7. The accused is 33 years of age and married. He was commissioned a Second Lieutenant, Army of the United States and entered active duty as such on 6 July 1946, after 12 years active duty with the Philippine Scouts.

8. 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 of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for one year is authorized upon a conviction of a violation of Article of War 96, and a sentence to dismissal is mandatory upon a conviction of a violation of Article of War 95.

R. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Pruitt, Judge Advocate

JAGH - CM 320670 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jose A. Yumang (O-1896431), Field Artillery.

2. Upon trial by general court-martial in the Philippine Islands, this officer was found guilty of an attempt to misappropriate five cans of coffee and one sack of sugar, property of the United States, of a total value of about $56.00, in violation of Article of War 96, and of giving a wrongful order to an enlisted man in violation of Article of War 95. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On 4 October 1946, five cans of coffee and one sack of sugar, property of the United States, were found on a trash truck in front of the mess hall of accused's organization. The mess sergeant stated that he had loaded the supplies on the truck and testified that accused told him to take them to accused's home. Another noncommissioned officer who was siting in the truck when the coffee and sugar were found there corroborated the mess sergeant's testimony. The accused testified that he had asked the mess sergeant for a can of coffee but denied having told him to deliver anything to accused's home.

I recommend that the sentence be confirmed but that the term of confinement be reduced to six months and that the sentence as thus modified be carried into execution, and that a United States disciplinary barracks be designated as the place of confinement.

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

(G.C.M.O. 293, 25 Aug 1947).

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

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 320681

4 August 1947

UNITED STATES	PENINSULAR BASE SECTION
v.	Trial by G.C.M., convened at Leghorn, Italy, 1 February 1947. Dismissal, confinement for two (2) years.
First Lieutenant HENRY S. WATCKE (O-556411), Transportation 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 officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

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

Specification: In that First Lieutenant Henry S. Watcke, did, in conjunction with Technician Fifth Grade John M. Hogg, both of Headquarters Company, Tenth Port of Embarkation, at or near Livorno, Italy, on or about 15 September 1946, wrongfully and unlawfully conspire and agree together to commit a criminal offense against the United States to wit: larceny of property of the United States.

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

Specification 1: In that First Lieutenant Henry S. Watcke, did, in conjunction with Technician Fifth Grade John M. Hogg, both of Headquarters Company, Tenth Port of Embarkation, at or near Livorno, Italy, on or about 21 September 1946, feloniously take, steal and carry away radios and equipment, of a value in excess of Fifty Dollars ($50.00) property of the United States, furnished and intended for the military service, thereof.

Specification 2: In that First Lieutenant Henry S. Watcke, did, in conjunction with Technician Fifth Grade, John M. Hogg, both of Headquarters Company, Tenth Port of Embarkation, at or near Livorno, Italy, on or about 21st of September 1946, knowingly and willfully apply to their own use and benefit, one motor vehicle, of a value in excess of Fifty Dollars ($50.00) property of the United States, furnished and intended for the military service, thereof.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for a period of two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

First Lieutenant Alfred L. Evans, 3195 Signal Service Company, testified that between 7 and 10 September, 1946, he inspected the signal property in the 10th Port of Embarkation Intransit Depot. At the time of his inspection he did not inventory the property but later sent an inventory team for that purpose. The inventory team submitted its completed report on 17 September (R. 39-41).

Technician Fifth Grade John M. Hogg testified that he had been the noncommissioned officer in charge of operations at the 10th Port of Embarkation Intransit Depot on and for some time prior to 21 September 1946. There were over four hundred boxes of signal equipment in the depot which had remained there some six or seven months and which had "no papers" with them (R. 8-10). During the early part of the month of September accused, who was the officer in charge of the depot (R. 61), informed Hogg that he, accused, was having financial difficulties and that since no records had accompanied the signal equipment it would be possible to sell some of it (R. 11). Between the time the Signal Officer inspected this property and the arrival of the inventory team, a period of about five days, accused and Hogg "reasoned that about fifty boxes would be a truck load" and either accused, or Hogg (R. 102), gave Renato Retti, the supervisor of Italian labor at the Intransit Depot, instructions to separate about fifty boxes from the main stockpile and Hogg gave Retti a list of code markings of the boxes to be separated. Only 35 boxes were moved according to these instructions, however, these boxes being placed behind the Post Property Office. Hogg was not present when the boxes were moved by Retti, but was present when they were later covered by a tarpaulin (R. 11,57,59,102-105). Accused asked Retti if he could make arrangements for the sale of this property in either Milan or Bologna. Retti's "contacts" having "fallen through," accused then asked Hogg to arrange the transaction (R. 11).

About 9 or 10 September 1946, Hogg visited an Italian acquaintance, Elsa Belferi, in Leghorn, and Elsa's roomer, another Italian named Enzo Capizzi, was present. On a previous visit, Hogg had been casually introduced to Capizzi and had told Elsa that there was a surplus of radios in the Intransit Depot but had expressed no desire to dispose of such equipment. On this occasion, however, Capizzi, without being first approached in the matter by Hogg, suggested that he could make "contacts" with someone in Bologna who could handle the radios. Although at this time the 35 boxes had already been moved, Hogg did not know the type or number of pieces in these boxes and did not pursue the conversation further. About two or three days later, Hogg again met Capizzi at Elsa's apartment and offered to sell the contents of the 35 boxes for one million lire, which price had been set by accused. Capizzi agreed and wrote Hogg's name and "Value 681" telephone number on a piece of paper. Accused was informed of these arrangements about 14 September. On the night of 20 September, Capizzi called upon Hogg at the latter's quarters and accompanied Hogg "down the road" to point out a place near a farm house south of the Peninsular Base

Section Headquarters just off Highway 1 where the goods would be delivered the next morning (R. 11,12, 98-101).

Between 8:30 and 9:00 a.m. on 21 September, Hogg had the 35 boxes of signal equipment loaded on a "six-by-six" truck and made out a tally-out sheet (on a tally-in form) to get the cargo past the guard at the Intransit Depot gate. This was done pursuant to instructions given Hogg by accused. The tally-out was given to Retti, who drove the truck and who was furnished with a driver's trip ticket therefor made out in the name of one Downing. The truck, preceded by accused's jeep driven by Hogg and in which accused was riding, then left the depot and both vehicles proceeded south along Highway 1 towards the Peninsular Base Section Headquarters. On approaching the location where the goods were to be delivered to the purchaser, a Criminal Investigation Division vehicle was seen leaving the spot and both the truck driven by Retti and accused's jeep turned around and headed in the opposite direction along Highway 1 towards the Signal Depot. At this time, accused told Hogg that he, accused, would "do the talking" and if they were overtaken by the "CID" accused would say that he had received a telephone call informing him that one of his trucks had broken down near the Peninsular Base Section Headquarters and that he had gone down there to check on it. This was the first time accused had said anything to Hogg about a broken down vehicle. Before reaching the junction of the highway and the road leading to the Intransit Depot, accused's jeep and the truck were overtaken by the Criminal Investigation Division vehicle and ordered to stop. Accused, Hogg, Retti, the jeep and the truck were then taken to the Criminal Investigation Division Headquarters in Leghorn (R. 12,13,54-57, 96,98,102,104).

On 31 August 1946, Hogg was with Corporal Downey when a jeep driven by the latter was stolen. There was a time when Hogg thought there might be a possibility that he would have to pay for it but about the middle of September he learned that he would not be charged with the loss of the jeep due to the fact that accused had recommended in a report of survey that the vehicle be "charged up as a government loss" (R. 59,60).

Sometime after 21 September 1946, Hogg was sent to the United States for separation from the service. When he arrived in New York City, however, he was informed that he would be returned to Italy as a casual prisoner so that he might be "a witness in one court-martial and the accused in another." He arrived back in Italy on 17 January 1947 (R. 97).

Renato Retti testified that sometime during the month of September 1946 accused called him aside and informed him that Hogg "had a jeep missing" and had no money to pay for it. Accused then said that "We got some stuff left over, we can sell it and buy the kid a jeep. Go ahead, arrange with Corporal Hogg." Retti then saw Hogg who told him to move "fifty boxes" to the Post Property Area. He moved "thirty four" boxes to that Area and showed them to Hogg who told him to cover them up and to find someone "outside" who

might buy their contents. Retti was unable to find a purchaser. On a Saturday morning a few weeks later, Hogg told him to load the boxes on an Army "six-by" truck and gave him a tally-out which indicated to him that the boxes were to go to the Signal Depot. Retti did not know where the Signal Depot was, however, and was told simply that "We are going a mile away from here." The truck, driven by Retti and preceded by accused and Hogg in a jeep, then left the Intransit Depot and proceeded south along Highway 1 towards the Peninsular Base Section Headquarters. After going some distance, the jeep in which accused was riding turned back and accused ordered Retti to turn his truck around, which Retti did (R. 14,15-17). The two vehicles then went north along Highway 1 and were stopped by an agent of the Criminal Investigation Division, at which time the following occurred:

> "*** CID man comes over and tell him to park on the side, which I did park on the side, and he stopped the jeep, too, with Lieutenant Watcke. Lieutenant Watcke jumped off the jeep and he said 'That is my stuff, it goes in the Signal Depot'. CID man comes over to me, he says 'Are you GI?' I said 'No sir'. 'Where are you going with this stuff?' I said 'The Signal Depot'. He said 'What are you doing this side'? I said 'I hear Lieutenant Watcke call somebody up, I think Lieutenant Watcke takes a look around to find the weapons carrier'. He said 'You was going to sell the stuff.' I said 'No sir, we going to the Signal Depot, there is the tally-out sheets.' He said 'You know where the CID office is', and I said 'Yes sir', and he said 'You go up there' and we went up there." (R. 18)

Enzo Capizzi, a student at the University of Pisa, testified that he had first been introduced to Hogg by Elsa Belferi during the month of September 1946. At this first meeting, Hogg approached Capizzi and said that he had some radio equipment to sell and mentioned a price. Capizzi said that he was interested and would think over the proposition and that Hogg would have an answer the following week. Elsa had introduced Hogg to Capizzi for the purpose of giving Hogg an opportunity to make this offer and had told Capizzi to inform the Criminal Investigation Division about the transaction. Two or three days after his conversation with Hogg, Capizzi reported the proposed sale of the radio equipment to Agent Hopkins of the Criminal Investigation Division and received instructions to go ahead with it. Capizzi acted as an informer because "the CID *** promised to find me a job." About ten days after his first meeting with Hogg, Capizzi again saw Hogg and told him that he had found a person who would buy the "stuff." A price of 800,000 lire was set and conversations concerning the consummation of the sale were held. The evening before the date fixed for delivery and about fifteen or twenty days after Capizzi had first met Hogg, Capizzi visited the latter and arrangements were made to deliver the goods "at the back of PBS" at 9:00 a.m. the next morning. Capizzi informed Agent Hopkins of these details and accompanied him to the place of delivery at the prearranged time. No one was there when they arrived but shortly thereafter

Capizzi saw a loaded truck go by preceded by a jeep. Since Hogg was riding in the jeep, Capizzi told Agent Hopkins that the property in which they were interested was probably on the truck and the agent left to overtake it. Capizzi was not present when Hogg and his party were apprehended (R. 19,20, 22,26-31,33-35,37). Capizzi had never intended to effect an actual sale of the radio equipment (R. 27,32,34,37).

Hogg had told Capizzi that another person was involved in the transaction but the identity of the other person was not disclosed to Capizzi. Capizzi did not know of any telephone call having been made to the Intransit Depot on the morning when the goods were supposed to have been delivered (R. 28).

Harry Hopkins, an agent of the Criminal Investigation Division, testified that about two weeks before 21 September 1946 an Italian named Enzo Capizzi, who had previously furnished "some information concerning cigarettes," informed him that he was negotiating with a soldier for the sale of Government property. Agent Hopkins told Capizzi to go ahead with the transaction and later received a report that the sale had been agreed upon. Capizzi gave the agent an inventory of the property he was to buy and on the back of one of the pages of the inventory was Hogg's name and telephone number. On the night of 19 September, Agent Hopkins instructed Capizzi to arrange with the seller to have the property delivered the next morning on the "dirt road south of PBS Headquarters." At the designated time on 21 September, the agent was present at the place of delivery. A jeep and a truck following the jeep turned off Highway 1 into the dirt road but both vehicles turned around and departed prior to reaching the place where Agent Hopkins was waiting. The agent pursued these two vehicles and caused them to halt. In the jeep were accused and Corporal Hogg. The truck, an Army "six-by-six" from the Tenth Port, was driven by an Italian named Renato Retti. In Retti's possession was a driver's trip ticket for the truck showing that it had been dispatched to a soldier by the name of Downing with orders to report to accused (Pros. Ex. 2). Retti also had in his possession a tally for 35 boxes of signal equipment (Pros. Ex. 1), which boxes were in the truck. When these boxes, which had been wired and nailed shut, were opened in Agent Hopkins' presence they were found to contain 23 Radio Receivers R/100, 2 Radio Receivers B C-342N, 9 Radio Receivers BC-603-C, 7 Radio Transmitters BC-604D, 2 Radio Transmitters BC-684, and 15 Batteries, BA-275 (R. 43-47; Pros. Ex. 3).

Agent Hopkins knew of no telephone calls made to the Intransit Depot on the morning of 21 September and, so far as he knew, none of his agents or informers had called accused to tell him that one of his trucks had broken down. The agent had first met Elsa Belferi in the latter part of August and she "was merely an acquaintance" until sometime in November when he used her as an informer. He had not used her as an informer in this case (R. 49,51). He had employed Capizzi as an informer in another case "approximately two weeks ago" (R. 47,49-51).

The radio receivers and transmitters and the batteries found in the truck driven by Retti were of a total value in excess of fifty dollars. According to the Signal Corps Supply Catalog, the list prices of this type property were as follows:

23 Radio Receivers R/100	$1564.	
2 Radio Receivers BC-342N	600.	
9 Radio Receivers BC-603-C	1260.	
7 Radio Transmitters BC-604D	3682.	
2 Radio Transmitters BC-684	600.	
15 Batteries, BA-275	30.	(approximately)

It was stipulated that the value of "a six-by-six, GMC, two and a half ton truck" is in excess of $50 (R. 64).

Evidence for the Defense

Accused, his rights as a witness having been explained to him, elected to testify under oath in his own behalf. Accused had not told Hogg that he was in need of money, nor had he told Retti that he wanted to buy a jeep for Hogg. The survey on the jeep, in the loss of which Hogg had been involved, had been approved in the middle of October. He did not know that 35 boxes of signal equipment had been removed from the main stockpile in the Intransit Depot and cached somewhere else. During the months of March and April, 1946, he had received a large shipment of signal equipment from Naples. Some of this cargo was shipped to the United States in June but a considerable amount remained thereafter. On 18 September, after an inventory, he shipped 479 boxes of signal equipment to the Signal Depot, which, he thought, was all the signal property left in the Intransit Depot. When he arrived at the Intransit Depot on the morning of 21 September 1946 he did not know that one of his trucks had been loaded with signal equipment (R. 78-82). Concerning the ensuing events that day, he stated:

"At approximately 20 minutes to 9 or quarter of nine, I received a telephone call from an Italian stating that he had a broken-down vehicle in the vicinity of the cemetery between PBS and the 61st Station Hospital. He said that he was a driver from Tenth Port. I at that time had vehicles in that vicinity. I told him to wait and I would do something about it, either help him out or do what necessary actions to get the vehicle fixed. At that time Corporal Hogg was leaving the depot with a truck to deliver some signal cargo to the Signal Depot. He told me, when I arrived at the depot at approximately 8:15, 'Lieutenant', he said, 'checking the area, I found a load of signal cargo that was left here and should have been shipped the 18th to Signal.' He asked me what he should do. I gave him the order that that signal cargo --- I didn't know how much it was -- he said 'a load'. I said 'Ship it to Signal', and after I received the telephone call,

the corporal was just getting ready to leave the depot, I was going out myself to check on the vehicle because I had only one other GI in the depot at the time and he was receiving fifty tons of incoming cargo from Ordnance, Intransit Storage. So I went out of the office and I saw Hogg getting ready to leave with the truck to go to signal, so I got into the jeep, and I said 'Hogg, let us take a run-up and check on this vehicle before you deliver the cargo to Signal.' So we went out to the general area where I was under the impression the vehicle would be. I did not see the vehicle. I turned the jeep - Corporal Hogg was driving, he turned the jeep around. I said 'All right, let us go back,' so we proceeded to go back to the depot. In the meantime near the Ordnance Depot 4189 a CID vehicle stopped us and started asking questions. Up until that time I had no knowledge of anything, a deal, or whatever it was, going on, until the CID man stopped us and then I still wasn't sure what was going on. He asked us to come to the office, so I went to the office and then later I found out arrangements have been made by a corporal and an Italian to sell some equipment. That was the first time I knew anything about it." (R. 81)

Accused brought the "six-by" truck with him so that he would have a vehicle of the proper size in case he had to tow back the broken-down vehicle. This truck was the only one in the depot at the time. Retti was not the regular driver of this truck but the regular driver did not appear to be present that morning. The telephone call from the Italian had come in on the "Value 683" line and accused had forgotten the caller's name, if he had ever known it. Accused first learned that Hogg had made arrangements to sell the signal equipment, and that he was allegedly involved therein, when Agent Hopkins so informed him during the course of the investigation (R. 83, 85,87,94).

Accused had been approached by one of the other officers working in the Intransit Depot about the middle of August with the request that one Elsa Belferi, a civilian employee, be discharged. Accused effected her discharge by notifying the Purchase and Contracting Officer that her services were no longer required. This was the same Elsa Belferi whose apartment Hogg visited. Accused did not know why Elsa was discharged (R. 87,88,91).

After accused had been apprehended on 21 September he had been placed in arrest of quarters. He was later released from arrest and restored to duty by his commanding officer. He continued working and thought the case against him had been dropped until he was served with the charges in this case on 15 January 1947. Nevertheless, he still remained on duty until 20 January when he was relieved at his own request so that he could prepare his defense. In checking passenger lists during the course of his duties, he noticed that Hogg had sailed for the United States for redeployment about 10 December 1946. He reported this fact to Colonel Dunham, his commanding officer, and Hogg was brought back from the United States as a casual prisoner (R. 91,94). Accused was not in financial difficulty and his pay and allowances

were sufficient to support his family, which consisted of his wife and two-year old daughter (R. 95).

Mario Demi, an Italian checker at the Tenth Port Intransit Depot, testified that during the month of September 1946 he had helped move approximately 35 boxes of signal equipment from the main stockpile to a place behind the kitchen under the direction of Retti. Hogg was not present at the time the boxes were moved or at the time they were covered at a later date. These boxes had been placed behind the kitchen about fifteen or twenty days after the inventory of signal equipment. About ten or fifteen days after the boxes had been moved, Demi and some other workmen loaded them on a truck. Hogg and Retti witnessed the loading (R. 69-72, 77).

Giuseppe Risalati, another Italian checker at the Tenth Port Intransit Depot, testified that when he arrived at the depot about 7:40 a.m. on the morning of 21 September 1946 he saw Hogg writing a tally. A few minutes after Hogg had completed the tally, a truck was loaded with 35 boxes. Accused did not arrive at the depot until about 8:15 a.m. The boxes loaded on the truck had been segregated about 10 or 11 September and Hogg had been present when they were originally moved (R. 74-76).

Lieutenant Colonel Hal F. Irwin, Tenth Port of Embarkation, testified that accused was assigned to his organization "at the present time." Accused's duties during "the past few months" including the loading and unloading of troops from ships and the handling of cargo. Since the month of September, accused had handled "millions of dollars" worth of cargo, including large quantities of "critical" items such as watches, jewelry, fountain pens and other post exchange items. Accused would have had an excellent opportunity to steal some of these items if he had desired to do so. Colonel Irwin considered accused an excellent officer of good moral character and believed that accused was living within his means. The Colonel did not know of accused having been involved in any "other" difficulties (R. 67-69).

Lieutenant Colonel Fred A. Dunham, Tenth Port of Embarkation, testified that accused had been under his command since September 1945. Until the incident in question accused had commanded the Intransit Depot of the Port. The Intransit Depot handled, among other things, shipments of signal equipment, bullion, penicillin, watches, Ordnance precision instruments and resale post exchange items. Accused could easily have stolen some of these "critical" goods if he had desired to do so. After 21 September 1946, Colonel Dunham relieved accused as depot commander but assigned him to duty as Cargo Security Officer for the Port where he "still handles" the "critical" cargo from shipside to the Intransit Depot. The Colonel still had confidence in accused and considered him an excellent officer of good moral character. Colonel Dunham's faith in accused had not been shaken by the events for which accused was on trial. Accused appeared to be living within his income (R. 61-63).

4. The specification to Charge I alleges that accused wrongfully and unlawfully conspired and agreed with Hogg to steal property of the United States, but fails to allege the commission of an overt act to effect the object of the agreement. A criminal conspiracy at common law is a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner. Section 37 of the Federal criminal code (18 U.S.C. 88) has not changed the nature of the offense of conspiracy but has added the requirement that an overt act to effect the object of the conspiracy be charged and proved (CM 273791, Gould, 47 BR 29,65; Marino v. United States, 91 F. (2d) 691). Thus, in cases falling within the terms of the cited Federal statute, the overt act is more than a mere requirement of proof but becomes an essential element of the crime of conspiracy (Brady v. United States, 24 F. (2d) 405,407, and cases there cited). The offense of common law conspiracy, then, is not punishable as such by tribunals which can take cognizance only of statutory crimes if there is no statute adopting the common criminal law (Harrison v. Moyer, 224 Fed. 224).

In the instant case, there being no overt act alleged in the specification to Charge I, there can be no violation of the Federal conspiracy statute found thereunder, for a failure to plead an essential element of an offense cannot be cured by the proof (Brady v. United States, supra; Harrison v. Moyer, supra; CM 319573, O'Brien). The specification purports to allege, however, a common law conspiracy.

Courts-martial are courts of limited jurisdiction and may punish only for violations of the Articles of War. The substantive common law is of interest to them only by way of definition and interpretation of offenses denounced by those Articles, which occasionally make use of common law terms, such as "murder" and "larceny." The offense of common law conspiracy is specifically denounced in the Articles of War only in the third paragraph of the 94th Article of War and the application of this paragraph is restricted to conspiracies having to do with obtaining the allowance or payment of false and fraudulent claims. Nor, in the instant case at least, is common law conspiracy included in the "crimes and offenses not capital" clause of the 96th Article of War, even if that clause were interpreted to give courts-martial jurisdiction over offenses proscribed by the law of the locus delicti (see CM 240176, Freimuth, 25 BR 369,379; CM 258105, Croslin, 37 BR 309), for here that locus is Italy, a country which does not adhere to the common law. Accused could not, then, have been found guilty under the specification in question of a common law conspiracy, as such.

The acts accused is alleged to have committed in this specification are, however, clearly of a nature prejudicial to good order and military discipline and have an obvious tendency to bring discredit upon the military service. Such acts, therefore, would constitute a violation of these prohibitions of the 96th Article of War. We conclude that the specification to Charge I sufficiently sets forth an offense of which courts-martial can take

cognizance.

A conspiracy, or agreement, to commit a criminal offense and the subsequent commission of the offense itself, even though done pursuant to the agreement, are each separate, substantive offenses. There was, therefore, no improper multiplication in charging accused with having entered into an unlawful agreement to steal Government property and with the actual larceny thereof (Ellerbrake v. United States, 134 F. (2d) 683,685). Accused had merely custody and not possession of the Government property under his control in the Intransit Depot and thus could commit a larceny, as distinguished from an embezzlement, thereof (CM 317327, Durant; CM 318296, Mayer). A larceny of such property, obviously the subject of Specification 1 of Charge II, was shown to have been completed when the 35 boxes of signal equipment were segregated from the main stockpile in the Intransit Depot with the intent to permanently deprive the United States of the use of such equipment, that is, with the intent to unlawfully sell it. Further evidence of this felonious intent was furnished by a showing that the property was transported from the Intransit Depot to or near the prearranged place of sale (CM 270058, Pearson, 4 BR (NATO-MTO) 79,83); State v. Rozeboom, 145 Iowa, 620; 124 N.W. 783).

The corpus of the misapplication which was denounced in Specification 2 of Charge II was established by proof that the "6x6" Army truck was used solely for the purpose of transporting Government property to a place where it was intended to unlawfully sell such property (CM 286525, Clegg, 20 BR (ETO) 79,91; CM 296630, Siedentop, 58 BR 191,197).

The defense of entrapment, should it be considered material to our decision with respect to the larceny charge herein, was not made out, for if the testimony of Hogg is to be believed, plans had been laid to steal and sell part of the signal equipment in the Intransit Depot before Capizzi, the informer, suggested the sale and, if the testimony of Capizzi is to be believed, Hogg suggested the sale to Capizzi (CM 258550, Shroyer, 38 BR 75, 80; CM 295683, Blackburn, 28 BR (ETO) 375,378; CM Siedentop, supra, p. 199). Also, activities of Government agents giving the appearance of agreement in and encouragement of a theft and wrongful sale of Government property are not to be construed as a consent thereto on the part of the Government, for no public official or servant has any authority to consent to a misappropriation of Government property (CM 306534, Lamb, 27 BR (ETO) 45,50).

It remains to be considered whether the evidence herein is sufficient to prove beyond a reasonable doubt that accused agreed with Hogg to steal Government property as alleged and that accused was particeps criminis in the actual theft of such property and the misapplication of the "6x6" Army truck, there being little doubt that both the theft and misapplication were in fact committed. In cases examined by us before confirmation pursuant to the second paragraph of Article of War 50½, as is the case here, it is our right and duty to weigh the evidence as well as to pass upon the formal

legal sufficiency of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions are, strictly speaking, legally justified by the evidence appearing in the record. Briefly stated, we are allowed in such cases, a difference of opinion. We, too, must be convinced of accused's guilt beyond a reasonable doubt (Dig Op JAG, 1912-1940, sec 408 (1); CM 259987, Loudon, 39 BR 109,113; CM 243818, Smith, 28 BR 111,118).

In the instant case, it appears that the conviction of accused is based almost wholly upon the testimony of purported accomplices and an informer. The evidence furnished by them is corroborated, if accused's testimony is to be entirely disbelieved, by the fact of accused's presence at or near the place set by Government agents for the consummation of the wrongful sale of the signal equipment. Although a conviction may be based upon the testimony of accomplices, even though uncorroborated, their testimony, or that of those who appear to be accomplices, is of doubtful integrity and is to be considered with great caution (par. 124a, MCM, 1928). The Board of Review has previously had occasion to weigh accomplice testimony and to find it wanting in credibility (CM Loudon, supra; see also CM 267651, Boswell, 44 BR 35,42). We have weighed the evidence given by Hogg, Retti and Capizzi in this case and find it replete with contradictions which, when viewed along with other highly suspicious circumstances indicative of accused's innocence, leave us with what we conceive to be a reasonable doubt of accused's guilt. We shall mention some of these contradictions and some of these circumstances.

Accused steadfastly claimed that his presence near the place set for the sale of the signal equipment was due to his having received a telephone call from an Italian who reported that one of the trucks from the Tenth Port had become disabled in that area. He said he had taken the "6x6" truck with him so that it might be used as a towing vehicle. We find nothing inherently unreasonable in this explanation which, if it were to be given the stamp of truth, would render accused's inculpatory presence near the prearranged place of delivery but an exculpatory coincidence. Hogg testified that accused had first mentioned the telephone call, which was to be used, if necessary, as an excuse for their being in the incriminating area, after spying the Criminal Investigation vehicle and while they were endeavoring to avoid apprehension by retracing their course. Retti testified, however, that upon being overtaken by an agent of the Criminal Investigation Division he told the agent, "I hear Lieutenant Watcke call somebody up, I think Lieutenant Watcke takes a look around to find the weapons carrier." Since it could scarcely be supposed that Retti, driving the truck, could have overheard accused's conversation with Hogg in the jeep relative to the telephone call, it became most material to determine whether Retti had, in fact, made this statement to the agent. A shadow of doubt had thus been cast upon Hogg's assertion that accused's story about the telephone call was a mere fabrication. Agent Hopkins, the agent who had apprehended Retti in the truck, testified at length at the trial, yet he was never asked whether Retti had made the statement in question. In neglecting to interrogate Agent Hopkins on this subject, the prosecution failed to meet

the obvious challenge thrown down before it and it was not for the defense to take the risk of bolstering the Government's case should an unfavorable answer be elicited by it.

The overcast of doubt in this case is deepened by yet another circumstance. Capizzi stated that Hogg had suggested the sale of the signal equipment and Hogg stated that Capizzi had suggested it. This is merely another contradiction in the testimony, but both Hogg and Capizzi agree that Elsa Beferi introduced them to each other in her apartment, in which Capizzi was a roomer and to which Hogg apparently made frequent visits. According to Capizzi, Elsa had brought Hogg and Capizzi together so that Hogg might have an opportunity to make his offer and so that Capizzi might progress in his chosen career as an informer. Hogg had given Capizzi his "Value 681" telephone number and it is obvious that either Elsa or Capizzi could easily have obtained accused's telephone number, "Value 683," from the same source. We note with more than passing interest that Elsa had been employed in the Intransit Depot in August,1946, and that she had been discharged from her position through the agency of accused. Here, again, we do not have the benefit of Elsa's testimony as to her actions in this atmosphere of intrigue and counter-intrigue. There is, then, from the evidence we have before us, something more than a mere possibility that accused did, in fact, speak over the telephone to an unidentified Italian as he claims to have done.

In cases of this type, where there is much conflict in the testimony and where the issue of accused's guilt or innocence is in delicate equipoise, the good character of accused for honesty, integrity, and general law-abidingness, as exhibited by his actions prior to and after the alleged commission of the offense and by the opinion held of him by others, may play a large part in tipping the scales of justice in his favor. Here it was shown by uncontradicted evidence that large quantities of valuable "critical" cargo had passed through accused's hands before and after 21 September and that such cargo included watches, fountain pens, penicillin and other items much more susceptible to furtive and successful theft than a truckload of bulky signal equipment. Two of accused's commanding officers thought very highly of him and one of them testified that his faith in accused had not been shaken by the events for which accused was on trial. Furthermore, it appears that Hogg, the chief witness against accused, was readily available to testify only because accused had discovered and reported upon his departure for the United States where he was to be separated from the service. We do not mean to intimate, of course, that crime is never, or even rarely, committed in an imprudent manner or that persons who have heretofore led blameless lives or have, at least, never been suspect are peculiarly incapable of offending against the law. We have here contemplated the evidence of accused's good character merely as another gram to be placed on accused's scale of the balance.

After a careful and thorough examination of the whole record of trial, we are of the opinion that the proof therein is not such as to exclude every fair and reasonable hypothesis except that of accused's guilt. The findings

of guilty and the sentence should, we believe, be set aside.

5. 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.

(On Leave), Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

JAGK - CM 320681 1st Ind

WD, JAGO, Washington 25, D. C. AUG

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Henry S. Watcke (O-556411), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of conspiring and agreeing with Technician Fifth Grade Hogg to steal property of the United States in violation of Article of War 96 (Charge I and Specification); of stealing property of the United States (Specification 1, Charge II) and of misapplication of a Government vehicle (Specification 2, Charge II), both in violation of Article of War 94. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for a period of two 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 insufficient to support the findings of guilty and the sentence.

Accused, at the time he was alleged to have committed the offenses charged against him, commanded the 10th Port of Embarkation Intransit Depot and Technician Fifth Grade Hogg was the non-commissioned officer in charge of operations thereat. According to the testimony of Hogg, accused had told him that he was in need of money and that it would be possible to sell some of the signal equipment in the depot. Pursuant to these instructions, Hogg directed Renaldo Retti, the Italian supervisor of labor, to separate thirty-five boxes of signal equipment from the main stockpile. This was done and the boxes were placed behind the property office and covered with a tarpaulin. According to his testimony, Retti was also requested by accused to find a purchaser for the property, but was unable to do so. Hogg, however, was more successful. On a visit to the apartment of an Italian acquaintance, Elsa Belferi, he was introduced to an Italian university student named Enzo Capizzi. The introduction was made by Elsa for the purpose of giving Capizzi a chance to inform on Hogg. Hogg stated that Capizzi had first suggested a sale of signal equipment but Capizzi stated that Hogg had first suggested it. Nevertheless, a sale was finally agreed upon and arrangements were made to deliver the goods near a farm house south of Peninsular Base Section Headquarters. Capizzi notified a criminal investigation agent of the time and place of the proposed sale and both Capizzi

and the agent repaired to the place of sale at the prearranged time. Hogg, again according to his testimony, informed accused of the progress of the transaction, accused having set the purchase price of one million lire.

About 9 o'clock in the morning on the day set for the sale, Hogg had the signal equipment loaded on a "six by six" Army truck driven by Retti and preceded the truck out of the gate of the Intransit Depot in a jeep driven by himself and in which accused was riding. Hogg had prepared a tally out for the property so that he could get it out of the gate, which tally showed that it was being shipped to the signal depot. On approaching the place where the intended sale was to take place, Hogg spied a "CID vehicle" and, turning around, proceeded in the opposite direction. Retti, in the truck, followed him. At this time, according to Hogg, accused informed him that if they were apprehended accused would say that he had received a telephone call informing him that one of his truck had broken down near the Peninsular Base Section Headquarters and that he had gone there to check on it, this being the first time accused had mentioned having received such a call.

The criminal investigation agent, waiting at the appointed spot, saw a jeep and a truck turn off the main road into the dirt road down which he had stationed himself. Both vehicles, however, turned around and made off in the opposite direction. Capizzi had identified Hogg as the driver of the jeep and told the agent that the truck probably contained the property they expected would be delivered. The agent thereupon overtook and stopped both the jeep and the truck. There were thirty-five boxes of signal equipment in the truck. Retti testified that when they were stopped, accused got out of his jeep and told the agent that the equipment on the truck was going to the signal depot and that when he, Retti, was asked by the agent what he was doing in that locality, he replied, "I hear Lieutenant Watcke call somebody up, I think Lieutenant Watcke takes a look around to find the weapons carrier." The agent, although he testified at length at the trial, was not questioned as to whether Retti had in fact made this statement to him.

Accused took the witness stand in his own behalf at the trial. He testified that he was not in financial difficulties and that his pay and allowances were sufficient to support himself and his family, which consisted of his wife and two year old daughter who were in Italy with him at the time. He did not know that thirty-five boxes of signal equipment had been moved from the main stockpile in the Intransit Depot and cached somewhere else and he first learned that Hogg had made arrangements to sell this property, and that he was allegedly involved in such sale, when the criminal investigation agent so informed him after his apprehension. He had arrived at his office in the Intransit Depot about a quarter past eight on the morning upon which he was subsequently apprehended. At this time, Hogg told him that in checking the area he had found a load of signal equipment which should have been shipped to the signal depot and accused gave Hogg instructions to take it there. Accused then received a telephone call from an

unidentified Italian stating that one of the trucks assigned to the Intransit Depot had broken down "in the vicinity of the cemetery between Peninsular Base Section Headquarters and the 61st Station Hospital." Accused noticed that Hogg was about to leave the Intransit Depot with a jeep and the truck loaded with signal equipment, so he informed Hogg that they would check up on the disabled vehicle before delivering the equipment to the signal depot. Accused brought the 6x6 truck with him so that he would have a towing vehicle, there being no other heavy trucks in the Intransit Depot at the time. Arriving in the locality where the broken down vehicle was supposed to be, accused was unable to find it and turned back. Shortly thereafter, he and his party were apprehended by a criminal investigation agent.

After accused had been apprehended, on 21 September 1946, he had been placed in arrest of quarters. He was later released from arrest and restored to duty by his commanding officer. He continued working and thought the case against him had been dropped until he was served with charges on 15 January 1947. In checking passenger lists during the course of his duties, he noticed that Hogg had sailed for the United States for redeployment about 10 December 1946. He reported this fact to his commanding officer and Hogg was brought back from the United States as a casual prisoner.

Two of accused's commanding officers, both lieutenant colonels of the Army, testified that both before and after his arrest accused had handled millions of dollars worth of "critical items," such as watches, jewelry, fountain pens, bullion, penicillin, and Ordnance precision instruments, and that he could easily have stolen some of these "critical" goods if he had desired to do so. Both officers stated that accused appeared to be living within his means and one of them testified that his faith in accused had not been shaken by the events for which accused was on trial.

About a month before the alleged commission of the offenses herein, accused had been instrumental in effecting the discharge of Elsa Belferi from her position as a civilian employee with the Intransit Depot. The criminal investigation agent who had apprehended accused had been "acquainted" with Elsa Belferi before the apprehension and had employed her as an informer thereafter. He had also employed Capizzi as an informer in another case approximately two weeks before this trial.

According to the Staff Judge Advocate's review, Hogg is to be tried by special court-martial for his part in this transaction.

4. It is apparent that the conviction of accused is largely based upon the testimony of purported accomplices and an informer. Although a conviction may be had upon the testimony of accomplices, even though uncorroborated, their testimony is of doubtful integrity and is to be considered with great caution. Having in mind this rule and after weighing the whole of the evidence herein, consistently with its duties under the second paragraph of Article of War 50½, the Board of Review came to the conclusion that the proof was not

such as to exclude every fair and reasonable hypothesis except that of accused's guilt. I agree with this conclusion. The testimony of the prosecution's witnesses was seemingly corroborated by the fact of accused's presence near the place where the sale of the signal equipment was to occur. Accused explained this incriminatory circumstance by saying that he had gone there pursuant to a telephone call from an unidentified Italian to recover a disabled vehicle. His version is corroborated by Retti's testimony to the effect that he had told the criminal investigation agent that accused was in fact there for that purpose. It thus became incumbent upon the prosecution to show that Retti had not made this statement, or, if he did, to adduce evidence tending to explain away its exculpatory import. This the prosecution failed to do, although the criminal investigation agent to whom Retti said he made his statement was a witness for the prosecution. Other facets of the evidence in this case also weigh heavily in accused's favor, among these being the disclosure that Elsa Belferi, who played a somewhat undisclosed but nevertheless important role herein, had been discharged through the agency of accused, accused's handling without hint of impropriety, both before and after the events for which he was placed on trial, of considerable amounts of "critical" cargo much more susceptible of theft than a truckload of bulky signal equipment and his having been apparently responsible for bringing Hogg, who was the chief witness against him, back from the United States for the trial. After thorough consideration of the whole record of trial and upon careful weighing of the evidence, I am not convinced beyond a reasonable doubt that the guilt of accused has been proved. Accordingly, I recommend that the findings and sentence be disapproved.

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

CM 320681

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 284. 22 Aug 1947).

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

JAGH - CM 320687

UNITED STATES	)	WESTERN BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Paris, France, 12 February 1947. Dismissal and $1,000 fine
	)	
First Lieutenant LOUIS P. TERREBONNE (0-1947103), Transportation Corps	)	

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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: (Stricken on motion of the prosecution).

Specification 2: In that First Lieutenant Louis P. Terrebonne, 14th Medium Port, United States Forces, European Theater, did, without proper leave absent himself en route to join his organization and duties at Reims, France, from about 2 November 1946, to about 12 November 1946.

CHARGE II: Violation of the 64th Article of War.

Specification 1: (Stricken on motion of the prosecution).

Specification 2: In that First Lieutenant Louis P. Terrebonne, 14th Medium Port, United States Forces, European Theater, having received a lawful command from Colonel Eli Stevens, his superior officer, to report to him on or about 4 November 1946, did, at Paris, France, on or about 4 November 1946, willfully disobey the same.

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

Specification 1: In that First Lieutenant Louis P. Terrebonne, 14th Medium Port, United States Forces, European Theater, being indebted to Raymond Chastegnel, in the sum of five thousand (5,000) francs, French currency, value about forty two dollars ($42.00), for repayment of a loan of five thousand (5,000) francs, French currency, borrowed from the said Raymond Chastegnel, which amount being due and payable on or about 8 September 1946, did, at Antibes, France, from 8 September 1946, to 21 November 1946, dishonorably fail and neglect to pay said debt.

Specification 2: In that First Lieutenant Louis P. Terrebonne, 14th Medium Port, United States Forces, European Theater, being indebted to Andre Sella in the sum of eleven thousand, eight hundred and sixty four (11,864) francs, French currency, value about ninety nine dollars and ninety five cents ($99.95) for room rent, which amount being due and payable on or about 8 September 1946, did, at Antibes, France, from 8 September 1946 to 21 November 1946, dishonorably fail and neglect to pay said debt.

Specification 3: In that First Lieutenant Louis P. Terrebonne, 14th Medium Port, United States Forces, European Theater, being indebted to Andre Sella in the sum of fifty thousand (50,000) francs, French currency, value about four hundred and twenty dollars ($420.00), for repayment of a loan of fifty thousand (50,000) francs, French currency, borrowed from the said Andre Sella, which amount being due and payable on or about 8 September 1946, did, at Antibes, France, from 8 September 1946 to 21 November 1946, dishonorably fail and neglect to pay said debt.

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

Specification 1: (Nolle Prosequi).

Specification 2: (Nolle Prosequi).

Specification 3: (Nolle Prosequi).

Specification 4: (Nolle Prosequi).

The accused pleaded guilty to the Specification of Charge I, except the words "2 November 1946," substituting therefor the words "5 November 1946," of the excepted words not guilty, of the substituted words guilty, and

guilty to Charge I; not guilty to Charge II and its Specification and Charge III and its Specifications. He was found guilty of Charge I and its Specification; of the Specification of Charge II, guilty except the words "willfully disobey," substituting therefor the words "failed to obey," of the excepted words not guilty, of the substituted words guilty; of Charge II, not guilty but guilty of a violation of the 96th Article of War; of Specification 1 of Charge III, guilty; of Specifications 2 and 3 of Charge III, guilty except the words and figures "8 September" and "8 September" in each Specification, substituting therefor the words and figures "16 September" and "16 September," of the excepted words and figures not guilty, of the substituted words and figures guilty; of Charge III, not guilty, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of One Thousand Dollars. The reviewing authority approved all the findings of guilty by the court after substituting in Specification 2 of Charge III for the words and figures "eleven thousand, eight hundred and sixty four (11,864) francs, French currency, value about ninety-nine dollars and ninety five cents ($99.95)," the words and figures "six thousand, eight hundred and sixty (6,860) francs, French currency, value about fifty two dollars and eighty six cents ($52.86)," 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. Charges I and II (Absence without leave and willful disobedience of an order): On 1 November 1946, at Paris, France, the accused's commanding officer ordered him to report to Lieutenant Colonel Penniman at Reims for duty, not later than 2 November 1946 and accused stated that he would comply (R 7, 9, 14). The commanding officer gave instructions for written orders to be published, but did not know whether the written orders were ever received by accused (R 15). It was not necessary for accused to have written orders in order to obtain transportation to Reims (R 16). On 4 November 1946, accused called the commanding officer by telephone and informed him that he had not reported as ordered, because he had received word that he was about to receive some money with which to pay his debts. Accused also stated that he had been called as a witness in a court-martial. The commanding officer told accused to come to his office immediately. Accused asked if it would be all right if he came right after lunch, as he was to see about the money at lunch time, whereupon the commanding officer said, "Yes, you come to my office immediately after lunch" (R 9). Accused did not report after lunch (R 10) and never reported to Lieutenant Colonel Penniman (R 18).

It was stipulated that the accused returned to military control on 12 November 1946 (R 20).

b. Charge III (Dishonorably fail and neglect to pay debts): It was stipulated (R 21) that, if Mr. Pierre Raymond Chastagnel were present, he would testify that accused rode in his taxi one night, and the next night, 1 September 1946, accused came to him and borrowed 5,000 francs, promising to repay the money borrowed, the following day. He heard nothing further from accused until 4 December 1946, when the debt was paid (Pros Ex B).

It was stipulated (R 22) that, if Mr. Andre Sella were present, he would testify as follows: That on 20 August 1946, accused rented a room at the Hotel Cap d'Antibes, of which Mr. Sella is proprietor. On 25 August, accused borrowed 20,000 francs from Mr. Sella, stating that he expected to receive some money from Paris. A few days later the accused, stating that his money had not yet arrived, borrowed 30,000 additional francs from Mr. Sella. On 31 August, accused left the hotel, leaving his baggage in his room. After a few days, Mr. Sella spoke to the American consul at Nice, and the latter, with a military police officer, brought the accused to the hotel a day or two later. Accused asked that he be permitted to remove his luggage and would "make it a point of honor to pay everything back in 8 days." Mr. Sella accepted the arrangement and accused left the hotel. On 23 September, Mr. Sella received a cable from accused containing a promise to pay his debt by 1 October. On 19 October, Mr. Sella received a letter from accused containing a long statement about lost money orders and expressing the hope that accused could pay "by the end of next week." Mr. Sella heard nothing further from accused until 4 December, when he received from the accused a telegraphic money order for 74,000 francs, in full payment of the money owed to him and to Mr. Chastagnel. (Pros Ex C).

4. For the defense, Master Sergeant Ruth Lodder, Sergeant Major of the Transportation Section of Western Base Section, testified that she knew of no orders transferring accused from Paris to Reims being cut after 1 November 1946 (R 23-24), and that it was necessary to have written orders to obtain transportation (R 24). She knew, however, of travel warrants being issued on verbal orders (R 26).

The accused, after being apprised of his rights as a witness, elected to be sworn and testified that on 1 November 1946 his commanding officer had told him to go to Reims "as soon as you possibly can" (R 31) and told accused to find out when the trains left and leave as soon as possible. Accused received no written orders (R 32). Accused stayed in Paris to be a witness at a court-martial, and called his commanding officer on 4 November and told the latter he would see him after lunch, to which the commanding officer agreed. Accused did not understand that he was ordered to report to his commanding officer after lunch (R 33) and did not so report.

On 5 November, he testified in the court-martial and went absent without leave on 6 November, because accused had been told that he would be summarily dismissed if he did not pay his bills (R 31, 34). Accused surrendered himself to military authorities on 12 November 1946 (R 34).

As to Charge III, accused testified that on 20 August he went to the Riviera for his first leave in 31 months overseas, and took a room at the Hotel Cap d'Antibes (R 29, 34). At the hotel he noticed his bag had been pilfered and he missed some cigarettes, a shirt and $1300 in money orders. He was not positive whether he had brought the money orders with him or left them in Paris. He reported the matter to Mr. Sella and telephoned a friend in Paris asking the latter to bring him some money (R 29). About five days after accused had borrowed the money from Mr. Sella, his friend brought him 30,000 francs, but accused spent this money instead of applying it to the debt due Mr. Sella (R 37-40). He thought that the money orders might be in Paris, but on returning did not find them. He then applied for duplicate money orders which he thought he could obtain by merely asking for them (R 44) and thus repay Mr. Sella promptly. He found that he would have to wait thirty days to file an application. Near the end of this thirty day period he telegraphed Mr. Sella advising him of the situation (R 38). The applications, when filed, had to be sent to New York and thus causing more delay. Accused frequently checked with the post office (R 30) and eventually obtained duplicates for part of his money orders on 3 December. In the case of five of the money orders the applications were returned as the orders had been cashed by someone and new applications were necessary (R 44). Accused, upon receipt of the duplicate money orders, immediately paid Mr. Sella and Mr. Chastagnel (R 30, 35, 38, 44). Between September and December accused drew some pay but had little left after paying debts he owed two officers for the 30,000 francs loaned to him (R 37, 39).

5. a. Charge I, Absence without leave - Accused pleaded guilty to absence without leave from 5 November to 12 November 1946. The only question presented for consideration is, therefore, whether the court was justified in finding that the absence began on 2 November as alleged. The accused's commanding officer testified that he ordered accused to report for duty in Reims on Saturday, 2 November, and while accused testified that it was not an order, his testimony makes it clear that he knew he was to report on that date "if possible." Although he testified that he made unsuccessful attempts to obtain written orders and transportation, it does not appear that he made prompt efforts to report this failure to his commanding officer, as a reasonable person would have done under the circumstances. The court was justified, therefore, in its refusal to believe accused's story of his activities from 2 to 5 November and in finding that the unauthorized absence began on 2 November, as alleged.

b. Charge II, Failure to obey an order - Accused's commanding officer testified that he ordered accused to report to him immediately after lunch on 4 November. The accused admitted that he promised to report at that time, but did not recall that an order had been given. There is, therefore, no substantial conflict between the testimony of the accused and that of his commanding officer. That the order was legal and that the accused failed to comply with it is unquestioned. The court's finding of guilty of a failure to obey the order is, therefore, amply supported by the evidence.

c. Charge III, Dishonorable failure to pay debts - The record discloses no conflict in the evidence as to the three specifications alleging dishonorable failure to pay debts. The accused, on beginning his first leave in over two years of overseas service, lost money orders totalling $1,300. He borrowed a total of 55,000 francs (about $462.00) from a taxi driver and the manager of the hotel in which he was staying and arranged with a friend in Paris to bring him some money. When the friend arrived, accused spent the money instead of applying it to his debts. When his leave ended, he returned to duty, promising the hotel proprietor that he would "pay everything back in 8 days." Although he made diligent efforts to obtain duplicate money orders to replace those lost, it was nearly three months before he received the duplicates. In the interim, he sent one telegram and one letter to the hotel proprietor, reaffirming his promise to pay the debts. On the day the duplicate money orders were received, accused sent the hotel proprietor a telegraphic money order, covering his hotel bill, the money borrowed from the taxi driver and the hotel proprietor and a bill due a night club. During the three months, the accused received his pay and allowances, but testified that he used that money to pay other debts, and that there was not enough left to permit the payment of these bills.

The record discloses no false representations on the part of the accused, nor any failure to pay, characterized by deceit, evasion or dishonorable conduct. On the contrary, it appears that accused contracted the debts under the mistaken impression that, if the money orders were lost, they could be promptly replaced. It further appears that he made diligent efforts to obtain their replacement, and that he paid the debts as soon as he received payment on the lost money orders.

> "Mere neglect on the part of an officer to pay debts contracted with persons with whom he has dealt upon an equal footing is not of itself sufficient ground for charges against him" (CM 251490, Clift, 33 BR 263) (See also CM 121207, CM 123090, Dig Op JAG, 1912-40, sec 453 (14)).

"The failure of an officer to pay a pecuniary obligation or to keep a promise to do so is not a military offense unless characterized by dishonorable conduct, such as deceit or a fraudulent design to evade payment. CM 221833 (1942)" (I Bull JAG 22, CM 240885, Holley, 26 BR 157, 162).

The finding by the court of not guilty of a violation of the 95th Article of War but guilty of a violation of the 96th Article of War does not remove the requirement of proof that the debt was incurred or remained unpaid under dishonorable circumstances (CM 240885, Holley, supra). Since that requirement has not been met in this case, it follows that the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specifications.

6. At the opening of the trial each member of the court was provided with a copy of the Charges and Specifications, including the four Specifications of Charge IV which, just prior to the arraignment, the trial judge advocate announced as nol prossed. The defense counsel strenuously objected to this procedure by which the nature of the nol prossed charges was brought to the attention of the court. He stated, and it was not denied, that approximately a month previous to the trial it was understood by him, after conferring with the trial judge advocate and the staff judge advocate, that these specifications would be nol prossed, and he contended that these specifications should have been deleted prior to trial. He also stated that the trial judge advocate, a few days before the trial, had indicated to him that he would not delete this Charge and the Specifications thereunder, and that they would be put before the court in some form or other.

It is to be noted that situations arise where it is not possible to keep nol prossed charges from the court. No doubt in some cases actual prejudice to the rights of accused might arise by a failure to delete nol prossed charges but no such prejudice appears in this case. In our opinion, however, if it is known a sufficient time in advance of trial that charges will be nol prossed, it is the better practice to delete such charges from the charge sheet, or at least to take necessary precaution that the nature of the nol prossed charges are not disclosed to the court.

7. The accused is 33 years of age, unmarried and has completed two years of high school. As a civilian, he was employed as a clerk for steamship agents and stevedoring companies. He was inducted on 28 January 1942, and had attained the grade of staff sergeant when selected to attend Transportation Corps Officer Candidate School. He was honorably discharged on 28 December 1943, and on 29 December 1943 was commissioned a second lieutenant, Army of the United States and entered upon active duty. He was promoted to first lieutenant on 1 June 1945. From the date of his

commission to 30 June 1946, his efficiency ratings were "excellent" and from 1 July to 31 October 1946, he was rated "satisfactory." He has been punished twice under the provisions of Article of War 104. On 24 September 1946, he was reprimanded and $50.00 of his pay was forfeited, for a three day absence without leave; on 11 December 1946, he received a reprimand and a forfeiture of $50.00 of his pay for violation of a theater currency regulation. He served in the European Theater of Operations from July, 1944 to the date of this trial.

8. 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 of guilty of Charges I and II and their Specifications, legally insufficient to support the findings of guilty of Charge III and its Specifications, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal and a fine are authorized upon conviction of a violation of Article of War 61 or 96.

[illegible], Judge Advocate

[illegible], Judge Advocate

[illegible], Judge Advocate

JAGH - CM 320687 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Louis P. Terrebonne (0-1947103), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for a period of ten days, in violation of Article of War 61, of failure to obey a lawful order in violation of Article of War 96, and of three specifications alleging dishonorable neglect to pay debts in violation of Article of War 96. He was sentenced to be dismissed the service and to pay to the United States a fine of one thousand dollars. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification (Absence without leave), legally sufficient to support the findings of guilty of Charge II and its Specification (Failure to obey an order), legally insufficient to support the findings of guilty of Charge III and its Specifications (Dishonorable failure to pay debts), legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

On 1 November 1946, at Paris, France, the accused was ordered by his commanding officer to report to another organization at Reims on the following day. He did not report to that organization, but remained in Paris. On 4 November 1946, he called his commanding officer and informed him that he had not left for Reims, whereupon the accused was ordered to report to his commanding officer "immediately after lunch." He did not so report, and remained absent from both his old organization in Paris and his new organization in Reims until he surrendered himself to military control on 12 November 1946.

As to Charge III and its Specifications, the fact that the debts were contracted and that they remained unpaid for over two months is uncontroverted. The evidence shows, however, that the accused possessed certain money orders totalling $1,300 which he lost just prior to the time he incurred the debts in question. He explained this fact as a basis for incurring the debts and made prompt and reasonable efforts to obtain duplicates of the money orders, which were necessary in order for him to obtain the $1,300 represented by those which were lost. After receipt of the duplicates and upon cashing same, he promptly paid his debts in full.

The accused is 33 years of age, unmarried, and has completed two years of high school. He served honorably as an enlisted man from 28 January 1942 to 28 December 1943. He was commissioned second lieutenant on 29 December 1943 and promoted to first lieutenant on 1 June 1945. Until he became involved in the present difficulty, his efficiency ratings were "excellent." On 24 September 1946, a reprimand and a forfeiture of $50.00 were imposed upon him under Article of War 104 for absence without leave from 5 September to 8 September 1946. On 11 December 1946, a reprimand and a forfeiture of $50.00 were imposed upon him under Article of War 104, for a violation of a theater currency regulation. War Department records also contain a complaint by a hotel proprietor in Paris, France, that accused left his hotel without paying a bill of 118,915 francs. It further appears that since the trial in the instant case, charges have been preferred against the accused for an absence without leave from 14 April to 16 May 1947.

In view of all the circumstances I recommend that the sentence be confirmed, but commuted to dismissal, a reprimand, and a forfeiture of $100.00 of accused's pay per month for two months, and that the sentence as thus commuted be carried into execution, but that the execution of the sentence to dismissal be suspended during good behavior.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O: 295, 25 Aug. 1947).

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

JAGK - CM 320690

2 JUL 1947

UNITED STATES	)	CONTINENTAL BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Frankfurt, Germany, 7 February 1947. Dismissal, total forfeitures and confinement for life.
	)	
First Lieutenant THOMAS M. REUSCH (O-411622), 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 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 92nd Article of War.

Specification: In that First Lieutenant THOMAS M. REUSCH, 390th Military Police Service Battalion, did, at Bebra, Germany, on or about 20 November, 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Captain HARRY J. GILLESPIE, a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, 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 life." The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Sometime in May 1946 and while he was stationed at Unna, Germany, the accused met a German woman named Hanna Pieper. He kept company with her continuously until the events hereinafter described. On or about 20 August 1946 accused's company moved to Bebra, Germany, and on 15 November Mrs. Pieper, with accused's consent, went to Bebra to visit him (R. 7,8,58). During the evening of 17 November 1946, which was Sunday, the accused, his company commander, Captain Gillespie (the deceased), Mrs. Pieper and Peggy Delhaye were together at the officers club and an argument arose between accused and

Captain Gillespie. Accused "said to Captain Gillespie that he, Captain Gillespie, had relations with Mrs. Hanna Pieper." The captain denied the accusation and Miss Delhaye, fearing serious trouble, appealed to accused, saying, "'Why do you argue? Sit down.' I said, 'It isn't, it's not worth, the whole thing isn't worth any argument and let's sit down.' Then the Lieutenant said, 'Okay, sir, but if I shall see you again with Madame Hanna Pieper, I will kill you'" (R. 17). The parties then sat down and continued drinking until the accused, who "was very much under the influence of the beverage" fell from his chair and was taken to bed (R. 17). On Tuesday morning, 19 November 1946, accused and Mrs. Pieper had breakfast together. At about 1810 hours on the same day she went to accused's bedroom and requested return of her "photos," informing him that she had been to Kassel with Captain Gillespie. Peggy Delhaye testified that she was present when Mrs. Pieper made this statement and that accused called Captain Gillespie by phone and stated, "I am finished here because Mrs. Hanna Pieper has told me all" (R. 10,17,18).

At about 1900 hours on the same date accused drew his liquor ration, two quarts, took an enlisted man with him and went to the home of Dora Skrobek, a civilian employee of accused's organization. A girl named Miss Knupe joined them at the Skrobek residence and the parties conversed and consumed the liquor "straight." At about 1930 hours, the enlisted man retired and accused, who "was very much under the influence of alcohol" left the house, stating that he had to make a telephone call (R. 37-39).

On the same evening (Tuesday) and in the living room of the officers club, Captain Gillespie, Captain Sandsmark, Miss Delhaye and Mrs. Pieper were having a party. At about 2400 hours the accused entered the room, advanced to about three feet from Captain Gillespie who was seated beside Mrs. Pieper and fired two shots from a U.S. .45 caliber pistol into his body. Captain Sandsmark rushed toward accused, but before he could reach him he fired a third shot which penetrated the arm and breast of Mrs. Pieper (R. 11-26). Captain Sandsmark struggled with accused and a fourth shot, coming from accused's weapon, penetrated his (accused's) thigh. Sandsmark procured a Coca-Cola bottle, struck accused on the head, thereby subduing him (R. 26-28). As he lay wounded upon the floor, accused muttered, "Kill me or let me kill myself" (R. 29-30).

Corporal Lester J. Hall, who in response to a call arrived at the scene a few minutes later, heard accused repeating, "I have had it now, kill me," and, "Did I kill the bastard?" or "Did I shoot the bastard?" (R. 36,37).

Immediately upon being shot Captain Gillespie slumped from his chair to the floor and it was found that he had two bullet wounds in his chest which had caused death almost instantaneously (R. 20,26,33,34; Pros. Ex. 1). Mrs. Pieper was hospitalized for several weeks but recovered from her injuries and testified at the trial (R. 7,12).

On cross-examination of the witnesses, defense counsel elicited evidence showing that the deceased and his friends had consumed about two quarts of liquor during the four-hour period immediately preceding the shooting, however, no disorder was shown to have occurred prior to the shooting (R. 13,22,27).

4. For the Defense

Dr. Nora Hein, a German physician, examined accused at about 0100 hours on 20 November 1946. He was suffering from a gunshot wound in the left upper thigh and she administered two hundredths of one cubic centimeter of morphine and sympatol to alleviate his suffering. He was under the influence of alcohol at the time of her examination. She also examined the body of Captain Gillespie and ascertained that he was dead (R. 44,46).

A blood alcohol examination of the accused conducted at 0600 hours on 20 November 1946 revealed two milligrams of alcohol per cubic centimeter (R. 51). In response to hypothetical questions propounded to him by counsel, Captain Daniel Stowens, MC, testified that a blood test which reveals two milligrams of alcohol per cubic centimeter in a normal person at about 0600 hours, who has not consumed alcohol for the preceding six hours, is indicative of a blood alcohol content of three milligrams per cubic centimeter at 2400 hours. Also, a person with a blood alcohol content of three milligrams per cubic centimeter is "definitely drunk." The witness admitted, however, that the significance of the blood alcohol content varies with different individuals (R. 47-50).

After being duly advised of his testimonial rights by the law member, accused elected to testify in his behalf. He stated that he entered the military service on 14 June 1934 as a private in the Infantry and was commissioned a second lieutenant, Army of the United States, on 29 April 1941. After eleven months of actual combat in the European Theater of Operations he volunteered for service in the Pacific Theater, but hostilities ceased before he could be transported overseas. He had been wounded in action on three different occasions. The first injury was received in Normandy and as a result he was hospitalized for four months. He was again wounded 15 March 1945 and hospitalized for 65 days. At this time he was engaged in house to house small-arms fighting. As a result of combat injuries he is totally deaf in his right ear. On 9 August 1944, accused was awarded the Purple Heart (Def. Ex. B), and on 26 March 1945 he received the Oak Leaf Cluster thereto (Def. Ex. C). He received the Combat Infantryman's Badge on 16 February 1945 (Def. Ex. D), the Bronze Star on 4 July 1945 (Def. Ex. F), and the Silver Star on 8 August 1945 (Def. Ex. G).

The accused testified that on 19 November 1946 at about 1700 hours he told the mess sergeant and the interpreter, who worked in his office, that he would see them at a party during the evening. He went to his quarters, washed, shaved, and put on his dress uniform. Hanna Pieper and Peggy entered

the officers' quarters. Mrs. Pieper asked him why he was dressed in his dress uniform and told him that she had joined Captain Gillespie in Kassel. The accused informed her that he had a date. They argued and she asserted that she was through with him. She went to his room to get her photographs and again told him that she was finished with him. The accused replied, "That's O.K., I am finished with you." The accused then telephoned Captain Gillespie. He was Captain Gillespie's executive officer, operation's officer, supply officer, motor officer, and mess officer. Captain Gillespie informed him that Captain Sandsmark, the battalion supply officer, was present and that Captain Sandsmark desired the accused to help him with a report of survey. The accused joined Captain Sandsmark and assisted him in the preparation of the survey. He then procured two bottles of whiskey and at about 1945 hours he and the mess sergeant went to the party. The four drank whiskey and engaged in conversation. The accused left about 2230 hours in order to get a "jeep" to take Miss Knupe home. It took him about half an hour to walk to the officers' quarters and when he arrived there he felt drunk and staggered as he walked. He entered the building and observed Captain Gillespie seated beside Hanna Pieper. This made him "real mad," and he was shocked. The next thing he remembered he was being transported to the hospital. The accused and Captain Gillespie became acquainted in August 1946 and prior to this incident they had no arguments nor difficulties with each other and the accused never offered violence or threatened Captain Gillespie.

The accused had known Mrs. Pieper since 15 May 1946 when he was stationed in Unna. He saw her practically every day. When he was transferred to Bebra he corresponded with her regularly. In her last letter to him she requested permission to visit him for three days and he consented. She had arrived in Bebra 15 November 1946 (R. 55-58).

There was received in evidence, without objection, as Defense Exhibit A, a copy of accused's W.D.A.G.O. Form 66-1. Entries thereon support his statement of service and show an average efficiency rating of "Excellent."

5. At the close of the case defense made a lengthy and able argument citing numerous cases and authorities in support of his contention, drawn from the entire case, that the homicide shown to have been committed was at most voluntary manslaughter, having been committed at a time when accused was definitely under the influence of intoxicating liquors and when he had perceived that his paramour of several months duration had rejected his attentions.

Voluntary manslaughter is the intentional killing of another without malice, as, for example, in hot blood under passion occasioned by adequate provocation. It is "homicide mitigated out of tenderness to the frailty of human nature" (Commonwealth v. Webster, 5 Cush. (Mass.) 294). And in military practice, although voluntary intoxication not productive of an unsound mind is not a complete defense to the crime of murder, it is

properly considered on the question as to whether accused was able to entertain the malicious intent which is an element of that offense. If, as a result of voluntary intoxication, an accused's intellect is so obliterated or dulled as to be incapable of malice aforethought, his act of homicide committed during such intoxication is, at most, voluntary manslaughter (CM 319168, Poe, and cases there cited). However, even though an accused's deliberative powers are impaired by drunkenness to such an extent that his actions are governed by passion and hysteria, this fact alone will not serve to reduce to manslaughter his impulsive, but nevertheless intentional, taking of human life when such violence has not been called forth by adequate provocation (CM Poe, supra; see CM 234998, McKenzie, 1 BR (ETO) 69). The question here presented, then, is (1) whether accused's mind was so benumbed by drunkenness at the time of the homicidal act as to be incapable of harboring malice aforethought, and, (2) if it was not, was accused's taking of the life of Captain Gillespie occasioned by such provocation as the law will deem adequate to reduce his offense from murder to voluntary manslaughter.

The question of the degree of accused's intoxication and its effect on his volition is generally one of fact for determination by the court-martial (CM 294675, Minnick, 26 BR (ETO), 11,21). In the instant case, it is apparent from the findings of guilty of murder that the court did not consider accused's drunkenness to be of such a degree of severity as to negative malicious intent. We agree with the conclusion of the court, for it is proven that both immediately preceding and after the tragedy accused was noticeably coherent in every respect. Upon leaving the Skrobek residence he stated that he desired to make a phone call and excused himself from that party. After he had walked into the club and fired the shots and while lying on the floor with a bullet wound in his thigh, he queried, "Did I kill the bastard?" or, "Did I shoot the bastard?" His expression of a desire to die at this time indicates that he fully realized what he had done and that he had committed a most reprehensible crime. Not to be overlooked also is the testimony that within several hours prior to the homicide accused had told the deceased by phone that, "I am finished here because Mrs. Hanna Pieper has told me all." The liquor accused consumed, and the evidence indicates he had drunk a considerable amount, appears to have had no more effect than to have stimulated his nerves to the point of boldness in committing the act of killing (CM 265441, York, 43 BR 19,27).

We now consider the second fact or circumstance which was urged upon the court as tending to reduce the offense to voluntary manslaughter, viz, accused's discovery of what he considered to be the infidelity of his paramour. It appears to be recognized in the law that,

> "'If a husband detects his wife in the act of adultery, there is sufficient provocation to reduce the homicide to manslaughter if he immediately kills the wife or paramour, provided that the killing is due to passion aroused by the provocation and not to revenge or malice'

(29 C.J., sec. 125, p. 1142). [Sec. 389, Robertson's New Ky. Crim. Law and Procedure, 2nd Edition.]

(See also 1 Wharton's Criminal Law, 12th Ed., sec. 426, p. 50). However, the courts have been unwilling to extend the above rule to the case where the accused killed his mistress or the 'other man' (29 C.J., sec. 126, p. 1143, fn 70). ***"
(CM 301324, Chaddock, 31 BR (ETO) 229,233)

Although accused, as he asserted, may have become "real mad" when he observed his company commander sitting beside Mrs. Pieper in the club on the fatal evening, and although his so-called madness may have been aggravated by the excessive amount of liquor which he had previously voluntarily imbibed, there is entirely absent in his wanton and willful act the adequate legal provocation necessary to reduce the homicide from murder to voluntary manslaughter (CM 294675, Minnick, 26 BR (ETO)11,20,21; CM 274678, Ellis, 47 BR 271,289).

6. War Department records show that the accused is 31 years of age and married. Prior to his entry in the Army he was a clerk in various retail organizations and also was a welders helper in structural steel work. His efficiency reports show an average of "Excellent." On 22 October 1946 the accused was found guilty by general court-martial of making a false official statement to his battalion commander and of wrongfully inducing an enlisted man to make a false official statement, both in violation of Article of War 96. He was sentenced to pay to the United States a fine of $1,000.00, to be restricted to the limits of his station for three months, and to be reprimanded. On 23 January 1947 the sentence was approved and ordered executed but $500 of the fine was remitted.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Dismissal is authorized upon conviction of an officer of a violation of Article of War 92 and penitentiary confinement is authorized upon conviction of murder in violation of that Article.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

_____, Judge Advocate

JAGK - CM 320690 1st Ind

WD, JAGO, Washington 25, D. C. JUL 2 5 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Thomas M. Reusch (0-411622), Infantry.

2. Upon trial by general court-martial this officer was found guilty of murder in violation of Article of War 92. 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 life." 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.

For a period of about seven months prior to 17 November 1946 the accused had been intimately associated with a German woman referred to in the record as Mrs. or Madame Hanna Pieper. He had met her when he was stationed at Unna, Germany, and when his organization was subsequently transferred to Bebra, Germany, Mrs. Pieper, with accused's consent, went to Bebra to visit him. On 17 November, in the officers' quarters, accused and his company commander Captain Harry J. Gillespie, CMP, had an argument, the accused asserting that Captain Gillespie had had intimate relations with Mrs. Pieper. The captain denied the allegation and accused then said, "Okay, sir, but if I shall see you again with Madama Hanna Pieper, I will kill you."

On the morning of 19 November the accused and Mrs. Pieper had breakfast together. In the afternoon of the same day she accompanied Captain Gillespie to Kassel, Germany. Upon her return she informed accused of her trip to Kassel, quarreled with him and removed her "photos" from his room. During the evening accused and an enlisted man in his unit went to the home of some civilians and drank accused's liquor ration, two quarts of whiskey. Shortly before 2400 hours accused left the house and went to the officers' club where Captain Gillespie, Mrs. Pieper, another officer and his girl friend were dancing and drinking. This party had been in progress for several hours. Accused walked into the room and to a point about three feet in front of Captain Gillespie, who at that time was seated beside Mrs. Pieper, aimed a service revolver at the officer's chest and fired two shots. He then fired one shot at Mrs. Pieper which pierced her arm and chest. The other officer present struck accused with a Coca-Cola

bottle and finally subdued him. During the scuffle accused's pistol was discharged a fourth time, apparently by accident, wounding him in the thigh. As he lay on the floor he muttered, "Did I kill the bastard?" or, "Did I shoot the bastard?" Also, "I have had it now, kill me." Captain Gillespie died within a few minutes as a result of the two wounds he received in the chest. Mrs. Pieper was hospitalized but lived and was a witness at the trial.

The evidence is very convincing that accused was drunk when he committed the homicide in question, however, as exhibited by his statements when he lay on the floor after the shooting, his actions appear to have been deliberate, premeditated and willful. Captain Gillespie was unarmed, had no opportunity to defend himself, and appears not to have taken seriously the threat made by accused two days previous to his death. The evidence shows that the officers had always been friends and at a trial of accused by general court-martial held less than a month prior to the homicide, Captain Gillespie had testified as a defense witness for the accused who was convicted of making a false official statement and inducing an enlisted man to make a false official statement in violation of Article of War 96. For these offenses accused was sentenced to a fine and a reprimand.

4. On 23 July 1947 Captain David J. Duff, CMP, Special Defense Counsel for accused, appeared before the Board of Review and made oral argument. Although accused has a creditable combat record, having received the Purple Heart with Oak Leaf Cluster, Combat Infantryman's Badge, Bronze Star and Silver Star, and although he appears to have been intoxicated when he committed the homicide, the evidence is clear that at the time he killed his company commander he had the malice aforethought requisite to constitute the offense of murder as alleged. I therefore recommend that the sentence be confirmed and carried into execution, and that an appropriate U.S. penitentiary be designated as the place of confinement.

5. 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. 275, 22 Aug. 1947).

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

JAGH - CM 320700

24 JUL 1947

UNITED STATES	)	WESTERN BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Headquarters, Western Base Section, Paris, France, 9-12, 16-18 December 1946. Dismissal and to pay a fine of $3,000
Captain VERNON L. WOOD (0-1304603), Infantry	)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, on or about 15 June 1946, knowingly and willfully misappropriate three hundred (300) pounds of sugar of the value of $19.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, on or about 15 July 1946, knowingly and willfully misappropriate six hundred (600) pounds of sugar of the value of about $36.00, property of the United States furnished and intended for the military service thereof.

Specification 3: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, on or about 10 August 1946, knowingly and willfully misappropriate one thousand and twenty (1,020) blankets of a value of more than $50.00, property of the United States furnished and intended for the military service thereof.

Specification 4: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, on or about 25 August 1946, knowingly and willfully misappropriate two hundred and forty (240) pounds of coffee of the value of about $50.00, furnished and intended for the military service thereof.

Specification 5: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, on or about 30 August 1946, knowingly and willfully misappropriate two hundred and ninety (290) tubes of Morphine Tertrate of the value of about $50.00 and one hundred and sixty-five (165) vials of morphine sulphate of the value of about $35.00, of a total value more than $50.00, property of the United States furnished and intended for the military service thereof.

Specification 6: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, on or about 8 September 1946, knowingly and willfully misappropriate thirty-two (32) cases of soap of the value of more than $50.00, property of the United States furnished and intended for the military service thereof.

Specification 7: In that Captain Vernon L. Wood, 7738 Prisoner of War Overhead Detachment, United States Forces, European Theater, did, at or near Croutoy, France, between 1 May 1946, and 15 September 1946, knowingly and wrongfully misappropriate six (6) cases of baking soda of the value of about $18.00, eleven (11) cases of canned meat of the value of about $33.00, two (2) cases of butter of the value of about $6.00, seven (7) cases of evaporated milk of the value of about $21.00, and seven (7) cases of pepper of the value of about $21.00, all of a total value more than $50.00, property of the United States furnished and intended for the military service thereof.

After the arraignment of accused, the defense entered a plea in abatement on the ground that the preliminary investigation pursuant to Article of War 70 was not thoroughly and impartially performed. After evidence was heard upon this issue, and after argument by both the defense and the prosecution, the law member denied the plea in abatement. The accused then pleaded not guilty to each Specification and the Charge. He was found guilty of Specifications 1, 2, and 3; guilty of Specification 4, except the words "two hundred forty," substituting therefor the words "two hundred," of the excepted words not guilty of the substituted words guilty; guilty of Specification 5; guilty of Specification 6, except the words "thirty-two," substituting therefor the words "twenty-four," of the excepted words not guilty, of the substituted words guilty; guilty of Specification 7, except the words "six" and "eleven," substituting therefor, respectively, the words "four" and "seven", of the excepted words not guilty of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to be confined at hard labor for two years and to pay the United States a fine of three thousand dollars. The reviewing authority approved the findings of guilty after substituting in Specification 7 the word "boxes" for the word "cases" in the portions relating to pepper and baking soda, approved the sentence but remitted the period of confinement, 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 Western Base Section Judge Advocate, Headquarters Western Base Section, United States Forces European Theater, dated 12 February 1947.

4. It is noted that Prosecution Exhibit I is not attached to the record of trial, nor is it among the papers accompanying the record. This exhibit was an inventory of supplies returned to the post by accused from his home pursuant to direction by his commanding officer. Although it is referred to in the Review of the Staff Judge Advocate, its content was not set forth in the record of trial. The record on page 416 shows that it was admitted in evidence, after having been several times excluded on objection by the defense. While the list of goods in the inventory is known to the Board only in part, by reference to it in the Review of the Staff Judge Advocate, the record does sufficiently disclose the nature of the exhibit so that the question of the correctness of the ruling of the law member admitting it in evidence can be determined. It does not appear that the substantial rights of the accused are injuriously affected by the failure to attach Exhibit I to the record when the record was forwarded for action under Article of War 48.

5. The accused is 29 years of age, married (to a Frenchwoman), and has a high school education. War Department records show that he enlisted in the Army in 1937 and was stationed at Schofield Barracks, Hawaii, at

the outbreak of the war. He attended Infantry Officer Candidate School and was commissioned second lieutenant on 18 December 1942. He was promoted to first lieutenant on 19 May 1943 and to captain on 27 June 1944. He served overseas in North Africa, Italy, France and Germany. He was awarded the Purple Heart for wounds received in action on 7 December 1941 in Hawaii and has been awarded the Bronze Star Medal for meritorious service from 21 March 1944 to 31 August 1944. In a copy of accused's War Department Officers Qualification Card, WD AGO Form 66-1, which was prepared by the accused, it is stated that the accused is authorized to wear the American Defense Ribbon, the Asiatic-Pacific Theater Ribbon with campaign stars for the Central Pacific and Midway Campaigns and the European-African-Middle Eastern Theater Ribbon with campaign stars for the Naples-Foggia, Rome, Arno, Southern France and Rhineland Campaigns. It is also stated that he was awarded the Combat Infantry Badge, the Soldiers Medal, the Good Conduct Medal, and the Sultan of Morocco Medal.

Efficiency reports of the accused available in War Department records show that accused was rated "Excellent" for the periods 1 July 1944 to 31 December 1944, and 1 January 1945 to 30 June 1945; "Unknown" for the period 1 July 1945 to 31 December 1945 and "Very Satisfactory" for the period 1 July 1946 to 31 December 1946.

The accused, by letter dated 10 February 1947, requested a personal interview with the reviewing authority, which was granted. By third indorsement dated 25 February 1947, the reviewing authority, Major General John T. Lewis, forwarded this letter to The Judge Advocate General, with the copy of accused's Form 66-1 and other documents attached, for consideration in connection with the case. Among these attached papers is a statement by the accused outlining his prior military service. Also attached are memoranda containing reports of investigation of, and interviews with, accused by several officers. These documents have been considered by the Board.

There is attached to the record of trial a petition for clemency dated 26 December 1946, addressed to the reviewing authority and signed by all the members of the court and the defense counsel, which has also been considered by the Board.

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. 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 a payment of a fine are authorized upon conviction of a violation of Article of War 94.

A. Hottenstein, Judge Advocate

Wakeman A. Jolf, Judge Advocate

[illegible], Judge Advocate

JAGH - CM 320700 1st Ind

WD, JAGO, Washington 25, D. C. AUG 14 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Vernon L. Wood (0-1304603), Infantry.

2. Upon trial by general court-martial this officer was found guilty of seven specifications alleging misappropriation of sugar, blankets, coffee, morphine, soap, and food supplies, all property of the United States furnished and intended for the military service thereof, in violation of Article of War 94. He was sentenced to dismissal, to pay a fine of three thousand dollars ($3000) and to confinement at hard labor for two years. The reviewing authority approved the sentence but remitted the period of confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying Review of the Western Base Section Judge Advocate dated 12 February 1947 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 of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority, and to warrant confirmation thereof. I concur in that opinion.

Between 1 May 1946 and about 15 September 1946 the accused was post supply officer at Continental Central Prisoner of War Enclosure No. 15 at Croutoy, France. On or about 15 June 1946 accused directed a prisoner of war, who was chief clerk of the post supply section, to obtain for him, from the ration breakdown section, three 100 pound sacks of sugar. This sugar was loaded into accused's jeep and taken off the post by the accused. On or about 15 July 1946, he directed the same prisoner of war to obtain 600 pounds of sugar, which the accused also took off the post in his jeep. Early in August 1946, he ordered from the prison supply section between 1000 to 2000 German Army blankets, 1020 of which were delivered to the supply tent. Some 900 to 1000 blankets were later seen being delivered to accused's quarters in Pierrefonds. The evidence also shows that over a period of three or four weeks in August the person in charge of roasting coffee at the post delivered approximately 260 to 280 pounds of coffee to individuals designated by the accused. One of these persons was the chief clerk of the post supply section, who stated that he delivered to accused's home two 10 pound bags of coffee three or four times a week for a period of two or three weeks in August. Quantities of soap were delivered to accused's house, some of which was apparently sold by prisoners of war

working there. About 6 cases were used to clean accused's house. He was seen on one occasion hauling away from his house 20 to 24 cases.

The evidence also shows that accused had delivered to his house large amounts of various food supplies, for some of which he signed issue slips. In other cases issue slips or ration receipts show that goods were issued to accused but the slips were not signed by him. Considerable food supplies were found in the house of the grandmother of accused's wife and quantities of food were returned to the post by the accused upon orders from his commanding officer. While the exact amount of food which accused had in his possession is not clearly shown, it is apparent that he had much more than the amounts alleged.

A large quantity of morphine tartrate and morphine sulphate was found in the house of the grandmother of accused's wife. Accused stated that he had taken morphine from medical chests in the supply tent and placed some of it in his desk and the remainder in a box on a shelf in his office. A medical non-commissioned officer was sent from the dispensary to collect it. Accused gave this non-commissioned officer the morphine in his desk, but he stated that the morphine on the shelf had disappeared. Later accused took from his office a bag containing parachutes. This bag was later taken to the house of his wife's grandmother in Belfort. There the morphine was discovered in this bag, in a green metal box, similar to one given to the accused by the medical non-commissioned officer at the time the morphine was collected. The accused stated that he did not know how the morphine got into the bag and that he did not know it was there.

4. The accused is 29 years of age, married (to a Frenchwoman), and has a high school education. War Department records show that he enlisted in the Army in 1937 and was stationed at Schofield Barracks, Hawaii, at the outbreak of the war. He attended Infantry Officer Candidate School and was commissioned second lieutenant on 18 December 1942. He was promoted to first lieutenant on 19 May 1943 and to captain on 27 June 1944. He served overseas in North Africa, Italy, France and Germany, He was awarded the Purple Heart Medal for wounds received in action on 7 December 1941 in Hawaii and the Bronze Star Medal for meritorious service from 21 March 1944 to 31 August 1944. In a copy of accused's War Department Officers Qualification Card, WD AGO Form 66-1, which was prepared by the accused, it is stated that the accused is authorized to wear the American Defense Ribbon, the Asiatic-Pacific Theater Ribbon with campaign stars for the Central Pacific and Midway Campaigns and the European-African-Middle Eastern Theater Ribbon with campaign stars for the Naples-Foggia, Rome, Arno, Southern France and Rhineland Campaigns. It is also stated that he was awarded the Combat Infantry Badge, the Soldiers Medal, the Good Conduct Medal, and the Sultan of Morocco Medal.

Efficiency reports of the accused available in War Department records show that accused was rated "Excellent" for the periods 1 July 1944 to 31 December 1944, and 1 January 1945 to 30 June 1945; "Unknown"

for the period 1 July 1945 to 31 December 1945 and "Very Satisfactory" for the period 1 July 1946 to 31 December 1946.

The accused, by letter dated 10 February 1947, requested a personal interview with the reviewing authority which was granted. By third indorsement dated 25 February 1947, the reviewing authority, Major General John T. Lewis, forwarded this letter to my office, with the copy of accused's Form 66-1 and other documents attached, for consideration in connection with the case. Among these attached papers is a statement by the accused outlining his prior military service. Also attached are memoranda containing reports of investigation of, and interviews with, accused by several officers. These documents have been considered.

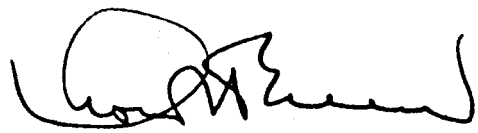
There is attached to the record of trial a petition for clemency dated 26 December 1946 addressed to the reviewing authority and signed by all the members of the court and the defense counsel, wherein they urged the remission of that portion of the sentence which provides for dismissal and confinement at hard labor. In support thereof, they stated:

> "We feel there are extenuating circumstances surrounding the acts of Captain Wood, in that during his trial it became evident that a laxness of command existed at Continental Central Prisoner of War Enclosure No. 15 at the time Captain Wood was assigned there, and that this laxness of command, continuing over a period of months and manifesting itself in insufficient command inspections and lack of supervision generally facilitated the misappropriation of Government property and created a situation in which Captain Wood, as Post Supply Officer, either through carelessness or design, allowed himself to become culpably involved along with various others."

5. I recommend that the sentence as modified by the reviewing authority be confirmed, but that the fine be remitted, and that the sentence as thus further modified be carried into execution.

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

Cm 320700



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 271, 22 Aug. 1947)

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

JAGN-CM 320726

U N I T E D S T A T E S	)	HEADQUARTERS CAMP CAMPBELL
	)	
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 21 February 1947. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private WILLIE BURKS (14211731), 821st Quartermaster Fumigation and Bath Company (Mobile).	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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 93rd Article of War.

Specification: In that Private Willie Burks, 821st Quartermaster Fumigation and Bath Company, (Mobile) then in the 568th Motor Ambulance Company, (Separate) did, at Camp Campbell, Kentucky, on or about 29 October 1946, willfully, feloniously, and unlawfully kill Private James L. Williams, by stabbing him with a knife.

Accused pleaded not guilty to the Charge and Specification, was found guilty of the Charge and Specification, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Knox, Kentucky, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The records of this office show (CM 320727, Burks, 1947) that on 22 November 1946, accused was tried by a general court-martial under the following Charge and Specification:

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

Specification: In that Private Willie Burks, 568th Motor Ambulance Company, (Separate) did, at Camp Campbell, Kentucky, on or about 29 October 1946, willfully, feloniously and unlawfully kill Private James L. Williams by stabbing him with a knife."

He pleaded not guilty but was found guilty of the Specification and Charge 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 for a period of five years. On 19 December 1946 the reviewing authority signed the following action in that case:

"HEADQUARTERS CAMP CAMPBELL
Camp Campbell, Kentucky

Dec 19 1946.

In the foregoing case of Private Willie Burks, 14211731, 568th Motor Ambulance Company (Separate), examination and consideration of the record of trial discloses that the court was without jurisdiction, in that there was no substantial compliance with Article of War 70 in that there was no investigation made after the charges were preferred and prior to reference to a general court-martial for trial. Therefore, the findings and sentence being illegal are null and void and are hereby vacated. Private Burks will be restored to all rights, privileges and property of which he has been deprived by virtue of said sentence.

/s/ JENS A. DOE
/t/ JENS A. DOE
Major General, United States Army
Commanding."

The results of that trial were promulgated in General Court-Martial Orders Number 83, Headquarters Camp Campbell, Kentucky, dated 19 December 1946.

On 16 December 1946 a new charge sheet was executed setting out the Charge and Specification (see paragraph 2, supra) upon which accused was here tried. By first indorsement thereon, dated 13 December 1946, the matter was referred in the usual form for trial. It is the record of this second trial which is now before us and which, for the sake of brevity, will hereafter be referred to as the current trial.

Proceedings were conducted throughout as a new, separate, and distinct trial from that of 22 November 1946. The accused was arraigned in the current trial 21 February 1947 as appears in paragraph 2, supra. He did not interpose any plea of former trial but did enter a plea of not guilty to the Charge and Specification. Nowhere in the record of the current trial is there any reference to the first trial.

At the first trial the trial judge advocate was Captain James W. Graham, who was assisted by First Lieutenants Tord V. Malmquist and Granville M. Johns, and defense counsel were Major Theodore K. White, First Lieutenant Murice J. Nettelhorst and First Lieutenant Harry M. Bartlett. In the current trial the trial judge advocate was Captain Robert C. Bowen, assisted by First Lieutenant Tord V. Malmquist, and defense counsel were First Lieutenant Murice J. Nettelhorst and Second Lieutenant Neilus D. DeSilvey.

4. Upon the facts related four questions are presented for determination:

(a) Was the first trial in all respects legal and free from any defect which might nullify it as a matter of law?

(b) What was the legal effect of the reviewing authority's action of 19 December 1946?

(c) Should a plea of former trial, if duly interposed in the current case, have been sustained? and,

(d) By failing to interpose such a plea in bar and by pleading to the general issue in the current case did accused waive his exemption rights under Article of War 40?

5. The record of the first trial was examined by the Examination Branch, Office of The Judge Advocate General, and it was there determined that the proceedings were legally valid in all respects and that the action of the reviewing authority, although based upon an erroneous conception of the applicable law, had the effect of a disapproval of such proceedings. That the provisions of Article of War 70 requiring investigation of charges before trial are not jurisdictional was established in CM 229477, Floyd, 17 BR 156. That case has since been consistently followed by this Department.

6. It is obvious that the action of the reviewing authority was based solely upon a misconception of the law respecting Article of War 70 and that it was taken without regard to the merits of the case. Under the provisions of Article of War 49 the reviewing authority clearly had authority to disapprove the findings and sentence and the fact that he

was acting under an erroneous conception of the legality of the trial would in no way negative such authority or make his resultant action any the less binding. It is the opinion of the Board that the action of the reviewing authority under date of 19 December 1946 constituted a disapproval of the findings and sentence. His authority to order a retrial is contained in the following pertinent provision of Article of War 50½. "When the * * * reviewing or confirming authority disapproves or vacates a sentence the execution of which has not therefore been duly ordered, he may authorize or direct a rehearing." Paragraph 89, Manual for Courts-Martial, 1928, page 80, provides that "the order directing a rehearing should be made at the time of disapproving or vacating the sentence and will ordinarily be included in the action on such sentence." The written action and the published General Court-Martial Orders in the first case do not contain any authorization or direction for a rehearing.

7. The question next to be determined is whether a plea of former trial, if timely made in the current case, should have been granted as a matter of law. Under a somewhat similar set of circumstances in CM 241027, Comer, 26 BR 185, the Board of Review said:

> "Since action of the reviewing authority in disapproving the original record was without qualifications, it was for all purposes final. Moreover, it must be further observed that the present case does not purport to be a rehearing, but is presented as a new case, entirely independent of the former case and in contradistinction to a rehearing, or a proceeding in revision. Winthrop states that,
>
> 'Where the entire sentence is disapproved, the proceedings in the case are wholly terminated and nugatory. * * *
>
> Upon such a disapproval also the accused is restored ex vi to his normal legal status as existing before his arrest, and is entitled to be at once released from any form of restraint to which he may have been subject, and to be returned to the duties and rights of his rank or office; his legal rights and privileges remaining no more affected than if the trial had resulted in an acquittal" (Winthrop Military Law and Precedents, pp. 451, 452).
>
> From the above authority it clearly appears that the effect of the former disapproval of the first trial by the reviewing authority without ordering a rehearing was a consummation of that trial which operated as a bar to any subsequent trial for the same offense (MCM, 1928, par. 68; Winthrop Military Law and Precedents, pp. 259-260)."

The rule thus laid down is proper and it is equally determinative in this case.

8. The only question remaining for determination is whether accused, by failing to interpose a plea in bar and by entering his plea to the merits, waived the protection afforded him by Article of War 40 against being tried a second time for the same offense without his consent. Winthrop, in his Military Law and Precedent, 2nd Edition, par. 403 (pp. 268-269) states that such protection, being for the sole benefit of the accused party, may be "expressly or impliedly waived by him," and that "by intelligently pleading guilty or not guilty without interposing the special plea under consideration" (underscoring supplied), he would effect such a waiver.

It is quite obvious from all of the facts and circumstances surrounding this case that accused was not aware of his right to interpose a plea in bar in the current trial and hence it cannot be said that he "intelligently" entered his plea to the issued in such a sense that he thereby knowingly waived his rights in bar. It is sufficiently clear that accused was entitled to interpose a plea in bar; that he did not knowingly waive such right; and that if such plea had been properly interposed it should, as a matter of law, have been sustained.

9. An examination of these factors forces the conclusion that the unqualified disapproval of the prior record by the reviewing authority operated as a bar to any subsequent trial for the same offense unless it affirmatively appears that such a subsequent trial is with the consent of accused. The record of the current trial does not affirmatively show such consent.

10. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings or to sustain the sentence.

Edward J. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Francis [illegible], Judge Advocate.

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

JAGK - CM 320750

4 JUN 1947

UNITED STATES v. Private PRESTON J. PRICE (RA 13022819), Headquarters Detachment, 363d Port Battalion	KOREA BASE COMMAND Trial by G.C.M., convened at Headquarters Korea Base Command, 2 January 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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1. The record of trial in the case of the above named soldier, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty of Charge II and its specification and so much of the sentence as is necessarily based on such findings, has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

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

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

Specification 2: In that Private Preston J. Price, Hq Det, 363d Port Bn, did at Seoul Korea, on or about 1 December 1946, unlawfully carry a concealed weapon, viz, a .45 calibre automatic pistol.

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

Specification: In that Private Preston J. Price, ***, did at Seoul Korea, on or about 1 December 1946, with intent to do him bodily harm, commit an assault upon Edward Jaramillo by threatening him with a dangerous weapon to wit, a .45 calibre automatic pistol.

He pleaded not guilty to and was found guilty of all charges and specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge I, approved the sentence, but reduced the period of confinement to three years, ordered the sentence as thus modified executed but suspended the execution

of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Camp McQuaide, California, 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. 9, Headquarters, Korea Base Command, APO 901, 20 February 1947.

3. On the evening of 1 December 1946, Private First Class Edward Jaramillo and two other enlisted men obtained a ride in an Army truck from their military station to Seoul, Korea. Accused, driving another truck, was following the vehicle in which the three enlisted men were riding and tried, unsuccessfully, to pass. A verbal argument then ensued between the drivers of the two vehicles while continuing towards Seoul. Arriving in Seoul, Private Jaramillo and his two friends were let off at the traffic circle near the Chosen Hotel and the truck in which they were riding continued on its way. Accused, however, stopped his vehicle at the place where the three men had dismounted, got out and approached them. He addressed them in an opprobrious manner, using such terms as "son of a bitch," and, pulling a pistol half way out of his pocket, stated that he had been in the Army five years, did not care what happened and "I would just as soon kill you as anybody else." This remark was directed to all three of Jaramillo's party and all were put in fear by accused's attitude and the display of his weapon. One of their number hailed a passing military policeman and accused, seeing the approaching policeman, threw the weapon in his truck. The whole incident happened very quickly and no one in Jaramillo's group had done anything to aggravate accused. After accused's arrest, the military policeman found a 45-caliber pistol in the vehicle accused had been driving. The pistol had a round of ammunition in the chamber. Accused was somewhat intoxicated (R. 15-22; Pros. Ex. 1).

4. There can be little doubt that accused was properly convicted of unlawfully carrying a concealed weapon as alleged in Specification 2 of Charge I. The only question requiring discussion is whether the evidence adduced at the trial as above summarized is sufficient to support the conviction of assault with intent to do bodily harm with a dangerous weapon as alleged in the specification to Charge II.

In Price v. United States (156 F. 950), defendant had been convicted of an assault with a dangerous weapon. He had pointed an unloaded revolver at his victim. The court said:

> "But, while the evidence does not show that the defendant committed the crime of assault with a dangerous weapon (not dangerous, for the revolver was not loaded and not used as a bludgeon, see 74 ALR 1206), it is yet sufficient to prove him guilty of the minor offense of assault. It is true, as contended by counsel for appellant, that it has been adjudged in many cases that pointing an unloaded pistol at another accompanied by a threat to shoot, does not constitute an assault. *** Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42 *** lays down the broad rule 'that

there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another.' We do not concur in this statement of the law, and in our opinion the true rule is stated by Mr. Bishop in his work on Criminal Law (volume 2 [3rd Ed.] s. 53), in the following language:

> 'There is no need for the party assaulted to be put in actual peril, if only a well-founded apprehension is created; for his suffering is the same in the one case as in the other, and the breach of public peace is the same. Therefore, if within shooting distance one menacingly points at another with a gun, apparently loaded, not loaded in fact, he commits an assault the same as if it were loaded. There must in such a case be some power actual or apparent, of doing bodily harm; but apparent power is sufficient.'

"This view is sustained in many cases, only two of which will be cited: Commonwealth v. White, 110 Mass. 407; Beach v. Hancock, 27 N.H. 223, 59 Am. Dec. 373." (Parenthetical statement supplied.)

It is thus apparent that the offense of assault rests upon two legal theories, one being that an assault is an attempt to commit a battery upon the person of another and the other being that an assault is a putting in reasonable fear of immediate bodily harm. Much confusion is found in the reported cases because of an all too frequent tendency to apply but one of these theories to the exclusion of the other, both being equally valid and each having its own application to a given factual situation. For example, pointing an unloaded pistol which the assailant knows to be unloaded at another not in obvious jest might not, strictly speaking, be considered an attempt, for the assailant is cognizant of his inability to commit a battery by shooting, but as we have seen, it is none the less an assault, for there has been a putting in fear. And pointing a loaded pistol with intent to shoot it at one whose back is turned and who is unaware of the impending application of violence to his person, although not a putting in fear, is yet an attempted battery and, therefore, an assault. The definition of assault given in paragraph 149l of the Manual for Courts-Martial, 1928, recognizes these two theories. There it is said that an assault is "an attempt or offer with unlawful force to do a corporal hurt to another. *** Furthermore, in an assault there must be an intent, actual or apparent, to inflict corporal hurt on another." Under either theory, of course, there must be some overt act towards the application of physical force or violence, mere preparations for an assault or mere words or insulting gestures not being a sufficient basis for a conviction of this offense.

In the instant case, Private Edward Jaramillo was put in fear, and

reasonably so, by the acts of accused and this circumstance is sufficient to make accused guilty of an assault upon him. The pistol in accused's hand being loaded, the assault was committed with a dangerous weapon and, we believe, the circumstances indicated a present intention on the part of accused to do bodily harm with such weapon to Jaramillo and his friends, which intention failed of fruition solely because of the timely arrival of the military policeman (CM 274647, Trujillo, 1st Ind., 47 BR 261; CM 286984, Manning, 18 BR (ETO) 201, 205; CM 300565, Houle, 23 BR (ETO) 141; CM 268810, Ruff, 2 BR (NATO-MTO) 115). Accordingly, we are of the opinion that the evidence is sufficient to support the findings of guilty of Charge II and its specification. In this particular case, the assault here found may be predicated upon the attempt theory as well as upon the putting in fear theory. In Johnson v. State (132 Ark. 128, 200 S.W. 982) appellant had been convicted of an assault with intent to kill. He had drawn a pistol upon his victim with intent to kill him but before he was able to present it in the attitude of firing the weapon was seized by the person assailed. In upholding the conviction, the court said:

> "Mere preparation for an assault does not complete the offense, but any overt act in partial execution of the design to make an assault completes the offense. The drawing of a deadly weapon if so intimately connected with its use that it cannot be said to be merely a preparation for the use, but is a part of the use itself, (is) such an act (as) constitutes an assault when accompanied by evidence of an intention to immediately use the weapon."

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

Chester D. Silvers, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert S. Sprague, Judge Advocate

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

JAGN-CM 320762

26 May 1947

U N I T E D S T A T E S v. T/5 ROBERT A. ALSTON (14185831), Private CLYDE COOPER (38611740), both of Headquarters & Headquarters Detachment, 473rd Quartermaster Group, and Private First Class FREELER JONES (33957824), 82nd Quartermaster Depot Company.	)	KOREA BASE COMMAND Trial by G.C.M., convened at Korea Base Command, APO 901, 10 and 13 January 1947. Each: Dishonorable discharge and confinement for ten (10) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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

2. The accused Jones and Alston were purportedly arraigned and tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that PrivateClyde Cooper, Headquarters and Headquarters Detachment, 473rd Quartermaster Group, APO 59, acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, 82nd Quartermaster Depot Company, APO 59 and Technician Fifth Grade Robert L. Alston, Headquarters and Headquarters Detachment, 473rd Quartermaster Group, APO 59, did, at APO 59, on or about 26 November 1946, unlawfully enter the house of In Kim Oak with intent to commit a criminal offense, to wit robbery therein.

Specification 2: In the Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, * * * and Technician Fifth Grade Robert L. Alston, * * * did, at APO 59, on or about 26 November 1946, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the presence of Won Chan Kim, about $555.00 lawful money of the United States.

Specification 3: (Finding of not guilty).

Specification 4: In that Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, * * * and Technician Fifth Grade Robert L. Alston, * * * did, at 231 Yul Mok Jung, Inchon, Korea, on or about 26 November 1946, with intent to do him bodily harm, commit an assault upon Won Chan Kim, by striking him about the head and body.

Specification 5: In that Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First ClassFreeler L. Jones, * * * and Technician Fifth Grade Robert L. Alston, * * * did, at 231 Yul Mok Jung, Inchon, Korea, on or about 26 November 1946, commit an assault upon In Kim Oak, by striking him and kicking him about the head and body.

Specification 6: In that Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, * * * and Technician Fifth Grade Robert L. Alston, * * * did, at 231 Yul Mok Jung, Inchon, Korea, on or about 26 November 1946, with intent to do him bodily harm commit an assault upon Won Hak Kim, by striking and kicking him about the head and body.

Specification 7: In that Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, * * * and Technician Fifth Grade Robert L. Alston, * * * did, at 231 Yul Mok Jung, Inchon, Korea, on or about 26 November 1946, with intent to do her bodily harm, commit an assault upon Wha Mok Chai by striking her and kicking her about the head and body1.

Specification 8: In that Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, *** and Technicna Fifth Grade Robert L. Alston, * * * did, at 231 Yul Mok Jung, Inchon, Korea, on or about 26 November 1946, with intent to do her bodily harm , commit an assault upon Un Soon Mang, by striking her and kicking her about the head and body.

Specification 9: In that Private Clyde Cooper, * * * acting jointly and in pursuance of common intent with Private First Class Freeler L. Jones, * * * and Technician Fifth Grade Robert L. Alston, * * * did, at 231 Yul Mok Jung, Inchon, Korea, on or about 26 November 1946, in the nighttime feloniously and burglariously break and enter the dwelling house of In Kim Oak, with intent to commit a felony, viz, larceny therein.

They each entered a pleaof not guilty of the Charge and all Specifications. Each was found not guilty of Specification 3, guilty of all other Specifications and the Charge, and each was sentenced to dishonorable discharge, total forfeitures, and confinement at hardlabor for sixteen years. The reviewing authority as to each accused approved the findings and sentence, reduced the period of confinement to ten years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The purported arraignment was based upon two charge sheets, one naming Alston and Cooper as accused and one so designating Jones. The Charge and Specifications, in both charge sheets, are set out in identical wording. All parties to the trial, from its inception, obviously considered the proceedings as a joint trial upon a joint charge.

Stripped of verbiage descriptive of the individuals named the charging part of each Specification reads as follows:

"In that Cooper, acting jointly with and in pursuance of a common intent with Jones and Alston, did [commit an offense described].."

In this residuary sentence "Cooper" is the subject, "did" is the verb, and "acting jointly with and in pursuance of a common intent with Jones and Alston" is a participial phrase modifying the verb "did." Each Specification effectively alleges the commission of an offense by Cooper, but fails to allege the commission of any offense by either Jones or Alston. As to Jones and Alston each Specification "violates the fundamental principle of pleading that the 'indictment information or complaint must be positive in respect to the charge that the person accused committed the crime which renders him amenable to the charge'." (CM 257983, Biondi et al, 3 BR (ETO) 45). Jones and Alston

were brought to trial upon Specifications fatally defective as to them, and such defects were not waived by their plea to the general issue or by their failure to raise the question during the trial. CM 257983, Biondi et al, supra; CM 250668, Kistler et al, 33 BR 33; CM 260797, Seymour et al, 40 BR 20. Such defects are not within the purview of Article of War 37, and are fatal to these proceedings against Jones and Alston. CM 257983, Biondi et al, supra; CM 250668, Kistler et al, supra; Seymour et al, supra.

4. For the reasons stated the Board of Reviewholds the record of trial legally insufficient to support the findings and sentence as to Accused Jones and Alston.

/s/ Edward J. Johnson, Judge Advocate.

/s/ Joseph L. Brack, Judge Advocate.

/s/ Francis S. Boyles, Judge Advocate.

CERTIFIED A TRUE COPY

Walter D. Sowa

WALTER D. SOWA
Capt., Inf
Acting Staff Judge Advocate

JAGN-CM 320762 1st Ind. (183)

WD, JAGO, Washington 25, D.C.

TO: Commanding General, Korea Base Command, APO 901, c/o Postmaster San Francisco, California

1. In the foregoing case of Technician Fifth Grade Robert A. Alston, 14185831, Private Clyde Cooper, 38611740, both of Headquarters and Headquarters Detachment, 473rd Quartermaster Group, APO 59, and Private First Class Freeler Jones, 33957824, 82nd Quartermaster Depot Company, I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentences as to accused Alston and Jones be vacated. Upon vacation of the findings of guilty and the sentences as to accused Alston and Jones, you will have authority to order the execution of the sentence as to accused Cooper.

2. In disapproving the findings of guilty and the sentence as to Alston and Jones you will have authority, under Article of War 50½, to direct a rehearing in their cases.

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

(CM 320762)

11 SEP 1950

/s/ Thomas H. Green
/t/ 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.

JAGN-CM 320795

UNITED STATES v. Private First Class FRED S. PROCTOR, JR. (44016934), Privates ESCHOL E. RICHARDS (17163806), and ROBERT V. WESTFALL (35970643), all of Headquarters and Service Company, Third Military Government Regiment.	THIRD UNITED STATES ARMY Trial by G.C.M., convened at Munich, Germany, 10 January 1947. Westfall: Disapproved by reviewing authority. Proctor: Dishonorable discharge and confinement for one (1) year. Richards: Dishonorable discharge and confinement for three (3) years. Both: Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of accused Richards and Proctor.

2. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as to accused Richards. In view of this holding, discussion will be limited to that portion of the record concerning the accused Proctor.

3. Accused Proctor was tried upon the following Charges and Specifications:

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

Specification 1: In that Private First Class Fred S. Proctor, Jr., Headquarters and Service Company, Third Military Government Regiment, did, in conjunction with Private First Class Clarence D. Brendle, Private First Class Grover T. Renshaw, Jr., Private Eschol E. Richards and Private Robert V. Westfall, all of Headquarters and Service Company, Third Military Government Regiment, at

Munich, Germany, on or about 17 September 1946, feloniously take, steal and carry away one BMW Sedan, Engine Number 70254, License Number BY 114 777, value about five hundred dollars ($500.00) property of Franz Fichtenger.

Specification 2: (Finding of not guilty).

CHARGE II: Violation of the 96th 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 not guilty of Specification 2 of Charge I, not guilty of Specifications 1 and 2 of Charge II and Charge II, and guilty of Specification 1, Charge I, and of Charge I. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved only so much of Specification 1 of Charge I as involves a value in excess of fifty ($50.00) dollars and disapproved so much of Specification 1 of Charge I as involves the words "Private First Class Grover T. Renshaw, Jr., and Private Robert V. Westfall," approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

4. Evidence for the Prosecution:

Franz Fichtinger, the owner of a BMW Sedan, Engine Number 70254, License Number 114,777, at about 9 o'clock on the night of 17-18 September 1946 parked his car on the Kapuzinerstrasse in Munich. Before leaving the car he locked the ignition. When he returned for the car at two or three o'clock in the morning it was gone. He immediately reported the loss to the police and received the car back on 18 September. Various items of equipment, including the ignition, were missing from it when it was returned to him (Pros. Ex. 2). Private Clarence D. Brendle testified that Proctor was present at the time the Fichtinger car was taken, and that Proctor started it (R. 29-30). Brendle had a car "similar" or "identically the same" as the Fichtinger car. "You couldn't tell the difference in their color at night" (R. 30). At this point Brendle testified:

"Q Was Proctor familiar with your car? Did he know that car well?
A He had seen it, sir. I don't know how familiar he was with it.

Q Can you tell the court how it came about, how you asked Proctor and Richards to go with you to pick up Fichtenger's car?

A I asked Proctor and Richards if they would go with me after my car. I said it was broke down on the side of the street and I wanted to bring it in. We went down there and Proctor got in the car and I didn't tell him anything about the car, but he believed it to be my own from what he later said. He got in the car and drove it back to the compound and parked it on the visitors' parking lot. When he got out, he looked, and my car was sitting by the side of it. He said something, I don't remember the exact words, that this other car looks like the one you have; I thought this was your car. I don't remember what it was he said. I said, 'They are both my cars.' I said, 'This other one is the one I had before.' That is the first time he noticed that it wasn't the car I had all the time.

Q Did you tell Proctor you had stolen that car?
A No, sir.

Q Did you ever tell Proctor that Fichtenger's car that you took was a stolen car?
A I don't remember if I ever told him that or not" (R. 31).

5. Evidence for the Defense:

The accused Proctor having been advised of his rights as a witness elected to make an unsworn statement. He stated that the car he went to get with Brendle and Richards looked just like the car that belonged to Brendle, that when they reached the compound he noticed Brendle's other car and spoke about it; that he had no idea that when he went out with them that they were stealing a car; that he had seen Brendle drive his car many times in and out the south gate; and that he had no inkling the Fichtinger car was a stolen car until he was so notified by the C.I.D. (R. 38, 39).

6. Proctor was found guilty of the larceny of an automobile. One of the essential elements of proof to sustain such a conviction is that the facts and circumstances of the case indicate that the "taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property * * *" (MCM, 1928, p. 173). The record contains much uncontroverted evidence that accused thought Brendle was the owner of the car he was assisting to start. The record further shows without contradiction that Proctor was justified in so believing, as many times he had observed Brendle driving a car practically identical with the car Proctor is charged with stealing. The Board of Review finds in the record no substantial evidence of larcenous intent on the part of accused Proctor; and without proof of such intent the record of trial does not legally support the finding of guilty of larceny under Specification 1, Charge I (CM 207446 Philpott 8 BR 343). Mere probabilities and suspicions

will not support a conviction of a criminal offense (CM 260828 Parker 40 BR 34).

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority as to the accused Richards but legally insufficient to support the findings of guilty and the sentence as approved by the reviewing authority as to accused Proctor.

Edward D. Johnson, Judge Advocate.

_____, Judge Advocate.

Lewis V. Eckner, Judge Advocate.

JUN 11 1947

JAGN-CM 320795 1st Ind
WD, JAGO, Washington, D. C.
TO: The Adjutant General, Washington 25, D. C.

1. In the case of Private First Class Fred S. Proctor, Jr., (44016934), and Private Eschol E. Richards (17163806), both of Headquarters and Service Company, Third Military Government Regiment, I concur in the holding of the Board of Review and for the reasons therein stated recommend that a general court-martial order be published vacating the findings of guilty and the sentence as to accused Proctor. Upon vacation of the findings of guilty and the sentence as to accused Proctor the execution of the sentence as to accused Richards will be authorized.

2. In view of the discontinuance of the activities of the Third United States Army in the European Theater, it is recommended that War Department General Court-Martial Orders be published. A draft of such general court-martial order is inclosed.

3. The return to this office of the holding together with five copies of the published War Department General Court-Martial Order is requested.

(CM 320795).

2 Incls
~~Record of trial~~
Draft of GCMO

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 219, 13 June 1947).

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

JAGK - CM 320805

7 JUL 1947

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 11 February 1947. Dismissal and total forfeitures.
Major JOHN B. HAMILTON (0-21197), Field Artillery	)	

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 charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Major John B. Hamilton, Field Artillery, Attached Unassigned, Headquarters Fifth Army, did, aboard the Pennsylvania Railroad train "Trailblazer" in the vicinity of Johnstown, Pennsylvania, on or about 14 March 1946, wrongfully shoot Aaron Russansky in the chest with a pistol.

He pleaded not guilty to and was found guilty of the charge and guilty of the specification "including the addition of the words 'and back' after the word 'chest'". 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. At about 1655 hours on 14 March 1946, Mr. Aaron Russansky, 910 Margate Terrace, Chicago 40, Illinois, boarded the Pennsylvania Railroad all-coach train known as the "Trailblazer" at New York, New York, destined for Chicago, Illinois. Mr. Alfred R. Quirk, Jr., Lee Hall, Virginia, a merchant seaman, occupied the seat immediately in front of Mr. Russansky. The accused and his wife boarded the same train at Newark, New Jersey, and took seats in the same coach as Mr. Russansky and Mr. Quirk (R. 23).

The train had a club car where drinks were served. As the train traveled westward and at about 1900 hours, Mr. Russansky, who testified that he did not drink but went to the club car to smoke, noticed accused

seated, apparently alone, in the club car ordering drinks. At about 2230 hours he saw accused and Mr. Quirk drinking together in this car (R. 24, 26). The club car closed at 2400 hours and shortly thereafter Mr. Quirk procured a bottle of liquor from his luggage and went to the men's wash room. Shortly thereafter Mr. Russansky went to the Men's Room to wash his hands and observed accused and Mr. Quirk engaged in boisterous conversation, the accused particularly using obscene and repulsive language. They were drinking whiskey from paper cups. As he washed his hands Mr. Russansky saw accused draw a pistol from his pocket and point it at Mr. Quirk, saying, "I am going to shoot you right through the head," to which Quirk replied, "You haven't got guts enough to pull the trigger." Russansky was frightened, did not wait to wipe his hands on a towel but opened the door and started to leave the room. As he made his exit the accused fired the pistol into his back near the right shoulder blade, the bullet coming out "about an inch from the nipple" on his breast (R. 18,19,43). Mr. Russansky testified that he saw accused fire the shot (R. 36,41,44). He then ran through the car shouting that he was shot and a stewardess in the diner, which was the following car, caused Mr. Russansky to lie down and she stopped the flow of blood by use of a handkerchief. The train was approaching Johnstown, Pennsylvania, where it was stopped and Mr. Russansky was removed to the Johnstown Memorial Hospital (R. 22).

Mr. Quirk testified that he was sitting in front of Mr. Russansky on the "Trailblazer" on 14 March when accused, dressed in a major's uniform, boarded the train in New Jersey with a lady he presumed to be his wife. He had exchanged friendly remarks about the weather with Mr. Russansky and later he and accused became acquainted and had some drinks in the "observation" car. The porter served these drinks and after they "cut off the liquor at the bar",which occurred at 2400 hours, he "broke out" a bottle of bonded whiskey and went to the "smoking compartment or washroom." The accused was sitting in the corner "against the bulkhead" reading a book. Quirk stated that a coast guardsman, who was also in the room, procured some paper cups which they "practically filled" and the three took some drinks. The coast guardsman left the room and accused "became extremely excited. He was speaking to me in German and French, and I told him, 'Nein, nein, nicht sprechen Deutsch' *** 'Speak to me in Greek. I just came back from Greece.'" Accused "was waving his arms around and hopping up and down and sitting on the edge of the settee, *** but I couldn't seem to calm him down" (R. 65). Mr. Russansky had entered the room and suddenly he (Quirk) turned his head and the gun went off "past my nose, or my eyes." The witness stated that at this point he jumped up, protested with the major for causing trouble, took the gun away from him, forced him to go on back to his seat and he (Quirk) threw the gun under his seat. He then started to the major's seat to urge him to remain quiet but,

> "I did not have a chance to say anything. There was MPs, conductors, waitresses, and stewardesses, and everybody up there except the fireman and engineman. They pulled us back in the washroom, and

it was then that I found out that Mr. Russansky had been shot, taken off, and he was in the hospital in Johnstown, Pa." (R. 66).

While in the washroom Mr. Quirk stated that the following occurred:

"A After the MPs took us back into the washroom he started to climb up on my neck and accused me of shooting Mr. Russansky. Well, I don't mean that, it is a figure of speech. He was leaning up against me and he said, 'You shot him, you shot him, you shot him; tell them you shot him. Why did you try to kill him?' And I broke out in a sweat, because I took the gun away from him and I had my fingerprints on it. And then afterwards I realized I would not be accused of anything." (R. 69)

The witness asserted that he did not shoot Mr. Russansky, that accused had the gun pointing it toward his face and the projectile went past his face (R. 69,73). On cross-examination Mr. Quirk stated that after the military police had taken him and the accused in custody accused said to him, "Why don't you tell them you shot him, you son-of-a-bitch; tell them you shot him? What did you do it for?" Quirk thereupon kicked accused in the groin and struck him with his fist but the military police restrained him. The accused then stated, "Shoot me, I haven't anything to live for. Put a bullet in my head" (R. 93,94,96). The conductor procured the gun and brought it into the washroom but its whereabouts was unknown at the time of trial (R. 100).

With the foregoing testimony the prosecution rested and defense counsel moved for a finding of not guilty. After lengthy argument by counsel the court closed and upon being opened the President announced that the motion was overruled (R. 102,109).

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

The defense called as its first witness Mrs. Dorothy B. Hamilton, accused's wife, who stated that she and accused had been married for eight and one-half years. They were the parents of two children. Mrs. Hamilton asserted that prior to the time her husband went overseas, 1944, she noticed that on occasion he would become morose and refuse to talk for several days. One time when they were in New York she and her husband had a quarrel. On another occasion when he had been drinking she observed him loading a gun. She took the gun away from him and he went into the bathroom and got a razor - but she persuaded him to lay it aside. After he returned from overseas Mrs. Hamilton stated that her husband "had fits of depression, very severe depression." (R. 110,115)

The witness boarded the Pennsylvania train "Trailblazer" with her husband at Newark, New Jersey, at about "5.00" on 14 March 1946 and she did not see him from "9:30" that night until after the incident. She described his condition

as follows: "Well, he had been drinking and it was noticeable, but he was not real drunk" (R. 116). The witness heard the report of the gun and saw the pistol after the shooting, but she could not say that it was the same gun which her husband was carrying when he boarded the train. The Merchant Marine had the gun after the incident and asked her to "get rid of it" but she replied that she did not know what to do with it (R. 120,121).

Captain Verlynne V. Volin, Medical Corps, Neuropsychiatrist, Regional Station Hospital, Fort Sheridan, Illinois, testified that on 7 February 1947 he examined accused and had studied the proceedings of the Army Retirement Board which had considered his case. The witness stated that he diagnosed accused as suffering from an "anxiety state, chronic, severe." Captain Volin did not believe accused could adhere to the right on 14 March 1946 due to his addiction to alcohol. He summarized his findings by stating that although he believed accused to be technically sane, with knowledge of right from wrong, drinking had "interferred with his ability to adhere to the right" (R. 128,137).

On cross-examination the witness stated that he meant to say that he did not believe accused could "completely" adhere to the right on 14 March 1946 (R. 138). On further cross-examination the neuropsychiatrist admitted that he had never seen the War Department Technical Bulletin on psychiatric testimony before courts-martial (TB Med 201) and that his knowledge of accused's condition was gained from a 1-1/2 hour conference with him (R. 141-143). It was not considered necessary to give accused an encephalographic examination and none had been given (R. 149). The trial judge advocate read into the record excerpts from the mentioned War Department Technical Bulletin. Without objection there was received in evidence a copy of the Proceedings of an Army Retiring Board convened pursuant to paragraph 4, Special Orders No. 177, Headquarters, First Army, Governors Island, New York, 8 August 1946, and which had examined accused. The Board found that accused was not incapacitated for active duty, that he was mentally responsible for his actions on 14 March 1946, but that on such occasion his ability to adhere to the right was considerably impaired (R. 164, Def. Ex. 1).

The accused, having been informed of his rights as a witness, elected to testify under oath in his own behalf. He stated that he was born in Flint, Michigan, was 31 years of age, and graduated from the U.S. Military Academy at West Point, New York, in 1938. He departed for the European Theater in September 1944 and served as a Battalion S-3 until June 1945 when he became commanding officer of a Field Artillery battalion. He returned to the United States in February 1946 and resided with his wife in Summit, New Jersey. He boarded the "Trailblazer" with his wife at Newark, New Jersey, on 14 March 1946, and sometime between "11:00 and 12:00 o'clock" he went to the washroom to read a book, had a few drinks with a merchant marine, but accused stated he did not remember what occurred after he had

the drinks (R. 167-174). On cross-examination he admitted that when he got on the train at Newark he was armed with a 7.65 mm automatic pistol with shells in the magazine. He had two other guns in his luggage and was destined for a small town in Colorado where he could do some shooting. Accused asserted that he carried the pistol on his person because he had forgotten to pack it with his luggage and he did not recall ever seeing Mr. Russansky on the train. In response to numerous questions concerning details of the shooting accused replied,"I do not recall" (R. 174,204).

5. The specification alleges that at the time and place accused wrongfully shot Mr. Russansky in the chest. The court, in its findings added "and back." The added words are merely descriptive of the wound received by the victim and the findings do not change the nature or identity of the offense charged in the specification. It is obvious that the added words relate to the same shooting originally charged and the evidence clearly shows that the bullet entered Russansky's back and lodged in or came out his right chest. No prejudicial error resulted, therefore, from the addition of the quoted words (MCM, 1928, par. 78c, pp 64-65; CM 246044, Copeland, 2 BR (ETO) 291,295; CM 193292, Olles, 2 BR 79,81).

The evidence shows beyond peradventure of a doubt that it was the accused who shot Mr. Russansky on the night in question. If accused was mentally responsible for his acts, there can be no doubt that the shooting was "wrongful," viz, without justification in law. The psychiatric testimony goes no further than to state that on the night of the shooting accused's ability to adhere to the right was impaired in some degree. This would not appear to be an unusual condition resulting from excessive intoxication, however,

> "It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.
>
> "Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.
>
> "In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence." (MCM, 1928, par. 126a, p. 136; see also CM 265441, York, 43 BR 19,27.)

It has been uniformly held that an impaired ability to adhere to the right, a partial irresponsibility, is no defense to crime. (CM 289355, Smith, 21 BR (ETO) 25,33; CM 243048, Hall, 1 BR (A-P) 213; CM 246548, Maxwell, 2 BR (ETO) 251, 273; CM 274676, Ellis, 47 BR 271,285; CM 319168, Poe.

6. War Department records show that accused is 32 years of age and married. On 14 June 1938 and upon completion of his studies as a cadet at West Point he was appointed a second lieutenant, Field Artillery, Regular Army. His W.D.A.G.O. Form 66-4 shows that accused has a total of 22 entries under paragraph 15, "Record of Service." Seven entries show no rating, two ratings are "Superior," nine, "Excellent," and four, "Very satisfactory." On 21 October 1943 he was reprimanded under the provisions of Article of War 104 for absence without leave and being drunk in uniform in a public place.

The January 1944 edition of the Official Army Register shows his service as follows:

> "1 lt. A.U.S. 9 Sept. 40; accepted 3 Oct.40; capt. A.U.S. 1 Feb. 42; maj. A.U.S. 3 Dec. 42 - Cadet M.A. 2 July 34; 2 lt. of F.A. 14 June 38; 1 lt. 14 June 41."

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the 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 R. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

_____, Judge Advocate

JAGK - CM 320805 1st Ind

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

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 John B. Hamilton (O-21197), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of wrongfully shooting Aaron Russansky in the chest and back with a pistol. He was sentenced to be dismissed and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial pursuant to 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.

4. On the evening of 14 March 1946 the accused and his wife boarded the Pennsylvania Railroad train "Trailblazer" at Newark, New Jersey, travelling westward. The accused was armed with a 7.65 mm German-made pistol. They procured seats in a coach occupied by Mr. Aaron Russansky of Chicago, Illinois, and a merchant seaman named Alfred Quirk of Lee Hall, Virginia. The train had a club car where drinks were served and accused made several trips to this car, drinking steadily until about midnight when the car was closed. He had become acquainted with Mr. Quirk and after the club car was closed Quirk procured a bottle of whiskey from his luggage and went to the men's wash room where accused was sitting reading a book. The parties drank considerable liquor. Accused became boisterous and offensive. Quirk could not calm him. Mr. Russansky entered the room and noticed the accused with a drawn pistol making threats toward Quirk. Russansky turned to leave the room and as he left accused fired the pistol striking Russansky in the right side of his back, the projectile coming out near the nipple of his right breast. Mr. Russansky was removed from the train and hospitalized at Johnstown, Pennsylvania. The evidence discloses no altercation between accused and Mr. Russansky prior to the shooting and it does not appear that the parties were acquainted with each other.

Immediately after the shooting accused asserted that Mr. Quirk had fired the pistol. At the trial accused contended that he could not recall any of the details of the shooting, but he admitted being armed with a pistol and drinking liquor in the men's room with Mr. Quirk. Medical testimony adduced at the trial indicates that accused was mentally responsible for his acts in question but that, due to excessive intoxication, his ability to adhere

to the right was impaired. There was received in evidence a copy of an Army Retirement Board proceedings relating to accused which was convened pursuant to paragraph 4, Special Orders No. 177, Headquarters First Army, Governors Island, New York, 2 August 1946. The Board found that accused was not incapacitated for active duty, which finding was concurred in by the War Department.

5. On 19 June 1946 and under the provisions of paragraph 2, Army Regulation 605-275, 9 November 1944, accused submitted his resignation from the Regular Army stating that he disliked Army life, was dissatisfied with the Army as a career and that his dissatisfaction had resulted in severe emotional conflicts which greatly impaired his efficiency as an officer. No action appears to have been taken on accused's tender of resignation.

6. I recommend that the sentence be confirmed but that the forfeitures be remitted and that as thus modified the sentence be carried into execution.

7. 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. 274, 22 Aug. 1947).

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

JAGH - CM 320884

10 JUL 1947

UNITED STATES	)	SEVENTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 953, 12 and 14 November
Captain DWIGHT R. SMITH	)	1946. Dismissal, total for-
(0-429686), Air Corps	)	feitures and confinement at
	)	hard labor for two (2) 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Captain Dwight R. Smith, Headquarters and Headquarters Squadron, Hawaiian Air Materiel Area (Prov), did, at APO 953, on or about 1 August 1946, knowingly and willfully apply to his own use by causing to be delivered for packaging for transportation to himself at a private address in the United States one (1) General Electric eight-cubic foot Refrigerator, value of more than $100.00; eight (8) mattresses, value of more than $50.00; and three (3) blankets, value of more than $20.00; of a total value of more than $170.00; all property of the United States furnished for the military service thereof.

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

Specification 1: In that Captain Dwight R. Smith, Headquarters and Headquarters Squadron, Hawaiian Air Materiel Area (Prov), did, at APO 953, on or about 1 August 1946 with intent to deceive Mr. George Paiva, an employee of the United States government, execute the customary blank Certificate of Personal Property Shipped, W.D., A.G.O. Form No. 55-109, that "I CERTIFY that the following shipments, (including present shipment) have been or are intended to be made by me at public expense on _____ change of station, and that said goods are household or personal effects or automobile* belonging to me; that they were acquired prior to the effective date of my last order for change of station; that they are not intended, directly or indirectly, for any other person or persons, or for sale; that packages numbered ___ to ___, both inclusive, contain professional books and papers, the total weight of which are stated below; and that they are necessary in the performance of my official duties.

/s/ Dwight R. Smith
Capt., AC

which statement was made by the said Captain Dwight R. Smith as true when he did not know it to be true in that the property delivered for packaging was property other than personal and household effects of the said Captain Dwight R. Smith.

Specification 2: (Stricken by court on motion of defense).

CHARGE III: Violation of the 56th Article of War.

Specification: In that Captain Dwight R. Smith, Headquarters and Headquarters Squadron, Hawaiian Air Materiel Area (Prov), did, at APO 953, on or about 1, 2, 3 and 5 July 1946, wrongfully take from Staff Sergeant Warren C. Mathiasen the total sum of $40.00 as a consideration to him, the said Captain Dwight R. Smith, for knowingly permitting the mustering in roll or morning report of the then Hawaiian Air Depot, APO 953, for on or about 1, 2, 3 and 5 July 1946, to falsely show as present for duty Staff Sergeant Warren C. Mathiasen, who as he, the said Captain Dwight R. Smith, well knew was not present.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years.

The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of knowingly and willfully applying to his own use at the time and place alleged and in the manner alleged one (1) General Electric eight-cubic foot refrigerator, value of more than $100.00; seven (7) mattresses, value of more than $44.00; and three (3) blankets, value of more than $20.00, of a total value of more than $164.00, of ownership as alleged, approved the finding of guilty of the Specification of Charge III, except the words "the then Hawaiian Air Depot," substituting therefor the words "543rd Base Headquarters and Air Base Squadron," 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:

During the month of July, 1946 the accused was the Ground Safety Officer of the 543d Base Headquarters and Air Base Squadron, stationed at Hickam Field, T. H. (R 38-39; Pros Ex 3).

On or about 1 August 1946 the accused was preparing to return to the United States (R 8). At about that time he visited Captain Edwin M. Franklin, Officer in Charge of the Grounds and Service Branch, Utilities Division, Hawaiian Air Depot, to request that arrangements be made to crate and ship his household effects (R 8). The accused specifically mentioned that he had a refrigerator which he wanted crated (R 9). He also specifically mentioned mattresses and blankets among other general household articles (R 9). The accused stated to Captain Franklin that the mattresses had been procured from Navy Salvage and that, although they were similar to Army issue mattresses, they were not Army mattresses (R 9). Captain Franklin informed the accused that he would have to produce proper certificates that the mattresses were not Army mattresses (R 9). The accused had not produced these certificates up to the time that Captain Franklin was transferred out of the section (R 9).

On or about 1 August 1946, the accused requested Mr. George M. Paiva, Foreman of the Packing and Crating Unit, Hawaiian Air Depot, to ship the accused's effects for him (R 10-11). In accordance with the established procedure of the office (R 10-11, 14), upon receipt of four copies of the accused's orders, Mr. Paiva had the accused accomplish in quadruplicate the Certificate of Personal Property Shipped, WD AGO Form No. 55-109 (R 10-11; Pros Ex 1). These were signed in Mr. Paiva's presence by the accused in blank (R 11; Pros Ex 1).

The certificate executed by the accused in blank stated:

"CERTIFICATE OF PERSONAL PROPERTY SHIPPED

"I CERTIFY that the following shipments (including present shipment) have been or are intended to be made by me at public expense on _____
(Permanent or temporary)
change of station, and that said goods are household or personal effects or automobile* belonging to me; that they were acquired prior to the effective date of my last order for change of station; that they are not intended, directly or indirectly, for any other person or persons, or for sale; that packages numbered _____ to _____, both inclusive, contain professional books and papers, the total weights of which are stated below; and that they are necessary in the performance of my offical duties (see par. 14 AR 55-160 regarding limitation on movement on and after 1 Sept. 1942).

"Last order for change of station _____, 19 ___, relieves me from duty at _____, on (date of relief) _____ and assigns me to duty at _____ per certified copy attached.

* * *

"If the shipment of my personal property on this change of station, whether it be shipped now or later, is in the aggregate in excess of the present prescribed allowance therefor, and/or includes an automobile,* and/or is made upon my written request in any way so as to involve additional expense, I hereby agree, as a condition precedent to such shipment, that, upon receipt of a statement showing the excess cost as determined by the finance officer paying the carrier's transportation account, I will either remit an amount sufficient to cover such cost, or permit the application of so much of my pay as may be necessary to cover such cost. It is understood that this agreement will not prejudice my right of appeal to the Comptroller General and the courts for adjudication after such payment or deduction has been made in case I feel that the amount thereof has not been properly determined.

_____, 19 ___ s/ Dwight R. Smith

Capt. AC.
(Title on pay roll)"

At the same time, the accused accomplished Base Engineer Form No. 24, dated 1 August 1946 (R 11; Pros Exs 2, 3). This form was completed in the accused's handwriting and read as follows:

"SHIP TO: Name: Capt Dwight R. Smith

Address: 1324 S. Abe

San Angelo Texas

SHIPPER: Name: Capt Dwight R. Smith

Capt (Rank) O-429686 (Serial No.)

Organization: 543 AAFBU

Phone No.: 13158

301-A Signer

SHIPPING CONTENTS: Aug 1 1946

Household goods

1 - Refrigerator" (R 11; Pros Exs 2, 3).

Arrangements were made between Mr. Paiva and the accused to pick up the accused's effects from his quarters (R 11-12). On the first or second day following completion of the necessary forms by the accused, Mr. Paiva and men of his unit went to accused's quarters where the accused pointed out the furniture which he desired shipped (R 12). At that time the accused pointed to a refrigerator which he said was his refrigerator, and which he desired shipped (R 12-13; Pros Ex 5A-C). In accordance with accused's instructions, Mr. Paiva and men of his unit moved the refrigerator from the accused's quarters to the packing and crating unit (R 12-13; Pros Ex 5A-C). The accused helped Mr. Paiva and his men pull the refrigerator out of his quarters and put it on the trailer (R 12-13; Pros Ex 5A-C). The refrigerator was then taken to the packing and crating warehouse (R 12-13; Pros Ex 5A-C). The refrigerator taken from the accused's quarters bore the Engineer number R-390 (R 12-13; Pros Ex 5C), and the serial number 0259688 (R 12-13; 19, 24-25, 27; Pros Ex 5B).

According to Hawaiian Air Depot property records, a General Electric refrigerator of the same size and description as the refrigerator which accused sought to have shipped as his own and bearing the same serial

number was requisitioned by the Quartermaster Corps for installation in field and company officers' quarters at Hickam Field, APO 953 (R 24; Pros Ex 7). This refrigerator was received on 13 May 1940 (R 24; Pros Ex 7) and was initially installed at 104 A Beard Avenue, Hickam Field (R 27; Pros Ex 6). Base Engineer No. R-390 was etched on the refrigerator (R 25, 27). While there were no records to show that a refrigerator bearing Base Engineer No. R-390 and Serial No. 0259688 had been removed from 104 A Beard Avenue to the accused's quarters, it was the practice at Hickam Field to move refrigerators about from one set of quarters to another without maintaining records of the moves (R 28).

When the refrigerator arrived at the packing and crating warehouse for crating prior to shipment, the Base Engineer No. and the Serial No. were checked with base property records (R 19, 33). The refrigerator was identified as government property (R 34)and action to arrange for the shipment was stopped before any packing or crating had been accomplished and before the refrigerator could be removed from Hickam Field (R 14).

The accused was questioned by Captain Thomas F. Halligan, then Assistant Property Officer of the Base Quartermaster (R 30, 34). The accused expressed surprise that the refrigerator bore numbers indicating it as government property (R 34). He stated that he had believed the refrigerator to be his own and that some one might have exchanged refrigerators with him while he was at Hilo on detached service (R 34). When asked by Captain Halligan if he had a bill of sale or other document for his refrigerator, the accused replied that he did, but these were in his 201 file which he had sent on ahead of him to his home (R 34). The accused stated that a similar refrigerator had been given to him by his father-in-law as a present (R 34).

"Quite some time" before the accused departed for the United States, he told Master Sergeant Robert B. Gilmore, who was then a Ground Safety Technician working under his supervision in the Ground Safety Office (R 38-39), that he, the accused, had gone to the Base Quartermaster to check on the serial number of the larger of two refrigerators which were in his quarters and that he had been informed that there was no record of this refrigerator (R 39-41). The accused had told Sergeant Gilmore that he, the accused, had inspected the refrigerator for an Army serial number and could not find one (R 40-41). The accused told Sergeant Gilmore that he intended to take the refrigerator with him to the States (R 41).

The value of the government refrigerator which the accused sought to have crated and shipped as his own was stipulated to be more than $100.00 (R 30; Pros Ex 9).

Among the household effects taken from accused's quarters to the packing and crating warehouse for processing prior to shipment were eight mattresses and three blankets which accused represented as his own (R 9, 13-18, 27). With the exception of one mattress, all these

items were identified as military property of the United States (R 17-18, 29, 31-34, 38). Seven of the mattresses were Quartermaster issue and had been issued from the San Antonio Quartermaster Depot (R 31-32; Pros Ex 10A-H, incl). The blankets were identified as United States Army blankets issued by the Philadelphia Quartermaster Depot (R 32-33; Pros Ex 11A-C, incl).

The court took judicial notice of paragraph 8e, AR 35-6520, which provides that when an officer or other individual is relieved from a duty in respect of which he holds property on memorandum receipt, he will without delay turn in the property or transfer it to an authorized successor, and effect settlement of his responsibility. When an officer or other individual is detached from duty at a post, camp, or station for duty in the field, for permanent change of station, or for separation from the service by resignation or discharge, he will similarly effect a settlement before leaving the station (R 36-37).

The court also took judicial notice of pages 4 and 8 of Army Service Forces Catalogue QM 5-1-E which lists the price of mattresses as $6.30 each and blankets as $8.04 each (R 36).

Prior to 1 July 1946, Staff Sergeant Warren C. Mathiasen a member of the 543d Base Headquarters and Air Base Squadron (Pros Ex 12) who was then on duty in the Hickam Field Gound Safety Office under the immediate supervision of the accused (R 41, 50, 64), entered into an arrangement with the accused. Under the terms of this arrangement the accused agreed to overlook Mathiasen's absences from duty in consideration of a payment of $10.00 for each day's absence (R 50-51). Payments were to be made to accused's wife (R 54). At the same time the accused also agreed to rent his car to Mathiasen for $10.00 for each time the car was used by Mathiasen (R 51). Pursuant to the existing understanding between them, Mathiasen absented himself from his duties on 1, 2, 3, and 5 July 1946 (R 50-53) and delivered $60.00 or $70.00 to accused's wife, covering his absences for four days and rental for accused's car (R 50-51, 54, 56).

During the period in question, Mathiasen was neither on pass nor on furlough (R 50). The morning report of 543d Headquarters and Air Base Squadron for 1, 2, 3, and 5 July 1946 shows no remarks pertaining to Sergeant Mathiasen (R 58-59; Pros Ex 12).

Enlisted men of the first three grades were not authorized to be absent longer than twenty-four hours without a written pass signed by the squadron commander (R 58). It was the duty of the accused, as a department head, to report to the squadron commander the failure of any soldier assigned to his department to appear for duty (R 58).

The accused told Sergeant Mathiasen that, inasmuch as Captain Handley, the accused's immediate superior, might question the accused and Sergeant Mathiasen about absence during the week the accused thought

it best that Mathiasen prepare a report purporting to represent a Ground Safety inspection of Hickam installations (R 53) covering the period of his absence. Sergeant Mathiasen did prepare such a report in which he stated that he had inspected various places on the field (R 53). In fact he had made no such inspection (R 53). The accused had seen this report after Sergeant Mathiasen turned it in (R 53).

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

The accused, after being duly warned of his rights by the defense counsel and the law member, elected to submit an unsworn statement through counsel which is summarized below (R 67-69):

In November 1945, the accused returned to his home in San Angelo, Texas, from Hickam Field on emergency leave. While there he informed his wife of his pending application for housing on the field and of the refrigerator shortage in the homes. They decided to have the accused's father-in-law ship their own refrigerator to them commercially. Commercial means were selected inasmuch as the refrigerator had been damaged by the Quartermaster on a previous shipment. On 23 March 1946, the accused's wife arrived at Hickam Field. Shortly thereafter, the accused and his wife received a telegram from his father-in-law stating that the refrigerator had been shipped. About six weeks after the accused's wife arrived, their furniture arrived and shortly thereafter, their refrigerator arrived. The accused was absent on another island when the refrigerator was delivered to his quarters at Hickam Field. His wife later informed him that she had had two enlisted men unpack the refrigerator and place it in the kitchen.

During January, 1946 while living with Lieutenant Breedlove, the accused and Breedlove built two punees for which they needed mattresses. The supply officer had none available, but, upon information supplied by the sergeant on duty at the time at that office, the accused and Lieutenant Breedlove went to the Pearl Harbor Salvage Yard (Navy) to obtain the mattresses. The officer in charge at the yard told them to take what mattresses they wanted and sign for them at the office. They took about twenty-five or thirty mattresses and about forty pillows. The accused asked the officer what he should do with the articles when he had no further use for them. The accused was informed that, since he had acquired them from a salvage yard and the government had no further use for them, the accused could keep the mattresses as his own personal property and the government could not, at a later date, claim them back. The accused had informed Major Clodfelter, Quartermaster Officer, that he had acquired about eight mattresses from the salvage yard which he desired to ship home. Major Clodfelter told the accused that he could do so if he attached a certificate to that effect. The accused did attach such a certificate.

The accused stated that he had acquired the three blankets in question from the 30th Observation Squadron in Atlanta, Georgia. Upon being transferred from that organization, the accused asked the supply officer whether he had to turn in the blankets or whether in the alternative he could take them with him. He was informed by the supply officer that he could take the blankets with him as the squadron had plenty of them. He had kept the blankets and, when supply officers of organizations to which he had been subsequently assigned had informed him that they did not want the blankets, he had brought them to Hickam Field.

Upon receipt of his orders transferring him from Hickam Field, the accused took copies of his orders to the packing and crating unit and asked that his furniture and refrigerator be picked up for shipment to his home. He signed all the necessary papers and later assisted Mr. Paiva, foreman of the unit, to move his household goods out of his residence. The afternoon before the accused was to leave the field, he was called by Captain Halligan and informed that the refrigerator was a government refrigerator and could not be cleared. The accused asked where his own refrigerator was but no one was able to provide the answer. He thereupon told Mr. Paiva not to crate and ship the government refrigerator. He also told the Quartermaster that after he arrived home he would send the papers for his own refrigerator and asked that the Quartermaster forward his refrigerator to him when found. The accused had not attempted to deceive Mr. Paiva in any way by signing the false statement. To the best of his knowledge and belief, he had no government property in his possession which had not been properly cleared.

In June, 1946, the accused and his wife decided to sell their car before departing for the mainland. Sergeant Mathiasen, of the accused's office, wanted to buy it. It was agreed that the purchase price would be $1,000.00, and that, in the intervening time before the actual sale, the accused would rent the car to Sergeant Mathiasen for $20.00 each time Sergeant Mathiasen used the car. The car was to be returned by eight o'clock in the morning inasmuch as the accused's wife used it during the day. The accused's wife did not like the idea of renting the car. Accordingly, the price had been made purposely high in order to discourage the sergeant, but he, nevertheless, agreed to the accused's terms.

During the first week of July, the accused assigned Sergeant Mathiasen to inspect the post for traffic conditions, cleanliness, and safety conditions. It was the accused's policy not to have the enlisted man assigned to this job report in each morning as the accused assumed, in the absence of other arrangements, that the enlisted man was engaged in the performance of his duties. To the best of his knowledge and belief Sergeant Mathiasen was actually performing his assigned job. The sergeant had turned in an inspection report and the accused believed that the job would take an inspector a week to perform. During this week Sergeant Mathiasen rented the car from the accused about six or seven times, paying the accused $20.00 for each use.

Mr. Alvin D. Bugbee, Foreman of the Refrigerator Unit at the Hawaiian Air Materiel Area, testified that when the accused was informed concerning government ownership of the refrigerator which he sought to have shipped as his own, the accused said that it obviously was a mistake. He also said that since it was a government refrigerator, it should not be shipped as his own. He further stated that he would locate the papers on his own refrigerator, and asked that it be shipped in the event that it was found (R 64).

It was stipulated (R 64; Def Ex A) that the wife of the accused would testify that the accused owned a General Electric refrigerator, seven-cubic foot size, that the accused was home in the month of November, 1945 and at that time asked her father, Mr. Hollis N. Nutt of San Angelo, Texas, to ship their refrigerator to them in Hawaii, and that this refrigerator arrived later in Hawaii and was uncrated by two enlisted men. The accused's wife had never told Sergeant Gilmore that she knew Sergeant Mathiasen was paying her husband to show Sergeant Mathiasen present for duty when he was not present. The accused's wife was informed by her husband that he was renting their car to Sergeant Mathiasen for $20.00 for each use.

It was stipulated (R 65; Def Ex B) that Lieutenant James Breedlove would testify that he and the accused went to the Pearl Harbor Navy Salvage Yard in January, 1946 and obtained some mattresses and pillows for use in their quarters on Hickam Field. They signed for these articles and were informed by the officer in charge that the Navy had no further interest in the articles and that the accused and Lieutenant Breedlove might take them for their own personal use.

Mr. P. M. Elliott, President of the Honolulu U-Drive Association, testified that a uniform rate of $10.00 per 12-hour period and $20.00 per 24-hour period was charged locally for the rental of cars (R 66). Deposits ranged from $50.00 to $100.00, and no delivery or pickup service was provided by any member of the association, which included eighteen of the twenty-one operators in the county of Honolulu (R 66).

5. In rebuttal the prosecution introduced into evidence District Order No. 83-45, Office of Commandant, 14th Naval District, Pearl Harbor, Territory of Hawaii, dated 2 November 1945, Subject: "Government Property - Unauthorized Use of (Scrap and Salvage)", which provided that "No Government material of any kind may be drawn from any source or area, including the Makalapa Dump, Sale 21 area, or elsewhere in the Fourteenth Naval District, unless such material is to be used for authorized governmental purposes. Under no circumstances may any individual withdraw or appropriate any such material for personal use or private gain * * * regardless of age, condition or location." This order further provided as follows: "Attention is invited to the fact that diversion of material to private use is a serious offense punishable by court-martial in the case of military personnel or through the civil courts in the case of civilian personnel" (R 69-70; Pros Exs 13, 14).

It was stipulated that the records of all commercial shippers operating between the mainland and the Territory of Hawaii indicated that no refrigerator had been transported from the United States to Oahu consigned to the accused (R 70-74; Pros Exs 15-23).

6. In surrebuttal the defense called Coxswain Edwin Playmale, who testified that he was in charge of the Makalapa Storage Dump during January, 1946, and that during that period mattresses were issued at the dump to any officer who wished to draw them for official use (R 74-76). He admitted, however, that prominent signs were displayed about the Makalapa Storage Dump stating that material therein would be drawn for official purposes only and would not be diverted to personal or private use (R 79-80).

7. Under the specification of Charge I the accused stands convicted of knowingly and willfully applying "to his own use by causing to be delivered for packaging for transportation to himself at a private address in the United States one (1) General Electric eight-cubic foot refrigerator, value of more than $100.00; seven (7) mattresses, value of more than $44.00; and three blankets, value of more than $20.00, of a total value of more than $164; all property of the United States furnished for the military service thereof," in violation of Article of War 94.

Misapplication means the devotion to an unauthorized purpose for the party's own use or benefit.

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 that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was wrongfully or knowingly done, as alleged; and (d) the value of the property, as alleged" (MCM 1928, par 150i, p 185).

Uncontroverted evidence established that a General Electric refrigerator of the same description and bearing the same serial number and the same Base Engineer number as the refrigerator which the accused attempted to transport to his home as his own was requisitioned by the Base Quartermaster at Hickam Field for use as government property in field and company officers' quarters on Hickam Field. There is uncontroverted evidence that this refrigerator was received on 13 May 1940 at Hickam Field and was installed at 104 A Beard Avenue. Although there was no written record accounting for its presence in the accused's quarters, competent testimony indicated that frequent unrecorded transfers of government refrigerators from one set of quarters to another on Hickam Field were customary. There can be no reasonable doubt that the refrigerator which the accused caused to be removed from

his quarters for shipment to the United States was the same refrigerator which was requisitioned and installed in officers' quarters on Hickam Field as government property. The accused's guilty knowledge and intent was established by the testimony of Sergeant Gilmore, who testified that the accused had outlined to him his plan to remove the government refrigerator as his own. Even without this direct evidence of the accused's guilty knowledge and intent, the court could properly infer such knowledge and intent from the fact that the accused attempted to remove from his quarters as his own a refrigerator which was owned by the government. The court could properly disregard accused's explanation of honest mistake as unworthy of belief. No documentary evidence of any kind was submitted by the accused to substantiate his claim of ownership of a similar refrigerator and it was stipulated that no record of any shipment of such a refrigerator from the mainland to the accused in Hawaii was found in the files of any commercial shippers serving the island of Oahu. Accused did not produce a copy of the telegram purportedly sent to him by his father-in-law informing him of the shipment. Nor was the testimony of either of the two enlisted men who allegedly uncrated the refrigerator and placed it in the kitchen of accused's quarters offered by the accused.

The three blankets for the misapplication of which the accused was found guilty were adequately identified as government property and the accused was unable to produce satisfactory evidence of legal transfer of ownership to himself. The court could properly infer guilty knowledge and intent on the part of the accused. Accused's assertion of an honest though mistaken belief of right could have been disregarded by the court as unworthy of belief. Accused's unsworn statement was not evidence except for the admissions contained therein and was entitled to only such weight and consideration as was deemed warranted by the court (MCM 1928, par 76). Moreover, knowledge not only of the law but of Army Regulations is presumed; ignorance is no excuse (MCM 1928, par 126a; AR 1-15, par 1a).

Values of all items of government property misapplied by the accused were properly established by stipulations and by suitable Army price lists of which the court took judicial notice.

In our opinion the evidence clearly establishes that the accused misapplied the refrigerator and blankets described in the specification, all of which were military property of the United States, in the manner alleged, and that such property was of the value alleged.

Similarly the record shows clearly that the accused misapplied the mattresses described and that the mattresses were the property of the United States and of the value alleged.

There remains for consideration whether the evidence sufficiently establishes that the seven mattresses involved were military property of the United States.

It was shown that the seven mattresses were Army issue and that they had been originally issued by the San Antonio Quartermaster Depot. Nevertheless, the evidence for the defense that the mattresses had actually been obtained by the accused from a Naval installation remained uncontradicted.

It is not inconceivable that Army mattresses would be procured by the Navy. Presumably when property originally procured for the Army is transferred to the Navy it ceases to be military property within the meaning of Article of War 94.

Conversely when such property is returned to the Army it again becomes military property.

The evidence showed that the accused obtained the mattresses from the Makalapa Navy Salvage Depot. It was shown that salvage materials from this dump were issued to military personnel for official purposes only. Existing Naval directives as well as signs prominently displayed at the salvage dump, plainly indicated that property obtained from the dump was to be used for official purposes and that conversion to personal or private use was unauthorized.

Since the only authorized issue of mattresses from the Makalapa Salvage Dump to Army personnel was for official purposes, it follows that any property drawn therefrom by the accused as an Army officer became property furnished for the military service.

Accordingly we are of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification.

8. In Specification 1 of Charge II it is alleged that the accused, with intent to deceive Mr. George Paiva, a government employee, executed in blank a Certificate of Personal Property Shipped, WD AGO Form No. 55-109 wherein it is stated in relevant part: "I CERTIFY that the following shipments * * * are intended by me to be made at public expense * * * and that the said goods are household or personal effects * * * belonging to me," which statement was made by the accused as true when he did not know it to be true in that the property delivered for packing was property other than personal and household effects of the accused.

In order to support a conviction for the offense alleged the record must show that it was both alleged and proved that the accused: (a) made a certain official statement, (b) that the statement was false, (c) that the accused certified the statement as true, when he did not know it to be true, and (d) that such false statement was made with intent to deceive the person to whom it was made (CM 263366, Campbell, 41 BR 58; CM 316750, Ortiz-Aponte; CM 318167, Green; CM 318705, Jackson).

The evidence pertinent to this specification shows that the accused requested Mr. Paiva, the foreman of the packing and crating unit to arrange for the shipment of his personal effects to the United States. In accordance with the established custom at the Hawaiian Air Depot the accused signed in blank four copies of WD AGO Form No. 55-109. Simultaneously he executed a mimeographed form known as Base Engineer Form No. 24 wherein it is stated that the household goods to be shipped are: "1 Refrigerator." A few days after these forms were executed Mr. Paiva and a crew of men arrived at accused's quarters for the purpose of picking up the furniture to be included in the shipment. The accused pointed out to the men miscellaneous pieces of furniture including the refrigerator, blankets, and mattresses discussed above. It was shown that the mentioned items were not the accused's personal property.

Since the form was executed in blank before the accused indicated to Mr. Paiva which items were to be shipped it is clear that the execution of the alleged form certificate, standing by itself, did not amount to a misrepresentation on the part of the accused. The actual misrepresentations made to deceive Mr. Paiva consisted of three separate acts:

a. The delivery to Mr. Paiva of government property for crating and shipment to the United States as the accused's personal property;

b. The execution of BE Form No. 24 wherein the refrigerator was listed as the accused's personal household goods; and

c. The execution of WD AGO Form No. 55-109 in blank.

Since only the last act listed above was alleged, and since the same act would have been performed even if the accused had intended to ship only his authorized personal and household effects, we are of the opinion that the alleged execution of a blank certificate standing by itself, in the circumstances of this case does not constitute the making of a false official statement and that the finding of guilty of the Specification of Charge II cannot be sustained. Had the specification alleged either the execution of BE Form No. 24 or the delivery of the goods in question to Mr. Paiva coupled with the execution of WD AGO Form No. 55-109, the result would have been different, for the evidence clearly shows a series of false official representations made with intent to deceive.

9. Under the Specification of Charge III the accused stands convicted of wrongfully taking from Staff Sergeant Warren C. Mathiasen the sum of $40 as a consideration for knowingly permitting the mustering in roll or morning report of the 543rd Base Headquarters and Air Base Squadron for 1, 2, 3, and 5 July 1946 to show as present for duty Staff Sergeant Warren C. Mathiasen who, as the accused well knew, was not present, in violation of Article of War 56.

In relevant part Article of War 56 provides:

"Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company or other organization, or on signing muster rolls, * * * shall be dismissed from the service and suffer such other punishment as a court-martial may direct."

Although there is no discussion of Article of War 56 in the 1928 Manual for Courts-Martial, the 1921 Manual contains a brief discussion, relevant parts of which are quoted below:

"ANALYSIS AND PROOF."

* * *

"The article defines a number of offenses which may be treated under the following heads:

"I. Making false muster.

"II. Signing, directing, or allowing the signing of false muster rolls.

"III. Taking money or other consideration on muster or signing muster rolls.

"IV. * * *"

The elements of proof of the offense alleged as stated in the 1921 Manual are:

"(a) That the accused officer made the muster of the organization or signed the muster rolls as alleged.

"(b) That he accepted money or other consideration as a compensation or reward for making the muster or signing the muster rolls.

"(c) That the taking of such money or other consideration was wrongful—that is, without legal excuse" (MCM 1921, Sec 407, pp 339-341).

In discussing the 6th Article of War of the Articles of War 1874 (which then denounced the offense alleged in the Specification) Winthrop stated:

"This article makes it an offense for an officer to accept or receive, directly or indirectly, a pecuniary or other compensation in connection with, and in relation to, the making of an official muster or the execution of a

muster roll. Samuel, in remarking, with respect to the Corresponding British Article, that 'the taking of the gratuity is the act prohibited and is of itself the sole offense' adds that if the same 'be received, no matter with what view on the part of the person receiving it, or what effect it may afterwards have on the muster or on the signing of the rolls, the offense will be complete'. O'Brien's comment is — 'The Article is explicit and makes no distinction whether the muster roll be true or false.'" (Winthrop's Military Law & Precedent, 2d Ed (1920 Reprint), p 554).

The evidence pertinent to the specification under consideration shows that the accused accepted a bribe from Sergeant Mathiasen for failing to report to the officer charged with the responsibility of making the pertinent morning report, that Sergeant Mathiasen was in fact absent without proper leave on the dates alleged.

The record of trial presents two questions with respect to this specification:

a. Is a morning report the equivalent of a muster roll within the meaning of Article of War 56?

b. If the first question is resolved in the affirmative it must be determined whether the accused accepted a consideration for making a muster or signing a muster roll.

The muster is almost unknown in the present-day Army. It involved an actual physical verification of the presence or absence of each man in the organization, and the muster roll consisted of a list of all of the men in the organization with the status of each.

Winthrop defines muster as follows:

"The proceedings of muster may be defined as the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of a command of persons or public animals" (Winthrop, op cit, p 552).

TM 20-205, Dictionary of the United States Army Terms defines muster roll as a "list of personnel of an organization in which the names and grades are given. It is made up at an assembly or roll call, and it lists the names and grades of the men present or accounted for."

Attached to an opinion of The Judge Advocate General dated 23 January 1913 there is a study recommending the abolition of the muster roll. Therein it was stated that the purposes of the muster roll are:

"1. To furnish a complete history of the organization for the period covered by the roll;

"2. To furnish a complete military record of every member of the organization for the period covered by the roll;

"3. To enable the War Department to furnish the Commissioner of Pensions data in connection with pension claims made by former soldiers.

"4. To enable the War Department to furnish the Auditor for the War Department information necessary to settle the accounts of certain soldiers.

"5. To enable the War Department to answer inquiries from friends, relatives and others regarding the whereabouts, physical condition, etc., of soldiers.

"6. To enable the recruiting branch of The Adjutant General's Office to determine the number of prospective vacancies in the various organizations" (File 72-201, Office of TJAG, 24 Jan 1913).

Notes attached to the same opinion include a study of the origin of the muster rolls:

"The Muster; Its Genesis.

"The practice of mustering troops periodically originated in the days when commanding officers used to draw upon requisition the money necessary to pay their troops. In those days looting was authorized, rape was one of a soldiers' perquisites, and the practice of making requisition for pay for fictitious persons was not an uncommon form of graft. Therefore to protect the sovereign, a disinterested officer, usually a superior, would be sent around to verify, to muster the men for whom pay had been requisitioned. The conditions that then made musters necessary ceased to exist years ago.

"In our army the troops are mustered for pay on the last day of each month, the muster being used when practicable, preceded by a minute and careful inspection. Muster rolls are made out bi-monthly, February 28th, April 30th, etc. In our navy the sailors are mustered quarterly, but the ceremony of muster has no connection with the payment of the sailors. A muster roll is made out for every muster. In the marine corps the marines are never mustered. However, muster rolls are made out monthly.

"In the British army the practice of mustering troops, which was a most formal and serious ceremony, was discontinued twenty years ago. The troops were mustered every six months. To-day in the British army the company commander's certificate that so many men are present is accepted.

"Under present conditions with us it is almost impossible to conceive of a case of false muster of a man. However, the present proposition to abolish the muster roll does not contemplate the abolition of the monthly ceremony of muster."

* * *

"The object of the Articles of War relating to muster * * * is, of course, to protect the Government against fraud in the payment of troops. The paper involved in this matter is, therefore, the pay roll, and not the bi-monthly muster roll on which troops are never paid. Originally troops were paid on the muster roll, then called muster and pay roll, and the muster roll was then as contemplated by the Articles of War the document by means of which the Government was protected against fraud in the payment of troops. But the present muster roll has been completely adverted from its original purpose, having been in this respect superseded by the present pay roll which is in reality a muster roll for pay * * *. The inspecting and mustering officer signs this certificate on the pay roll:

'I certify that I have this day mustered this organization, and find all present and absent are accounted for on this roll as required by Army Regulations.'" (File 72-201, op cit).

Although the statute required only that a muster roll include each soldier's name and the duration of and reasons for any absences since his last muster, the scope of the roll was gradually expanded until it included a brief history of the organization and of each individual in it, with information as to absences and changes since the last muster. It was the document upon which the War Department relied to make up the detailed, connected history of each organization and each soldier. In 1913, the muster roll was abolished and the "descriptive list," forerunner of the present service record, became the document in which was recorded all information pertaining to the individual soldier. For some time, however, the "annual muster and pay roll" was prepared on the 31st of December of each year. The only information appearing on this roll, aside from the entries required to constitute a pay roll, was a notation showing the duration of and reasons for absence of each man who was not present with the organization on the annual muster day(File 72-120, Office of TJAG, 24 Jan 1913, 7 Feb 1913).

In 1918, the preparation of muster rolls was discontinued, and there has been no muster of troops for pay since that time. When the 1920 revision of the Articles of War was under consideration, The Adjutant General recommended that Article of War 56 be omitted entirely from the revision. The Judge Advocate General pointed out, however, that the law still provided for the "muster-in" and "muster-out" of the militia and volunteer

forces, and that the requirement of a periodic muster could be restored at any time by an administrative order. Therefore, since the presence in the code of Article of War 56 did no harm, and although it was then considered as being inoperative, it was retained (300.2, JAGO, 1 May 1920).

In Army Regulations 345-400, 18 April 1947, the morning report is defined as "the daily history of the company or of the headquarters. It is a permanent, statistical and historical record, and its eventual custody rests with The Adjutant General. * * *"

> "All personnel of the Army will be accounted for daily in the morning report * * * Any change as described in Section III affecting the military status of personnel will be entered and described in the morning report."

In TM 20-205 (op cit) the morning report is defined as the:

> "daily history or log of a company or similar unit. It shows the daily strength and official status of the personnel of the command. It also contains a daily record of events, showing important changes of location or duty of the unit. The morning report is a permanent record as well as the basic report of a unit."

Viewed in the light of the historical background of the muster, it appears that the present-day morning report has many of the attributes of the muster roll in use prior to 1913. Both contain a record of events affecting the organization and the absences of the individuals in the unit. The morning report, however, lacks several elements which the muster roll included. These include the certificate of the mustering officer that he had, by actual physical count of the individuals listed, verified the accuracy of the roll, and the direct use of the document for pay purposes.

Accordingly we are of the opinion that the present-day morning report is not the equivalent of the muster roll within the meaning of Article of War 56.

Even if the morning report were construed to be the equivalent of a muster roll, the proof in the instant case is insufficient to support the offense alleged namely, the taking of money or other consideration for making a muster or signing the muster roll.

The morning reports of the 543rd Base Headquarters and Air Base Squadron, received in evidence as Prosecution Exhibit No. 12, were not

signed by the accused, nor was it his responsibility to prepare or sign them. The morning report, insofar as it concerned men of the accused's office, was made up from information furnished by the accused, but it does not appear that the accused made any formal written report. Rather, he reported informally to the commanding officer of the squadron any changes in the status of his subordinates. Since it does not appear that the accused made a muster, or signed any document that could be construed as the equivalent of a muster roll, a conviction of a violation of the 56th Article of War cannot stand.

It is clear, however, that the acceptance by an officer of a bribe, in connection with any of his official duties, constituted a violation of Article of War 96 (CM 224286, Hightower, 14 BR 97). The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of Charge III as finds the accused guilty of that specification except the words "mustering in roll or," in violation of Article of War 96.

10. The accused is 27 years of age, married, and a high school graduate with two years of evening study in a secretarial course at George Evening College. War Department records show that he enlisted as an Aviation Cadet on 15 March 1941 and was honorably discharged on 30 October 1941. He was commissioned a second lieutenant, Air Corps Reserve, on 31 October 1941 and entered active duty the same date as a rated pilot. He was promoted to first lieutenant, Army of the United States, on 17 September 1942 and to captain on 1 November 1944. He served as a pilot of observation aircraft in the European Theater of Operations from September, 1942 until August, 1943, when he was hospitalized for sinusitis and returned to the United States, where he served as a ferry pilot. In September, 1945, he was transferred to Hickam Field, Oahu, T.H., where he served as a co-pilot, as test pilot, and as Ground Safety Officer until July, 1946, when he was returned to the United States for relief from active duty. Prior to such relief, he was returned to Hawaii for this trial.

On 30 November 1944, the accused was punished under Article of War 104, by a reprimand and a forfeiture of $100.00 of his pay, for failure to report as ordered for a flight in connection with a ferrying mission. His efficiency index is 35.82, and includes ratings varying from satisfactory to 5.0 (excellent).

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the approved findings of guilty of Charge I and its Specification, legally insufficient

to support the findings of guilty of Specification 1 of Charge II and Charge II and legally sufficient to support only so much of the approved findings of guilty of the Specification of Charge III as finds the accused guilty of that Specification, except the words "mustering in roll or," in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. A sentence to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years is authorized upon a conviction of violations of Articles of War 94 and 96.

[illegible], Judge Advocate

Waldemar A. Solf, Judge Advocate

[illegible], Judge Advocate

(220)

JAGH - CM 320884 1st Ind

WD, JAGO, Washington 25, D. C. 14 Aug 47

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Dwight R. Smith (0-429686), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the misapplication of an electric refrigerator, eight mattresses, and three blankets, military property of the United States, of total value of more than $170, in violation of Article of War 94 (Chg I and Spec), of making a false certificate, in violation of Article of War 96 (Chg II, Spec 1), and of accepting a bribe for permitting a muster roll or morning report to falsely show an absent enlisted man as present, in violation of Article of War 56 (Chg III and Spec). He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involves the misapplication of one electric refrigerator, seven mattresses, and three blankets, military property of the United States, of a total value of more than $164.00, 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 approved findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of Specification 1 of Charge II and of Charge II, legally sufficient to support only so much of the finding of guilty of Charge III and its Specification as finds the accused guilty of that specification except the words "mustering in roll or," in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

On or about 1 August 1946, the accused was relieved from duty at Hickam Field, Oahu, T.H., where he was furnished government quarters, and ordered to a separation center in the United States for relief from active duty. He had his personal property removed from his quarters and transported to a warehouse for packing and shipment to the United States. With it, he removed an electric refrigerator, seven mattresses, and three blankets, all government property.

An enlisted man of the accused's office was absent on the 1st, 2d, 3d, and 5th of July 1946. He paid the accused $10 per day, in return for which sum the accused, by agreement, failed to report the absences.

I recommend that the findings of guilty of Charge II and the Specification thereof be disapproved, that only so much of the findings of guilty of Charge III and its Specification be approved as finds the accused guilty of that specification except the words "mustering in roll or," in violation of Article of War 96, that the sentence be confirmed, that a Branch United States Disciplinary Barracks be designated as the place of confinement and that the sentence be 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.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 277, 27 Aug 1947)

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

JAGK - CM 320957

20 MAY 1947

UNITED STATES	FIRST AIR FORCE
v.	Trial by G.C.M., convened at AAF Overseas Replacement Depot, Camp Kilmer, New Jersey, 11 March 1947. Dishonorable discharge (suspended), total forfeitures and confinement for one (1) year. Branch U.S. Disciplinary Barracks, Fort Knox, Kentucky.
Private PAUL D. BOONE (RA 44090981), attached unassigned Squadron K, 106th Army Air Forces Base Unit, AAF Overseas Replacement Depot, Camp Kilmer, New Jersey.	

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, having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence, has been examined by the Board of Review.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Paul D. Boone, Attached Unassigned Squadron K, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot, Camp Kilmer, New Jersey, did, while enroute from Army Air Forces Overseas Replacement Depot, Kearns, Utah to Army Air Forces Overseas Replacement Depot, then at Greensboro, North Carolina, on or about 28 March 1946 desert the service of the United States and did remain absent in desertion until he was apprehended by military police at Camden, South Carolina on or about 10 January 1947.

He pleaded not guilty to and was found guilty of the charge and specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for one and one-half years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, ordered the sentence as thus modified executed but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Fort Knox, Kentucky, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 14, Headquarters, First Air Force, Fort Slocum, New York, 21 March 1947.

3. On 3 March 1946, accused was relieved from attached unassigned Squad-

ron O, 467th Army Air Forces Base Unit, Kearns, Utah, and transferred to Army Air Forces Overseas Replacement Depot, Greensboro, North Carolina, to which station he was ordered to report for assignment and duty on 28 March 1946 (R. 6; Pros. Exs. 1,2). There was introduced in evidence, without objection by the defense, an extract copy of a morning report entry of Squadron M, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot (R. 6,7; Pros. Ex. 3). This entry read as follows:

"17 Feb 47
CORRECTION (21 Jun 46)
Boone Paul D * * * Pvt
Enroute to join to AWOL 0001 3 Mar 46
/s/ LLOYD N LEWIS CAPT AC
SHOULD BE
Boone Paul D * * * Pvt
Enroute to join to AWOL 0001 29 Mar 46
/s/ NICHOLAS J SCHOLZ
1st Lt AC"

The morning report containing this entry was submitted at Camp Kilmer, New Jersey. It was stipulated by and between the prosecution, defense and accused that accused was apprehended by military authorities at Camden, South Carolina, on or about 10 January 1947. Accused, having been advised of his rights as a witness, elected to remain silent (R. 7).

4. The record of trial is sufficient to support a conviction of desertion if the corrected morning report entry set out above is competent to establish that accused entered upon an absent without leave status on 29 March 1946. Since the court, in closed session, or the reviewing authority, may have taken judicial notice of the provisions of Movement Directive, Headquarters, Army Air Forces, 25 July 1946, as amended by Amendment No. 2, 29 August 1946, we will do so here. The mentioned directive authorized the movement for permanent change of station, "by 1 Oct 46," of the Army Air Forces Overseas Replacement Depot and the 106th Army Air Forces Base Unit (ORD) from Greensboro, North Carolina, to Camp Kilmer, New Jersey. It is thus apparent that on 28 March 1946 the Overseas Replacement Depot was still located at Greensboro, North Carolina, and that accused would have encountered no difficulty in complying with his orders.

There being a presumption of regularity in the conduct of governmental affairs, it is a fair assumption that the person who made the corrected morning report entry in question did not usurp official duties which had not legally devolved upon him and, therefore, that accused had properly been assigned to the reporting unit by its parent organization, the replacement depot to which accused had been ordered to report and which was located at the same station (CM 277800, Hill, 51 BR 221). The original entry of 21 June 1946, showing accused absent without leave on 3 March 1946, was obviously inaccurate, for accused was not due to report until 28 March 1946, but this entry was "corrected" on 17 February 1947 so as to show that his absence

without leave commenced on 28 March 1946. It will be noticed that this correction was not made until almost eleven months after the event reported upon, that the corrected entry was made at Camp Kilmer, New Jersey, whereas the failure to report and its resulting unauthorized absence allegedly occurred at Greensboro, North Carolina, and that the corrected entry and the original entry were signed by different persons.

It has been held that morning report entries need not, necessarily, be made contemporaneously with the happening of the events recorded and that, therefore, a delayed entry need not be denied evidentiary value solely because of the delay, it being presumed in the absence of a showing to the contrary that the person making the entry had personal knowledge of the facts recorded. (CM 302006, Sweezy, 26 BR (ETO) 277,279; CM 306331, Golej, 26 BR (ETO) 193, 195.) In the instant case, however, although there may exist a permissible inference that the corrected entry was the result of personal recollection of past events by the person who made it, the great length of time between accused's initial absence and the date of the entry in question, the change of station of the reporting unit from Greensboro to Camp Kilmer and the circumstance that the corrected entry and the original entry were signed by different persons, give rise to as strong an inference that the corrected entry was not based upon the personal knowledge of the person making it but, rather, that it was based upon information the reporting officer, having the duty to ascertain the facts, had obtained from other sources which did reflect first hand knowledge that accused had not been present with his assigned unit on 29 March 1946 or thereafter.

Paragraph 117a of the Manual for Courts-Martial, 1928, provides that,

> "An official statement in writing *** is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts or events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events ***. For instance, the originals of an enlistment paper *** and morning report are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge. ***"

The Manual, then, as well as the common law exception to the hearsay rule, requires only that an official record, to be admissible in evidence, be based on personal knowledge and that the public official making the entry have the duty to determine the facts recorded and to enter them in a public document. There is no requirement that the person by whom the entry is actually made have himself personal knowledge of the facts recorded, it being sufficient that he had the duty to ascertain such facts through the personal knowledge of his subordinates or informants. It is in this manner that his entry is based on personal knowledge, the observations of his agents in the matter

being legally attributable to him. A morning report occupies no unique status in the law of evidence, it being no more or less a public document than is a record of birth. The registrar of vital statistics who enters the fa t of John Doe's birth in his record book obviously has no personal knowledge of John Doe's birth. This entry, however, is based on personal knowledge, for the attending physician or parent from whom the registrar derives his information has been a witness to the event or its results. Furthermore, credence is given to recitals in public documents not only because of the existence of a duty to make them but also because, being on file in a public office and available to those having an interest in their contents, any errors they may contain are peculiarly susceptible of discovery and correction.

The exception to the hearsay rule with which we are here concerned has been well stated by Professor Wigmore:

> "It has already been seen that an essential qualification of a witness is that in general his knowledge or belief should be based on personal observation: and that testimony based on anything short of this is receivable only in a few classes of cases in which the source of knowledge is for practical purposes equivalent to personal observation. ---- Must the officer whose statement is admitted have personal knowledge of the thing recorded, certified or returned? In general, there can be no doubt that the principle applies here as elsewhere; but the principle itself need not be and is not judicially employed to the extent of unpractical strictness; and ----- it has its qualifications and exceptions, based on good sense and practical convenience. ---- Assuming still that the transaction is one in its nature required to be done by or before an officer, there are nevertheless many classes of public offices in which the work must be apportioned among subordinates. Clerks and treasurers, for example, have in populous districts one or more, perhaps scores, of assistants, to whom various parts of the work are assigned; the chief officer, on whom the general duty rests, retaining only a supervisory function, and rarely doing in person the acts of recording, returning or certifying. This is well understood and fully sanctioned as a proper and necessary mode of securing the performance of the official duty. The substantive law recognizes this; and it would be impossible and inconsistent in the law of evidence to refuse equal recognition. When such an officer's record or certificate is made, no one supposes that the chief officer himself has had personal knowledge of the data stated over his name. It cannot be doubted that such official statements are admissible. His duty makes him responsible for errors or defaults therein, no matter whose they are, and his duty should equally suffice to admit such statements. The question, it should be noted, is not whether a statement in the deputy's own name is admissible, but whether a statement coming in the name

of the officer himself is admissible if it appears that he made it, not on personal knowledge, but on the faith of a subordinate's information. Since the general nature of the official duty requires that the assistance of proper subordinates must be relied upon for its performance, it follows necessarily that the same assistance may be relied upon for the due recording of things done. On principle, therefore, there seems to be no objection; and practical necessity certainly demands the same result." (Wigmore on Evidence, 2d Ed., sec. 1635.)

(See also United States v. Meyer (113 F. (2d) 387,397) and Ches. & Del. Canal Co. v. United States (250 U.S. 123,128).)

The rule concerning the admissibility of public, that is, official records, as set forth in the Manual for Courts-Martial (quoted above) has been similarly interpreted. In reply to an official inquiry as to the admissibility of certain morning report entries, the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the Mediterranean Theater of Operations had occasion to say:

"Paragraph 117a of the Manual for Courts-Martial provides, among other things, that a 'permanent record compiled from mere notes or memoranda' is competent evidence of the facts and events recorded. Knowledge of the facts and events need not therefore be founded in the immediate visual sense of the recording officer. On the contrary, the test as to whether an entry is competent evidence lies in determining whether the entry is the prescribed, original and permanent record of the fact or event as ascertained or verified by the recording officer from sources recognized by competent military orders or custom as authentic for record purposes.

"The Manual for Courts-Martial excepts from the rule of competency those records, including morning reports, which are 'obviously not based on personal knowledge.' The exclusionary rule is not construed to prohibit the use of entries compiled from memoranda where the entries constitute the first prescribed permanent record of the facts or events and where competent military orders or custom contemplates the use of the memoranda, although the use of the memoranda may admit elements of hearsay in that the memoranda are prepared by persons other than those who make the permanent record. Military custom supports this view. It is well known that in the preparation and authentication of morning reports by company commanders it is not unusual for them to utilize data and memoranda furnished by other military personnel of the company for the purpose of determining the facts and events recorded." (1st Ind, AJAG to SJA, 1st Armd Div, 17 Feb 1944, Dig Op BOTJAG, MTO, p. 39.)

Although the corrected morning report entry here in question may well have been predicated upon information obtained by the reporting officer from sources other than his own personal knowledge, it does not follow that the information so relied upon was not itself based on personal knowledge. We must assume that the person who made the entry properly performed his duty and ascertained the truth of the facts recorded by him through dependable and officially recognized channels. We are of the opinion, therefore, and so hold, that the corrected morning report entry here in question was properly admitted in evidence and is sufficient to establish the inception, on 29 March 1946, of an absent without leave status on the part of accused.

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

Charles T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elliot E. Kropf, Judge Advocate

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

JAGH - CM 320998

[illegible] MAY 1947

U N I T E D S T A T E S	)	ARMY GROUND FORCES, PACIFIC
v.	)	Trial by G.C.M., convened at APO 958, 13 January and 1 February 1947. Dishonorable discharge and confinement for one and one-half (1½) years. The Post Stockade at APO 957
Private WARREN A. FARRAR (RA 36888660), 208th Military Police Company, APO 954	)	

HOLDING by 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 soldier named above.

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 Warren A. Farrar, now a member of the 208th Military Police Company, 602nd Military Police Battalion, APO 954, then a member of the Army Personnel Center, Oahu, APO 969, with intent to defraud the United States Government, did at the said Army Personnel Center, on or about 7 September 1946, unlawfully pretend to Captain F. W. Shimmel, Finance Department, a Finance Officer of the United States Army, that he, the said Warren A. Farrar, was a Technical Sergeant, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Captain F. W. Shimmel the sum of $70.00 in lawful currency of the United States.

Specification 2: In that Private Warren A. Farrar, now a member of the 208th Military Police Company, 602nd Military Police Battalion, APO 954, then a member of the Army Personnel Center, Oahu, APO 969, with intent to defraud the United States Government, did at the said Army Personnel Center, on or about 17 September 1946, unlawfully pretend to Captain F. W. Shimmel, Finance Department, a Finance Officer of the United States Army, that he, the said Warren A. Farrar, was a Technical Sergeant, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Captain F. W. Shimmel the sum of $60.00 in lawful currency of the United States.

Specification 3: In that Private Warren A. Farrar, now a member of the 208th Military Police Company, 602nd Military Police Battalion, APO 954, then a member of the Army Personnel Center, Oahu, APO 969, with intent to defraud the United States Government, did at the said Army Personnel Center, on or about 5 October 1946, unlawfully pretend to Captain F. W. Shimmel, Finance Department, a Finance Officer of the United States Army, that he, the said Warren A. Farrar, was a Technical Sergeant, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Captain F. W. Shimmel the sum of $70.00 in lawful currency of the United States.

Specification 4: In that Private Warren A. Farrar, now a member of the 208th Military Police Company, 602nd Military Police Battalion, APO 954, then a member of the Army Personnel Center, Oahu, APO 969, with intent to defraud the United States Government, did at the said Army Personnel Center, on or about 12 October 1946, unlawfully pretend to Captain F. W. Shimmel, Finance Department, a Finance Officer of the United States Army, that he, the said Warren A. Farrar, was a Technical Sergeant, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Captain F. W. Shimmel the sum of $50.00 in lawful currency of the United States.

Specification 5: In that Private Warren A. Farrar, 208th Military Police Company, 602nd Military Police Battalion, APO 954, did, at Fort Kamehameha, Oahu, Territory of Hawaii, from on or about 18 October 1946 to on or about 1 November 1946, wrongfully appear at Fort Kamehameha, Oahu, Territory of Hawaii, wearing Technical Sergeant's insignia.

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

Specification: In that Private Warren A. Farrar, 208th Military Police Company, 602nd Military Police Battalion, APO 954, having been duly placed in arrest at Fort Kamehameha, Oahu, Territory of Hawaii, on or about 1 November 1946, did, at Fort Kamehameha on or about 9 November 1946, break his said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to Charge I and its Specifications, guilty to Charge II and its Specification, and was found guilty of all Specifications and Charges. Evidence of three 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 for five years. The reviewing authority approved the sentence but reduced the period of confinement to one and one-half years and designated the Post Stockade at APO 957, or elsewhere as the Secretary of War may direct, as the place of confinement.

3. Specifications 1, 2, 3, and 4 of Charge I each aver that the accused, with intent to defraud the United States, unlawfully pretended to be a technical sergeant to Captain Shimmel, a finance officer, well knowing said pretense to be false, and that by means thereof did fraudulently obtain a certain sum of money from that finance officer. Specification 5 of Charge I avers that accused wrongfully wore the insignia of a technical sergeant.

With respect to the findings of guilty of Charge I and its Specifications, the principal question presented by the record is whether the accused, a former technical sergeant, had notice, actual or constructive, that he had been reduced to the grade of private by reason of the execution of the sentence by a special court-martial. The evidence pertinent to our consideration of this question is summarized as follows:

a. For the prosecution: The accused was shown to be in the military service (R 9, 19). On 12 June 1946 accused, then a technical sergeant, was tried and found guilty by a special court-martial convened at Camp Kilmer, New Jersey. The approved sentence imposed a forfeiture of pay in the amount of $76.00 per month for six months. A copy of Special Court-Martial Order No. 181, Headquarters Overseas Replacement Depot, Camp Kilmer, New Jersey, dated 13 June 1946, which promulgated this sentence, was received in evidence, without objection, as part of prosecution's Exhibit 5. On 1 August 1946, accused, still a technical sergeant, was again tried and found guilty by a special court-martial at Camp Kilmer, New Jersey. He was sentenced to be reduced to the grade of private, to be confined at hard labor for two months and to forfeit $49.00 of his pay per month for six months. This sentence was approved, but the confinement was suspended. A copy of Special Court-Martial Order No. 845, Headquarters Overseas Replacement Depot, Camp Kilmer, New Jersey, dated 1 August 1946, which promulgated this sentence, was also received in evidence, without objection, as part of prosecution's Exhibit 5 (R 8).

A page of the passenger list prepared and published at Camp Kilmer for the ship which transported accused from New York to Hawaii was received in evidence, without objection by defense, as prosecution's Exhibit 6 (R 8). Accused's name appeared on this list as follows:

"1 FARRAR WARREN A 36888660 PVT C 9 RA 745"

His grade as "Pvt" had been penciled out and "T/Sgt" had been written in, along with other pencil changes on the same page.

A written pre-trial statement of the accused was admitted in evidence as prosecution's Exhibit 7. This statement reads, in material part, as follows:

* * *

"On or about the 1st of August 1946, I was arranged before a Special Court Martial and convicted at Camp Kilmer, New Jersey, at which time I was informed by the Court that I was to be reduced to the grade of a private and to forfeit forty-nine dollars ($49.00) per month for a period of six months and to serve two months at hard labor. I was confined at the Post Stockade, however on or about the 9th of August 1946, I was released and entered on shipping orders to leave Camp Kilmer for the Hawaiian Islands. While in the Casual Company awaiting shipment and processing for shipment, I was paid for the month of July 1946. When I was paid, it was a Technical Sergeant. I asked the Commanding Officer, a Major Wise, if I was still a Technical Sergeant or if I had been reduced, and informed him on my Court-Martial. He (Major Wise) stated that he did not know but would check up and find out for me. The following day while boarding the ship, Major Wise informed me that he had checked my records, to that effect and that no Court-Martial had been recorded. Therefore he was of the opinion that I was still a Technical Sergeant. Having been informed of this by Major Wise, I put my Technical Sergeant chevrons on again and assumed the position of Sergeant Major aboard ship. From the 9th August 1946 until on or about the 1st November 1946 I wore Technical Sergeant chevrons and drew pay accordingly. I was informed by the Commanding Officer, 208th Military Police Company, APO 954, on or about the 11th of November 1946 that I was a private."

It was stipulated between the prosecution, defense and accused that during the months included between July 1946 and January 1947 accused became indebted to the Government in certain fixed sums, by reason of court-

martial sentences, in the following amounts: July, $76.00; August, $125.00; September, $125.00; October, $125.00; November, $160.00; December, $125.00; and January, $49.00; and that his military earnings were further depleted by a dependency allotment in the amount of $22.00 per month which became effective as of 1 September 1946. This stipulation, in written form, was accepted in evidence as prosecution's Exhibit 8 (R 8).

On 7 September 1946 accused received a partial payment in the amount of $70.00 on Voucher No. 2450, accounts of Captain F. W. Shimmel, Finance Department. A certified photostatic copy of this pay voucher was admitted in evidence as prosecution's Exhibit 1, without objection by defense (R 6). On 17 September 1946 accused received a partial payment in the amount of $60.00 on Voucher No. 2752, accounts of Captain F. W. Shimmel, Finance Department. A certified copy of this pay voucher was admitted in evidence as prosecution's Exhibit 2, without objection by defense (R 6). It was stipulated that accused received these two partial payments from Agent Finance Officer Lieutenant Alvin L. Tanner (R 6). On 5 October 1946 accused received a partial payment in the amount of $70.00 on Voucher No. 3342, accounts of Captain F. W. Shimmel, Finance Department. A certified photostatic copy of this pay voucher was received in evidence as prosecution's Exhibit 3, without objection by defense (R 7). It was stipulated that accused received this payment from Agent Finance Officer Lieutenant Masakatsu Hisaka (R 7). On 12 October 1946 accused received a partial payment in the amount of $50.00 on Voucher No. 3549, accounts of Captain F. W. Shimmel, Finance Department. A certified photostatic copy of this pay voucher was received in evidence without objection by defense as prosecution's Exhibit 4 (R 7). It was stipulated that accused received this payment from Technician Fourth Grade Harold W. Hagen, cashier for Captain Shimmel. The accused was listed and paid on these pay vouchers as a technical sergeant and in each instance affixed his signature immediately after the typewritten indication of that grade.

First Lieutenant John P. McDonell testified that accused was transferred to his organization, the 208th Military Police Company, 602d Military Police Battalion, Oahu, on orders that gave his grade as technical sergeant (R 9-10). The record also shows that a copy of Special Court-Martial Orders No. 845, was not mailed from Camp Kilmer to accused's organization in Hawaii, for entry in his service record, until about 26 August 1946 (Pros Ex 5; R 7-8).

b. For the defense: The accused, after being properly warned of his rights as a witness, elected to testify under oath. He stated that he was promoted to the grade of technical sergeant at Ioshima where he returned immediately following the battle of Okinawa. Following his trial by special court-martial at Camp Kilmer, New Jersey, on 1 August 1946, he remained in confinement for approximately six days, whereupon he was released from confinement and placed on shipping orders (R 13). He inquired of his commanding officer, Major Wise, who was also the assistant troop commander aboard ship,

as to whether he (the accused) had been reduced in grade. Major Wise informed him that a check of his records showed no authority for such reduction and he was designated as troop ship sergeant major. Prior to sailing he did not see his service record or WD AGO Form 20. His company commander in Oahu, Captain Erickson, asked him if he was a technical sergeant and accused told him "so far as he knew" he was. Accused then went to the personnel clerk about his grade. When he made out a dependency allotment to his wife "they" asked him about his grade, checked his records and told him he was a technical sergeant and his allotment was made on that basis (R 14). Accused stated further that, at Camp Kilmer, the "pay officer," a Captain Smith, and a warrant officer were present, in the "alert" barracks at Camp Kilmer, at the time that he asked Major Wise about his grade (R 14, 26). Accused was, at that time paid as a technical sergeant and for that reason inquired concerning his grade. Accused stated that he told Major Wise about the court-martial and that he did not know whether it was approved or not (R 26). The warrant officer asked accused if he was "busted" and accused stated that he told him the president of the court said he was, whereupon the warrant officer, upon this information, entered him as a private on his Form 20 (R 14, 30). Subsequently, on the ship when the records were being checked, Major Wise, in the presence of other officers and accused crossed out and initialed that entry (R 15, 30-31). Major Wise also authorized a clerk to change the entry on the transport passenger list from "private" to "technical sergeant" (R 18).

Not until 12 November 1946 was he informed by his commanding officer, Lieutenant McDonell, that he was a private. On board ship he was the sergeant major, wore technical sergeant chevrons, and performed a technical sergeant's duties. He had access to his records on but one occasion while aboard ship (R 16) and a copy of Special Court-Martial Order No. 845 was not among his records at that time. He was released from confinement at Camp Kilmer during evening hours, drew clothing the following day, boarded ship the day after but did not sail for another day or two (R 17). He also talked to Captain McDermott, currently on duty in the Adjutant General's Department at Fort Shafter, about the situation and Captain McDermott had concurred with Major Wise (R 18).

A photostatic copy of accused's WD AGO Form 20 was introduced in evidence as defense's Exhibit A (R 15). There appears on line 13, Item 29 the following entry:

"1 July ORD Cp Kilmer N.J. PVT Repl 745"

Through this entry a line was drawn, and at the end of it appears the initials "AHW."

Accused's service record was introduced in evidence as defense's Exhibit B (R 15) with particular reference to page 5 on which these entries appear:

"T/Sgt 5 Nov 45 S.O. 147 Hq 106 Inf MC"

"Pvt 1 Aug 46 Special CM #845 ORD Cp Kilmer, N.J. MC"

and also to page 24 where the initials M. C. are identified as those of Michael R. Casarella, Captain, CMP, Adjutant, 602 MP Bn.

It was stipulated by the prosecution and defense that if Captain Casarella were present he would testify that the initials "M. C." were his and that the entry was actually made on 12 November 1946 (R 15).

c. For the court: Captain William McDermott testified that he came to Oahu on the same ship as accused and that he was personnel officer and custodian of accused's service record (R 19). Accused and witness had a discussion about accused's grade but the witness did not recall the details of the conversation (R 19, 22). At the time, accused asked to see his service record which the witness showed him and then replaced it in the files (R 19, 23). The service record listed accused as a technical sergeant (R 19). The witness did not know about the entry on the Form 20 or why it was crossed out (R 19). Accused told the witness about his being court-martialed, but does not remember exactly what was said relative thereto (R 22-23). Accused, as sergeant major on the ship might have access to his service record, but at the time that witness showed it to him he did not have an opportunity to tamper with it, and accused was not among those men making entries on the service records. Accused was in an office in another part of the ship from where they were working on the service records (R 23). During the trip entries were made on Form 20's but witness did not personally make them. In some cases this was delegated to the company commander of the enlisted men, Major Wise (R 23).

The court directed that the testimony of Major Albert H. Wise be obtained, particularly on the question of the lining out of the entry on accused's WD AGO Form 20. As a result of communicating with Major Wise, a stipulation as to how he would testify, if present, was entered into by the defense and prosecution and was received in evidence as follows (R 29):

* * *

"That he did not line out and initial in Section 29 of WD AGO Form 20 of said Farrar the following entry, '1 July ORD Camp Kilmer New Jersey Private Repl 745' (that service and allied records of all troops aboard ship were in the custody of Captain William J. McDermott 01001101, AGD by order of the commanding officer of troops, Lt. Col. Leroy B. Miller, 0289004, Infantry, that Capt. McDermott was charged with the supervision of all entries made in service records during the voyage).

"That he was appointed Commanding Officer of Company E for shipment RB-D407(a) by par. 47 SO 114 ORD Camp Kilmer, New Jersey dated 3 August 1946. That troops composing said company and passengers list therefor were turned over to him late in the afternoon of 7 August 1946. That Warren A. Farrar was listed as a private in the third platoon. That he noted said Farrar to be wearing technical sergeant chevrons and at the first opportunity questioned him about it and was informed that he (Farrar) had been tried by court-martial for being AWOL and was sentenced to a heavy forfeiture per month for six months without reduction. That he did not question the veracity of Farrar's statement. That service records were turned over to him (Major Wise) when he and the troops boarded the train on 8 August at Camp Kilmer, New Jersey enroute to the New York Port of Embarkation. That Farrar was appointed sergeant-major and acted as such during the voyage.

"Regarding Farrar's inquiry as to military rank, that a day or so after they sailed from the New York Port of Embarkation, Farrar asked him if he could check his service record and advise him as to his rank. That he obtained from the Adjutant's officer - also the sergeant-major's office - Farrar's service record and record envelope and noted the entry pertaining to his court-martial. That nothing therein indicated reduction and that the forfeiture listed appeared excessive for a private. That there was no copy of the court-martial order in the record envelope and that he told Farrar that from the recorded information it was to be assumed that the court-martial order carried no reduction."

4. The law applicable to this case is set forth in CM 283983, Cawley, 55 BR 191; 4 Bull JAG 385. In that case the Board of Review stated:

"* * * A general court-martial order approving a sentence and directing its execution applies specifically to the accused and is, as to him, a special order. Since a special order can be binding upon the person affected only if delivered or made know to him, it follows that a general court-martial order is subject to the same limitation. In discussing the action of the reviewing authority in a court-martial case, the Manual for Courts-Martial states: 'Any action taken may be recalled and modified before it has been published or the party to be affected has been duly notified of the same' * * * (MCM 1928, par. 87b). If the accused is ordered to be dismissed or discharged from the service, his status as an

officer or as a soldier is not changed by the signing of the final action but remains unaffected until the general court-martial order is implemented by further necessary action. For the same reason the status of confinement or arrest imposed upon an accused, prior to a trial by court-martial does not automatically terminate upon approval of the court-martial sentence. He continues in his pre-trial status until notice of the general court-martial order has been served upon him or such other procedural step taken as may be necessary to implement and execute the court-martial order * * *."

What was said regarding a general court-martial order in that case, applies equally to a special court-martial order, which is also a special order, as to the accused.

The special court-martial order in the instant case included reduction to the grade of private, but a special court-martial order reducing an enlisted man to the grade of private, like a special order, is not binding on him personally until he has been, in some manner, notified of the order or its contents. Paragraph 16, AR 615-5, 23 September 1946, provides, with respect to reductions in grade, as follows:

"16. When effective.—Termination of appointment will be effective—

a. When by sentence of court-martial.—On the date of publication of the court-martial order approving the reduction, dishonorable discharge, or sentence to hard labor. See paragraph 13a.

b. In all other cases.—On the date upon which notice of reduction is received by the enlisted man, or, if absent for his own convenience or through his own fault, upon the date the notice of reduction is received at his proper station."

The regulations in effect prior to 23 September 1946, provided the same as the above. Although this regulation provides for the <u>effective date</u> of the termination of appointment, it does not follow that the court-martial order is binding upon accused for all purposes as of the date it was published and before he has notice of the order. For a court-martial order to be binding upon the accused, at least insofar as to hold him criminally responsible for acts inconsistent therewith, he must have received notice of the order, in accordance with the principles stated in the <u>Cawley</u> case.

In Specifications 1, 2, 3, and 4 of Charge I, it was alleged that accused did:

"* * * unlawfully pretend to Captain F. W. Shimmel, * * *, that he, the said Warren A. Farrar, was a Technical Sergeant, well knowing that said pretenses were false, * * *" (Underscoring supplied).

The evidence in this case, relative to his knowledge of, or notice of any order, shows that the accused, a technical sergeant, was tried by general court-martial at Camp Kilmer, New Jersey, on 1 August 1946, sentenced to be reduced to the grade of private, to forfeit $49.00 of his pay per month for six months and to be confined at hard labor for two months. He heard this sentence announced in court and thereafter remained in the guard house a few days when he was released, processed and shipped to Hawaii on a transport which sailed from New York on 10 August. Before sailing he was not informed of the reviewing authority's action, but must have known the sentence would be modified in some respects, because his release from confinement was an indication that the confinement was not to be served. In fact, a special court-martial order was issued, dated 1 August 1946, which approved the sentence and ordered it executed, but suspended the confinement. The evidence, from accused's testimony, shows that he was not sure of his status and took the matter up with Major Albert Wise, Commander of Troops on the transport, both prior to sailing and during the trip. While the stipulated testimony of Major Wise indicates that it was he, Major Wise, who brought up the matter of accused's status, his testimony, nevertheless, shows that accused's status was in doubt and was discussed. Accused also discussed the matter with the personnel officer on the ship, Captain McDermott. Upon arrival he again raised the question of his status with his first commanding officer in Hawaii, Captain Erickson, and later with the personnel records section there, at the time he made out his allotment to dependents.

It is clear from the record of trial that no entry of the court-martial of 1 August 1946 was made in accused's service record until 12 November 1946 (R 15). This entry was then made upon receipt of the special court-martial order from Camp Kilmer, which prosecution's Exhibit 5 shows was not mailed from Camp Kilmer until 26 August 1946. This date is the first, and only evidence, of any publication of the order. Also, it is to be noted that Lieutenant McDonell testified that the orders transferring accused to the 208th Military Police Company, in September or October, gave accused's grade as technical sergeant, and the payrolls, on which his grade appeared as technical sergeant, introduced in this case, were certified to by a personnel officer as correct. The evidence shows that despite the discussions relative to the status of accused's grade, all military authorities over accused considered him a technical sergeant, and that they had no notice of the court-martial until November.

No evidence was introduced to show that the accused had actual notice of the special court-martial order or that any act with a view toward giving him such notice was performed prior to the mailing of a copy of the

order to accused's organization on 26 August 1946. Although the special court-martial order in question was dated 1 August 1946, there was no evidence that it was actually prepared and distributed prior to 26 August 1946, for it is required that such order be dated as of the date of the reviewing authority's action (MCM 1928, par 87d).

The evidence is not clear as to just how or by whom the erroneous entry on accused's WD AGO Form 20, listing him as a private at Camp Kilmer as of 1 July 1946, was stricken out, nor is it clear with respect to the alteration of the transport passenger list, which originally carried accused as a private. Apparently these changes were made as a result of the discussions as to accused's status and because the service record did not show any change of status.

5. There remains for consideration whether there is anything that might operate in a manner to give the accused constructive notice of the special court-martial order reducing him to the grade of private. Constructive notice means, not actual notice, but something short of and which will take the place of actual notice. Thus, in accordance with paragraph 16d of the regulation above quoted, receipt of notice of reduction at the soldier's proper station is deemed notice to him, if by his own fault he is absent and cannot receive it. Similarly, mailing a telegram to an accused officer's post was deemed notice of confirmation of his dismissal, when he was absent in desertion and was therefore by his own fault not present to receive it (CM 123824, 1919; Dig Op JAG 1912-40, Sec 476 (8)). It has been held that soldiers have received notice of orders duly posted on bulletin boards when they had a duty to read and know what was posted there. But all such constructive notice required some act to be done which normally would result in notice. The term constructive notice is sometimes used where notice is to be inferred from the facts. This is not constructive notice in the sense of a substitute for notice, but is an inference of fact. That is, often there may be proof of facts from which, in the absence of evidence of receipt of actual notice, such receipt may be inferred. Such is the inference that a letter was received from proof that it was duly addressed, stamped and placed in the mail. Such an inference, or rebuttable presumption, cannot arise however, without proof of some fact upon which to base it. The evidence in this case indicates no such fact, except possibly the mailing of the special court-martial order from Camp Kilmer on 26 August 1946, which, however, was not received until November 1946.

Where an accused is sentenced to confinement at hard labor, which by operation of law effects a reduction, the serving of the confinement would no doubt be actual notice thereof, and knowledge of the consequent reduction would necessarily follow. But in this case, within a few days of the trial, accused was released from confinement, and thereby knew that at least some modification in the sentence as announced by the court was made or contemplated. No constructive notice of reduction, therefore,

can be based on the confinement in this case. Furthermore, it is doubtful if constructive notice, only, of his reduction, would support the allegation that the pretense was made "well knowing that the said pretense was false."

6. The foregoing discussion has been entered into at length since it applies to all five of the Specifications of Charge I. There are, however, additional grounds for holding the record legally insufficient to support Specifications 1, 2, 3, and 4 relating to obtaining money by false pretenses. The only evidence that any false pretenses were made to Captain Shimmel, as alleged, are the payrolls themselves. Accused's signatures thereon merely acknowledge receipt in cash of the amounts in the columns "amount paid" set opposite his name. Accused did not make up the payrolls, nor is there any evidence that the information in them came from him. They were all certified as correct by an assistant personnel officer. Accused's signature, for all that appears in the evidence, was not placed on the payrolls until he was paid. It cannot be assumed that he signed before he was paid, or that the signing was, or was intended to be, anything more than a receipt. It does not purport to be a certification of the correctness of any payroll entry (CM 251348, Gaston, 33 BR 211). No other statement or act that could be considered a pretense was shown to have been made by accused to Captain Shimmel, as alleged.

It is necessary, in a charge of obtaining money by false pretenses, that it be proved that the pretense was made to the person alleged, and that he believed it to be true and paid the money on the strength of it. Nothing in this case shows, even assuming the signing of the payroll to constitute a false statement, that it was, as alleged, by means thereof that the money was paid. It would appear that Captain Shimmel, or persons in his office at least, relied on the certification of the payroll by the assistant personnel officer, which is the primary purpose of requiring such certification.

There is no evidence that accused made pretenses to Captain Shimmel which accused knew were false and which Captain Shimmel believed to be true, and by means of them was induced to pay money to the accused. In CM 151223, Thompson, it was held that though accused made a false pretense, as the evidence showed the property allegedly obtained thereby was probably in fact obtained on the strength of another and different statement, which was not proved false, the record was legally insufficient to support the findings of guilty.

If it be assumed that accused made a false statement to someone other than Captain Shimmel and thus induced the payrolls to be made and certified to by the assistant personnel officer, he cannot be convicted thereof under these specifications. In CM 159127 (1924), Dig Op JAG 1912-40, Sec 454 (52), it was held that proof that accused by means of a false pretense obtained the indorsement of Sergeant B on a check, and thereafter obtained money from

the post exchange on the check, would not support findings of guilty of obtaining money from Sergeant B by false pretenses. Obtaining the indorsement was stated to be a different offense than obtaining the money. So in this case, obtaining the certification of the payroll by the personnel officer through fraud or deceit, if such was in fact done, is a different offense than that of obtaining money from the finance office by means of a false pretense made to him.

7. The record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification. The Table of Maximum Punishments, however, authorizes confinement not to exceed three months and a forfeiture of two-thirds of accused's pay per month for a like period for the offense of breach of arrest.

8. For the reasons stated above, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and all Specifications thereof, legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds of accused's pay per month for three months.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JUN 5 1947

JAGH - CM 320998 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Army Ground Forces, Pacific, APO 958, c/o Postmaster, San Francisco, California.

1. In the case of Private Warren A. Farrar (RA 36888660), 208th Military Police Company, APO 954, I concur in the foregoing holding by the Board of Review, and for the reasons stated therein recommend that the findings of guilty of Charge I and its specifications be disapproved, and that only so much of the sentence be approved as involves confinement at hard labor for three months and forfeiture of two-thirds of accused's pay per month for three months. Thereupon you will have authority, under the provisions of Article of War 50½, to order the execution of the sentence as modified.

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 320998).

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.

JAGK - CM 321002

8 JUL 1947

U N I T E D S T A T E S	)	SECOND ARMY
	)	
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 28 February 1947. Dismissal and total forfeitures.
	)	
Captain EDMUND G. GINNANE (O-414668), 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 63rd Article of War.

Specification: In that, Captain Edmund G. Ginnane, Counter Intelligence Corps Center, Holabird Signal Depot, Baltimore, Maryland, did, on a railroad train enroute from Baltimore, Maryland, to New York City, New York, on or about January 10, 1947, behave himself with disrespect toward Major James M. Horan, his superior officer, by saying to him, "Why you no good fucking chicken shitted son of a bitch", "You are a stuffy son of a bitch", or words to that effect.

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

Specification: In that Captain Edmund G. Ginnane, Counter Intelligence Corps Center, Holabird Signal Depot, Baltimore, Maryland, was, on a railroad passenger train enroute from Baltimore, Maryland, to New York City, New York, on or about January 10, 1947, in a public place, to wit, a passenger coach being used by the public, drunk and disorderly while in uniform.

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

Specification: In that Captain Edmund G. Ginnane, Counter Intelligence Corps Center, Holabird Signal Depot, Baltimore, Maryland, having been duly placed in arrest at Holabird Signal Depot, Baltimore, Maryland, on or about 13 January 1947, did, at Holabird Signal Depot, Baltimore, Maryland, on or about 18 January 1947 break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its specification, guilty to the Specification of Charge II and not guilty to Charge II but guilty of a violation of Article of War 96 and not guilty to Charge III and its specification. He was found guilty of Charge I and its specification, guilty of the Specification of Charge II and not guilty of Charge II but guilty of the 96th Article of War and guilty of Charge III and its specification. 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.

About 500 p.m. on 10 January 1947 the accused and four or five other officers left Holabird Signal Depot for the weekend. They had verbal orders authorizing their absence. This group of officers went to the Baltimore, Maryland, station of the Pennsylvania railroad in a taxicab. On the way to the railroad station they stopped the cab at a store where the accused purchased a fifth of whiskey. Before they arrived at the station each member of the party took two drinks of whiskey from the bottle purchased by accused. The accused, Captain Eccleston and Lieutenant Kahn boarded a train for New York City. Within ten minutes of the time they boarded the train the accused asked for his liquor and took another drink. During this trip and before the train reached Philadelphia, Pennsylvania, Captain Eccleston saw the accused in company with some sailors. The accused went to the latrine and shortly thereafter Captain Eccleston saw him being pushed onto the platform. Captain Eccleston went to the platform to see if anything was wrong. A train official named Tracy was present as well as another passenger. A man carrying two bags attempted to pass this group and the accused grabbed at him. The accused said that the bags belonged to him. Captain Eccleston grabbed the accused and told him that the bags did not belong to him. Captain Eccleston was attempting to get the accused to sit down and be quiet and after about 20 minutes the accused did sit down.

(R. 14, 17, 18, 19) Mr. Tracy, the brakeman on the train, asked Major James M. Horan, a passenger on the train, to assist him in settling an argument with the accused. (R. 7, 14) Major Horan went with the brakeman to where the accused was sitting. Major Horan stated to the accused that he was there to settle things so there would not be any trouble. The accused asked "what are you" and after looking at Major Horan's insignia said "a major." Major Horan attempted to reason with the accused and persuade him to be quiet. The accused then said to Major Horan the words set forth in the Specification of Charge I. (R. 8, 9, 10, 14) Mr. Tracy attempted to have the accused removed from the train at Philadelphia. The police would not remove the accused from the train unless Mr. Tracy would accompany them and prefer charges. Major Horan then took the responsibility of keeping the accused quiet during the remainder of the trip. The accused refused to be quiet and it was necessary for Captain Eccleston and Major Horan to forcibly restrain him. During the struggle, accused was pushed against a window and the window was broken. (R. 15, 16, 19, 21) The accused was in uniform and under the influence of liquor (R. 11, 14, 21) The coach in which the accused was riding was filled with passengers consisting of military and civilian personnel. (R. 11) The accused was removed from the train at Trenton, New Jersey. (R. 16)

On 13 January 1947, Colonel Melvin C. Noble, the accused's Commanding Officer, informed the accused that his conduct on 10 January 1947 was to be investigated and that during the investigation he was in arrest and restricted to the limits of Holabird Signal Depot. This arrest and restriction was in effect on 18 January 1947. (R. 24, 47) On 17 January 1947 the accused was given orders to report to the Post Dispensary for the purpose of being transported to Fort George G. Meade Hospital in connection with his annual physical examination. He was directed to report to headquarters, Counter Intelligence Corps Center, Holabird Signal Depot upon completion of the examination. (R. 24, 26, Defense Ex. A)

Major Charles B. Davis, Jr., was Staff Duty Officer of the Counter Intelligence Corps Center from 18 January 1947 to 20 January 1947. About 8:30 a.m. on 18 January 1947 Colonel Noble informed Major Davis that the accused was in arrest and restricted to the post and directed him to check on the whereabouts of the accused. Major Davis checked the post but was unable to find the accused until about 5:00 a.m., 19 January 1947. (R. 28,29)

First Lieutenant Davenport saw the accused on Saturday 18 January 1947 at Holabird Signal Depot. The accused and Lieutenant Davenport left Holabird Signal Depot in an automobile belonging to accused. They went to Lieutenant Davenport's home where they were joined by Mrs. Davenport. This group drove to Washington, D. C. where they remained until about 11:00 p.m. They returned to Holabird Signal Depot about 4:00 a.m. 19 January 1947. (R. 31, 32).

4. For the defense.

Major Carlton C. Keyes testified that he has known the accused since 1933. He served with accused as an officer in a National Guard cavalry unit on Staten Island. They visited in each others homes and attended social events together. The conduct of accused during this period was "Nothing but good; I have never seen Captain Ginnane act in anything, except a gentlemanly fashion the whole time, all the years I have known him."

Major Albert G. Scherer attended a six weeks' course of instruction with accused in 1944. During this period they closely associated together both in and out of classes. The accused's character was excellent. He was exceptionally polite and courteous. (R. 34, 35).

Master Sergeant Charles Joseph Frary first met the accused at a parochial school in 1924. The accused was an alter boy under Sergeant Frary's direction. Between 1924 and 1940 they visited in each others homes. The accused was a gentleman at all times. (R. 35, 36)

The stipulated testimony of Major J. T. Trenholm, Captain James W. Heydenreich, and Captain Rolf Dallmer, all of the 71st Field Artillery Brigade, Fort Ethan Allen, Vermont, was to the effect that accused's reputation, character and ability are excellent. (R. 46)

The accused was warned of his rights as a witness and elected to testify. He testified that he left Holabird Signal Depot about 5:40 p.m., 10 January 1947 with four other officers. Captain Eccleston, Lieutenant Kahn and the accused were going to New York for the weekend. Enroute to the station they stopped and he purchased a fifth of whiskey. They had one or two drinks on the way to the station. He had another drink after they boarded the train. Their classes lasted until 5 p.m. and they did not eat supper as they wanted to make the train. They did not eat at the station nor on the train. His companions went to sleep. He walked through the car and sat down with three Navy personnel. They had a drink from his bottle. One of the Navy men spilt whiskey over the front of his trousers. He left this group in order to clean his trousers. On the way to the latrine he stopped to talk with Captain Eccleston and Lt. Kahn. He remembered nothing from the time he left Captain Eccleston until he was put off the train. He was in custody of the civilian police for about two hours before the Criminal Investigation Division from Fort Dix arranged for his release. He stayed at Fort Dix overnight and made a statement to the Criminal Investigation Division the next morning. After spending the balance of the weekend at home he returned to Holabird Signal Depot. On his return trip he stopped at Trenton and apologized to Mr. Slade, the station master, and offered to make restitution for the broken windows. About 4 p.m. Monday, 13 January 1947, he was called to Colonel Nobel's office and placed under restriction. He stayed within the restriction until Thursday when he was ordered to the Post Dispensary for his annual physical examination. Captain Hobert, the medical officer, recommended that he go to Fort Meade and see a psychiatrist.

On Friday (17 January 1947) he went to headquarters to see Colonel Noble to get released from his restriction in order that he might go to Fort Meade. He explained the situation to Major Smith, the executive officer, and asked permission to use his own automobile. Colonel Noble was busy and Major Smith told him he would have a decision in about an hour. When he again reported to Major Smith he was informed that the restriction had been lifted. At this time he was given orders (Defense exhibit A) to report to Fort Meade. He signed out at 10:30 a.m. at the hospital as required, reported to Fort Meade and returned to Holabird about 4:45 p.m. He remained on the post in quarters until the next morning (Saturday 18 January 1947) at which time he and Lieutenant Davenport went to meet Lieutenant Davenport's wife. They left the post and went to Lieutenant Davenport's home after which they went to Washington to visit a friend. They left Washington and returned to Holabird Signal Depot. They were stopped at the post by the guard who inquired of Lieutenant Davenport as to the whereabouts of the accused. Lieutenant Davenport was to report to Major Davis so accused went to his quarters. About 15 minutes later he was instructed to report to Major Davis who informed him that the restriction had not been lifted and that he was under restrictive arrest. When he left the post on 18 January 1947 he was under the impression that the restriction imposed had been removed by the order of 17 January 1947. (Defense Exhibit A). He stated that he enlisted in the National Guard on 29 November 1933 and served continuously until inducted in the "Federal National Guard" on 3 February 1941. On 29 April 1941 he was commissioned a Second Lieutenant, Field Artillery. In December 1941 he transferred to the Air Corps and was sent to Brooks Field, Texas. He served 14 months at Fort Devens, Massachusetts, after which he attended intelligence school for several months. In October 1943 he was sent overseas to Guadalcanal. In January 1944 he was transferred to intelligence. He returned to the United States in September 1945 and was separated from the service in September 1946. (R. 37-45).

War Department AGO Form 66-2 was introduced in evidence as Defense Exhibit B. This form shows his various assignments in the Army and that his performance of duty was excellent or superior. (R. 45).

5. By the Court.

The court recalled Colonel Noble and Major Smith. Each testified that the arrest and restriction imposed upon the accused was in effect on 18 January 1947 and that the order of 17 January 1947 lifted the restrictions imposed for accused's trip to Fort Meade and for no other purpose.(R. 47, 48)

6. Charges I and II and their Specifications.

The evidence discloses and the accused admits by his plea of guilty to the Specification of Charge II that on 10 January 1947 he was drunk and disorderly in a public place while in uniform. While in this condition he used disrespectful language (as alleged in the Specification Charge I)

towards Major Horan, his superior officer. The language used by accused was in itself disrespectful and the circumstances under which it was used clearly indicates that it was intended to be disrespectful. (CM 262 919 Wright 41 BR 169, 173)

The court found that the drunkenness and disorderly conduct charged in the specification of Charge II was in violation of Article of War 96 and not in violation of Article of War 95. This finding was within the power of the court and there can be no doubt that such conduct was of a nature to bring discredit upon the military service. (CM 271083 Barry, 49 BR 19; CM 276248 Stroud, 48 BR 232; CM 315105 Rochon)

Specification and Charge III.

The accused was arrested and restricted to Holabird Signal Depot on 13 January 1947. He complied with the terms of his arrest until 17 January 1947 at which time he received orders to report to Fort George G. Meade for the purpose of taking his annual physical examination. Under the terms of his orders he was required to report back to Holabird Signal Depot. He returned to Holabird Signal Depot but on 18 January 1947 he left the post and went to Washington, D. C. He claimed that the order of 17 January 1947 lifted the arrest and restriction previously imposed upon him. His commanding officer and the executive officer each testified that the accused was permitted to go to Fort Meade but that the arrest and restriction was not removed for any other purpose. This presented a question of fact for the court to decide and by their finding of guilty they resolved this fact against the accused. The Board of Review is of the opinion that the record discloses that the accused was in arrest and restricted to Holabird Signal Depot on 18 January 1947 and that he did on that day breach his arrest.

7. War Department records show the accused to be 34 4/12 years of age and single. He graduated from high school and attended Fordham University two years. He enlisted in the New York National Guard 28 November 1933 and served therein until the guard was inducted into Federal service 3 February 1941. On 29 April 1941, he was appointed and commissioned a Second Lieutenant, Field Artillery, Army of the United States. On 14 May 1942 he was appointed Second Lieutenant, Air Corps Reserve (thereby vacating his prior commission). On 30 July 1942 he was promoted to First Lieutenant and on 3 August 1944 he was promoted to Captain. On 13 September 1943 he was awarded the Air Medal. He is also entitled to wear the American Defense Ribbon, Asiatic Pacific Theater ribbon with 11 battle stars, Unit Presidential Citation, Victory ribbon and three overseas service bars. He was released from active duty 3 April 1946 but retained a commission as Captain in the Air Reserve. On 9 December 1946 he re-entered active duty and was assigned to the Counter Intelligence Corps, Holabird Signal Depot. His efficiency reports for the period 1 July 1944 to 30 June 1945 are excellent.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors 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 finding of guilty and the sentence, Dismissal is authorized upon conviction of an officer for a violation of Articles of War 63, 69 and 96.

Charles B. Sikes, Judge Advocate

Carlos E. McAfee, Judge Advocate

_____, Judge Advocate

JAGK - CM 321002 1st Ind

JUL 1 7 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 the record of trial and the opinion of the Board of Review in the case of Captain Edmund G. Ginnane (O-414668), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of disrespect towards a superior officer, in violation of Article of War 63; of being drunk and disorderly in a public place while in uniform, in violation of Article of War 96; and of breach of arrest, in violation of Article of War 69. 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 under Article of War 48.

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

On 10 January 1947 the accused left Holabird Signal Depot in the company of four other officers. The accused and two of the officers were going to New York City for the weekend. On the way to the railroad station the accused purchased a fifth of whiskey. The group of officers each took two drinks from this bottle. After the accused boarded the train he took another drink. Accused became drunk and created a disturbance. The brakeman on the train solicited the aid of a Major Horan who attempted to quiet the accused. The accused thereupon addressed disrespectful remarks to Major Horan. The accused was removed from the train at Trenton, New Jersey. On 13 January 1947 the accused was placed in arrest and restricted to Holabird Signal Depot. On 17 January 1947 this restriction was released for the purpose of permitting the accused to go to Fort Meade to take an annual physical examination. On 18 January 1947 the accused breached his arrest by leaving Holabird Signal Depot and going to Washington, D. C. He returned to the post early in the morning of 19 January 1947.

4. War Department records show that the accused is 34 and 4/12 years of age and single. He served as an enlisted man in the New York National Guard from November 1933 until his unit was inducted into Federal Service on 3 February 1941. On 29 April 1941 he was appointed a second lieutenant, Field Artillery. On 14 May 1942 he was appointed a second lieutenant, Air Corps. On 30 July 1942 he was promoted to first

lieutenant and on 30 August 1944 he was promoted to Captain. On 13 September 1943 he was awarded the Air Medal. He is also entitled to wear the American Defense Ribbon, Asiatic Pacific Theater Ribbon with 11 battle stars, Unit Presidential Citation, Victory ribbon and three overseas service bars. On 3 April 1946 he reverted to inactive duty and on 9 December 1946 he reentered active service. His efficiency reports are excellent and superior.

5. The sentence in this case is not excessive, but in view of the creditable prior service of accused, his combat record and all the other circumstances of the case I am of the opinion that punishment less than dismissal will be adequate. I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100.00 pay per month for six months.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 262, 24 July 1947).

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

JAGH - CM 321028

6 MAY 1947

UNITED STATES v. Private BRADFORD R. PULLIAM (RA 44079897), Assigned Squadron A, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot	)	FIRST AIR FORCE Trial by G.C.M., convened at AAF Overseas Replacement Depot, Camp Kilmer, New Brunswick, New Jersey, 18 March 1947. Dishonorable discharge (suspended) and confinement for six (6) months. The Post Stockade

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 of guilty and legally insufficient to support the 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 61st Article of War.

Specification: In that Private Bradford R. Pulliam, assigned Squadron "A", 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot, Camp Kilmer, New Jersey, did, at 106th Army Air Forces Base Unit Detachment, Greensboro, North Carolina, absent himself from his command, from about 20 September 1946, to about 4 February 1947.

He pleaded not guilty to, and was found guilty of, the Specification and the Charge 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 six months. Evidence of one previous conviction was introduced. The

reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Post Stockade, Camp Kilmer, New Jersey, or elsewhere as the Secretary of War may direct as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 20, Headquarters First Air Force, dated 24 March 1947.

3. By competent evidence introduced at the trial it was proved that accused absented himself without proper leave from his command during the period alleged in the Specification. The only question presented for consideration by the Board is whether the Specification alleges an offense.

4. Article of War 61 provides as follows:

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

The Specification alleges that the accused "did, * * * absent himself from his command from about 20 September 1946 to about 4 February 1947." It is entirely devoid of any word or words alleging that the absence was "without proper leave" or otherwise unauthorized.

In a line of cases cited in Section 419 (1) Digest Opinions, JAG 1912-40, where the accused pleaded guilty to Specifications laid under the 61st Article of War but which did not allege that the absence was "without proper leave," it was held:

> "The gist of the offense is not * * * the absence, but the absence without proper leave. An examination of the Specification under Charge I discloses that the words 'without proper leave' are omitted therefrom. To constitute a valid charge not only should the charge designate the real offense committed but the specification should set forth the legal constituents of such offense, as defined by the statute or by the usages and precedents of the service. The plea of 'guilty' was void where the specification failed to set forth the elements constituting the offense."

It has further been held by the Board of Review in CM 187548, Burke, 1 BR 55, that:

> "A specification must exclude every reasonable hypothesis of innocence * * * must be so drawn 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—may be regarded as the settled law of this office as it is the settled law of the land."

The Specification upon which the accused was arraigned contains nothing but the statement that he absented himself from his command from about 20 September 1946 to about 4 February 1947. In the absence of some word or words alleging that his absence was without proper authority the Specification sets forth no offense either in violation of Article of War 61 or any of the Articles of War. Consequently, no offense having been alleged, the accused cannot be found guilty.

5. For the reasons above 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.

_____, Judge Advocate

On Leave, Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 321028 1st Ind

WD, JAGO, Washington 25, D. C. MAY 21 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 Bradford R. Pulliam (RA 44079897), Assigned Squadron A, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 191, 27 May 1947).

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

JAGH CM 321057

31 JUL 1947

SIXTH ARMY

UNITED STATES V. Captain EDGAR M. VANCE (0-504472), Army of the United States.	Trial by G. C. M. convened at Fort Douglas, Utah, 5, 6 and 7 March 1947. Dismissal, total forfeitures and confinement for one (1) year.

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

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

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

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

Specification: In that, Captain Edgar M. Vance, A.U.S., Fort Douglas, Utah, having on or about 19 May, 1944, entered into a contract agreement with the Fish and Game Department of the State of Utah to act as an agent for said Department and State for the purpose of selling, issuing and delivering fish and game licenses and in pursuance of that agency having during the period of on or about 20 April, 1945 to on or about 10 January, 1946, collected from sales of Utah fish and game licenses, the sum of about five hundred and twelve dollars ($512.00), said money being the property of the Fish and Game Department of the State of Utah, the said Captain Edgar M. Vance, did, at Salt Lake City, Utah, on or about 10 January, 1946, wrongfully, unlawfully and feloniously embezzle by fraudulently converting to his own use the said sum of about five hundred and twelve dollars ($512.00) in United States currency.

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

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

Specification 2: In that Captain Edgar M. Vance, A. U. S., 6001 A.S.U., Fort Douglas, Utah, being indebted to Miss Bernice Stewart of Salt Lake City, Utah, in the sum of two hundred dollars ($200.00) for money personally loaned, which amount was due and payable on or before 1 January, 1946, did, at Salt Lake City, Utah, from 1 January, 1946 to 30 August, 1946, wrongfully and dishonorably fail and neglect to pay said indebtedness in full.

Specification 3: In that Captain Edgar M. Vance, A.U.S., 6001 A.S.U., Fort Douglas, Utah, being indebted to Mrs. Louisa Sult Tacker Stevens of Salt Lake City, Utah in the sum of two hundred dollars ($200.00) for money personally loaned, which amount was due and payable on or before 1 January, 1946, did, at Salt Lake City, Utah, from 1 January, 1946 to 30 August, 1946, wrongfully and dishonorably fail and neglect to pay said indebtedness in full.

Specification 4: In that Captain Edgar M. Vance, A.U.S., 6001 A.S.U., Fort Douglas, Utah, being indebted to Miss Margie Dewey (Freeling) of Salt Lake City, Utah, in the sum of three hundred dollars ($300.00) for money personally loaned, which amount was due and payable on or before 12 July, 1945, did, at Salt Lake City, Utah, from 12 July, 1945 to 8 August, 1946, wrongfully and dishonorably fail and neglect to pay said indebtedness in full.

Specification 5: In that Captain Edgar M. Vance, A.U.S., 6001 A.S.U., Fort Douglas, Utah, being indebted to Mr. L. D. Newsome of Salt Lake City, Utah, in the sum of two hundred dollars ($200.00) for money personally loaned, which amount was due and payable on or before 31 January, 1946, did, at Salt Lake City, Utah from 31 January, 1946 to 8 August, 1946, wrongfully and dishonorably fail and neglect to pay said indebtedness in full.

Specification 6: In that Captain Edgar M. Vance, A.U.S., 6001 A.S.U., Fort Douglas, Utah, being indebted to Corporal George T. Harrison, Military Police Department, Fort Douglas, Utah, in the sum of three hundred dollars ($300.00) for money personally loaned, which amount was due and payable on or before 3 May, 1946, did, at Salt Lake City, Utah, from 3 May, 1946 to 8 August, 1946, wrongfully and dishonorably fail and neglect to pay said indebtedness in full.

Specification 7: (Finding of Guilty Disapproved by Reviewing Authority).

Specification 8: (Finding of Guilty Disapproved by Reviewing Authority).

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, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority disapproved the findings of guilty of Specifications 1, 7 and 8 of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the Sixth Army Judge Advocate dated 25 March 1947.

4. Attached to the record of trial is a recommendation for clemency dated 10 March 1947, signed by the Defense Counsel and Assistant Defense Counsel, wherein it is stated:

"2. The following are the bases for the recommendation for clemency:

"a. The accused has an outstanding recording during his five years of commissioned service. Reference is made to defense exhibits 1 to 13, letters from superior officers, heads of civic and governmental agencies, stating their appreciation for the assistance and cooperation given them by the accused. Facts, evidence and testimony have revealed that the actions of the accused were continually bringing credit to the military service.

"b. A copy of the personnel record of the accused shows a consistent efficiency index of superior, an exceptional record extending over a prolonged period during which he was assigned a multitude of additional duties.

"c. Although the accused, while exercising initiative, unusual ability and conscientious effort in carrying out his duties, may have used poor judgment in some of his personal matters, at no time was there any discredit reflected upon the military service.

"d. It is maintained that this officer is of definite value to the military service, and as an active officer, he would be retained for use by the service at a time when personnel of his ability and background are at a premium.

"e. When called before The Adjutant General's office and reminded of his failure to meet his obligations, the accused made what he and The Adjutant General's representative, Colonel Clarkson, believed to be an acceptable and equitable arrangement by setting aside $100.00 per month to effect complete repayment of his obligations. This he has done and was doing up to the date of trial, knowing during the time that repayment was no defense.

"3. It is recommended that either all or part of the sentence as adjudged be suspended."

5. The accused is 38 years of age, married and the father of one child. His civilian occupation was that of a private detective. War Department records show that he is a high school graduate and that he attended the Georgia School of Technology for two years. The accused served in the National Guard as an enlisted man from May 1926 until June 1928. In June 1928 he enlisted in the Regular Army and served therein until 2 April 1932 when he was discharged for physical disability. He served in the National Guard as an enlisted man from 6 February 1940 until 19 November 1942 when he was given a direct commission as a second lieutenant, Army of the United States. He was promoted to first lieutenant on 14 June 1943 and to Captain on 6 May 1944. On 17 March 1944 he was placed on a limited duty status for sinusitis and inguinal hernia.

From the date of his commission until 15 July 1946 the accused was stationed at Fort Douglas, Utah, and was assigned as Provost Marshal at that Post on 28 December 1946. The manner of performance of his duties has consistently been rated as superior, with the exception of two ratings which are excellent. He has received many letters of commendation from superior officers, civilian officials and federal and state law enforcement agencies attesting to his efficiency, cooperation and devotion to duty.

On 4 March 1946 the Commanding Officer, Fort Douglas, Utah, initiated a recommendation that the Legion of Merit be awarded to accused for the meritorious performance of his duties. This recommendation was not favorably considered by the War Department because exceptionally meritorious service was not shown. Instead the Army Commendation Ribbon was awarded the accused in August 1946. However, the award was revoked because the offenses for which he was tried had occurred during the period covered by the award.

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 of guilty as approved by the reviewing authority

and the sentence and to warrant confirmation thereof. A sentence to dismissal, total forfeitures and confinement at hard labor for one year is authorized upon a conviction of violations of Articles of War 93 and 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 321057 1st Ind
WD, JAGO, Washington 25, D. C.
TO: The Secretary of War AUG 18 1947

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Captain Edgar M. Vance (0504472), Army of the United States.

2. Upon trial by general court-martial this officer was found guilty of embezzling $512.00, property of the Fish and Game Commission of the State of Utah in violation of Article of War 93 (Chg I, Spec), and and of dishonorably failing and neglecting to pay his debts in violation of Article of War 96 (Chg II, Specs 1-8 incl). No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority disapproved the findings of guilty of Specifications 1, 7 and 8 under Charge II (dishonorable failure to pay debts), 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 evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I concur in that opinion.

On or about 19 May 1945 the accused while on duty as Provost Marshal of Fort Douglas, Utah, entered into a written contract with the Fish and Game Commission of the State of Utah under the terms of which he was appointed agent of the Commission for the purpose of issuing certain fish and game licenses. The contract provided that an accounting for all proceeds from license fees, less a nominal fee for the accused, be made on the 10th of each calendar month for receipts of the previous month. The contract further provided that "all license money * * * shall be kept separate and apart from * * * private funds and shall not be co-mingled therewith." Final payment of all license fees collected during 1945 was due on 10 January 1946, but the accused had paid no part thereof on that day. The accused ignored numerous written and telephonic requests from the chief clerk of the Commission for an accounting. In March 1946 the chief clerk turned the matter over to the Attorney General of the State for collection. In a letter dated 12 July 1946, wherein he advised the chief clerk that he was being transferred to Washington, D. C., the accused acknowledged that he owed the Commission $512.00. Although the accused promised on numerous occasions to make restitution, no payments were received until November 1946, after the investigation leading to the present charges had been initiated. On 10 February 1947 he made final payment on the account. In a voluntary pre-trial statement and

as a witness in his own behalf, the accused admitted that in September or October 1945 he had loaned $500 of the Fish and Game funds to a Lieutenant Brandt who was in desperate need of money. Lieutenant Brandt committed suicide a short time thereafter.

Between January 1945 and February 1946 the accused borrowed various sums varying from $200 to $300, amounting to a total of $1200, from acquaintances including an enlisted man, two waitresses and others. In two cases he stated that he needed the money to replace prison funds which had been stolen from his office. The accused did not repay any of these loans when due. Instead he made repeated but unfulfilled promises to repay the debts and made partial payments only when pressed by his creditors. In each case his failure to repay was characterized by evasion or indifference to just obligations. In his voluntary pre-trial statement the accused said "To all charges and specifications * * * I am Guilty." At the time of trial the accused had paid $521 on account of the debts involved in the specification of which he was found guilty. As a witness in his own behalf the accused testified, in mitigation, that from November 1942 until July 1946 he worked approximately fifteen to seventeen hours a day in order to properly perform his duties as Assistant Provost Marshal, Police and Prison Officer, and Provost Marshal. He personally spent large sums in buying information from informants in crime detection with an obsession to do his job well, for which expenditures he could not get reimbursement.

Other witnesses, including the Chief of Police of Salt Lake City testified that the accused was an efficient Provost Marshal who worked long hours and that he cooperated excellently with the local and Federal authorities. It was also shown that the accused was hospitalized several times, once in July 1946 because of a "reactive state" due to working hard, and long under pressure.

4. Attached to the record of trial is a recommendation for clemency dated 10 March 1947, signed by the Defense Counsel and Assistant Defense Counsel, wherein it is stated:

> "2. The following are the bases for the recommendation for clemency:
>
> "a. The accused has an outstanding recording during his five years of commissioned service. Reference is made to defense exhibits 1 to 13, letters from superior officers, heads of civic and governmental agencies, stating their appreciation for the assistance and cooperation given them by the accused. Facts, evidence and testimony have revealed that the actions of the accused were continually bringing credit to the military service.
>
> "b. A copy of the personnel record of the accused shows a consistent efficiency index of superior, an

exceptional record extending over a prolonged period during which he was assigned a multitude of additional duties.

"c. Although the accused, while exercising initiative, unusual ability and conscientious effort in carrying out his duties, may have used poor judgment in some of his personal matters, at no time was there any discredit reflected upon the military service.

"d. It is maintained that this officer is of definite value to the military service, and as an active officer, he would be retained for use by the service at a time when personnel of his ability and background are at a premium.

"e. When called before The Adjutant General's office and reminded of his failure to meet his obligations, the accused made what he and The Adjutant General's representative, Colonel Clarkson, believed to be an acceptable and equitable arrangement by setting aside $100.00 per month to effect complete repayment of his obligations. This he has done and was doing up to the date of trial, knowing during the time that repayment was no defense.

"3. It is recommended that either all or part of the sentence as adjudged be suspended."

5. The accused is 38 years of age, married and the father of one child. His civilian occupation was that of a private detective. War Department records show that he is a high school graduate and that he attended the Georgia School of Technology for two years. The accused served in the National Guard as an enlisted man from May 1926 until June 1928. In June 1928 he enlisted in the Regular Army and served therein until 2 April 1932 when he was discharged for physical disability. He served in the National Guard as an enlisted man from 6 February 1940 until 19 November 1942 when he was given a direct commission as a second lieutenant, Army of The United States. He was promoted to first lieutenant on 14 June 1943 and to Captain on 6 May 1944. On 17 March 1944 he was placed on a limited duty status for sinusitis and inguinal hernia.

From the date of his commission until 15 July 1946 the accused was stationed at Fort Douglas, Utah, and was assigned as Provost Marshal at that Post on 28 December 1946. The manner of performance of his duties has consistently been rated as superior, with the exception of two ratings which are excellent. He has received many letters of commendation from superior officers, civilian officials and federal and state law enforcement agencies attesting to his efficiency, cooperation and devotion to duty.

On 4 March 1946 the Commanding Officer, Fort Douglas, Utah, initiated a recommendation that the Legion of Merit be awarded to accused for the meritorious performance of his duties. This recommendation was not favorably considered by the War Department because exceptionally meritorious service was not shown. Instead the Army Commendation Ribbon was awarded the accused in August 1946. However, the award was revoked because the offenses for which he was tried had occurred during the period covered by the award.

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

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

CM 321057

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 - Recordof trial
2 - Form of Action

(G.C.M.O. 303, 27 Aug 1947).

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

JAGK
CM 321105

8 JUL 1947

UNITED STATES	)	FORT ORD, CALIFORNIA
	)	
v.	)	Trial by G.C.M., convened at Fort Ord, California, 21 February 1947. Dismissal, total forfeitures and confinement for three (3) years.
	)	
Second Lieutenant JESSE A. SANDERS (O-1332316), 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 trial in the case of the officer named above and 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, Second Lieutenant Jesse A. Sanders (then a member of Headquarters and Headquarters Detachment, Section One, Reception Station, Fort McPherson, Georgia) did, while on emergency leave, on or about 16 November 1945, desert the service of the United States and did remain absent in desertion until he was returned to military control at Fort MacArthur, California on or about 3 October 1946.

He pleaded guilty to the specification, except the words "desert the service of the United States and did remain absent in desertion", substituting therefor the words "absent himself without proper leave from his organization", and not guilty to the charge but guilty of a violation of Article of War 61. He was found guilty of the charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Without objection by the defense, an extract copy of paragraph 35, Special Orders Number 264, Fourth Service Command, Fort McPherson, Georgia, was admitted in evidence showing that accused had been granted an emergency leave of absence for a period of twelve days effective on or about 4 November 1945 (R. 7; Pros. Ex. 1). An extract copy of a morning report of Headquarters and Headquarters Detachment, Section 1, Service Command Unit 1464, Reception Station Overhead, Fort McPherson, Georgia, containing a corrected entry under date of 19 November 1945, reciting that accused went absent without leave from "15" days emergency leave on 16 November 1945, was received in evidence without objection (R. 7; Pros. Ex. 2). Also admitted in evidence without objection was an extract copy of a morning report of the 6004 Army Service Unit, Casual Detachment, Post Operating Company, Fort MacArthur, California, which contained an entry dated 8 October 1946 stating that accused was attached unassigned to that unit after having been apprehended by civilian authorities and returned to military control as of 3 October 1946 (R. 7; Pros. Ex. 4).

Evidence for the Defense.

Accused, his rights as a witness having been explained to him, elected to testify under oath in his own behalf. At the time he was given emergency leave to return to his home in California, his wife had been pregnant about seven and one half months. She was about thirty nine or forty years old and was having pre-natal difficulties. While on emergency leave, accused made arrangements with the Oakland California Regional Hospital for his wife's hospitalization and, since it had taken him longer to do this than he had anticipated, he requested by letter and telegram that his leave be extended. He received no reply to this request and, after he had overstayed his leave seven days, a "couple of CID men" questioned him as to his identity and brought him to their office. After they heard about his wife's condition, they told him to remain with his wife until they received further instructions from Fort McPherson. Upon receipt of these instructions, accused reported back to Fort McPherson. He "signed in" and when he reported to his company commander, Lieutenant Weinberg, the latter gave him a telegram from a doctor at the Oakland Regional Hospital which stated that accused's wife had suffered a hemorrhage and was not expected to live. Accused asked Lieutenant Weinberg if he could have some leave and when he received a negative reply he informed his company commander that he "was going back home anyway." Accused thereupon returned to his home. His wife had a "dry birth" and both she and the baby "almost passed away." This was her first child. After the birth, his wife remained in the hospital thirty-three days and the baby forty-three days. After accused's wife and baby were released from the hospital, his wife's mother and father came to live with them. The mother was crippled and the father

was an invalid. Accused was unable to procure domestic help and, since his wife and his parents-in-law could do no house work, he "thought it best" to stay home and take care of the baby. On 30 September 1946, "someone called from the Post Office" and asked accused if he "was ready to go back to camp." He was first taken to San Luis Obispo and then to Fort MacArthur, where he was placed in arrest of quarters. A few days later he received a telephone call from his wife who informed him that his father-in-law had died. Accused was given a three day pass, which was extended at his request, and returned home to make arrangements for the funeral. When he returned to Fort MacArthur, he was assigned duties as Assistant Provost Marshal and Assistant Police Officer. On 5 December 1946, he was released from arrest "by the Sixth Army Inspector General." While he was under arrest, he had been allowed to go home and come back "by himself" on weekend passes. After his release from arrest, he performed various duties, including that of Officer of the Day. He reported "on his own" to Fort Ord for this trial on 6 February 1947. The baby's condition is still serious. During his unauthorized absence he wore the uniform at all times and used his correct name. When he returned home from Fort McPherson he left "his things" at the latter place (R. 8-14).

It was stipulated by and between the prosecution, defense counsel and the accused that if the commanding officer, deputy commander, prevost marshal and assistant adjutant of Fort MacArthur were present in court they would testify that accused performed his duties while at that station in an excellent manner and that his reputation was never discussed other than favorably (R. 14; Def. Exs. 1-4).

4. Competent evidence adduced by the prosecution sufficiently established, without resort to accused's plea, that accused was absent without leave from 16 November 1945 to 3 October 1946, a period of over ten months. In CM 211586 Gerber (10 BR 107, 115), the Board of Review said:

> "The only remaining element in the offense of desertion is an intent not to return. Is there 'some substantial evidence' of such an intent? The Manual for Courts-Martial says, as the first sentence under the head of 'intent' (M.C.M., par 130a):
>
> > 'If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent.'
>
> "The accused was absent ninety days. Absences of equal or less duration have in many instances been held to justify the inference of an intent not to return. It is true that accused gave testimony tending to show an intent to return, but the court was not obliged to believe his testimony and apparently in this respect did not believe it."

The legal principles expressed in the cited case are of obvious applicability herein and we find no reason to disturb this court's findings of guilty. Even if accused's explanation of his unauthorized absence were to be accepted at face value, it is obvious that he placed his personal desires, born of the difficulties of life as they may have been, before his obligations to the service and that whatever intent he may have had to resume these obligations was dependent for its execution upon the urgings of the law. Such a contingent intent to return as is here shown is not a defense to a charge of desertion (CM 318130 Scott).

5. The defense counsel and all the members of the court present at the trial of accused requested that clemency be extended by the reviewing authority due to accused's prior excellent record, the "fine and soldierly appearance" he made in court and the "mitigating and extenuating" circumstances surrounding the case. Attached to the record of trial are letters from Doctor G. L. Sobey, Paso Robles, California, and Mr. Charles E. Gee, Atascadero, California, both of whom state that they know accused, his wife and baby son and that accused is needed at home to care for his family.

6. War Department records show that accused is 38 years of age. He served in the Army for one enlistment, from 30 September 1930 to 7 August 1933, with Battery A, 60th Coast Artillery (AA), Corregidor, P.I. He was a member of the 25th Battalion, Oregon State Guard, from June 1942 to May 1944, rising to the rank of captain therein. In civilian life he was a farmer and from September 1943 to May 1944 was Field Deputy Assessor of Malheur County, Oregon. On 30 May 1944 he reentered the service as an enlisted man, the answers to his Personnel Placement Questionnaire indicating that at this time he was married to Ruby Edna Sanders and had one other dependent. He graduated from the Infantry Officer Candidate School at Fort Benning, Georgia, on 14 February 1945 and was appointed and commissioned a second lieutenant in the Army of the United States. According to the Staff Judge Advocate's Review he was married in March 1945 to the woman by whom he had a child during his period of unauthorized absence.

7. The court was legally constituted and had jurisdiction over the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings 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 58.

Christian D. Gilbert, Judge Advocate.
Carlos E. McAfee, Judge Advocate.
Gilbert H. Chappell, Judge Advocate.

JAGK - CM 321105 1st Ind

WD, JAGO, Washington 25, D. C. JUL 17 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 Jesse A. Sanders (O-1332316), Infantry.

2. Upon trial by general court-martial this officer was found guilty of desertion for the period 16 November 1945 to 3 October 1946, in violation of Article of War 58. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

It was shown by extract morning report entries that accused absented himself without leave from his organization at Fort McPherson, Georgia, on 16 November 1945 by failing to return from a period of emergency leave and that he was apprehended by civilian authorities and returned to military control at Fort MacArthur, California, on 3 October 1946. Accused pleaded guilty to having been absent without leave for this period but not guilty to desertion. He attempted to explain his unauthorized absence in his sworn testimony before the court.

Accused stated that his wife was between 39 and 40 years of age and that at the time he was on emergency leave she was about 7-1/2 months along in her first pregnancy and was having pre-natal difficulties. He obtained hospitalization for her at the Oakland, California, Regional Hospital and requested an extension of his leave from Fort McPherson. Receiving no reply to his request, he remained at his home in California until, having overstayed his leave about seven days, he was apprehended by C.I.D. agents. These authorities, after inquiring into his case, told him to stay with his wife until they could communicate with Fort McPherson. When no reply was received by them, he returned to Fort McPherson and reported to his company commander. The company commander gave him a telegram from the Oakland Regional Hospital informing him that his wife had suffered a hemorrhage and was not expected to live. His request for further leave being denied by the company commander, he went back home "anyway." His

wife had a "dry birth" and both she and the baby "almost passed away." After his wife and baby were released from the hospital, his parents-in-law, both invalids, came to live with him. He could not get domestic help and since he was the only person who could do any work about the house he decided to stay home and care for the baby. On 30 September 1946 "someone called from the Post Office" and asked him if he "was ready to go back to camp." He was ultimately taken to Fort MacArthur, where he was placed in arrest of quarters. He was released from arrest on 5 December 1946 "by the Sixth Army Inspector General." Both before and after his release from arrest he performed various duties and was given week-end passes to visit his home.

It was stipulated that the commanding officer, deputy commander, provost marshal and assistant adjutant of Fort MacArthur would testify that accused performed his duties in an excellent manner while at that station. The defense counsel and all the members of the court present at the trial of accused submitted a request for clemency due to accused's prior excellent record, the "fine and soldierly appearance" he made in court and the "mitigating and extenuating" circumstances surrounding the case. Attached to the record of trial are letters from Doctor G. L. Sobey, Paso Robles, California, and Mr. Charles E. Gee, Atascadero, California, both of whom state that they know accused, his wife and baby son and that accused is needed at home to care for his family.

It is stated in an indorsement to The Adjutant General from the Commanding General, Seventh Army, dated 9 December 1946, found in the accompanying papers, that accused was "first" apprehended on 30 November 1945 at San Leandro, California, by the Provost Marshal, Oakland, California, and released on warning orders on 2 December "1946" ("1945"), obviously intended to return to his proper station, but that he never reported as directed. It is also stated in the same indorsement that a charge of bigamy against accused had been withdrawn pending further investigation.

4. Accused is 38 years of age. He served in the Army for one enlistment, from 30 September 1930 to 7 August 1933, with Battery A, 60th Coast Artillery (AA), Corregidor, P.I. He was a member of the 25th Battalion, Oregon State Guard, from June 1942 to May 1944, rising to the rank of captain therein. In civilian life he was a farmer and from September 1943 to May 1944 was Field Deputy Assessor of Malheur County, Oregon. On 30 May 1944 he reentered the service as an enlisted man, the answers to his Personnel Placement Questionnaire indicating that at this time he was married to Ruby Edna Sanders and had one other dependent. He graduated from the Infantry Officer Candidate School at Fort Benning, Georgia, on 14 February 1945 and was appointed and commissioned a second lieutenant in the Army of the United States. According to the Staff Judge Advocate's review he was married in March 1945 to the woman by whom he had a child during his period of unauthorized absence.

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

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

(CM 321105)

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 259, 23 July 1947).

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

JAGH - CM 321141 17 JUL 1947

UNITED STATES v. Private LEE JAMES HOWARD (18018215), Attached Unassigned 3rd Replacement Depot	THIRD UNITED STATES ARMY Trial by G.C.M., convened at 3rd Replacement Depot, Marburg, Germany, 7 and 10 February 1947. Dishonorable discharge and confinement for thirty (30) years. United States Penitentiary

REVIEW by 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 soldier named above.

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

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

Specification: In that Private Lee James Howard, 115th Field Artillery Battalion, did, at Frankfurt, Germany, on or about 16 October 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Colgone, Germany on or about 2 July 1946.

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

Specification: In that Private Lee James Howard, 115th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, in conjunction with Private Robert Ashcom and other persons unknown, at Junkerdorf-Cologne, Germany on or about 29th April 1946, by force and violence and by putting her in fear, feloniously take, steal and carry away from the room of Frau Ria Bardenheuer, 1 platinum

diamond ring, 1 gold watch, 1 diamond and pearl brooch, 1 black onyx and pearl ring, 1 pair onyx earrings, 1 sapphire ring, 1 platinum and ruby bracelet, and one silver bracelet, the property of said Frau Ria Bardenheuer, all of a value of over $50.00.

FIRST ADDITIONAL CHARGES:

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

Specification: In that Private Lee James Howard, attached-unassigned 3rd Replacement Depot, having been duly placed in confinement in 3rd Replacement Depot Stockade, Marburg, Germany, on or about 24 October 1946, did, at Marburg, Germany, on or about 30 October 1946 escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Lee James Howard, attached-unassigned 3rd Replacement Depot, did, without proper leave absent himself from his organization at Marburg, Germany, from about 30 October 1946 to about 19 December 1946.

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

Specification 1: In that Private Lee James Howard, attached-unassigned 3rd Replacement Depot, did, at Pelkum, Germany, on or about 19 November 1946, feloniously take, steal and carry away two ladies wrist watches, value of more than $50.00, property of Frau Graefe.

Specification 2: In that Private Lee James Howard, attached-unassigned 3rd Replacement Depot, did, at or near Duesseldorf, Germany, on or about 16 November 1946, feloniously take, steal and carry away one Opel-Kadett automobile, value of more than $50.00, property of Walter Voss.

SECOND ADDITIONAL CHARGES:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private James Lee Howard, attached unassigned 3rd Replacement Depot, having received a lawful command from 1st Lieutenant James G. Wamsley, his superior officer, to get off his bunk and clean his cell, did at Marburg, Germany, on or about 28 December 1946, willfully disobey the same.

THIRD ADDITIONAL CHARGES:

CHARGE I: Violation of the 64th Article of War.

Specification 1: In that Private James Lee Howard, attached unassigned 3d Replacement Depot, APO 872, having received a lawful command from First Lieutenant Paul A. Cooper, Infantry, on duty as Officer of the Day, 3d Replacement Depot, on 16 January 1947, his superior officer, to "take his hands out of his pockets and march at attention", did, at Marburg, Germany, on or about 16 January 1947, willfully disobey the same.

Specification 2: In that Private James Lee Howard, attached unassigned 3d Replacement Depot, APO 872, having received a lawful command from Captain Louis Caudell, Infantry, on duty as Officer of the Day, 3d Replacement Depot, on 17 January 1947, his superior officer, to "take his hands out of his pockets and be at attention", did, at Marburg, Germany, on or about 17 January 1947, willfully disobey the same, by putting his hands deeper into his pockets.

Specification 3: (Findings of guilty disapproved by the reviewing authority).

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

Specification: In that Private James Lee Howard, attached unassigned 3d Replacement Depot, APO 872, did, at Marburg, Germany, on or about 17 January 1947, behave himself with disrespect toward Captain Louis Caudell, Infantry, on duty as Officer of the Day, 3d Replacement Depot, on 17 January 1947, his superior officer, by saying to him "Fuck you", or words to that effect.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be 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 disapproved the findings

of guilty of Specification 3 of Additional Charge I, Third Additional Charges (violation of Article of War 64), approved only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for thirty (30) years, 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 evidence and law contained in the Third United States Army Judge Advocate's review, dated 10 March 1947.

4. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority. Confinement in a penitentiary is authorized by Article of War 42 for the offense of larceny of property of a value of more than fifty dollars, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 287, Criminal Code of the United States (18 USC 466). Where part of the whole sentence is punishable by confinement in a penitentiary, the whole sentence may be served therein (AW 42).

A. Hottenstein, Judge Advocate

Weldon A. Self, Judge Advocate

Philip R. Sewell, Judge Advocate

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

JAGK - CM 321176

8 MAY 1947

UNITED STATES	11TH AIRBORNE DIVISION
v.	Trial by G.C.M., convened at Camp Schimmelpfennig, Sendai, Honshu, Japan, 30 January and 5 February 1947. Dishonorable discharge and confinement for two (2) years. Penitentiary.
Private ARTHUR V. HORSEY (43038921), Detachment Headquarters Company, 11th Airborne Division.	

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 84th Article of War.

Specification: In that Private Arthur V. Horsey, Detachment Headquarters Company, 11th Airborne Division, APO 468, did, at or near Iwanuma, Honshu, Japan, on or about 21 November 1946, unlawfully sell to Kiyoshi Itasaka, cotton waste of the value of about $77.00, issued for use in the military service.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for a period of two years. The reviewing authority approved the sentence and designated the U. S. Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring discussion is the propriety of the designation of a penitentiary as the place of confinement of the accused. The offense of selling Government property issued for use in the military service in violation of the 84th Article of War is essentially a military offense and is not recognized as an offense of a civil nature punishable by penitentiary confinement for more than one year by any statute of the United States or by a law of the District of Columbia (AW 42). (CM 301149, Hardin, 18 BR (ETO) 151; CM 291137, Reed, 18 BR (ETO) 215; CM (ETO) 10282, Vandiver, 22 BR (ETO) 165.)

4. For the reasons stated the Board of Review holds the record of trial

legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal correctional institution or reformatory.

Chester D. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Ashcroft, Judge Advocate

JAGK - CM 321176 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, 11th Airborne Division, APO 468, c/o Postmaster, San Francisco, California.

1. In the case of Private Arthur V. Horsey (43038921), Detachment Headquarters Company, 11th Airborne Division, 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, and confinement at hard labor for two years in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon approval of 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 two years in a place other than a penitentiary, Federal correctional institution or reformatory, 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 321176).

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 321194

AUG 1947

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at New Orleans Port of Embarkation, 18 and 21 March 1947. Dismissal, total forfeitures, and confinement for twenty (20) years.
Second Lieutenant THOMAS J. MITHEN (O-687889), Air Corps	)	

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 58th Article of War.

Specification: In that Second Lieutenant THOMAS J. MITHEN, Air Corps, 9223 Technical Service Unit, Transportation Corps, New Orleans Port of Embarkation Casual Detachment, New Orleans, Louisiana, then attached unassigned to Pettus Provisional Group, 18th Bomber Squadron (H), 34th Bombardment Group (H), Blythe Army Air Field, Blythe, California, did, at Blythe Army Air Field, Blythe, California, on or about 1230 hours, 8 October 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at New Orleans, Louisiana on or about 29 January, 1947.

He pleaded not guilty, and "not guilty because of insanity" at the time of the alleged offense, to both the Charge and its Specification. Prior to arraignment the defense made a motion for a further inquiry into the mental condition of the accused, which was denied by the court after accused pleaded to the general issue. The accused was found guilty of the Charge 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 twenty years. 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 is summarized as follows:

A certified extract copy of a morning report showed that on 8 October 1943 the accused absented himself without proper leave from Pettus Provisional Group, 18th Bombardment Squadron (H), 34th Bombardment Group (H), Blythe Army Air Field, Blythe, California (R 22; Pros Ex 1). On 29 January 1947 accused was apprehended and returned to military control at New Orleans, Louisiana (R 31; Pros Ex 2). The FBI agent who arrested accused testified that accused's employers referred to him as Thomas W. Nithen (R 24), and that accused attempted to evade arrest (R 26).

4. The evidence for the defense, upon both the motion for further inquiry into the mental condition of the accused and upon the issues raised by the pleas, is summarized as follows:

Dr. Charles Holbrook, a civilian psychiatrist, testified that he had examined the accused and from information obtained from the accused, accused's wife, and from Mr. Miller, one of the individual defense counsel and an employer of accused for the year preceding his apprehension (R 13), he arrived at the opinion that accused was possibly suffering from hysterical amnesia due to war strain at the time he went absent without leave. Accused probably could not distinguish right from wrong, or, if he could, he would not be able to adhere to the right (R 12). Dr. Holbrook considered accused normal at the time he interviewed accused (R 16).

A report of a Board of Medical Officers, Station Hospital, New Orleans Port of Embarkation, dated 26 February 1947 was introduced without objection. The Board found that accused was sane at the time the examination of accused was made, but gave no opinion as to the mental condition of the accused at the time of the commission of the offense (R 65; Def Ex 2).

Two members of the Board testified that no finding as to the prior mental condition of accused was made as they had insufficient basis upon which to make such finding (R 63-64). Captain Herbert L. Archibald, MC, the senior member, testified that in his opinion accused was sane at the

present time (R 72). The only evidence available to the Board as to the past was accused's statement and exactly what transpired could not be determined because of the length of time that had elapsed (R 72). He admitted that accused could have had hysterical amnesia or a phychosis but he did not feel justified in committing himself at this date (R 72). Accused is a person with an abnormal personality adjustment and comes under the general classification of psychoneurotic (R 73). There has been a "mother fixation," with the wife, who is seventeen years older than accused, substituted in the role of mother and wife (R 74). There is no evidence of insanity (R 73).

Mrs. Lillian Mithen, wife of the accused, testified that she has known him since July 1939 and that they were married 7 December 1942 (R 32), which was the same day accused received notice to report for active duty (R 33). Accused was assigned to Navigation School in Hondo, Texas, in April 1943 (R 33-34). He was completely "wrapped up" in his studies and discussed navigation continually (R 34). During this time accused was very nervous and tense and unable to relax (R 34-35). He graduated 5 August 1943 and received a 10-day leave. Accused was busy obtaining uniforms, was not interested in chess or automobile riding or any of the things he and his wife had done previously, and he talked only about navigation (R 34-35). After graduation he was transferred first to Tucson, Arizona, and then to Blythe, California (R 36). At the latter station accused was granted an 8-day leave and they went to a hotel at Coronado. He stayed in his room all the time and played pinochle, except for short walks (R 36). He was utterly unlike anything his wife had known him to be, was irritable and she could do nothing to amuse him (R 36). Upon returning to Blythe accused sometimes made one and sometimes two flights a day. He was frequently hysterical, breaking down and sobbing and he could not sleep (R 37). After three weeks they went to Phoenix on a 48-hour pass. On returning from this pass at about 2:30 a.m. on October 6 accused was in "awfully bad shape." He had a flight scheduled, but begged his wife not to force him to go on it. She suggested that they go to New Orleans, thinking the change would do him good (R 39). In New Orleans accused just slept, or sat and looked out the window (R 40). After two days there they went to Dallas and then to San Antonio (R 41). She stated that while they were at San Antonio accused was "completely off his head and irrational" and she decided to take him back to New Orleans (R 42). They remained in New Orleans until accused was apprehended, living first at a tourist camp, then in an apartment on Benefit Street, and finally in a room at 2010 Milan Street. During the first part of the stay in New Orleans accused "was in a state of complete lassitude" and spent most of the time in bed, with the room in semi-darkness as the light bothered him (R 43-44). Mrs. Mithen made copies of accused's leave orders which she dated ahead, and twice when he asked about his status she showed him these orders which indicated that he had two or three more days of leave.

Accused was not aware of the passing of time, and on awakening often would not remember what had happened before he went to sleep (R 44). Mrs. Mithen locked up accused's uniforms and everything that would remind him of the Army, and for a long time he did not mention the Army (R 4-6). In the fall of 1944 he asked if he had received a medical discharge and when she told him he had not he was much upset, accused her of jeopardizing his whole life and wanted to return to the Army. He was still sick and weak and she persuaded him to wait (R 47). For a long time he wanted "to destroy himself" (R 48). About November 1944 she taught him to knit and thereafter he began to improve (R 48). Mrs. Mithen had obtained a job at the race track under the name of Lee Howell Nithen (R 49), but accused did not know this (R 52). Eventually accused took a job at the race track and they "worked as a couple." She obtained for him a social security card in the name of Thomas Nithen (R 49), as "it would have looked silly" for her to be "Nithen" and for him to be "Mithen" (R 52). In March 1946 accused took a position with Kirschman's Furniture Store, where he was employed until he was arrested (R 49).

No doctor was ever called or consulted and Mrs. Mithen did not communicate with accused's family since they were eccentric and she was not on friendly terms with them (R 50, 53). She did not take accused to a military hospital because she was afraid he would be put in a mental hospital and she would not be able to see him (R 55).

Mrs. S. J. Domec, the landlady at 2010 Milan Street, stated that accused and his wife rented a small room and bath in a cottage near her house. She was told in the presence of the accused that he had a medical discharge from the Air Corps (R 58). The room was rented in June or July 1944 at which time accused appeared to be sick (R 61) and was a very nervous man (R 62). He was not in uniform at the time the room was rented and she did not recall seeing him in uniform (R 60). The rent was paid sometimes by accused, sometimes by his wife (R 60). They used the name Mithen or Methen; the witness had spelled it both ways (R 60). She saw accused leave the house practically every day (R 59).

5. In rebuttal, the prosecution placed in evidence, without objection, two reports of physical examinations of the accused, the first (Pros Ex 3), dated 28 December 1942 and the second (Pros Ex 4), dated 17 June 1943 (R 79). These reports show accused's nervous system as normal and that he was physically qualified for flying duty as a navigator.

6. The evidence for the prosecution establishes that accused absented himself without leave from his station at Blythe Army Air Field, Blythe, California, on or about 8 October 1943 and that he remained absent until he was apprehended and returned to military control on or about 29 January 1947. He was dressed in civilian clothes at the time of his apprehension,

attempted to avoid arrest and was using an assumed name. The long period of absence of over three years and three months warranted the court in finding the accused guilty of desertion.

7. There remains for consideration whether accused was mentally responsible for the offense of which he was found guilty. The defense admitted that accused was sane at the time of the trial. A pre-trial mental examination of the accused was made by a Board of Officers at the Station Hospital, New Orleans Port of Embarkation, The report of the Board, dated 26 February 1947, and the testimony at the trial by members of the Board, showed that no findings as to the mental condition of the accused at the time of the alleged offense were made. He was found sane at the time of the examination. Dr. Holbrook, a civilian psychiatrist, testified for the defense and stated that he had examined the accused and that on the basis of information obtained by him from the accused and his wife, he was of the opinion that at the time the offense was committed and for some time thereafter, accused possibly had either a psychosis or hysterical amnesia due to war strain; that accused probably could not distinguish right from wrong, and if he had been able to do so, he would not have been able to adhere to the right. Captain Alexander, a member of the Board of Medical Officers which examined the accused, stated that it was possible that accused could have been suffering from hysterical amnesia or a psychosis at the time of the alleged offense, but that he would not commit himself as to these conditions and did not feel justified in so doing. He did state, however, that in his opinion the accused showed very definite emotional instability, and that he was psychoneurotic, but accountable for his actions. Mrs. Mithen testified in detail as to accused's condition and actions as observed by her during the period of his absence. The prosecution introduced into evidence two reports of physical examinations of accused, dated 28 December 1942 and 17 June 1943, both of which showed that accused's nervous system was normal and that he was qualified for flying duty.

The issue of insanity was a question of fact for the court to decide, and its findings of guilty import a finding that accused was sane at the time of the alleged offense and at the time of trial. The findings of the court should not be disturbed upon review if there is substantial evidence to sustain them. In this connection it is noted that Dr. Holbrook did not state definitely that accused was suffering from mental amnesia or a psychosis, but merely that he probably was. Captain Alexander admitted the possibility that accused might have been insane at the time of the commission of the offense. The opinion of Dr. Holbrook depended entirely upon the statements made to him by accused and his wife. The court heard the wife's testimony and the weight given to it would necessarily affect the weight to be given to Dr. Holbrook's opinion. The medical examinations of accused in December 1942 and June 1943 indicated no mental disturbance and the findings of the medical board in February 1947 were that, at that time, accused was sane. On all the evidence it cannot be said that the court was in error in finding accused sane at the time of the offense.

8. The accused is thirty years of age and is married. He enlisted as an aviation cadet and reported for active duty on or about 7 December 1942. He was commissioned as a second lieutenant, Air Corps, on 5 August 1943 and thereafter assigned to Blythe Army Air Field, Blythe, California, for further training. He deserted the service from Blythe Field on 8 October 1943.

Following the trial of accused he was examined by a Board of Medical Officers at Brooke General Hospital, Fort Sam Houston, Texas. The report of this Board dated 21 May 1947 is attached to the file in this case. The Board found that the accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong and to adhere to the right, and further, that at the time of the trial he was sufficiently sane intelligently to conduct or cooperate in his defense.

A brief for the accused submitted by special defense counsel, Mr. Richard C. Keenan has been considered by the Board of Review. There is also attached to the file a letter dated 7 April 1947 from accused's wife to the Honorable Owen J. Roberts inclosing a copy of the brief of defense counsel, and a letter dated 24 April 1947 from the Honorable F. Edward Hebert, House of Representatives, addressed to The Adjutant General, inclosing a copy of a letter dated 22 April 1947 from Max Ran, one of the employers of the accused.

9. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the 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 to support the sentence and to warrant confirmation of the sentence. A sentence to dismissal and confinement for twenty years is authorized upon a conviction of a wartime violation of Article of War 58.

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 321194 1st Ind

WD, JAGO, Washington 25, D. C. AUG 18 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas J. Mithen (0-687889), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of desertion in violation of Article of War 58. There was no evidence of previous convictions. He was sentenced to be dismissed from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for twenty 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 is contained 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 in October 1943 was assigned to duty at Blythe Army Air Field where he underwent training as a navigator. On or about 8 October 1943 he absented himself without leave and went to New Orleans with his wife. He remained absent until he was apprehended in New Orleans on 29 January 1947, dressed in civilian clothes and working under the name of Thomas W. Nithen. The absence of over three years and three months warranted the finding by the court that accused deserted the service.

4. The defense at the trial made a motion for further inquiry into the mental condition of the accused which, after testimony by a civilian psychiatrist, was denied. The question of insanity was also raised by the accused in his plea to the general issue and further evidence on the question was introduced. The wife of the accused testified at length as to events following accused's departure from his station, including accused's physical and mental condition as observed by her. Based upon the story related to him by accused and his wife, a civilian psychiatrist stated that in his opinion accused, at the time he absented himself, possibly had a psychosis or hysterical amnesia as a result of which he probably could not have distinguished right from wrong, or, if he could do so, could not have adhered to the right. A Board of Medical Officers examined the accused prior to trial and found him sane at that time. They made no finding as to his mental status at the time of the commission of the offense alleged. The senior member of the Board testified that he did not consider that he had sufficient basis for a definite opinion, but admitted the possibility that accused did have a psychosis or hysterical amnesia at the time he committed the offense. He was of the opinion that accused is an individual with an abnormal personality adjustment and classed him as psychoneurotic, but stated that there was no evidence of insanity.

The findings of guilty by the court import a finding that accused was sane, both at the time he deserted the service and at the time of trial.

After the trial the accused was examined by a Board of Medical Officers at Brooke General Hospital, Fort Sam Houston, Texas. The report of this Board dated 21 May 1947, is attached to the file in this case. In its report the Board stated:

"After careful examination, observation for a period of approximately seven (7) days, and due consideration of all available date, the findings are:

"1. THAT this officer was at the time of the alleged offense (violation of the 58th Article of War - desertion from on or about 8 October 1943 to on or about 29 January 1947) 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 this officer 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 this officer was at the time of his trial on 21 March 1947 sufficiently sane intelligently to conduct or cooperate in his defense."

This report supports the findings of the court with respect to accused's sanity. It appears from all the evidence, however, that, although accused was sane at the time the offense was committed, he was then suffering from considerable nervous strain. This condition cannot be considered as a defense, but may be considered as a mitigating circumstance. It is noted, however, that even after accused had, according to his wife's testimony, recovered, he took no steps to return to military control.

5. The accused is thirty years of age and is married. He enlisted as an aviation cadet and reported for active duty on 7 December 1942. He was commissioned a second lieutenant on 5 August 1943 and thereafter was assigned to Blythe Army Air Field, Blythe, California, where he deserted the service on 8 October 1943.

A brief was submitted by accused's special defense counsel, Mr. Richard Keenan and has been considered. A letter dated 7 April 1947 from accused's wife to the Honorable Owen J. Roberts and a letter dated 24 April 1947 from the Honorable F. Edward Hebert, House of Representatives, addressed to The Adjutant General, inclosing a copy of a letter from

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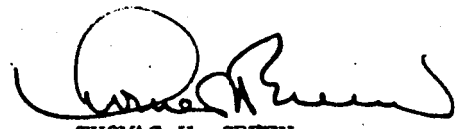
Max Ran, one of the employers of the accused, were forwarded to this office and have also been considered.

6. Upon consideration of all the facts in the case, I recommend that the sentence be confirmed but that the period of confinement be reduced to five years. I further recommend that the sentence as thus modified be carried into execution and that a Branch United States Disciplinary Barracks be designated as the place of confinement.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 300, 27 Aug 1947).

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

JAGH - CM 321246

24 JUL 1947

UNITED STATES	)	EIGHTH ARMY
v.	)	Trial by G.C.M., convened at Yokohama, Honshu, Japan, 31 December 1946 and 9-10 January 1947. To be reprimanded and to pay the United States a fine of one thousand ($1,000.00) dollars.
Captain ALBERT T. HENDRICK (0-1046124), Coast Artillery Corps.	)	

HOLDING by 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 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 of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Albert T. Hendrick, Headquarters Eighth Army, APO 343, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 6 November 1946, wrongfully take and carry away about four (4) cases of whiskey and about two (2) cases of rum, total value over Fifty Dollars ($50.), the property of the Eighth Army Officers Club.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be reprimanded and to pay to the United States a fine of one thousand dollars ($1,000.00). The reviewing authority approved the sentence and ordered it executed. The result of trial was published in General Court-Martial Orders No. 34, Headquarters Eighth Army, 13 February 1947.

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

On 6 November 1946, Corporal Frank Tesseyman, the club steward of the Bankers Officers Club located in the vicinity of Yokohama, Japan, made an inventory of the liquor in the stock room of the club and discovered that two cases of Seagram Seven Crown Whiskey, two cases of Schenley Reserve Whiskey, one case of Bacardi Rum and one case of Merito Rum were missing from the stock room according to the stock control records (R. 28-29). He reported the shortage to Captain Malcolm C. Mansfield, the club officer (R. 28).

At about 0030 hours, 7 November 1946, Special Agent Benjamin Donahue, 44th CID, found bottles of whiskey and rum in two footlockers in the accused's quarters and turned them over to Special Agent Edwin F. Marsullo, CID, who transported them to the CID office and turned them over to a Major Diaz (R. 9). Donahue identified 31 bottles of Schenley Reserve, 29 bottles of Seagram Seven Crown Whiskey, 14 bottles of Ron Merito Rum, 11 bottles of Bacardi Rum as being the same type and quantity of liquor he had taken from accused's quarters (R. 17; Pros. Exs. 1 and 2, R. 21). At the time the liquor was found the accused voluntarily stated to Donahue that First Lieutenant Robert J. Crook, the manager of the officers club gave the liquor to him (R. 18-19).

Captain Mansfield testified that he saw the accused at the club on the night of 5 November 1946 and identified Prosecution Exhibits 1 and 2 as the same type and kind of liquor that was missing from the club's stock room (R. 37). He further testified that Private Miller was in charge of the records and storeroom and was supervisor of the Japanese employees (R. 39). Captain Mansfield admitted that whiskey had been removed from the storeroom by individual officers including himself on several occasions (R. 39), and that the by-laws of the club authorized him to administer the club as he saw fit (R. 39). He further testified that he had given whiskey to individuals for services they had rendered to the club but it was not the policy of the club to use liquor as gifts, and that when he or Lieutenant Crook had given away liquor they had paid for the liquor so given (R. 42). Whiskey had been given away at the club to enlisted men and various motor pool employees, because they were kind enough to help make repairs and furnish extra transportation (R. 48-49).

Hiroshi Komaki testified that he worked at Bankers Club and that at 0300 hours, 6 November 1946 he saw the accused with a soldier named Miller who works at the club. He was instructed by Miller to take six (6) cases of liquor to accused's jeep, and he rode on the jeep to the Rising Sun where he carried the liquor into the building and up to accused's room (R. 53-55).

Private Miller who had charge of the liquor stocks for the club, testified that there were fifteen cases of liquor in the stockroom that were not on record as charged to the club. He further testified that between 1 and 3 November 1946, Lieutenant Crook took three of the cases and told him to do what he wanted to with the other twelve cases (R. 62). Miller testified: "He (Lt. Crook) came in from the country club and came into the stockroom at about 5:30 p.m. in the afternoon, and asked me for three cases of whiskey. I gave it to him, and upon his leaving the stockroom, I asked him what to do with the rest of the whiskey not on record. He said, 'I don't care what you do with it; anything you want to. Next week you will be leaving the club.' I said, 'I would like to get the record straight before I leave'. He said, 'I don't care what you do with it'. Then he left the club." (R. 58).

Miller further testified that he gave to accused six cases of liquor on 6 November for the use of "the troops" and had a Japanese employee deliver it (R. 56, 57). By the term "troops", he meant several officers who were known as "the troops" among themselves. The accused was to distribute the liquor to all of them (R. 58, 59). The witness instructed a Japanese employee to put it into the accused's jeep. He watched the liquor being loaded into the jeep and saw the accused driving it away from the club (R. 57-58).

He further testified that before accepting the liquor, the accused asked him "if it was right to take the whiskey, and if I (Miller) had permission from Lieutenant Crook, and I said if he didn't believe me he could go up to the bar and ask him himself" (R. 58). He continued by testifying that the whiskey he gave the accused was not on the inventory record of the Bankers Club and that he felt that he had a right to give it away (R. 58). Lieutenant Crook had previously given away whiskey (R. 59-61), and Captain Mansfield had given away whiskey (R. 60). The witness further testified that the accused did not ask him for the liquor, "as he was going down the steps to go out of the club, I asked him if he needed any, he said, 'yes', and I told him I had twelve cases not on record and he could have half." (R. 63).

Lieutenant Crook the club manager testified that he had never given the accused any whiskey and denied having instructed any of his staff to give any whiskey away (R. 65). Crook stated that he last saw accused between 0100 and 0200 the morning of the 6 November 1946, and at that time accused was drinking pretty heavily (R. 66). He further testified that there was no liquor in the storeroom that was not on record in the club's books (R. 66, 67). On cross-examination he testified as follows:

"Q. Did you make a statement to Colonel Maher, during the course of the investigation, that you might have made a statement that led Miller to believe that you had given him some whiskey?

"A. Yes. I told Colonel Maher that it was possible that I might have gone down to that room where it was kept and made some remark that if he didn't have any room to put it, to put it anywhere, as the warehouse was full at that time, but I don't think he could interpret that to mean I had given the whiskey to him." (R. 72)

Lieutenant Colonel Thomas D. Maher the investigating officer, a witness for the prosecution, testified that the accused after being advised of his rights under the 24th Article of War informed him that Private Miller, who was employed by the Bankers Club, told the accused that he had at his disposal twelve cases of liquor which he, Private Miller, could dispose of as he saw fit. The accused stated that he questioned Miller to be sure that he did have the right or authority or had been told by Lieutenant Crook that he could dispose of the liquor before he took it and that one of the employees of the club loaded the liquor in the jeep at the direction of Private Miller and delivered it to the Rising Sun where he, the accused, lived (R. 26).

By stipulation it was agreed that the value of the six cases of whiskey was $50.00 (R. 68).

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

Lieutenant Colonel Eugene S. Bibbs, accused's immediate superior, testified as to accused's good conduct during the six months prior to the trial (R. 71).

After his rights as a witness had been explained to him by the law member, the accused elected to be sworn as a witness (R. 79) and testified that on the night of 5 November 1946 he was at the Bankers Club where he had several drinks with friends. At closing time Lieutenant Crook asked him and Lieutenant Moore to visit him in his room, and while there, Private Miller came in the room and they all had a drink. Later they went to the bar downstairs, had a drink and then returned to Lieutenant Crook's room. On his way home accused went down the stairs with Miller and they stopped in Saki's room to have a drink. Miller then told him about a surplus of whiskey drawn by Bankers Club and that the club had an excess of 25 cases, which were not on record. Lieutenant Crook, who knew about it, had authorized him (Miller) to dispose of twelve (12) cases in any way he saw fit. After the accused questioned him, Miller insisted

it was true and accused did not think it worth the trouble to inquire further. Later, after accused had attempted to get Lieutenant Beeman, his roommate, to help, he returned to the Bankers Club alone and Komaki loaded six cases into the jeep, as accused could not handle them in his condition (R. 80). Accused supervised the loading of the cases in his jeep and then drove to Rising Sun billet, where Komaki unloaded the whiskey, taking it to accused's room. Later, accused took the whiskey out of the cases and put in two footlockers (R. 81). Accused stated that the whiskey was given to a number of officers who frequently drink together at the Bankers Club and who call themselves "the troops". He thought it was all right to accept the whiskey as he had heard of other cases where whiskey had been given away by the club. Accused stated that he had "quite a few" drinks during the evening of 5 November 1946 (R. 81).

5. The accused stands convicted of wrongfully taking and carrying away six cases of liquor, of a total value of $50.00, the property of the Eighth Army Officers Club.

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, 1928, par. 149g).

Wrongful taking and carrying away is distinguished from larceny only by the intent to permanently deprive the owner of his property. Therefore in order to find the accused guilty as charged all the elements of larceny must be proven with the exception of the intent to permanently deprive the owner of his property (CM 194359, Sadler, 2 BR 137; CM 193315, Rosenborough, 2 BR 83; TM 27-255, par. 24a and 106).

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

> "Proof.—(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." (par. 149g).

As the element of intent to permanently deprive the owner of his property is the only element of larceny that is not required in the offense of wrongful taking and carrying away the evidence in the instant case must establish each element of larceny except that enumerated in subparagraph e above. The only question presented by the record is whether the evidence establishes a wrongful taking by trespass, i.e., a taking from the owner without his consent.

The testimony of Private Miller, who had charge of the liquor stock of the Club, tends to show that he had permission, or at least thought that he had permission, from Lieutenant Crook, the club manager, to dispose of 12 cases of liquor "in any manner he saw fit." Acting on this presumption he offered six cases of liquor to the accused. After the accused questioned Miller as to his authority, but without further inquiry as to the source of Miller's authority, the accused accepted the offer, personally supervised the removal of the liquor from the club to his jeep by a Japanese employee, and took it to his quarters in the Rising Sun Barracks. Lieutenant Crook testified that he had never given Miller, or any other employee of the club, permission to give away the club's liquor.

It is obvious from the record that Miller had mere custody of the liquor in question, and that he did not have possession thereof. Permission from Miller to take the liquor from the club did not constitute permission from the owner who had possession of the property. Nevertheless, if the accused, in good faith, believed that Miller had authority to dispose of the liquor by gift and that he had authority to accept the gift, he lacked the criminal intent necessary to establish the offense charged, wrongful taking and carrying away.

The issue as to whether the accused acted in good faith in accepting the liquor from Miller at 0300 hours was one for determination by the court from all the evidence and the circumstances of the case. In arriving at its findings the court was warranted in considering that the accused, a member of the club, should have known that the custodian of the liquor stock had no authority to alienate the club's property, that all members of the officers club are entitled to the same privileges and that the club is operated for the benefit of all members. The accused had no reason to believe that every member was to be given six cases of liquor. He should have known that the liquor was paid for by the club and that losses sustained by the club are losses to all members. He was also under a duty to make inquiry directly of those responsible for the property of the club, especially where the monetary value of items is fifty dollars.

It is apparent that the court gave little credence to the accused's explanation that he believed Miller had authority to give him the liquor. It is also apparent that the court elected to believe Lieutenant Crook's version of his conversation with Private Miller rather than the latter's version.

The resolution of questions involving the credibility of witnesses rests with the court and with the reviewing authority and not with the Board of Review.

> "Except where the President is the reviewing or confirming authority, it is not the function of the board of review or the Judge Advocate General, in passing upon the legal sufficiency of a record under A. W. 50½, to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. In such cases the law gives to the court-martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby; therefore, if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts." (CM 152795, cited in MCM 1928, Appendix 1, p. 216).

Accordingly, we are of the opinion that the evidence establishes sufficiently that the taking of the liquor by the accused was by trespass.

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

Cm 321246

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip R. Smith, Judge Advocate

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

JAGK - CM 321309

4 AUG 1947

UNITED STATES	)	FORT BENNING
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 21-25 November 1946. Dismissal and total forfeitures.
Captain JAMES S. TISDALL (O-29522), Quartermaster 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 charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain James S. Tisdall, Section I, 1447 Area Service Unit, Station Complement, Sales Officer, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 15 March 1946, wrongfully and with intent to deceive higher authority as to the true condition of the accounts of his office, order and cause to be made false entries on certain outgoing tally sheets of his cold storage department, official records of his office, thus showing the issue of field rations which he well knew had not, in fact, been made.

Specification 2: In that Captain James S. Tisdall, ***, did, at Fort Benning, Georgia, on or about 15 March 1946, wrongfully and with intent to deceive higher authority as to the true condition of the accounts of his office, order and cause to be made false entries in certain abstracts of issues, official records of his office, thus showing the issue of field rations which he well knew had not, in fact, been made.

Specification 3: In that Captain James S. Tisdall, ***, did, at Fort Benning, Georgia, on or about 15 March 1946, wrongfully and with intent to deceive higher authority as to the true condition of the accounts of his office, order and cause to be made false entries on page six of his account as sales officer for the month of February, 1946, an official record of his office, thus showing the issue of field rations which he well knew had not, in fact, been made.

Specification 4: In that Captain James S. Tisdall, ***, did, at Fort Benning, Georgia, on or about 15 March 1946, wrongfully and with intent to deceive higher authority as to the true condition of the accounts of his office, order and cause to be made false entries in his monthly commissary operating statement for the month of February, 1946, an official record of his office, thus showing the issue of field rations which he well knew had not, in fact, been made.

Specification 5: In that Captain James S. Tisdall, ***, did, at Fort Benning, Georgia, on or about 1 April 1946, wrongfully instruct N. E. Clemmons, Jr., a civilian employee of the sales office, to give false testimony under oath before Lieutenant Colonel J. W. Sproesser, Inspector General, Fort Benning, Georgia.

Specification 6: In that Captain James S. Tisdall, ***, did, at Fort Benning, Georgia, on or about 1 April 1946, wrongfully instruct Dorothy Elizabeth Armour, a civilian employee of the sales office, to give false testimony under oath before Lieutenant Colonel, J. W. Sproesser, Inspector General, Fort Benning, Georgia.

He pleaded not guilty to and was found guilty of the charge and all specifications. 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 but recommended that it be commuted to a reprimand and a forfeiture of $100 of accused's pay per month for four months and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Mr. N. E. Clemmons, Jr., was chief clerk and general assistant to the Quartermaster sales and subsistence officer at Fort Benning, Georgia, from January to July 1946. Accused was the sales and subsistence officer during this period. When a trial balance was run on the February account of the sales officer it was found to be between eight and ten thousand dollars short. Miss Henson, the bookkeeper, brought this shortage to the attention of Mr. Clemmons who, in turn, mentioned it to accused. Accused ordered the account to be checked in detail and when this was done approximately the same shortage still remained. Mr. Clemmons advised accused that a report of survey would be required to adjust the account but accused rejected this advice on the ground that "if we had a report of survey we would always be under suspicion" and "they would always be snooping around and thinking something was wrong." A new inventory would possibly have adjusted the account, for in many cases the inventories were inaccurate and accused's office did a total monthly business of about $325,000, including sales and issues. Mr.

Clemmons believed that the shortage was only a paper shortage. There had been one error made in the account for the month of February concerning the price of matches which occasioned a shortage of approximately four or five thousand dollars. Accused decided, however, to adjust the shortage in his account by adding certain items to the month's issue tallies and directed Mr. Clemmons to instruct Mr. Freeman, the civilian employee in charge of cold storage, to make certain additions to the tallies of cold storage issues. Accused thought it would be easier to make up the shortage by adding these items because of their relatively higher monetary value. Mr. Clemmons asked Mr. Freeman to come to the sales office and, when Mr. Freeman arrived, both men went up to accused's desk and Mr. Freeman was given a slip of paper containing the items to be added to the organizational tallies and the total amount of money value to be added. Mr. Clemmons informed Mr. Freeman of what was to be done and accused added explanatory remarks (R. 164-168, 176, 178-181, 204-207).

The organizational tallies were made in duplicate, the carbon copy being given to the organization drawing the supplies and the original retained for the office files. The store issuing the supplies would make an abstract from the original tallies and they would then be returned to the sales office where the abstract clerk, Miss Armour, would post them to her abstract. This latter abstract was a consolidated voucher of all field ration issues made for any one particular day. At the end of each month, the abstracts would be totaled and entered on another form, the "Daily Cumulative Summary of Field Rations Issued," which would be posted to the sales officer's account as a credit voucher (R. 169, 170-173).

Mr. James Kirby Freeman, storekeeper of the cold storage plant, was called to the sales office between the 15th and 20th of March 1946. Mr. Clemmons gave him a list of items he was to add to certain outgoing tallies of cold storage issues. Accused was present during the conversation between Mr. Freeman and Mr. Clemmons and made some remark to Mr. Freeman which the latter could not recall. Mr. Freeman made the additions as directed and returned the altered tallies to Mr. Clemmons. He identified Prosecution Exhibits A to A-6, inclusive, which were admitted in evidence, as the originals and duplicates of the "Outgoing Tally Sheets" he had been directed to change. His additions appeared on the originals but not on the duplicates, for the duplicates were given to the receiving organization at the time the supplies were issued and they then passed out of his control. These additions were as follows:

Exhibit Number	Date of Tally	Added Entry
A	19-20 Feb 1946	1163 lbs frozen chicken
A-1	19-20 Feb 1946	267 lbs frozen chicken
A-2	19-20 Feb 1946	337 lbs frozen chicken
A-3	19-20 Feb 1946	512 lbs frozen chicken
A-4	4-5 Feb 1946	1392 lbs frozen chicken
A-5	4-5 Feb 1946	309 lbs frozen chicken
A-6	4-5 Feb 1946	683 lbs frozen chicken

At the time he altered the tallies, Mr. Freeman did not know whether the chicken had been issued or not, for sometimes emergency issues would be made on a weekend or at night when his office was closed and these issues would be later added to the tallies. Nothing had been said to him by Mr. Clemmons as to a discrepancy existing in the account for the month of February at the time he received his instructions. There was no actual shortage in his department in February (R. 6-10, 12-20, 22, 26, 27, 31, 32).

Staff Sergeant G. W. May, supply sergeant in charge of the ration breakdown for the Reception Center, Fort Benning, identified Prosecution Exhibit B as the original and duplicate of an "Outgoing Tally Sheet" for 4-5 February 1946 upon which he had drawn food for his organization from the cold stores at Fort Benning. He had signed both the original and the duplicate at the time he received his supplies and had retained the duplicate. A purported issue of 1384 pounds of frozen chicken appeared on the original but not on the duplicate. The sergeant had not received the chicken, for if he had he would have taken his duplicate copy back for correction. This exhibit was admitted in evidence (R. 74-82).

Miss Dorothy Armour, an account clerk at the Fort Benning sales office, as part of her duties received the tally sheets from cold storage and entered them on her daily abstracts, totaling the amounts issued and their money values. Sometime in the early part of March, Mr. Clemmons, in the presence and within the hearing of accused, told her that the February account was ten thousand dollars short and that the amount would be made up on her abstracts. Later, "Mr. Freeman" gave her a list of the items he had added to his tallies and she posted these changes to her abstracts. Miss Armour identified Prosecution Exhibits C, C-1 and C-2, which were admitted in evidence, as abstracts made out by her which she had altered under the direction of Mr. Clemmons. Exhibit C was the abstract for the day of issue 4-5 February 1946 upon which had been added 7904 pounds of frozen chicken at a total price of $6380.36. Exhibit C-1 was the abstract for the day of issue 22-23 February upon which had been added several issues of eggs. Exhibit C-2 was the abstract for 27-28 February upon which had been added 7658 pounds of beef at a total price of $1608.18. The day after Miss Armour had altered her abstracts, accused stopped by her desk and asked her how she "was coming along on the changes on the abstract." She told him she "was coming along fine" (R. 89,90,92-102).

Miss Sarah Henson, an accounts clerk at the Fort Benning Sales Office, kept the ledger of the account of the sales officer. The ledger was the record of all vouchers and matters pertaining to the account, was the final or master record of the sales office. Among other totals, she would receive from Miss Armour a figure derived from a summation of the daily abstracts of field rations for each month. In running a trial balance on the sales officer's account for the month of February 1946, she found it to be about ten thousand dollars short. She reported this shortage to Mr. Clemmons. She

was never given any instructions as to how she might bring the account into balance, but did receive from Miss Armour a second field ration voucher containing a new monthly total. Using this new figure to change the account, she then submitted the balanced account to Mr. Clemmons. After she had entered the second field ration voucher into the ledger, the voucher was signed by accused. She identified the document admitted in evidence as Prosecution Exhibit D as accused's account for the month of February, consisting of six pages. On page 6 of this account she had changed Item Number 201, "Report of Field Rations Issued" from a total credit in the amount of $245,620.94 to a like credit in the amount of $255,467.89. This change brought the account into balance. Accused's initials did not appear opposite entry Number 201 on his account as it did opposite most of the other entries therein, but Voucher Number 201, "Daily Cumulative Summary of Field Rations Issued," admitted in evidence as Prosecution Exhibit E, was signed by accused and showed a cumulative money value for rations issued during the month of February of $255,467.89 (R. 118-134). Accused had frequently failed to initial entries in his account (R. 225).

Lieutenant Colonel James M. Tubb, Inspector General, Fort Benning, identified Prosecution Exhibit G, which was admitted in evidence without objection by the defense, as a true copy of the "Monthly Commissary Operating Statement" for the month of February 1946, the original of which had been purportedly signed by accused. On line 22 of this statement it appeared that the actual value of the field ration issued that month, as computed by dividing the total value of rations issued by the number of rations issued, was $.6712. The official value of the garrison ration in the month of February was slightly in excess of $.6366. The cumulative difference in value between these figures based on the ration strength at Fort Benning would be slightly in excess of ten thousand dollars. The value of the field rations issued during the month of February appearing on the statement (total of lines 7 and 8) was $255,467.89 (R. 268-271). According to Mr. Clemmons, the operating statement is a detailed abstract of the sales officer's account for an entire month. It is used for stock control purposes by "the depot" and the Quartermaster General. It is prepared and due "in Atlanta" on the month succeeding that which it covers. During the course of each month, it was the practice in the sales office to run a trial computation to determine whether the rations issued were within the allowed amount, for the sales officer might "be called in for an explanation" if he exceeded the prescribed value. Field ration issues are not supposed to exceed the value of the garrison ration. The value of the field ration issued did not "frequently" exceed the value of the garrison ration (R. 200-202).

Sometime in March 1946, accused was called to the finance office by the auditing officer. When he returned he was rather excited and told Mr. Clemmons that "they had found the issues that had been added to the tallies." Accused immediately telephoned a number of organizations and "attempted to get these ration breakdown officers to remember having received these issues that they did not get." During the month of February, a carload

of chicken had been received which was in danger of deterioration. The veterinarian recommended that it be issued immediately on actual receipt and this was done. This incident was relied upon by accused in his endeavor to convince the ration breakdown officers that they had in fact received some of the questioned issues. On 18 April 1946, an investigation into the circumstances surrounding accused's accounting for the month of February was held by Colonel Sproesser, the Post Inspector General. Prior to appearing before the Inspector General, accused called Mr. Clemmons and Mr. Freeman aside and directed them to maintain at the hearing that the items added to the account had actually been issued and that no fictitious issues had ever been made. Miss Armour was instructed by Mr. Clemmons in accused's presence (accused being approximately five feet away) to deny any knowledge that a shortage existed in the February account. According to Mr. Clemmons, he also told her at this time to say that she had not changed any abstracts. Mr. Clemmons and Miss Armour "testified" as directed at the investigation, but Mr. Freeman maintained that he did not know whether the issues in question had been made or not, which statement he considered to be the truth. Miss Armour "lied under oath" a second time before a board of officers which investigated the incident sometime the following month. Mr. Clemmons had been advised by accused prior to this second hearing to stick to his previous story, which he did. Thereafter, charges having been preferred against Mr. Clemmons and Miss Armour under civil service regulations, each ultimately related the true facts. Both civil service employees have been dismissed for their part in the transaction (R. 21-24, 103, 107, 108, 113, 115, 141, 142, 159-162, 182-185, 188, 190, 194-196, 198, 219, 220, 243, 246, 250).

During the latter part of March 1946, Miss Henson asked accused, in a joking manner, if he had his bags packed "ready for Leavenworth" and accused replied that he kept them packed all the time (R. 102-104, 125, 228).

Defense counsel, in his cross-examination of Mr. Freeman, introduced in evidence for impeachment purposes a true copy of the testimony of Mr. Freeman given before Colonel Sproesser on 18 April 1946. From this exhibit it appears that the oath was administered to Mr. Freeman in the Inspector General's investigation on that date (R. 33, 37a; Def. Ex. 1).

Evidence for the Defense

Accused, having been advised of his rights as a witness, elected to testify under oath in his own behalf. He denied that Mr. Clemmons had ever suggested a survey on the alleged shortage, that he instructed Mr. Clemmons to make up the shortage on cold stores, that he was present when Mr. Clemmons told Mr. Freeman to alter the tally sheets and that he had instructed Mr. Clemmons and Miss Armour as to the testimony they should give at the investigation into his account. In the latter part of March 1946, he had been called to the auditing office and certain irregularities regarding the issue

of chicken were brought to his attention. He informed his commanding officer, Colonel Wallender, the Director of Supply, of these irregularities the same day. Sometime later, Colonel Wallender showed him a copy of the certificate of audit of his February account which contained a notation that the account was about nine thousand dollars short. This was the first time he had heard of the shortage. He knew that there had been a forced issue of chicken in February, from a carload which it was feared might deteriorate, but could obtain no other information tending to throw light on the irregularities with respect to the issue of chicken. Accused talked to Mr. Clemmons and Mr. Freeman about the shortage in the account but they could give no explanation of it. Colonel Wallender asked him not to say anything more about it until the Inspector General had a chance to check into it. He had signed Prosecution Exhibit E, Voucher Number 201 to his account, but recalled nothing unusual about it. Accused did not know why his initials did not appear opposite Entry Number 201 on his account, unless the ledger had not been submitted to him for his inspection after the entry was made. There had been such a rush to get the account into the auditor's hands that it may have been sent forward before he had a chance to see it. He thought his chief mission was to "feed troops," not to check each and every item in the journal, and that he could rely on his civilian personnel to properly perform such administrative details. The February account had been late and the auditing officer had "called" accused about it two or three times. Consequently, accused told his civilian employees that the account had to be out in the next two or three days. He thought the false entries may have resulted from anxiety on the part of these employees to meet his demands and that when their falsifications were discovered they made him the victim of their conspiracy. Mr. Clemmons, Mr. Freeman and Miss Armour perjured themselves in this case, in his opinion. Accused believed he signed Prosecution Exhibit G, "Monthly Commissary Operating Statement," dated 23 March 1946. This report was apparently made subsequent to the time the account got into the hands of the auditor. Accused's office was allowed considerable latitude in exceeding the value of the garrison ration when certain canned meats the Army had on hand were issued. Whether or not many of these items were issued during the month of February, accused was unable to say. He has exceeded the value of the garrison ration by amounts greater than the excess shown on Prosecution Exhibit G many times (R. 334-338, 340, 346-348, 350-354, 364, 367, 375-377).

Accused was commissioned in the Officers' Reserve Corps in May 1939 and was called to active duty on 8 September 1942. He was first stationed at Fort Benning in October 1943 and was assigned to duty as assistant sales officer. In January 1945 he became sales officer and chief of the subsistence branch, which assignment he held until July 1946, when he was hospitalized for a suspected heart attack. When he was released from the hospital he became purchasing contract officer, which position he continued to hold at the time of trial. On 6 July 1946, he was commissioned in the Regular Army. In January, 1946, there were only three enlisted men and about sixty-five civilians under his control. With this force, he was responsible for conducting the operations of dry storage, exceptional storage (fruits and vegetables) new cold storage (all meat products), the post bakery and the sales store. Inventories

were always a problem and often inaccurate, due to lack of properly qualified and trained personnel (R. 326-330, 333, 362).

Mr. Charles L. Cannington was employed as a clerk in the sales office in February and March 1946. He worked in the same room with Mr. Clemmons, Miss Armour and Miss Henson. His duties kept him at his desk throughout the work day. He did not hear accused give anyone instructions either as to changing tallies or as to how to testify at an investigation. He was advised by "someone" that there was a possibility that he might become implicated if he said "anything." He heard Miss Henson say that the account was out of balance before the investigation but did not hear of any steps being taken to correct it (R. 313,314,316,319,320).

Colonel Jack L. Meyer, United States Army, Retired, was director of supply at Fort Benning from 1943 until the early part of January 1946. Accused served under his command first as assistant sales officer and then as chief of the subsistence branch. Accused had been directly responsible for the rationing of approximately 85,000 troops and several thousand German prisoners of war. He also had supervision over the issuing of rations for troops departing for overseas. Accused was actually doing a field officer's job. Not one major deficiency in the operation of the subsistence branch had been reported to the colonel during the time accused served under him. The colonel had recommended accused for promotion and for the award of the Army Commendation Ribbon. He had also recommended that accused be commissioned in the Regular Army. The colonel did not feel that accused would induce civilian employees to give perjured testimony. Accused appeared to be a very intelligent young man (R. 299-302, 307, 309, 311, 312).

Brigadier General William S. Fulton, United States Army, Retired, was Commanding General of Fort Benning from April 1942 until his retirement in September 1943. After his retirement he became secretary of the Officers' Club, Fort Benning, and moved into quarters on the Post next door to those occupied by accused. He knew accused in a social way and also knew most of accused's friends. Accused enjoyed a "high" reputation (R. 379-381).

Stipulated testimony concerning accused's excellent character or commenting upon his outstanding performance of duty from the following named persons was introduced into evidence as Defense Exhibits 3 to 6, inclusive (R. 324-324a):

Def. Ex. 3 - Colonel James O. Tarbox, USA Ret., formerly Executive Officer, Fort Benning.

Def. Ex. 4 - Richard N. Tukey, Executive Director, Columbus, Georgia, Chamber of Commerce, formerly Public Relations Officer, Fort Benning.

Def. Ex. 5 - Brigadier General B. F. Caffey, USA, Commanding General, Fort Benning.

Def. Ex. 6 - Brigadier General W. H. Hobson, USA, formerly Commanding General, Fort Benning.

4. Discussion

Specifications 1, 2, 3 and 4

In these specifications accused is charged with having ordered and caused false entries to be made in certain official records of his office, with intent to deceive higher authority as to the true condition of his account. The allegedly falsified records mentioned in each of the specifications under discussion are, respectively, outgoing tally sheets, abstracts of issue, page six of the February account and the monthly commissary operating statement for that month.

From the evidence adduced by the prosecution, it appears that accused actually ordered, personally and through his agent, Mr. Clemmons, that certain fictitious issues of field rations be added to the outgoing tally sheets of his cold storage department and that these fictitious issues be reflected in the daily abstracts of issue. This was done with a view to brining his monthly account into balance, it having been discovered to be some ten thousand dollars short. These false entries having beem made as directed, they in turn were necessarily reflected in his monthly account and commissary operating statement, causing equally false entries in both.

It appears that accused did not initial the false entry on page 6 of his account (entry number 201) and he claims that he probably did not see it before the account was sent to the auditor. Although there is no evidence that he did in fact see this entry, we consider this to be an immaterial circumstance; for the account was submitted for audit with at least his implied consent, and, the court having chosen to believe the prosecution witness, he must be held responsible for such an obvious and natural consequence of the train of falsehood he set in motion.

There can be little doubt of accused's intent to deceive "higher authority" in causing each of these false entries to be made, for, in a real sense, the tally sheets and abstracts were but supporting documents to the account and the operating statement, both of which were to be forwarded in the normal course of Quartermaster business. Should the account and operating statement be questioned, the tally sheets and abstracts would certainly be examined by accused's military superiors.

The acts accused is alleged to have committed in each of the four specifications here in question constitute a clear violation of Article of War 96 (CM 274390, Rothey, 47 BR 169,173). We find no reason to disturb the court's findings of guilty of these specifications.

Specifications 5 and 6

In these specifications accused is charged with having wrongfully instructed certain civilian employees to give false testimony under oath before an inspector general. Although section 126 of the Federal Criminal Code (18 USC 232), in defining the crime of subornation of perjury, embraces subornation of every kind of perjury, statutory as well as common law perjury (Hammer v. United States, 6 F. (2d) 786), the specifications here in question do not set forth the offense proscribed by such statute, for they do not allege that perjury was actually committed (Austin v. United States, 19 F. (2d) 127,128; Danaher v. United States, 39 F. (2d) 325,327). Consequently, since the question as to whether false testimony was actually given in accordance with accused's instructions is immaterial to our consideration of this case, we have no occasion to discuss the Federal rule requiring, in subornation cases as well as in perjury cases, that the falsity of the allegedly perjured testimony be established by something more than the uncorroborated oath of one witness (see Hammer v. United States, 271 U.S. 620, 626).

Specifications 5 and 6 do, however, each sufficiently set forth a solicitation to commit statutory perjury, an offense cognizable under Article of War 96 (CM 301840, Clarke, 24 BR (ETO 203, 211). Although it does not appear from the evidence that accused instructed the civilian employees concerned "to give false testimony under oath" in haec verba, it was sufficiently shown that accused directed them to maintain at an official investigation into his affairs that the records of his office had not been tampered with. As an officer of considerable experience he either knew or should have known that investigations by the inspector general are customarily conducted under oath and that a compliance with his demands would result in the giving of perjured testimony (par. 3, AR 20-30, 23 May 1942; see Danaher v. United States, supra, p. 331, for the converse of this proposition). We are thus of the opinion that the findings of guilty of Specifications 5 and 6 were proper.

Production of Documentary Evidence

Before arraignment, defense counsel informed the court that he had requested in writing that he be supplied with transcripts of the records of certain civil service proceedings held at Post Headquarters with respect to Mr. Clemmons and Miss Armour and that his request had not been complied with. Upon renewing such request, the court ruled that it had no jurisdiction to demand these documents from the appointing authority and that defense counsel would have to take such legal measures as might be necessary to procure the documents. The defense desired to use these transcripts for the purpose of impeaching Mr. Clemmons and Miss Armour who were to take the stand as witnesses for the prosecution (R. 3b-3d).

In a criminal prosecution the state may be required, at the instance of accused, to produce records or documents in its possession when a timely demand based on proper grounds is made and the documents sought to be examined do not contain state secrets or fall within any other common law or statutory rule of privilege (Asgill v. United States, 60 F. (2d) 776, 23 CJS, p. 58; Wharton's

Criminal Evidence, 11th Ed., s. 1214). Although it has been held that the defense must resort to a subpoena duces tecum to obtain public documents which are not in the possession of the prosecuting attorney but which are on file in a Government office and equally available to both prosecution and defense (Marin v. United States, 10 F. (2) 271), we think this rule has no application in military practice where the documents desired are in the custody and control of military authorities. It would appear to be the duty of the trial judge advocate, the court, or appointing authority to effect the production of such documents upon proper request by defense counsel without the necessity of further legal process (par. 97, MCM, 1928). In the instant case, however, we are of the opinion that the rights of accused were not substantially prejudiced by the failure of the Government to produce the transcripts in question, for both Mr. Clemmons and Miss Armour admitted at the trial that they had given false testimony in two prior hearings and any further impeachment of these witnesses would have been merely cumulative (United States v. Muraskin, 99 F. (2d) 815).

5. War Department records show that accused is forty-one years of age, is married and has one child. He is a high school graduate and attended Ohio State University for two years and Bethany College for one year. In civilian life he was employed variously as a salesman for a lockwasher company and a men's furnishing store and as an assistant manager in a Montgomery Ward Company store. On 10 May 1939, accused was appointed a second lieutenant, Quartermaster Corps, in the Officers Reserve Corps and on 8 September 1942 he was called to active duty for limited service only. He was promoted to the grade of first lieutenant, in the Army of the United States, on 26 February 1944 and to the grade of captain on 20 November 1945. He accepted an appointment as captain in the Regular Army on 11 July 1946. On 12 April 1946 he was given a Certificate of Commendation by the Commanding General, Fourth Service Command, for performance of outstanding service while serving as officer in charge of the Subsistence Branch and Post Bakery, Fort Benning. His efficiency ratings for the period 1 January 1944 to 30 June 1946 are "Superior."

6. Careful consideration has been given to the brief filed on behalf of accused by his individual defense counsel, which brief accompanies the record of trial.

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

(On Leave), Judge Advocate

Carlos E. McCafferty, Judge Advocate

Gilbert S. Cathcart, Judge Advocate

JAGK - CM 321309 1st Ind

WD, JAGO, Washington 25, D. C. AUG 18 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain James S. Tisdall (O-29522), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of four specifications alleging that he had ordered and caused to be made false entries in certain official records of his office and of two specifications alleging that he had instructed civilian employees to give false testimony under oath before an inspector general, 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 forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but recommended that it be commuted to a reprimand and a forfeiture of $100 of accused's pay per month for four months 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.

Accused was Quartermaster sales and subsistence officer of Fort Benning, Georgia. When a trial balance was run on his February 1946 account it was found to be about ten thousand dollars short. Accused directed his chief clerk, a civilian, to have certain fictitious issues added to the issue tallies of cold storage items. These additions were to be carried over to the daily abstracts of issues, which were kept by a civilian account clerk. The alterations were made as directed and resulted in false entries on page six of the account, balancing it, and on the February commissary operating statement. The false entries on the tally sheets were the subject of Specification 1 of the Charge, those on the abstracts were the subject of Specification 2, and Specifications 3 and 4 concerned the false entries on his account and commissary operating statement, respectively. When discrepancies were found in accused's account upon an audit, an investigation was launched to inquire into his affairs. Accused instructed his chief clerk to maintain before the inspector general that the items added to the account had actually been issued and the chief clerk, in accused's presence, instructed the account clerk to deny any knowledge that a shortage existed in the February account and to say that she had not changed any of the abstracts. The chief clerk and account clerk testified as directed at the investigation. Accused's instructions to the chief clerk as to how he should testify were made

the subject of Specification 5 of the Charge and the instructions to the account clerk were covered in Specification 6. Accused testified under oath in his own behalf at the trial and denied that he had participated in the alteration of the records and that he had instructed his civilian employees to give false testimony before the inspector general.

4. Accused is forty-one years of age, is married and has one child. He is a high school graduate and attended Ohio State University for two years and Bethany College for one year. In civilian life he was employed variously as a salesman for a lockwasher company and a men's furnishing store and as an assistant manager in a Montgomery Ward Company store. On 10 May 1939, accused was appointed a second lieutenant, Quartermaster Corps, in the Officers Reserve Corps and on 8 September 1942 he was called to active duty for limited service only. He was promoted to the grade of first lieutenant, in the Army of the United States, on 26 February 1944 and to the grade of captain on 20 November 1945. He accepted an appointment as captain in the Regular Army on 11 July 1946. On 12 April 1946 he was given a Certificate of Commendation by the Commanding General, Fourth Service Command, for performance of outstanding service while serving as officer in charge of the Subsistence Branch and Post Bakery, Fort Benning. His efficiency ratings for the period 1 January 1944 to 30 June 1946 are "Superior."

5. The recommendation of the reviewing authority that accused's sentence be commuted was apparently based on certain factors in the background of this case which do not fully appear in the record of trial proper. According to the Staff Judge Advocate's review, the shortage in accused's February account was only a book shortage, which was finally adjusted by reinventory and correction of errors in the account. The theory is advanced in the review that accused had forced a balance in his account because his qualifications for a Regular Army commission were being considered at the very time the shortage was discovered and he was fearful that his chances of being accepted would be placed in jeopardy if the shortage should come to the attention of higher authority. In view of accused's prior excellent record, the recommendation of the reviewing authority and all the circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of $100 of accused's pay per month for four months and that as thus modified the sentence be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 326, 17 Sept 1947).

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

JAGN-CM 321542

UNITED STATES	)	FIFTH AIR FORCE
v.	)	Trial by G.C.M., convened at APO 710, 2 January 1947. Total forfeitures and confinement for three (3) years. Penitentiary.
HARRY M. McCULLOUGH, A person serving with the Army of the United States in the Field.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Harry M. McCullough, a person serving with the Army of the United States in the field, did, at Itami Army Air Base, APO 660, Honshu, Japan, on or about 1 November 1946, wrongfully take and use, without proper authority, a certain vehicle, to wit, a three-quarter ton, 4x4 truck, property of the United States Government, of a value of more than Fifty ($50.00) Dollars.

Specification 2: In that Harry M. McCullough, a person serving with the Army of the United States in the field, did, at the intersection of Umeda-Shirmichi and Mido-Suti, public highways in Osaka, Honshu, Japan, on or about 1 November 1946, wrongfully injure Teruko Miyazaki, by striking the said Teruko Miyazaki, with a three-quarter ton, 4x4 truck, which he, the said Harry M. McCullough was then and there operating in a reckless, careless, and negligent manner, and while under the influence of an intoxicant.

Specification 3: In that Harry M. McCullough, a person serving with the Army of the United States in the field, did, at Osaka, Honshu, Japan, on or about 1 November 1946, wrongfully leave the scene of an accident in which a motor vehicle driven by him was involved, without rendering such assistance as was needed.

Specification 4: In that Harry M. McCullough, a person serving with the Army of the United States in the field, did, on or about 1 November 1946, at Osaka, Honshu, Japan, wrongfully transport a Japanese national in a government vehicle, property of the United States.

He pleaded not guilty to the Charge and all Specifications thereunder. He was found not guilty of Specification 3, guilty of Specification 2 "except the words 'and while under the influence of an intoxicant'" and guilty of the remaining Specifications and the Charge. He was sentenced to total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to three years, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial to the Office of The Judge Advocate General.

3. The only question requiring consideration is the designation of a United States Penitentiary as the place of confinement.

4. Article of War 42 does not authorize penitentiary confinement in this case since none of the offenses of which accused was convicted is "recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the U. S., of general application within the continental U. S., excepting Section 289, Penal Code of the U. S., 1910, or by the law of the District of Columbia," nor do any of such offenses come within any of the other provisions of such article authorizing penitentiary confinement.

It appears probable that the erroneous designation of a penitentiary as the place of confinement was based upon the finding of guilty of Specification 1 of the Charge, interpreted in the light of Section 22-2204 of the District of Columbia Code. In order for an otherwise applicable code provision to be used as the basis for penitentiary confinement it must affirmatively appear that the offense alleged in the specification of which accused is found guilty is essentially in all respects the same offense as that made punishable by penitentiary confinement by the code.

Section 22-2204, District of Columbia Code, reads as follows:

"Any person who, without the consent of the owner, shall

take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit use or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment."

It will be noted that there are three elements to the offense denounced by this section, in essence namely: (1) the taking; (2) the lack of consent by the owner; and (3) the operation by the offender "for his own profit use or purpose."

Specification 1, above quoted, fails to allege the third element found in Section 22-2204 of the Code, and for that reason the finding of guilty as to that Specification cannot be used as a basis for penitentiary confinement in this case. None of the remaining Specifications of which accused was found guilty disclose any basis for such confinement. Insofar as it is inconsistent with this holding the case of CM 285757, Atherton et al, 25 BR (ETO) 233, is expressly overruled.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as provides for total forfeitures and confinement for three years at a place other than a penitentiary, Federal reformatory or correctional institution.

Edward I. Johnson, Judge Advocate.

Joseph C. Brack, Judge Advocate.

Lynwood K. Taylor, Judge Advocate.

(318)

JUL 1 1947

JAGN-CM 321542 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Fifth Air Force, APO 710, c/o Postmaster, San Francisco, California.

1. In the case of Harry M. McCullough, a person serving with the Army of the United States in the Field, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution you will, under the provisions of Article of War 50½, have authority to order execution of the sentence.

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

(CM 321542).

016566

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.

JAGK - CM 321563

10 July 1947

UNITED STATES	)	FIRST AIR DIVISION
v.	)	Trial by G.C.M., convened at APO 239, 27 February and 5 March 1947. Dismissal and total forfeitures.
Second Lieutenant JAMES E. THOMAS (O-838705), 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 officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that, Second Lieutenant James E. Thomas, 33rd Bombardment Squadron, 22nd Bombardment Group did, at Kadena Army Air Base, APO 239, on or about 12 January 1947, behave himself with disrespect toward Lieutenant Colonel Alvin J. Mueller, his superior officer, by saying to him, "I don't know what organization I am assigned to, and if I did I would not tell you", or words to that effect.

Specification 2: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant James E. Thomas, 33rd Bombardment Squadron, 22nd Bombardment Group, did, at Okinawa, Route 1, on or about 12 January 1947, wrongfully and unlawfully exceed the authorized speed limit.

Specification 2: In that Second Lieutenant James E. Thomas, 33rd Bombardment Squadron, 22nd Bombardment Group, did, at Okinawa, Route 1, on or about 12 January 1947, willfully, wrongfully and unlawfully drive a vehicle while under the influence of intoxicating liquor.

Specification 3: In that Second Lieutenant James E. Thomas, 33rd Bombardment Squadron, 22nd Bombardment Group did, at Okinawa, Route 1, on or about 12 January 1947, willfully, wrongfully and unlawfully sound the siren on the vehicle which he was driving.

He pleaded not guilty to all charges and specifications. He was found not guilty of Specification 2 of Charge I, but guilty of the Charges and remaining 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 of the Prosecution.

Lieutenant Colonel Alvin J. Mueller, Air Corps, Commanding Officer of the 22nd Bomb Group or 316th Bomb Wing, APO 239, testified that at about 0030 hours on 12 January 1947, as he proceeded north in a jeep on "Highway One" (ostensibly on the island of Okinawa), a vehicle approaching from the rear sounded a siren causing him to believe that he was being pursued by military police. He moved to the right and the vehicle passed at " a pretty fast rate of speed", went completely off the road and then pulled back onto the road. Colonel Mueller increased the speed of his vehicle and overtook the other jeep, following it for several miles travelling at a rate of about fifty miles per hour. Observing that the occupants of the forward jeep were not military police, Colonel Mueller ordered the driver to pull over to the side of the road and stop. The accused was the driver of the vehicle and he complied with the order. Colonel Mueller dismounted and asked accused "what his hurry was and where he thought he was going, or if he thought he was going somewhere" (R. 7). The field officer then requested that accused state his name. Accused gave a name and in response to a further request presented his AGO identification card. The card showed a name other than the one previously given by accused. Colonel Mueller also requested accused to show his driver's license and trip ticket. None was produced and in response to a direct order from Colonel Mueller, accused, together with Lieutenant E. G. Kane, who was with him, accompanied Colonel Mueller to the military police station where the field officer proceeded to make out a "charge slip" against accused. He asked the lieutenant the name of his organization and accused became "belligerent" and stated "he didn't know and if he did, he wouldn't tell me. The Provost Marshal told him that he would tell me or he would hold him until he did tell it." The accused finally stated that he thought he "belonged" to the 22nd Bomb Group and Colonel Mueller advised him that he was being charged with "speeding, reckless driving, and driving while under the influence of liquor." The accused denied that he was drunk and "flatly refused" to be taken to the Ninth Station Hospital to have a "sobriety test run on him." His refusal was accompanied by the use of profanity, however Colonel Mueller could not remember the language used. The blood test was suggested by Colonel Mueller because "Thomas was under the influence of liquor." (R.7-8)

On cross examination Colonel Mueller stated that on the occasion referred to he was accompanied by Captain Wilfred B. Leclaire, Air Corps, and two Naval officers who were being returned to their base (R. 10).

Captain Wilfred B. Leclaire, Air Corps, who was riding in the jeep which was being driven by Colonel Mueller on the occasion in question testified that the jeep which passed them, later discovered to have been driven by accused, sounded a siren and "passed us at an excessive rate of speed and the vehicle was weaving and continued on down the road." When they had "flagged the jeep down" Colonel Mueller asked accused "what his hurry was, then he asked him his name and he said that his name was Lieutenant Barry. The Colonel then asked him for his AGO ID card, took it forward and looked at it and said 'I thought you said that you were Lieutenant Barry' and at this point he said, 'No, I said the vehicle belonged to Lieutenant Barry, I am Lieutenant Thomas'" (R-14). The witness asserted that it took two or three direct orders to get accused and his companion into the other vehicle. When the parties arrived at the police station there "was quite a tumult and loud tones of voices after we got inside." An argument arose concerning accused's proper organization, accused stating that he had orders assigning him to both the 22nd Bomb Group and the 316th Bomb Wing and that he did not know which was proper but that if he did know he would not tell the colonel. Obscene language was used by accused and the Colonel reprimanded him for his appearance and conduct (R. 15)

On cross examination Lieutenant Leclaire stated that Colonel Mueller was not "under the influence of alcohol" and had consumed no more than three or four highballs during the entire evening but that accused, in his opinion, was intoxicated but not drunk (R. 17).

Lieutenant Howard F. Strom, Assistant Provost Marshal, 1391st Military Police, Aviation, testified that at approximately 0030 hours on 12 January 1947 Lieutenant Kane entered his office and requested a "ticket book" stating that he had just stopped a Colonel on the highway and wanted to give him a ticket. Immediately behind Lieutenant Kane was Captain Leclaire, Lieutenant Thomas, Colonel Mueller and the two Naval officers. Lieutenant Kane was wearing an A2 jacket with white scarf and "I knew that he had had a few drinks." An argument arose between Colonel Mueller and Lieutenant Thomas, the former asking the accused if he was drunk. Accused said "If I am drunk, then Christopher Columbus didn't discover America." It was at this point that Lieutenant Strom announced that he did not want any abusive or profane language used in the Provost Marshal's Office (R. 19). Colonel Mueller said "you (accused) are an officer and should know your organization." Accused replied "If I did know, I would not tell you anyway." Colonel Mueller thereupon directed the provost marshal to take accused to the station hospital for a blood alcoholic examination. Accused protested stating "I dodn't want to go to the hospital. Hell I am drunk anyway, and I will admit that I am drunk." On cross examination Lieutenant Strom stated that in his opinion Lieutenant Thomas and Lieutenant Kane were making the most noise (R. 20).

4. For the Defense.

Private First Class Gregory Shesterkin, 1391st Military Police Company, was in the orderly room at about 0030 hours on 12 July 1947, when some Naval officers, a lieutenant colonel, a captain and two lieutenants "were discussing something or other."***"They were talking and going on about a traffic arrest ticket. The lieutenant colonel asked Lieutenant Thomas a lot of questions and one of them was about his organization.***It seemed that he had two special orders on the same date, one special order to the 22nd Bomb Group and the other special order to the 316th Bomb Wing. The lieutenant colonel got sore about it and got boisterous and loud and called the lieutenant to attention and called him several things." And again "The lieutenant colonel said that he (accused) wouldn't make a good private in this man's Army; and wouldn't make a good pimple on an MP's ass." The lieutenant did not use any profanity and he said "Sir, I have got two special orders, one states the 22nd and the other special order the 316th and wasn't sure which one he was attached to." (R. 22) The witness stated that the profanity that he heard was used by the lieutenant colonel and that he was loud and boisterous. In the opinion of Private first class Shesterkin accused was "feeling pretty good" which he defined by stating "one man can drink and be hard to get along with and then another man can drink and be feeling pretty good" (R. 25). Private first class Shesterkin also was of the opinion that Colonel Mueller "had been drinking." He reached this conclusion by what he termed the bloodshot condition of his eyes and the thickness of his speech together with the officer's general appearance. In response to a question concerning Colonel Mueller's dress the witness stated that he had his hat on the back of his head, wore no jacket and his shirt collar was open (R. 26-28).

Lieutenant E. G. Kane, Air Corps, 316th Bomb Wing, who was riding in the jeep with accused on the night in question testified that they passed a jeep "off to the side of the road going very slow." When they had travelled about the distance of two city blocks they were overtaken by Colonel Mueller who demanded to know why they were travelling so fast. A dispute arose concerning their authority to use the jeep and the Colonel threatened to force the witness and accused to go to the 1391st Military Police Station. Lieutenant Kane stated that he tried to explain that they were using a borrowed jeep and that if they could go to the 785th the matter could be "straightened out." When they arrived at the 1391st the colonel was very loud and told accused "what kind of an officer he was." It was obvious to the witness that the colonel was under the influence of intoxicating liquor. He and accused discussed the matter of accused's proper organization and the witness tried to explain saying "That we were all mixed up", that two sets of orders had "come out" assigning both the witness and accused to two different organizations. When the colonel suggested a blood test Lieutenant Strom (the provost marshal) said to him "No, I don't think we will have to have a blood test***you are under the influence of liquor too." The witness admitted that he had four or five drinks during the evening (R. 29-31).

On cross examination Lieutenant Kane stated that he did not hear the accused tell Colonel Mueller "I don't know what organization I am assigned to and if I did I would not tell you." (R. 36) He recalled that the jeep in which he was riding with accused was equipped with a siren but Lieutenant Kane did not remember the siren being sounded (R. 39).

5. Evidence in rebuttal.

The court recalled Lieutenant Howard F. Strom who upon being reminded that he was still under oath, denied that on the occasion referred to in the evidence he had stated that Colonel Mueller was under the influence of liquor. He also stated that he did not hear the field officer use any profanity however he (the witness) did request all members involved in the argument in his office to quiet down. His remarks forbidding profanity were directed to accused (R. 40). The witness stated that he did not hear Colonel Mueller make any insulting or degrading statements to accused but he admitted hearing the field officer tell accused "you wouldn't make a good pimple to one of the MP's or privates" or words to that effect. Lieutenant Strom was of the opinion that Colonel Mueller was not intoxicated but that the accused was "weaving" and appeared to be under the influence of liquor (R. 41).

6. Specification 1 of Charge II alleges that accused, at the time alleged, on Route 1 Okinawa, wrongfully and unlawfully exceeded the authorized speed limit. There is no proof showing the authorized speed limit on the island and the court was not requested to take judicial notice of any orders or directives fixing such limit. There is therefore no evidence in the record to sustain the courts findings that any speed limits was exceeded although it may be admitted that accused was driving his jeep at a "fast" rate of speed.

Specification 3, Charge II, alleges that accused did willfully, wrongfully and unlawfully sound a siren on the vehicle he was driving. Inasmuch as the vehicle was apparently equipped with this type of warning signal and since it was sounded while passing another vehicle on the highway, we cannot assume that the siren was employed for any other purpose than that for which it was installed. We do not imply that such a device could not be used in such a manner as to constitute a breach of the peace per se, in violation of Article of War 96, but the facts in this case do not justify such a conclusion. The Board of Review therefore is of the opinion that the findings of guilty of Specifications 1 and 3 of Charge II cannot be sustained on the evidence presented.

With regard to Specification 2, Charge II, the evidence shows to the exclusion of any reasonable doubt that accused was intoxicated immediately after he dismounted from the vehicle he was driving. His defiant attitude and apparent confused state of mind forcibly support the court's finding that accused was driving the vehicle while under the influence of intoxicating liquor.

Two witnesses for the prosecution, Colonel Mueller and Captain Leclaire, stated that accused, when requested to state his organization replied that he did not know what organization he was assigned to, and if he did know he would not reveal this information to Colonel Mueller. This constituted a disrespect to his superior officer within the purview of Article of War 63 (Par. 875, page 567, Winthrop's Military Law and Precedents, 2nd Edition). Witnesses for the defense testified that they did not hear accused make such a statement and attempted to explain the commotion by asserting that accused was trying to explain that he had received conflicting orders. On such state of the evidence, it was within the province of the court to resolve the question of fact against accused and we do not find cause to question the court's decision, for as has been said in numerous opinions of the Board of Review, the weighing of evidence is primarily a matter for the court. (See CM 205920 McCann, 8 BR 239, 246; CM 212505 Tipton, 10 BR 237, 244).

Our opinion that the evidence is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereof is not in disregard of the evidence tending to show that the arresting officer himself may have been guilty of rash and indiscreet conduct in effecting his purpose. It is sufficient to say, however, that the accused, by his defiant conduct appears to have at least inspired the rebuke or upbraiding which he received.

7. War Department records show that accused is 24 years of age and a high school graduate. He was engaged in the trucking business prior to his induction as an enlisted man in the Air Corps in February 1943. He was commissioned a Second Lieutenant, Air Corps, Army of the United States on 20 November 1944 at the Columbus Army Flying School, Columbus, Mississippi. His efficiency reports average "very satisfactory."

8. The court was legally constituted. Except as set forth herein, 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 Charge II but is legally sufficient to support the findings of guilty of Charge II and Specification 2 thereof; legally sufficient to support the findings of guilty of Charge I and Specification 1 thereof and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon the conviction of an officer of violating Articles of War 63 and 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

[illegible], Judge Advocate

JAGK - CM 321563 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 25, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James E. Thomas (O-838705), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of behaving with disrespect toward his superior officer in violation of Article of War 63 (Specification 1, Charge 1); of wrongfully and unlawfully exceeding the authorized speed limit on Route 1, Okinawa (Specification 1, Charge II); of wilfully, wrongfully and unlawfully driving a vehicle while intoxicated (Specification 2, Charge II), and of wilfully, wrongfully and unlawfully sounding a siren on such vehicle (Specification 3, Charge II), all in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to 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 insufficient to support the findings of guilty of Specifications 1 and 3, Charge II (exceeding speed limit and wrongfully sounding siren), legally sufficient to support the findings of guilty of Charge II and Specification 2 thereunder; legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder and legally sufficient to support the sentence and to warrant confirmation of the sentence.

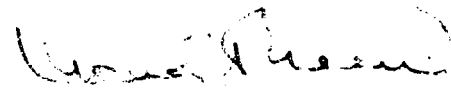
At about midnight on 12 January 1947 Lieutenant Colonel Alvin J. Mueller, Air Corps, was driving a jeep along Route 1 on the Island of Okinawa. In the jeep with him were another Army officer and two Naval officers whom he was returning to quarters. A vehicle approached them from the rear sounding a siren and travelling at an unusually high rate of speed. Colonel Mueller thought that he was being overtaken by military police, pulled to the side and allowed the oncoming car (jeep) to pass. He noticed that the car was weaving in and out of the road and gave pursuit. When he overtook the vehicle and caused it to be stopped he observed that accused was the driver and that he was accompanied by Lieutenant E. G. Kane. They appeared to be intoxicated. Colonel Mueller requested identification papers and the trip ticket of accused. An argument ensued. Accused had borrowed the jeep and had no trip ticket. After considerable argument Colonel Mueller was able to take accused to the 1391st Military Police Station where he proceeded to make out a charge "ticket". He asked accused to state his organization and

after an exchange of ill-tempered remarks between Colonel Mueller and accused the latter stated "I don't know what organization I am assigned to and if I did I would not tell you." Colonel Mueller thereupon and in the presence of other officers and enlisted men made some uncomplimentary remarks concerning accused. The Provost Marshal called for order and stated that profanity and boisterous language would not be allowed in his office. Several witnesses who observed the incident testified that in their opinion both accused and Colonel Mueller were intoxicated. The Provost Marshal staed that it was accused who was intoxicated and was using profanity. Irrespective of the questionable conduct of Colonel Mueller, the arresting officer, the evidence shows beyond any reasonable doubt that accused was disrespectful to him and that accused was driving his jeep while intoxicated.

On 17 September 1946 accused was convicted by general court-martial of being disorderly in uniform in the 9th Station Hospital Mess and of wrongfully, by false impersonation, obtaining and applying to his own use a 1/4 ton C&R car, all in violation of Article of War 96. He was sentenced to be reprimanded and to forfeit $100.00 per month for three months.

4. In view of all the circumstances of the case I recommend that the sentence be confirmed but commuted to dismissal, a reprimand and forfeiture of $100 per month for four months, and that the sentence as thus commutted be carried into execution, but that the execution of the dismissal be suspended during good behavior.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 258, 23 July 1947).

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

JAGK - CM 321643

23 MAY 1947

UNITED STATES v. Private LEWIS E. ROWELL (RA 34393000), Medical Detachment, 1st Constabulary Regiment.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wiesbaden, Germany, 5 February 1947. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

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

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Lewis E. Rowell, Medical Detachment, 1st Constabulary Regiment, having taken an oath in a trial by special court martial of Private Lewis E Rowell, before First Lieutenant Lewis H. Post, a Competent Officer that he would testify truly, did at Rothwesten, Germany, on or about 9 December 1946, willfully corruptly, and contrary to such oath, testify in substance, "on the night of 23 November 1946 I ate supper at approximately 1730 and went back to my billets and did not leave the building until the next morning" which testimony was a material matter and which he did not then believe to be true.

He pleaded not guilty to and was found guilty of the charge and its specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War might direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Major Howard T. Shafer, 1st Constabulary Regiment, Rothwesten, Germany, identified prosecution's exhibit 1 as a record of trial by special court-martial of accused, whereupon the exhibit was accepted in evidence without objection by the defense (R. 6,7).

The charge sheet accompanying this record of trial by special court-martial

showed that accused was tried for breach of restriction in violation of Article of War 96 and for misapplication of a Government ambulance in violation of Article of War 94, both offenses allegedly having been committed on 23 November 1946. At the trial before the special court-martial, various witnesses testified that they had seen accused driving a Government ambulance in or near Hofgeismar, Germany, between 7 and 9 o'clock on the evening of 23 November 1946 and that accused had visited a German civilian home in that town between 8:30 and 9:30 o'clock that evening. Accused, having been informed of his rights as a witness, elected to make a sworn statement before the special court-martial and, after being sworn, he testified as follows:

> "I am the accused in this case. On 23 November 1946 I ate supper at approximately 1730 and then went back to my billets, because I was under restriction. I did not leave the building until the next morning."

The special court-martial found accused guilty of all charges and specifications and sentenced him to be confined at hard labor for six months, to forfeit $35 of his pay per month for a like period and to be reduced to the grade of private. The record of trial was authenticated by Major Shafer as president and by First Lieutenant Lewis H. Post as trial judge advocate. It did not contain a copy of the special court-martial orders appointing the court nor was there any notation as to the identity or number of the members attending the session at which accused was tried.

In the instant case, one witness testified that he had seen accused in an ambulance on the road between Hofgeismar and Rothwesten, Germany, between 7 and 9 o'clock on the evening of 23 November 1946. Another witness, a German woman, testified that accused was at her home in Hofgeismar from half past eight until half past nine o'clock on the evening of 23 November 1946. Accused, having been warned of his rights as a witness, elected to remain silent (R. 8-11).

4. One of the essential elements of the crime of perjury is that the false testimony in question must have been given "in a judicial proceeding or course of justice" (MCM, 1928, par. 149i). Here the offense is alleged to have been committed in a judicial proceeding, in a trial by special court-martial. The prosecution, then, had the burden of proving that accused gave false, material testimony under oath before a special court-martial which had been duly constituted and had jurisdiction over the person of accused and over the offenses for which he was on trial.

Sufficient evidence was adduced at the trial in the instant case tending to show that accused gave false testimony under form of oath before a purported special court-martial and that such testimony was material to the issues there being tried. However, no written or verbal order appointing the special court having been introduced in evidence, there is no proof

that such court was duly constituted or, indeed, that it ever existed in legal contemplation. This failure of proof is but accentuated by the lack of any showing as to the identity or number of the members present at the session of the special court at which accused was tried. This being so, there is likewise a failure of proof that the purported special court had jurisdiction over the person of accused and the offenses he allegedly committed, for the entire proceedings of a court-martial which has not been duly constituted are null and void (CM 302975, Machlin, 59 BR 343,346).

Any oath taken before an improperly constituted tribunal or one acting beyond its jurisdiction is as utterly without legal force and effect as is that body's decree, judgment or sentence. Perjury, therefore, cannot be committed in the course of such void proceedings (Commonwealth v. Hillenbrand, 96 Ky. 407, 29 S.W. 287; People v. Tracy, 9 Wend. (N.Y.) 265). A court-martial is a court of limited, not general, jurisdiction. It gains its judicial powers only by being called into existence by appropriate orders, by taking an oath before embarking upon the trial of each case and by having before it an accused arraigned upon charges and specifications setting forth a cause it is empowered to hear and determine (CM 218150, Hinman, 11 BR 377; CM 319573, O'Brien). Hence, no true analogy can be drawn between the proof required of the prosecution in the case at bar and that required of the prosecution in a civil criminal case where accused has allegedly perjured himself before a court of general jurisdiction or before a quasi-judicial body of whose constitution the court trying accused for perjury can take judicial notice. It has been generally held, however, that direct evidence must be adduced concerning those jurisdictional facts of which judicial notice cannot be taken, for example, it must be shown that the jury before which accused gave his false testimony had been sworn. It must appear in some manner, from all the evidence in the case, that the tribunal before which the alleged perjury was committed had been properly and legally organized (Curtley v. State, 42 Tex. Cr. 227, 59 S.W. 44; Crow v. State, 55 Ga. App. 288, 190 S.E. 65; State v. Gross, 175 Ind. 597, 95 N.E. 117). Also, the question here presented is somewhat analogous to that arising in trials for perjury in the civil criminal courts where the court before which accused has given the challenged testimony had no jurisdiction over the subject matter of the action. In such cases it has been held that the entire proceedings in which the allegedly false testimony was given were coram non judice, including the administration of the oath, and that accused could not be convicted of perjury (Commonwealth v. White, 8 Pick. (Mass.) 452, 453; Commonwealth v. Carel, 105 Mass. 582; Daniels v. Commonwealth, 300 Ky. 541, 189 S.W. (2d) 849; Bennett v. Tulsa, C.C.A., Okla., 162 P. (2d) 561; see also CM 261341, Wallace, 40 BR 179,182).

We are not unmindful of the provisions of 18 U.S.C. 558 to the effect that an indictment for perjury need not set forth the commission or authority of the court or person before whom the perjury was committed, it being sufficient in this respect that there be an averment that such court or person had authority to administer the oath. In People v. Miller (264 Ill. 148, 106 N.E. 191), the court held, in construing a similar state statute, that

since the constitution of the judicial body before which the oath was taken, a grand jury in this case, need not be alleged it followed that it need not be proved. With this proposition we do not find ourselves in entire agreement. This type statute does not purport to change the law of perjury by doing away with the necessity of showing that the false testimony in question was given in a judicial proceeding or in the course of justice. These statutes have only to do with pleading and, we think, are obviously intended merely to abrogate cumbersome common law requirements as to the form of indictment in perjury cases. As we have intimated above, proof of the proper organization of the court or due authorization of the person before whom the oath was taken is generally, in civil criminal practice, supplied by judicial notice. For example, in the case of Baskin v. United States (209 Fed. 740, 747) the court, while seeming to apply the above mentioned Federal statute to the proof, apparently took judicial notice that the referee in bankruptcy, before whom the allegedly perjured testimony had been given, was in fact a referee in bankruptcy and that he had authority to administer the oath. And in Carroll v. United States (16 F. (2d) 951,953), where the proper selection of the grand jury before which accused had taken a false oath was put in issue, the court said, "Grand juries hold their office under direct authority and supervision of the court. It is an important and notorious office. Federal courts have taken judicial notice of organizations less important. *** The incumbents of *** important and notorious offices are judicially noticed." Consequently, we are of the opinion that the above cited Federal statute can have no application to the instant case where the appointment and constitution of a tribunal of such transitory existence and limited jurisdiction as a court-martial must necessarily be drawn in question.

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

(Dissent), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Boyd, Judge Advocate

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

JAGK - CM 321643

23 MAY 1947

UNITED STATES v. Private LEWIS E. ROWELL (RA 34393000), Medical Detachment, 1st Constabulary Regiment.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wiesbaden, Germany, 5 February 1947. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

DISSENTING OPINION
of
SILVERS, Judge Advocate

I am unable to agree with the conclusions reached in the majority opinion, or the interpretation of the law set forth therein and feel compelled to dissent therefrom for the reasons hereinafter stated.

The majority opinion holds that the "purported" special court-martial proceedings wherein the false testimony was given, including the administration of the oath, to be void and of no effect because, it is said, "there is no proof that such court was duly constituted or, indeed, that it ever existed in legal contemplation." And further "This failure of proof is but accentuated by the lack of any showing as to the identity or number of the members present at the session of the special court at which the accused was tried." This failure of proof, it is asserted, deprived the "purported" court of jurisdiction rendering it somewhat analogous to trials for perjury in the civil criminal courts where the court before which accused has given the challenged testimony had no jurisdiction over the subject matter of the action (citing cases). The majority opinion concedes, I take it, that a duly constituted special court-martial would have had jurisdiction of the subject matter herein and the only question is whether in fact a legally constituted special court-martial tried the case below.

Although no copy of the order appointing the special court-martial is attached to the record, the record of trial recites that it is the (1) "Record of trial of (accused) by special court-martial appointed by the Commanding Officer of 1st Constabulary Regt, at Rothwesten, Germany, 9 December 1946"; (2) the first indorsement to the charge sheet recites that the case was referred for trial to Second Lieutenant Rayburn L. Smith"*** TJA of Special Court Martial appointed by paragraph 2, Special Orders No. 183, Headquarters First Constabulary Regiment *** By order of Colonel MALONEY. MARTIN A. THOMAS Capt. CAC Asst. Adjutant"; (3) that the court met, pursuant to the orders appointing it, at 1300 o'clock on 9 December 1946, all members being present except Lieutenant Colonel John A. Norris, Jr., Captain Richard H. Cook, First Lieutenant Arthur J. Frey, Jr. and First Lieutenant Duncan N. Emery; (4) that the court was sworn; (5) that

accused was arraigned upon the charges and specifications appended, to which he pleaded "not guilty"; (6) sworn testimony of accused (proven to have been false herein); (7) findings and sentence; (8) examination by defense counsel prior to authentication; (9) authentication of the record by the trial judge advocate and President; (10) action of the reviewing authority (unsigned copy).

It will therefore be seen that the evidence, Prosecution Exhibit 1, recites that it is the record of trial of accused by special court-martial; Major Shafer, the president thereof, identified the record and testified that the accused gave the testimony before the special court-martial, however the Board of Review, for lack of identity of the members present and the number thereof, presumes to say there is no sufficient showing that this was a legal special court-martial. That the question raised by the Board of Review was not raised at the trial of accused by general court-martial is assumed to be inconsequential. In Carroll v. United States, 16 Fed (2d) 951, the accused was convicted of perjury by making false statements before two U.S. grand juries. Evidence submitted to the jury tended to show plaintiff in error appeared before the grand juries on the dates alleged, was sworn by the foreman and made certain material statements shown to have been false. One of the assignments of error was that the proof failed to show that the grand juries were duly constituted. The court said:

> "It was sufficiently proven that the plaintiff in error appeared before the grand jury and took an oath, and that the grand jury heard his testimony. In the absence of a showing to the contrary, the presumption is that the grand jury was properly selected and drawn according to law. Link v. U.S. (CCA) 2 Fed (2d) 709; U.S. v. Greene (D.C.), 113 Fed. 683."

In Baskin v. United States, 209 Fed. 740, the defendant was convicted of perjury under an indictment alleging false testimony given before a referee in bankruptcy. Error was alleged for want of proof of the averment of special reference to Referee Eastman for the examination of accused. After discussing the evidence relative to such reference the court said:

> "We are of the opinion, however, that this assignment of error is untenable upon another ground, irrespective of the foregoing view, namely, that proof of an order of reference is not essential for support of the conviction, under the federal statutes and authorities applicable to the case, which have materially modified the common-law requirements in perjury prosecutions. The statutes referred to are sections 5392 and 5396 of the Revised Statutes (U.S. Comp. St. 1901, pp. 3653, 3655), construed in Markham v. United States [160 U.S. 319323; 16 Sup. Ct. 288, 40 L. Ed. 441]. In the one section perjury is defined to reach material false testimony given 'in any case in which a law of the United States authorizes an oath to be administered,' and the other prescribes it to be sufficient in the indictment to aver 'such

court or person to have competent authority to administer' the oath, 'and without setting forth the commission or authority of the court or person before whom the perjury was committed.' The Markham Case referred to clearly involved the above proposition as to the effect of these provisions upon a charge of perjury, under analogous facts of authority for administering the oath and taking the testimony, and plainly decides: That they render it sufficient for support of conviction to aver and prove that the officer was authorized by statute of the United States to administer the oath, and that the material testimony in question was taken within the general scope of his authority, and thus dispense with any requirement to aver or prove that such exercise was expressly authorized or rightly invoked in the instant examination. It arose upon conviction of the accused under a charge of false testimony, in an examination and deposition made under oath before a 'special examiner of the Pension Bureau,' alleged to be 'a competent officer and having lawful authority to administer said oath,' in a matter alleged to be 'material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions.' The federal statutes under which the testimony was taken (Rev. St. 4744; Act July 25, 1882, c. 349, 22 Stat. 175 /U.S. Comp. St. 1901, p. 3276/; Act March 3, 1841, c. 548, 26 Stat. 1083 /U. S. Comp. St. 1901, p. 3278/) authorized the Commissioner of Pensions to appoint special examiners to conduct inquiries pending in the department, who were thereupon empowered by the statute to administer oaths and take depositions, in the course of their examinations when detailed by the department for such inquiries. For want of an averment that the special examiner in question was detailed or expressly authorized by the department to make the inquiries and take the testimony alleged to be false, it was contended that the accused was not sufficiently informed 'of the official character and authority of the officer before whom the oath was taken'; but this proposition was expressly overruled upon the doctrine above stated, which we believe to be equally applicable to the authority of a referee in bankruptcy under the statute. Thus the present averment of an order of reference in the cause is made superfluous by the above provisions, and failure of competent proof thereof furnished no ground for reversal." (Underscoring supplied.)

The record of trial by special court-martial in the instant case was authenticated by First Lieutenant Lewis H. Post as trial judge advocate. Major Shafer testified that accused was sworn. A trial judge advocate of a special court-martial is authorized by Article of War 114 to administer oaths. Section 231, Title 18, U.S.C., defines perjury as follows:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony,

declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years. (Mar. 4, 1909, ch. 321, sec. 125, 35 Stat. 1111.)"

I am therefore of the opinion that Lewis H. Post was a competent officer to administer the oath, that the Board of Review can reasonably presume that the record of trial by special court-martial is what it purports to be and that, in the absence of proof to the contrary, it can be presumed that the regimental commander's appointment of the special court-martial was regular and in compliance with law, and that such special court-martial hearing the case was duly constituted, viz, had the requisite number of authorized members present. Judicial notice is not necessarily involved. All that is required is a reasonable construction and interpretation of the evidence. It is stated by Underhill that "Usually proof of an officer de facto will suffice (in perjury prosecutions) and his written appointment need not be produced (Underhill's Crim. Ev., 4th Ed., sec. 740, p. 1361). Consequently, proof that a justice of the peace or other public officer has acted as such in the administration of an oath is prima facie of his authority without putting in evidence his commission or other facts giving jurisdiction (State v. Greer, 48 Kas. 752, 30 Pac. 236, Woodson v. State (Tex. App.), 6 S.W. 148).

Article of War 38 provides that the President may by regulations prescribe the procedure and modes of proof in court-martials, which regulations shall so far as practicable apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. In paragraph 111 of the Manual the President exercised this authority and provided, "So far as not otherwise prescribed in this manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the U.S. will be applied by courts-martial."

Section 558, Title 18, U.S.C., provides:

"In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed. (R.S. sec. 5396)"

If, therefore, in a United States court and in a prosecution for perjury, it is not necessary to plead in the indictment the commission or authority of the court or person before whom the perjury was committed, it would appear to follow as the night follows the day, that in the absence of an issue to the contrary, it is unnecessary to prove the commission or authority of the court or person before whom the perjury was committed. I conclude that, standing alone, the record of trial is sufficient to show that the perjured testimony was given before a duly constituted special court-martial appointed by authority of law and that the oath was administered before a person so authorized, however, the plain unambiguous meaning of section 558, Title 18, U.S.C., eliminates the necessity of showing the (commission) order appointing the court and the trial judge advocate.

None of the foregoing should be construed as having any bearing on the propriety of convicting a soldier by special court-martial and then trying him for perjury arising out of his testimony given at such trial. We are presently concerned only with legal sufficiency and I am of the opinion that the record of trial in this case is legally sufficient to support the findings of guilty and the sentence.

Charles D. Gilbert, Judge Advocate

JAGK - CM 321643 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, New York.

1. In the case of Private Lewis E. Rowell (RA 34393000), Medical Detachment, 1st Constabulary Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

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

(CM 321643).

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.

(337)

JAGQ - CM 321688

JUN 30 1947

UNITED STATES v. Captain NORMAN T. BYRNE (0-1055547), Coast Artillery Corps.	BERLIN COMMAND OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US) Trial by G.C.M., convened at Berlin, Germany, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17 and 18 February 1947. Dismissal.

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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.
(Finding of not guilty).

Specifications 1-5: (Findings of not guilty).

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

Specification 1: In that Captain Norman T. Byrne, Office of Military Government (Berlin District), APO 755, U.S. Army, did, at Berlin, Germany, between 1 July 1945 and 12 August 1946, feloniously take, steal and carry away three boxes of porcelain, of the value of more than fifty dollars, the property of Fritz Weber; one pair of lady's boots, one fur jacket, three typewriters, some silk stockings, some leather and one hand bag, of the value of more than fifty dollars, property of Bero Berow; one "Sabo" radio, of the value of more than twenty dollars, property of persons unknown; and one stamp collection, of the value of more than fifty dollars, the property of Gertrud Quiadkowski.

Specification 2: (Nolle Prosequi).

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

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

Specification 3: (Nolle Prosequi).

Specifications 4-5: (Findings of not guilty).

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

Specification: (Finding of not guilty).

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

Specification: (Finding of not guilty).

Accused pleaded not guilty to and was found not guilty of all Charges and Specifications, except Charge II and Specification 1 thereunder. The finding of guilty of this Specification was subject to exceptions and substitutions which resulted in rewording the Specification as follows:

> In that Captain Norman T. Byrne, Office of Military Government (Berlin District), APO 755, U.S. Army, did, at Berlin, Germany, between 1 July 1945 and 12 August 1946, wrongfully take and carry away three boxes of porcelain, of the value of more than fifty dollars, the property of Fritz Weber; one pair of lady's boots, one fur jacket, three typewriters, some silk stockings, some leather and one handbag, of the value of more than fifty dollars, property of persons unknown; and one stamp collection, of the value of more than fifty dollars, the property of Gertrud Quiadowski (changes underlined).

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 pursuant to Article of War 48.

3. Before discussing the evidence, it should be noted that there was a variance between the allegation and the finding insofar as ownership of "one pair of lady's boots, one fur jacket, three typewriters, some silk stockings, some leather and one handbag" are concerned. The specification alleged that these items were the "property of Bero Berow" whereas the court, by exceptions and substitutions, found these items to be the "property of persons unknown". Ownership of property must be

strictly proved as alleged and variance between allegation and proof is fatal (CM 201485, Darr, 5 BR 119, 136-144). The record of trial is therefore legally insufficient to support the finding of guilty of that portion of the specification quoted above and reference to those items will be omitted from the summary of the evidence. This reduces the offense to the wrongful taking and carrying away of:

1. Three boxes of porcelain, valued at more than $50, property of Fritz Weber.

2. One stamp collection, valued at more than $50, property of Gertrud Quiadowski.

4. During the period from 1 July 1945 to 12 August 1946, accused was the Monuments, Fine Arts, and Archives Officer of the Berlin District, U. S. Army (R. 26, p. 2 of Ex. 3). His duties included searching out, recovering, and holding "looted cultural objects" which had been confiscated by the Nazis (R. 27, 295, 316, p. 1 of Ex. 3). Pursuant to this authority, he conducted "raids" on suspected places and if he found any questionable item, he would "pick it up * * * and hold it for the Army" (R. 460).

On 12 September 1945, accused raided the home of Fritz Weber, 3 Sophie Charlotte Str., Berlin Zehlendorf (R. 55-56). He confiscated several pictures from Weber's home and also seized several unmarked boxes which Weber had stored in a nearby garage. Some of these boxes contained church property belonging to the Grand Mufti of Jerusalem; other boxes contained porcelain works of art which Weber claimed as his personal property (R. 62-67). The church property had been obtained by Weber while he was "on a Committee (appointed by the Magistrat of Berlin) which was collecting art objects" (R. 67). Weber claimed that the porcelain items had been acquired by him for his personal use during his 25 years of collecting art objects (R. 64). He had never offered them for sale (R. 69) and had placed them in the garage for safekeeping from air raids (R. 64). Several days after 12 September, Weber saw accused and told him the source of the porcelain figures, and he assured Weber that they would be returned to him. At that time, accused gave Weber a receipt for the pictures that had been seized but not for the porcelain (R. 63).

On 11 May 1946, accused raided the unoccupied apartment of Mrs. Gertrud Quiadowski, SW 11, 22 Hallesches Ufer, Kreuzberg, Berlin. He was accompanied on the raid by his secretary-interpreter (Mrs. Waschow), two Military Police officers, and 5 or 6 Military Police enlisted men (R. 163, 206-207, 211). Among other items confiscated was a stamp collection - a package about the size of legal paper and approximately 8 inches high (R. 209). Some question arose as to whether this stamp

collection should be retained by the Military Police or by accused. It was finally agreed that accused should keep it and he promised to furnish the Military Police with a complete receipt of all items taken, including the stamp collection, but no receipt was ever received by the MPs (R. 166, 167, 209) or by Mrs. Quiadowski (R. 100).

A building in Berlin known as Magazinbau was the official collecting point for art objects which were confiscated by accused (R. 230). In a report to his Commanding General (R. 86; Ex. 7), accused mentioned the "Affair Weber" (pp. 5-6, Ex. 7) and attached a "Collecting Point Inventory" which listed the pictures and religious robes seized from Weber but made no reference to the three boxes of porcelain which had been seized at the same time (App. F to Ex. 7).

Sometime in May 1946 accused moved to new quarters and his landlady saw some porcelain in his house, including Exhibit 17 and Item 16 of Exhibit 10 (R. 232-235).

On 7 June 1946, accused departed from Berlin for temporary duty in the United States (R. 117). On the day prior to his departure, he instructed one of his secretaries, Helga Von Corvin, to pack his personal things and send them to the collecting point to await his return (R. 88, 94-95). There were a lot of loose things around his quarters and Miss Von Corvin "asked about everything" in order to know just what should be packed (R. 99). She asked particularly about 6 or 7 boxes of loose porcelain and accused told her that the porcelain should not be sent to the collecting point — that "Mrs. Waschow * * * would come over and pack it and send it over to the States" (R. 96-97).

Mrs. Herta Waschow, another of accused's employees, was asked by accused to pack his porcelain items and after his departure, she packed seven wooden boxes of porcelain which she found at his quarters, some of which she recognized as having been purchased by herself for accused and some coming from other sources (R. 117-118). She included the stamp collection because she "found it standing in the hall" and thought it belonged to accused (R. 121). She addressed the seven boxes to Mr. Mercer in New York in accordance with accused's instructions (R. 108, 113, 183). Major Paddock then picked up the boxes for forwarding, in keeping with accused's request (R. 117).

Subsequent to his departure, an investigation was started on the basis of an allegation that accused had taken some pictures and some porcelain with him on his trip to the States (R. 446). Two Criminal

Investigation Division (CID) agents were sent to the United States to pursue the investigation and to bring accused back to Berlin (R. 436). These two CID agents located accused and took him into custody at San Francisco, California, on 12 August 1946 (R. 128). Prior thereto (on 9 Aug. 46,R. 424) these agents visited the home of "Mr. Mercer, former Lt. Col. in the U.S. Army, at White Plains, N.Y." where they found several "boxes addressed to Lieutenant Colonel Mercer with the return address of Major Paddock" (R. 133). The boxes had been opened (R. 434) and contained, among other things, 52 pieces of porcelain and a stamp collection (R. 131). These boxes were confiscated, turned over to the customs officials (R. 132), and then returned to Berlin (R. 133).

Thirty-seven of these porcelain items were received in evidence as Exhibit No. 10 (R. 133) and the stamp collection was received as Exhibit 12 (R. 136). Items 1 to 30 of Exhibit 10 and a portion of Exhibit 12 were identified by the CID agents as having been recovered in Mr. Mercer's home at White Plains as described above (R. 133, 135). CID Agent Kolste also identified a copper snuff box (Ex. 17) and a small enamel box (Ex. 18) as having been recovered by him from accused's secretary, Mrs. Waschow (R. 138-139).

Fritz Weber identified a large vase (item No. 16 of Ex. 10) and Exhibits 17 and 18 as porcelain items packed in the three boxes which were taken from his garage (R. 145-146).

An expert in fine arts testified that Item 16, Exhibit 10, was an object "of considerable interest because of its size and the painting illustrations", and had an international value of $400 to $500 (R. 251, 255).

The stamp collection (Ex. 12) was divided into three groups — Ex. 12a included those stamps which were seen in Mrs. Quiadowski's apartment prior to the raid (R. 202). The remaining stamps were divided into one group (Ex. 12b1) which were recognized by the MP officer during the raid, and another group (Ex. 12b2) which were not so recognized (R. 214). A stamp expert valued the three groups as being worth more than 500 marks each (R. 222, 224).

When accused was first interviewed by the CID agents at San Francisco on 12 August 1946, he made a written statement which was received in evidence (R. 277-278; Ex. 29). In this statement accused advised that the three boxes of porcelain which were seized at Weber's garage were first taken to the collecting point (Magazinbau) but subsequently

"I took them out again and kept them in my home. They remained there until I left on TDY at which time Frau Waschow repacked the various porcillain /sic/ pieces and at my request sent them to the home of Lt. Col. Mercer in White Plains, N.Y."

In connection with the raid at Mrs. Quiadowski's apartment, accused explained in his statement that no one was there and numerous things were taken into "protective custody". The stamp collection "was left in my quarters and then packed and shipped to Lt. Col. Mercer for me by Frau Waschow."

Lieutenant Colonel John P. MacNeill, the officer investigating the charges against accused, interviewed accused on 28 September 1946 in the presence of his defense counsel (R. 442). Notes were taken and checked with accused, and witness was positive in his understanding of accused's statements (R. 444). In this interview, accused admitted that the three boxes of porcelain had been temporarily kept at his billet but they were "headed for the Magazinbau" (R. 442). He also stated that there was a question in his mind about the destruction of certain stamps in the collection that he had seized and he had taken them to New York "to verify this as a legal point", that he intended to return to the owner all the stamps which were legitimate (R. 443, 472).

5. Allen H. Westervelt, a United States civilian employee charged with general supervision of the Berlin postal facilities (R.404), testified as a defense witness that about May 1946 accused told him that he had located a stamp collection and there followed "a general discussion as to the status of the legality of existence of Nazi stamps." There was a general prohibition against Nazi symbols and large quantities of stamps in Government stores had been impounded in the Fall of 1945. The status of private holdings was uncertain and no instructions had ever been issued regarding same. Accused never requested witness to examine any collection (R. 405-407).

Colonel Frank C. Howley, Director, Office of Military Government, Berlin Section, testified that accused had the authority to take a valuable work of art to the United States "in good faith" to have it appraised without consulting witness, but it would reveal "damn poor judgment" (R. 464).

Lieutenant Colonel William T. Babcock, Acting Director, Office of Military Government, testified that accused had "practically unlimited

authority" to search out works of art or archives of value to the United States, "but if anything out of the ordinary comes up, he must come to the director or deputy to consult or obtain additional authority or decision" (R. 413).

Accused, at his own request, was sworn and testified as follows: The three boxes of porcelain which Weber stated belonged to him were taken from Weber's garage as "loot" or "abandoned property" (R. 297, 331, 334). He was convinced that these boxes were part of the "Zehlendorf loot" — property of the Grand Mufti. He investigated same, found Weber's explanations were "vague", and "ended up by classifying it in the Magazinbau as abandoned property" (R. 298). He told the caretaker to unpack the boxes and list the items — "that's the last I know of them." He did not know when or how these boxes were removed to his house (R. 332). He did not intend to appropriate these boxes of porcelain (R. 304), did not instruct anyone to send them to the United States, and did not know that they had been shipped until so advised by the CID agents (R. 299). He arrived in the states about the middle of July (R. 366), none of the boxes was there when he first arrived (R. 369), none arrived while he was at Colonel Mercer's home (R. 369), but at least one of the boxes arrived before he departed for the West Coast (R. 370). He did not see the large vase (Item 16 of Ex. 10) or the stamp collection at Colonel Mercer's home (R. 339).

He explained that he gave Mrs. Waschow as specific instructions as he could in German (R. 397), that he wanted her "to pack the small and best items that belonged to me and to send them to Colonel Mercer. * * * I didn't point out in detail. I didn't describe what I wanted. I did say I didn't want these large pieces sent because I had no use for them" (R. 333).

Regarding the stamp collection, accused stated that it was seized because "stamps properly are housed in museums and these might be museum property and * * * I was under obligation to report all Kriegsmarken" (R. 305). He "immediately consulted with Public Safety" (R. 307) and during the 3 to 4 weeks he held the collection (R. 350), he tried unsuccessfully to get someone to assume responsibility for disposing of them (R. 348). He did not put the collection on the Magazinbau inventory because "they had to be investigated" (R. 348). He kept the collection unlocked in his home because

> "In the first place, I was under the impression that most of the stamp collection would have to be destroyed because of the nature of the ACA directive; in the second place, I left it there to be taken to the Magazinbau and recorded there." (R. 349).

When he left for the States, he gave Mrs. Waschow instructions to place the collection in a box and take it to the Magazinbau (R. 307, 349). In a later explanation, he said he told Mrs. Waschow to put the collection in a cardboard box "and have them taken to the Magazinbau. My supposition was that Miss Corvin, my other secretary, would take them along with other stuff which was going to the Magazinbau" (R 351). Under further cross-examination, he stated that he had ascertained to his own satisfaction that the collection was not stolen or looted from a museum, but he could not return them until he could ascertain which ones had to be destroyed (R. 351). He did not give Mrs. Quaidowski a receipt for the collection because (1) "she wasn't there" and (2) "she didn't rate a receipt" (R. 306, 349). He denied that he told MP Captain Feldman that he would give the MPs a receipt (R. 348). He knew the collection was valuable (R. 347); that such collections were often worth 40,000 to 50,000 marks (R. 348), but he was unable to identify Exhibit 12 as the collection taken from Mrs. Quaidowski's apartment even though it contained letters addressed to the Quaidowskis (R. 347). He did not intend to consider the stamps as his personal property but handled them only in line of duty (R. 307). Regarding his statement to the CID agents, accused testified that he told them he had no intention of having the collection shipped and that he did not know that it had been shipped until the CID agents told him (R. 315). Accused also denied that he had told Colonel MacNeill that he had brought the stamps to the United States to determine their legality or value (R. 474-475).

6. Before pleading to the general issue, accused's counsel made three motions to "dismiss" Specification 1 of Charge II:

(1) That the pleading was not specific as to time (R. 9-10).
(2) That the three larcenies should be charged separately (R. 10).
(3) That the offense should be charged under AW 93 instead of AW 95 (R. 12).

These motions were all properly denied by the court. Inasmuch as the evidence was uncertain as to just when accused committed the larcenies alleged, and as he had opportunity to do so during his entire tenure of duty as Monument, Fine Arts, and Archives Officer, the allegation that the offense occurred "between 1 July 1945 and 12 August 1946" was entirely proper. Regarding the charging of three larcenies in one specification, it has been held that

> "A specification alleging, as a violation of AW 95, a series of acts constituting a course of dishonorable conduct amounting to a fraud, is not objectionable on the ground of duplicity.

CM 153268 (1922); 192530 (1930)." (Dig Ops JAG 1912-40, Sec. 428 (13) p. 298; see also CM 268259, Stevens, 44 BR 241, 4 Bull JAG 232).

The test is whether the specification is so framed as to advise the accused of the particular act or offense intended to be alleged and to enable him to plead a former conviction or acquittal if brought to trial on account of the same act. No basis exists in the instant case for a contention that accused was in any way misled by the form of the specification, nor was any such contention made (CM 264296, Simms, 42 BR 89). The third motion was also properly overruled in that while larceny is ordinarily charged as violative of Article of War 93, it is also a violation of Article of War 95 since it is a crime involving conduct unbecoming an officer and a gentleman (CM 258108, 3 Bull. JAG 381).

The court found the accused guilty of a wrongful taking which is a lesser included offense under a charge of larceny (CM 241045, Cleaver, 26 BR 190).

The evidence shows, and accused admits, that the property of Mr. Weber and Mrs. Quiadowski was seized during the period alleged in the specification; there was also substantial evidence presented by accused to indicate that he had the right to seize said property. In his capacity of Monuments, Fine Arts, and Archives Officer, he was the rightful custodian of this property and as such, he had the duty to place the property in the official collecting point and to record it on the inventory.

Accused testified in court that he took the three boxes of porcelain to the Magazinbau and that was the last he knew of them. This testimony was contrary to his previous statements to the CID agents and the Investigating Officer wherein he admitted that the three boxes were removed from the Magazinbau and taken to his quarters. In any event, there is ample evidence that the three boxes of porcelain were at his quarters when he left for the United States on 7 June 1946.

Accused also testified in court that he kept the stamp collection at his quarters from the time of its seizure until he departed for the United States. He then testified that he instructed one of his employees, Mrs. Waschow, to take the stamp collection to the Magazinbau, but later, he added that he told Mrs. Waschow to put it in a cardboard box and it was his "supposition" that his other secretary would take it to the Magazinbau.

Accused testified that he was surprised to learn from the CID agents that the porcelain and the stamp collection had been shipped to

Colonel Mercer's home in New York. This testimony was contrary to his statement to the CID agents that these things had been shipped at his request and his explanation to the investigating officer that the stamp collection was sent over to the States so that he could determine its legality and value. The testimony of Miss Von Corvin was also clear that she asked accused specifically about the porcelain and other things and accused stated that the porcelain was to be packed by Mrs. Waschow and shipped to him in the States. Mrs. Waschow also testified that she was unable to recall accused's telling her to send the stamp collection to the Magazinbau (R. 417).

Another indication of accused's attitude and intentions might be deduced from the testimony of the two Military Police officers who accompanied accused on the raid of Mrs. Quiadowski's apartment. During this raid, accused told the several enlisted men present that they could pick up "souvenirs" if they brought them to him for approval (R. 162-164, 208). Accused denied this part of the testimony of these two officers (R. 348-350). The "souvenirs" were returned to Mrs. Quiadowski by the Military Police officers (R. 100, 211).

It should also be noted that accused was found guilty of wrongfully taking various personal items in another raid, some of which items he gave to his secretary and some of which he used himself; however, as heretofore set forth, a variance in the finding as to ownership of this property requires disapproval of the finding of guilty insofar as such items are concerned. However, it is proper to consider such evidence to establish accused's intent or motive in respect to the offense charged (par. 112b, MCM 1928).

It was established beyond a reasonable doubt that during the period from 1 July 1945 to 12 August 1946, accused wrongfully took and carried away the porcelain and stamp collection as alleged. Accused merely had the care and charge of this property; the ownership still remained in Mr. Weber and Mrs. Quiadowski, and in the same manner that a servant may commit larceny of his master's property (par. 149g, MCM 1928 and CM 211900, Edwards, 10 BR 167), so too the accused did wrongfully take and carry away property committed to his care as Monuments, Fine Arts, and Archives Officer.

7. Accused is 48 years of age, married, and has no children. He graduated from the University of Oregon, and did postgraduate work at Harvard and the University of California. He covered the Spanish War as correspondent for the New York Post in 1937. Prior to his military service, he was teaching at Los Angeles City College.

Accused served in Asia with the Marine Corps in 1917-1918. He was inducted on 13 November 1942 and was commissioned a second lieutenant on 6 May 1943 upon graduation of Antiaircraft Officer Candidate School at Camp Davis, North Carolina. He was promoted to first lieutenant on 16 December 1944 and to captain, 12 December 1945. Between April and September 1944, he served with the British in the Normandy and Northern France Campaigns. He was given the Army Commendation Ribbon on 17 June 1946. His efficiency ratings have been excellent and superior and one report describes him as:

> "A versatile soldier of fortune who is a Phi Beta Kappa with two masters degrees."

8. The court was legally constituted and had jurisdiction over the accused and the subject matter of the offenses charged. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and Specification 1 thereunder, excepting the words "one pair of lady's boots, one fur jacket, three typewriters, some silk stockings, some leather, and one handbag, property of persons unknown"; legally sufficient to support the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

_____, Judge Advocate

Joseph J. Stern, Judge Advocate

_____, Judge Advocate

JAGQ - CM 321688 1st Ind

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 Norman T. Byrne (O-1055547), Coast Artillery Corps.

2. Upon trial by general court-martial, this officer was found guilty of wrongfully taking and carrying away cultural objects and personal property of certain German nationals, in violation of Article of War 95 (Charge II, Spec. 1). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial pursuant to 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 of Charge II and Specification 1 thereunder except the words "one pair of lady's boots, one fur jacket, three typewriters, some silk stockings, some leather, and one handbag, of the value of more than fifty dollars, property of persons unknown"; legally sufficient to support the sentence and to warrant confirmation thereof.

The evidence shows that during the period from 1 July 1945 to 12 August 1946, accused was the Monuments, Fine Arts, and Archives Officer, United States Army, Berlin. His duties required that he search out and recover cultural art objects which had been seized by the Nazis. In carrying out these duties, he took custody of three boxes of porcelain belonging to Fritz Weber and a large stamp collection belonging to Mrs. Gertrud Quiadowski. Coincident with his return to the States for temporary duty on 7 June 1946, the porcelain and stamp collection were sent, with other property, to the home of a friend of accused in New York. They were recovered there and returned to Berlin.

Accused testified that he was surprised to learn that these boxes of porcelain and the stamp collection had been sent to the States, that upon leaving Berlin, he had instructed his secretary to pack only some small things he had acquired and to send the stamp collection to the collecting point in Berlin. This testimony was contradictory to his previous statements to the CID agents to the effect that these items had

been shipped to the States for him and at his request. He also told the investigating officer that he wanted to have the stamps in the United States in order to determine their legality and their value. Accused's secretary also contradicted accused in that she asked him specifically as to what things in his quarters should be sent to the collecting point and he told her that the porcelain items were to be packed by another employee and sent to him in the States. One vase in the porcelain group had a value of $400 to $500 and the stamp collection was worth more than 1500 marks.

The court also found accused guilty of wrongfully taking and carrying away other personal property in connection with his official raids but the court made a change in its findings regarding the ownership of these items which requires that that part of the findings be disapproved.

Another indication of accused's attitude towards the property of others was his authorization to enlisted men to take "souvenirs" from a raided apartment, provided that the "souvenirs" were first presented to him for approval.

4. Accused is 48 years of age, married and has no children. He graduated from the University of Oregon, and did postgraduate work at Harvard and the University of California. He covered the Spanish War as correspondent for the New York Post in 1937. Prior to his military service, he was a teacher at Los Angeles City College.

Accused served in Asia with the Marine Corps in 1917-18. He was inducted on 13 November 1942 and was commissioned a second lieutenant on 6 May 1943 upon graduation of Antiaircraft Officer Candidate School at Camp Davis, North Carolina. He was promoted to first lieutenant on 16 December 1944 and to Captain, 12 December 1945. Between April and September 1944, he served with the British in the Normandy and Northern France Campaigns. He was given the Army Commendation Ribbon on 17 June 1946. His efficiency ratings have been excellent and superior and one report describes him as:

> "A versatile soldier of fortune who is a Phi Beta Kappa with two masters degrees."

5. I recommend that the findings of guilty of that portion of Specification 1, Charge II reading as follows: "one pair of lady's boots, one fur jacket, three typewriters, some silk stockings, some leather, and one handbag, of the value of more than fifty dollars,

property of persons unknown" be disapproved, that the sentence be confirmed but commuted to a reprimand and forfeiture of $250 pay and that the sentence as thus commuted be carried into execution.

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

CM 321688

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 270, 22 Aug 1947).

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

JAGN-CM 321692

U N I T E D S T A T E S	)	TENTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Brooks Field, Texas, 4 and 6 March 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private JOE V. MARTINEZ (38752559), Squadron A, 306th Army Air Forces Base Unit.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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 69th Article of War.

Specification: In that Private Martinez, Joe V., Squadron A, 306th Army Air Forces Base Unit, having been duly placed in confinement in Post Guard House, Brooks Field, Texas on or about 16 May 1946 did at Brooks Field, Texas, on or about 1 June 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Martinez, Joe V., Squadron A, 306th Army Air Forces Base Unit, did at Brooks Field, Texas, on or about 1 June 1946, desert the service of the United States, and did remain absent in desertion until he was apprehended at Houston, Texas, on or about 1 December 1946.

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

Specification: In that Private Martinez, Joe V., Squadron A, 306th Army Air Forces Base Unit, did without proper leave absent himself from his station at Brooks Field, Texas, from 16 January 1946 to about 29 March 1946.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the finding of guilty of the Specification of Charge III and Charge III, approved the sentence and 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 pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings. The only question in the case requiring consideration is whether or not the record of trial is legally sufficient to support the sentence. The record establishes that the escape from confinement alleged in the Specification of Charge I was concurrent with the inception of the desertion alleged in the Specification of Charge II. The two offenses were but different aspects of the same act. Where a sentence is imposed with reference to two or more offenses constituting but different aspects of the same act or omission, so much thereof as exceeds the maximum authorized penalty for the most serious aspect of the act or omission is illegal (CM 313544 Carson, 1946 (V Bull JAG 202)). The Table of Maximum Punishments is applicable to the offense of escape from confinement and authorizes a maximum sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The Table of Maximum Punishments is likewise applicable to the offense of desertion, it having been committed subsequent to 19 January 1946, which was the date of the termination of the suspension of limitations upon punishments for violations of Article of War 58, and authorizes a maximum sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, under the facts in this case, for two and one-half years.

In this case the desertion is the more important aspect of the act in that it carries the heavier penalty.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty but

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 two and one-half years.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

JAGN-CM 321692 1st Ind
WD, JAGO, Washington, D. C.
TO: Commanding General, Tenth Air Force, Brooks Field, San Antonio, Texas.

1. In the case of Private Joe V. Martinez (38752559), Squadron A, 306th Army Air Forces Base Unit, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 321692).

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.

JAGK - CM 321734

14 July 1947

UNITED STATES v. First Lieutenant GEORGE E. CREIGHTON (O-809930), Air Corps.	)	ATLANTIC DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 28 February 1947. Dismissal and total forfeitures.

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 First Lieutenant George E. Creighton, Flight A, 53d Reconnaissance Squadron, Very Long Range, Weather, Air Weather Service, Morrison Field, West Palm Beach, Florida, was, at West Palm Beach, Florida, on or about 17 October 1946, drunk and disorderly in a public place, to wit: in front of the Greyhound Bus Station, West Palm Beach, Florida.

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

Specification 1: In that First Lieutenant George E. Creighton, Flight A, 53d Reconnaissance Squadron, Very Long Range, Weather, Air Weather Service, Morrison Field, West Palm Beach, Florida, did, at Morrison Field, West Palm Beach, Florida, on or about 9 September 1946, with intent to deceive wrongfully and unlawfully, make and utter to the Officers' Mess, 1103d Army Air Force Base Unit, Morrison Field, West Palm Beach, Florida, certain check in words and figures as follows, to wit:

GEORGE E CREIGHTON
Lt. Air Corps

No. 177

Palm Beach, Fla. 9 Sept 1946

Pay
To The
Order of Morrison Field Officers' Mess $ 15 00/00

Fifteen and 00/100 DOLLARS

THE FIRST NATIONAL BANK
63-483 PALM BEACH, FLA. FR 631 /s/ George E. Creighton
1st Lt. A.C. 0809930

and, by means thereof, did fraudulently obtain from the said Officers' Mess, 1103d Army Air Force Base Unit, Morrison Field, West Palm Beach, Florida, the sum of fifteen dollars, lawful money of the United States, in payment of the said check, he, the First Lieutenant George E. Creighton, Flight A, 53d Reconnaissance Squadron, Very Long Range, Weather, Air Weather Service, Morrison Field, West Palm Beach, Florida, then well knowing that he did not have, and not intending that he should have, sufficient funds in the First National Bank, Palm Beach, Florida, for the payment of said check.

(Note: Specs. 2, 4, 5, differ materially from Spec. 1 only in the date, and amount of the check as follows:

SPEC.	DATE	AMOUNT
2	14 September 1946	$20.00
4	29 September 1946	$25.00
5	5 October 1946	$20.00

Specs. 3 and 6: (Finding of not guilty))

He pleaded not guilty of all charges and specifications. He was found guilty of the specification of charge I, not guilty of charge I but guilty of a violation of the 96th Article of War, guilty of specifications 1,2,4, and 5 charge II, not guilty of specifications 3 and 6 charge II and guilty of charge II. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial under Article of War 48.

3. Evidence for the Prosecution.

a. Specification and Charge I

About 3:00 a.m. on 17 October 1946, Mr. William V. Eddy, a police officer of West Palm Beach, Florida, saw the accused sitting in an automobile in a parking lot in rear of the bus station at West Palm Beach.

He knew that this automobile belonged to a boatman and not to the accused. He asked the accused what he was doing in the automobile and the accused stated that he thought he had an automobile somewhere in the lot. The accused was unable to locate his automobile so Mr. Eddy placed him under arrest for further investigation because of the illegal entry into the automobile. Mr. Eddy took his prisoner to the bus station in order to call a police car. The bus station contained about one hundred people. The accused was dressed in civilian clothes. At the bus station a lieutenant approached them and wanted to know about the trouble and asked the policeman if he needed any help. The accused stated in a loud voice to this lieutenant that " I am a lieutenant in the United States Army and this son-of-a-bitch wants to kidnap me and is going to beat me up and kill me. Go to the George Washington Hotel and wake up all the soldiers." When the police car arrived it was necessary to take the accused by the arm and shoulder and put him in the car. The accused was drunk and disorderly. The accused was taken to the police station for investigation (R. 8-14). Lieutenant R. C. McGriff of the West Palm Beach police department saw the accused between 8:30 and 9:00 a.m. on 17 October 1946. The accused was with others in custody at the station. In carrying out their usual investigation as to the cause of arrest the accused stated that he had been drinking very heavily. The accused was suffering from a hangover. He was released upon his promise to return to his base. Lieutenant McGriff took the accused to the vicinity of 18th Street where accused thought he had left his car but it could not be found. The accused then remembered, that his car was at the Washington Hotel (R. 18-21).

About 3 p.m. on 17 October 1946 Patrolman J. J. Watts was at the bus station in West Palm Beach when he was approached by a taxicab driver who stated that a man was asleep in his cab. Mr. Watts went with the cab driver and found the accused in a cab back of the bus station. He tried to awaken the accused but was not successful. Mr. Watts took the accused in the cab to the police station and succeeded in arousing him sufficiently to get him out of the taxicab. In the station he discovered that the accused was a lieutenant in the Army. The accused was drunk. His eyes were red and blurry. (R. 14-18). Lieutenant McGriff saw the accused on the morning of 18 October 1946 with other prisoners at the police station (R.21).

b. <u>Specifications 1, 2, 4 and 5 Charge II.</u>

The accused made and issued four checks to the Morrison Field Officers' Mess (R. 24, 25). One check dated 9 September 1946 in the amount of $15.00 is the check set forth in Specification 1 (R. 37 Pros. Ex. 7). The check dated 14 September 1946 in the amount of $20.00 is the check set forth in Specification 2 (R. 37 Pros. Ex. 7a). The check dated 29 September in the sum of $25.00 is the check set forth in Specification 4 (R. 37 Pros. Ex. 7c). The check dated 5 October 1946 in the sum of $20.00 is the check set forth in Specification 5 (R. 37, Pros. Ex. 7d). These checks were all drawn on the First National Bank, Palm Beach, Florida.

Mr. H. H. Lawlor, bookkeeper of the Morrison Field Officers' Mess testified that the Mess normally employed four girls as cashiers and that on occasions he also acted as a cashier. Checks and money were received by the cashiers and turned over to him. He made the appropriate entries on the books and deposited checks and cash in the bank. He received the four checks issued by the accused in the normal course of business and deposited them in the bank. Each check was returned by the bank with an "advice of charge" which stated that payment was not made thereon because of insufficient funds. On 26 September 1946, he caused a letter to be sent to accused informing him that two of his checks amounting to $35.00 had been returned with the notation "not sufficient funds" and requested that the accused come to the office and "take up the matter." He also talked to accused about the returned checks. On 31 October 1946 the accused paid to the Mess the amount represented by his returned checks and the original checks were delivered to him (R. 22-36 Pros Ex 1, 2, 4, 6).

Mrs. Ruth Duffin, Assistant Cashier and Manager of the Bookkeeping Department, First National Bank, Palm Beach, Florida, testified concerning the bank account of the accused. The account was opened on 5 October 1945 and closed on 8 October 1946. He drew checks (which were returned) on the following dates and the following balances were in his account during the months of September and October 1946.

DATE	AMOUNT CHECK	BALANCE
9 September 1946		5.54
10 September 1946	$15.00	5.44
11 September 1946		1.54
14 September 1946	20.00	1.54
27 September 1946		1.54
29 September 1946	25.00	1.54
5 October 1946	20.00	13.94
8 October 1946		Account Closed

On 1 October 1946 his balance was $184.94. This increase was occasioned by a deposit of $229.50. Between 1 October and 5 October 1946 he had reduced this balance by drawing checks for $50.00, $20.00, $20.00, $20.00, $25.00, $20.00. The bank also made four bank charges of $4.00 each. The bank charged $1.00 for the first dishonored check, $2.00 for the second dishonored check, $3.00 for the third dishonored check and thereafter charged $4.00 for each dishonored check (R. 39-47).

5. Charge I and its Specification.

The undisputed evidence shows that about 3:00 a.m., 17 October 1946 the accused was arrested by a civil policeman because he was sitting in an automobile which did not belong to him. The accused was drunk. The policeman took the accused to a bus station where accused became disorderly.

About 3:00 p.m., 17 October, the accused was again at the bus station in a drunken stupor. Such conduct is prejudicial to good order and military discipline (CM 271083 Barry, 49 BR 19; CM 276248 Stroud, 48 BR 232; CM 315105 Rochon). The court found that the drunken and disorderly conduct charged was in violation of Article of War 96 and not in violation of Article of War 95. This finding was within the power of the court.

Specifications 1, 2, 4 and 5 of Charge II.

These specifications charge that the accused made and issued the checks set forth therein and did thereby fraudulently obtain from the payee the amounts of money as shown on the face of each check well knowing and not intending that he should have sufficient funds in the drawee bank to pay the checks upon presentation.

It was shown that the accused made the checks payable to "Morrison Field Officers' Mess" and that the checks were received by the Mess. No evidence was introduced to show the circumstances surrounding the giving of these checks. The bookkeeper testified that the checks came to him from the cashiers. There is no evidence in the record to show that the accused received money or anything from the Mess for these checks. The evidence discloses that the checks were returned to the Mess by the drawee bank because of insufficient funds in the accused's account.

Under the specifications as drawn it was incumbent upon the prosecution to show not only that the accused issued the checks in question but that he did so with the intent to defraud, well knowing that he did not have sufficient funds in the bank to pay the checks and not intending that he should have any such funds.

In order to defraud by issuing a check with insufficient funds it must be shown that the accused received something of value in exchange for the check. Obviously the issuing of a check to pay a past due bill would not defraud anyone if the check was returned for insufficient funds. There being no evidence in this case to show that the accused received anything of value when the checks were issued there is no evidence to show an intent to defraud. The failure of proof on the intent to defraud will not relieve the accused of all responsibility because the proof amply establishes that the accused issued the four checks and failed, without justification or proper excuse, to maintain a sufficient balance in his bank account to pay them when presented to the drawee bank, which is a lesser included offense of the one charged (CM 270641 Smith, 45 BR 329, 342; CM 260446 Miller, 39 BR 251, 258; CM 258171 Lucas, 37 BR 327, 336).

6. War Department records show the accused to be 23-2/12 years of age and single. He is a high school graduate. Prior to his entry into service he was a bookkeeper in a retail food store in Brooklyn, New York. He entered active service from the enlisted reserve on 27 October 1942. He was a private in the Air Corps and upon completion of pilot training he was commissioned a Second Lieutenant, Air Corps, on 30 August 1943. He

received a temporary promotion to First Lieutenant on 14 July 1945. He received the Air Medal for meritorious achievement while participating in aerial flights between May 1944 and May 1945. He has one efficiency report of excellent, one very satisfactory, two satisfactory and one unsatisfactory. These reports show the accused to be intelligent but lacking in initiative and leadership. He is addicted to alcohol and is unable to hold the respect of officers and men with whom he serves.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Charge I and the Specification thereunder, legally sufficient to support only so much of the findings of guilty of Specifications 1, 2, 4 and 5 of Charge II as involves a finding that on the dates alleged the accused wrongfully and unlawfully made and uttered the described checks to the party alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof, legally sufficient to support the finding of guilty of Charge II, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Ackroyd, Judge Advocate

JAGK - CM 321734 1st Ind

WD, JAGO, Washington 25, D. C. AUG 14 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant George E. Creighton (O-809930), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in a public place on 17 October 1946 (specification and Charge I) and of making and uttering four checks with intent to defraud (Specifications 1,2,4, and 5, Charge II) all in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of the Specification and Charge I (drunk and disorderly in a public place), and legally sufficient to support only so much of the findings of guilty of Specifications 1,2,4 and 5, Charge II (making and uttering fraudulent checks) as finds that the accused wrongfully and unlawfully made and uttered the described checks to the party alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof, and legally sufficient to support the sentence and to warrant confirmation of the sentence.

About 3:00 a.m. 17 October 1946 the accused was in an automobile in a parking lot in rear of the bus station at West Palm Beach, Florida. This automobile did not belong to accused. The accused was drunk. When questioned the accused stated that he thought he had an automobile somewhere in the lot. He was placed in arrest by civilian police and taken to the bus station where he became disorderly. He was taken to the police station and later released upon his promise to return to his post. About 3:00 p.m. 17 October 1946 the accused was again at the bus station asleep in a taxicab. He was in a drunken stupor. On these occasions the accused was dressed in civilian clothes.

On four separate occasions the accused made and uttered checks to the Morrison Field Officers' Mess. These checks were dated September 9, 14, 29 and October 5, 1946. The specified amounts were $15.00, $20.00, $25.00 and $20.00. The checks were dishonored by the drawee bank because of insufficient funds. On 31 October 1946 the accused redeemed the checks from the Mess. The record fails to show that the accused received anything from the Mess at

the time he uttered the checks. The prosecution failed to prove that the checks were issued with intent to defraud in that they failed to show that the Mess parted with anything in reliance upon these checks. The evidence does show that he failed to maintain sufficient funds in his account to insure payment of the checks when presented to the drawee bank.

I recommend that only so much of the findings of guilty of Specifications 1,2,4 and 5, Charge II, be approved as involves findings that the accused, on the dates alleged, wrongfully and unlawfully made and uttered the described checks to the party alleged and did fail to maintain a balance in his account in the drawee bank sufficient to meet payment thereof in violation of Article of War 96 and that the sentence be confirmed but commuted to dismissal, a reprimand and forfeiture of $100 pay per month for three months, and that the sentence as thus commuted be ordered into execution, but that execution of the dismissal be suspended during good behavior.

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

CM 321734

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 280, 22 Aug 1947).

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

MAY 28 1947

JAGQ - CM 321765

UNITED STATES v. Sergeant TOMMIE L. FELL (RA 35066613), 3424th Transportation Corps Truck Company (Troop).	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremen, Germany, 31 January and 1 February 1947. To be hanged by the neck until dead.

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

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

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

Specification: In that Sergeant Tommie Fell, 3424th Transportation Corps Truck Company (Troop) did, at Schwanewede, Bremen Enclave, Germany, on or about 18 December 1946, forcibly and feloniously, against her will, have carnal knowledge of Meta Gruene.

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

Specification: In that Sergeant Tommie Fell, 3424th Transportation Corps Truck Company (Troop) did, at Blumenthal, Bremen Enclave, Germany, on or about 18 December 1946, with intent to do her bodily harm, commit an assault upon Meta Gruene by shooting at her with a dangerous weapon, to wit, a pistol.

Specification 2: In that Sergeant Tommie Fell, 3424th Transportation Corps Truck Company (Troop) did, at Schwanewede, Bremen Enclave, Germany on or about 18 December 1946 in the night time feloniously burglariously break and enter the dwelling house of Mrs. Anna Augustin with intent to commit a felony, viz. rape therein.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. No evidence of previous convictions was introduced. The accused was sentenced to be hanged by the neck until dead, all members of the court present concurring therein. The reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

On the evening of 18 December 1946, accused was visiting in the home of Anna Augustin in Schwanewede, Germany, when at approximately 1845 Meta Gruene, a sister of Anna Augustin, arrived and remarked that she was hungry. Accused and Meta thereupon walked to accused's camp, where he obtained some sandwiches; both returned to the Augustin house and accused drank a half bottle of "something" (R. 8, 9). Thereafter Meta, accompanied by accused, departed for her house in Blumenthal, arriving there about 2045, where they remained downstairs talking and dancing for approximately one hour. Accused suggested that they "sleep together" but Meta refused (R. 10). She then advised accused to go back to camp and went to her room but he followed, still insisting and displayed a pistol saying however that he would not shoot. Meta ran from the house followed by accused who fell over a fence and then shot at her, the bullet "passing by her side" (R. 11, 25).

Meta ran back to the Augustin house arriving at 2245 and found Staff Sergeant Pace there with her two sisters. When they asked what the trouble was she replied that it was none of their business (R. 11, 24).

At 2400 Meta retired to bed with her sister Anna while her other sister, Henny, went to bed with two small children in an adjoining room. At approximately 0200 they were all awakened by accused knocking on the door of Henny's room demanding that it be opened and when it remained closed he "broke in" the door, went to the room where Meta was in bed and "grabbed" her by the hair pulling her upright (R. 13). He told Anna to go "sleep with the children," removed his pants, taking a pistol from his pocket with which he struck Meta twice on the head and once on the shoulder, pulled a handful of hair from her head and struck her across the nose with his hand (R. 14). Meta described accused's actions as follows:

"Q. Go on with the story.
"A. Then he took the pistol, and hit me with it on my left hand side behind the ear of my skull, and then he hit me the second time; immediately after he hit me here just

over the forehead on the right side. My sister tried to pull him back and tried to soothe him, and I meant to rush through the door. Then he again pulled me, by the hair, and tore off quite a bundle of hair. This he put into the stove. Then he again took up the pistol and hit me on the shoulder. And then he slapped me across the nose with his other hand.

"Q. Up to that point were you bleeding at all?
"A. The first time he hit me?

"Q. Were you bleeding very profusely at that time?
"A. Yes.

"Q. Go on from that point, please.
"A. Then I told my sister to go out and get some help. And then he pushed me across the bed a few times. I got up again and warded him off; and when he realized that I would not consent, he choked me. Then he choked me to such an extent that I immediately lost consciousness.

"Q. Now, I want you to think very carefully before you answer the next question. Try to describe to the court exactly just how you saw things, exactly what was what as you regained consciousness.
"A. The first time I regained consciousness again I saw him standing by the stove. Then he at once came up to me again and he choked me again." (R. 14-15).

She again lost consciousness and when she recovered accused was lying on top of her and she could feel that "his private parts were inside me" (R. 15). She observed a soldier standing in the doorway; she requested help and then lapsed into a state of unconsciousness until she remembered seeing a certain Captain in the room at which time accused was lying upon her and "He had his genital organ within my body" (R. 16). The Captain ordered accused to get up. The order was obeyed and he was taken away by the Captain. Meta's face, head, night clothing and the bed were "covered with blood" and one hour later she was taken by the military police to a hospital for treatment (R. 17, 18).

Anna Augustin testified that on the night in question Meta Gruene and the accused left her home together at about 2030, and a few minutes before 2300, Meta came back alone (R. 52); that she went to bed with Meta about midnight, but at 0200, someone knocked on the door, which was not opened because they "felt scared". She heard nothing in English

from outside the door, but did hear a crashing noise, and the accused entered the room (R. 54). He grabbed Meta by the hair, and the witness went downstairs to get another colored soldier who was in the house (R. 54). She returned alone, and saw accused lying on Meta, striking her with a pistol and the accused stated: "I am going to fuck her and then I will kill her." (R. 56).

Captain James D. Hartley testified that on 19 December 1946, at approximately 0215, he proceeded to a house on Schwanewede Strasse, went upstairs into a room in which a light was burning, and saw a woman lying in bed with a considerable quantity of blood on her face, head, chest, breasts, and gown (R. 64). A colored soldier was "on her", clothed only in an under-shirt, and the woman's nightgown was pulled high around her chest (R. 65). The Captain's order to get up was obeyed, and the Captain saw the soldier's penis in an erect position (R. 65).

Private First Class Gulley, who was sleeping downstairs in the house in Schwanewede that night, dressed and started upstairs, but someone said that Tommie had a gun, so he was afraid (R. 67, 72) but after two or three minutes he went upstairs and saw accused, dressed only in an under-shirt, "on the woman, between her knees" (R. 73). The woman's head was bloody, her neck was bleeding, there was blood on the bed clothing, and there was hair on the bed and on the floor (R. 73, 74). In his opinion the accused was under the influence of alcohol (R. 77, 80). Gulley spoke to the accused: "Come on, Tommie, there's no use of things like that —— you know better than that"; whereupon the accused said: "Are you for me?" and Gulley replied, "Yes, I am for you when you are right". Accused then ordered Gulley to "Get out". Gulley reported the matter to Captain Hartley (R. 73) and was present when accused "got off the woman" at the Captain's order, but could not see whether the accused's penis came out of the woman's privates (R. 76).

Henny Gruene, sleeping in the room adjoining that occupied by her two sisters, Meta and Anna, was awakened by the accused demanding that the door be opened: then he broke it open and passed through her room into Meta's, but Henny remained in bed. Approximately three-quarters of an hour later, she heard screaming, went into Meta's room, saw her and the accused on the bed, and left at once. Later, she went back to the room with a soldier, and saw accused "lying on her sister", noting blood and hair over her face (R. 83). She then heard the soldier tell the accused to stop (R. 83). She again entered the room with Captain Hartley, standing within three feet of the bed when accused complied with the Captain's order to get up, and she saw that accused's penis was inside her sister's genital parts (R. 87, 88).

It was stipulated that at about 0930 hours on 19 December 1946, a physical examination of Meta Gruene disclosed recent scalp wounds with considerable bleeding, multiple abrasions, and small contusions of throat and shoulders, but no other trauma on the body. Genitalia showed marital type introitus without any signs of recent hemorrhage. Microscopic examination of smears did not reveal sperm (R. 97, 98). Meta asserted that she did not take a vaginal douche or clean her genitalia between the time of the rape and that examination (R. 107). Dr. L. Seifert, a German physician, examined Meta Gruene in the early morning hours of 18 December 1946, found a laceration on the left side of the skull, which did not go to the bone; and observed that her face, neck and right shoulder bore extended abrasions, that her right shoulder was swollen, and that the skin on her left knee had a few small lacerations; but nothing was said to him about rape and consequently no examination in that regard was made.

In a pretrial statement (Pros. Ex. 6) the accused admitted that on the night in question he and a German girl went to her house in Blumenthal, where they first drank schnapps and danced, then went upstairs to her room. He asked her for a sandwich, to which she replied that she had none. He shot at a loaf of bread with his pistol, and the girl ran out of the house. He then went to her sister's house in Schwanewede to get some clothes, where he was admitted by a girl who lives there, and went into the girl's sister's room. The sister left the room, and the accused asked the other girl why she had left him. She would not talk, so he grabbed her hair and shook her. He took off his clothes, knelt on the bed, and threw the pistol at her. She grabbed the gun, and he tussled with her, putting one hand on her neck, and tried to "grab" the gun with the other. She "kneed" him in the genitals, and he slapped her. He kept her in bed with him, and went to sleep. Later, he was talking with her when the Captain came into the room.

4. <u>Evidence for the defense</u>:

Private Rouse, testified that on the morning of 19 December 1946, at the main gate of Camp Schwanewde, Meta Gruene told him that she was going to the doctor for treatment of injuries caused by accused when he came to her house, kicked the door in, and started fighting her. Meta Gruene showed Rouse the bruises on her face, and he asked: "Did he do that thing with you?" and she answered "No". (R. 102). Meta Gruene, recalled by the defense, admitted having talked to Rouse but did not remember what she said to him (R. 106).

The accused having been advised of his rights as a witness elected to remain silent (R. 107).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. The evidence clearly establishes that accused, on the night in question had carnal knowledge of Meta Gruene, forcibly and against her will. It is conclusively shown from the words and actions of the victim that she did not yield to accused's desires. She verbally rejected his advances; endeavored to escape by running to her sister's house and refusing to open the door at his demand. No doubt can exist that accused used force to consummate his act. He broke open the door to victim's bedroom, seized her by the hair, clubbed her with his pistol and choked her into a state of unconsciousness. Penetration was sufficiently proved by the testimony of the victim which was corroborated by her sister who saw accused "get off" Meta at Captain Hartley's order. All the elements of the offense were proved beyond any reasonable doubt and the wanton and vicious brutality of the attack is recounted in detail by several eyewitnesses. While there is some evidence that accused had been drinking it is insufficient to show that he was so drunk that he could not have the specific intent necessary to commit the offense of rape.

The assault upon Meta Gruene by shooting at her with a pistol and the breaking and entering a dwelling house with intent to commit rape is also proved by competent evidence. It is not disputed that accused, armed with a pistol, ran out of the house after his victim and fired a shot which "passed by her side". The court was amply justified in finding that his intent was to do her bodily harm.

The evidence is clear that the accused did, as alleged in the second specification of Charge II, burglariously break and enter a dwelling house with intent to commit rape therein. That the accused was admitted to the lower floor of the building cannot absolve him from guilt. His subsequent action in forcibly breaking open the door of the room occupied by Fraulein Gruene constituted burglary. The confines of that locked room were as much her dwelling house as though completely isolated from all other human habitation, and were as inviolable as either a mansion or a cottage. The fact that it was under the same roof as other dwellings could not render it susceptible of ingress or egress at the whim of another, even one then legally under that same roof. In the case of CM 202951, Wyatt, 6 BR 385, at page 387, it was stated:

> "*** The common law offense of burglary is usually defined as breaking and entering another's dwelling house in the nighttime with intent to commit a felony therein. 1 Hawkins' Pleas of the Crown, 8th ed., 129; 4 Blackstone's Commentaries 224; 1 Bishop's New Criminal Law, sec. 129. Yet it has been held with respect to burglary that the breaking need not be of an exterior wall or door or window, but may be a breaking by a person

rightfully in the house of an interior door. Thus in 1 Hawkins' Pleas of the Crown, 8th ed., 131, it was said:

> 'But it is certain, that he would have been guilty thereof' (i.e., of burglary) 'if * * * having entered by a door which he found open, or having lain in the house by the owner's consent, he had but unlatched a chamber door.'

"In Edmonds' Case, Hutton 20, 123 English reprint 1071, arising in 1619, an apprentice, sleeping in his master's house, arose in the night, drew the latch of the door at the foot of the stair leading to his master's bedroom, mounted the stair, entered the bedroom, and with intent to murder assaulted his master with a hatchet. It was held by all the judges of England (one doubting) that this was burglary. To the same effect are 4 Blackstone's Commentaries 226; 9 Corpus Juris 1012, 1013; Rex v. Gray, 1 Strange 481, 93 English reprint 648; United States v. Bowen, 4 Cranch C.C. 604, Fed. Case 14,629, and many other cases."

The physical facts indisputably prove that the room was forcibly entered, the accused is inextricably connected to the breaking and entry, and his previous (and subsequent) actions leave no doubt that his intent was to commit rape therein.

6. The charge sheet shows accused to be 31 years of age. He enlisted in the Regular Army on 25 November 1945 after his discharge from service in the Army of the United States extending from 18 June 1942 to 24 November 1945. There is no evidence of previous convictions by court-martial.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

W. H. Johnson Jr, Judge Advocate

Joseph J. Sterk, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 321765 1st Ind

WD, JAGO, Washington 25, D.C. JUN 5 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 Tommie L. Fell (RA 35066613), 3424th Transportation Corps Truck Company (Troop).

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 rape, burglary and assault with intent to do bodily harm with a dangerous weapon, and the sentence and to warrant confirmation of the sentence.

3. The evidence shows that accused, while visiting in the home of a German civilian, requested one Meta Gruene to "sleep with him" but when she refused and went to her room accused, still insisting, followed her and displayed a pistol. The victim ran from the house with accused in pursuit. He fired one shot in her direction, the bullet passing by her side. She went to her sister's house and went to bed at approximately midnight. At two o'clock that morning accused knocked on the door of an adjoining bedroom where another sister, Henny, was sleeping and demanded entrance. When it was refused he broke open the door and entered the room where Meta was in bed with her sister Anna. He seized Meta by the hair, told Anna to go to sleep with the children and, taking a pistol from his pocket, struck the victim about the head and shoulders with it. When she continued to resist he struck her with his hand, choked her into a state of unconsciousness and proceeded to have sexual intercourse with her. The victim's two sisters were eye-witnesses to the assault and an American officer and enlisted man testified as to accused's presence in the room and the physical condition of the victim as a result of the assault. She had a laceration on the side of her head, abrasions about the neck and throat, and her face, neck, head and chest were covered with blood.

Accused had been drinking during the evening but the evidence is insufficient to show that he was so intoxicated that he could not possess the required criminal intent to commit the offense of rape. No issue of insanity was raised at the trial.

4. The charge sheet shows that accused is 31 years of age. He enlisted in the Regular Army on 25 November 1945 after his discharge from

service in the Army of the United States extending from 18 June 1943 to 24 November 1945. There is no evidence of previous convictions by court-martial.

5. I recommend that the sentence be confirmed but in view of all the circumstances including the questionable moral character of the victim and the recommendation of the reviewing authority, recommend that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused, and that the sentence as thus commuted be carried into execution. I further recommend 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 into effect the foregoing recommendation should such action meet with approval.

CM 321765

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of Trial
2. Dft ltr for sig USW
3. Form of Exec. action

(G.C.M.O. 228, 30 June 1947).

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

MAY 28 1947

JAGQ - CM 321773

U N I T E D S T A T E S	)	FORT ORD, CALIFORNIA
v.	)	Trial by G.C.M., convened at Fort MacArthur, California, 4 March 1947. Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five (5) years. Branch United States Disciplinary Barracks, Camp Cooke, California.
Private ANTONIO C. CORTEZ (39268732), attached Headquarters Detachment, 6004 ASU, Post Operating Company, Fort MacArthur, California.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 of guilty and the sentence. The record has now been examined by the Board of Review and the Board submits this its opinion to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Antonio C. Cortez, attached Headquarters Detachment, 6004 ASU, Post Operating Company, Fort MacArthur, California (formerly of Company D, 413th Infantry, Camp Adair, Oregon), did, at Camp Adair, Oregon, on or about 25 July 1943, desert the service of the United States and did remain absent in desertion until his return to military control at Fort MacArthur, California, on or about 16 January 1947.

He pleaded not guilty to, and was found guilty of, the Charge and Specification thereunder. There was no evidence of previous convictions. 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 five (5) years." The reviewing authority approved the sentence and ordered it executed, but suspended the dishonorable discharge until accused is released from confinement. Branch United States Disciplinary Barracks, Camp Cooke, 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. 33, Headquarters, Fort Ord, California, dated 22 April 1947.

3. The prosecution introduced into evidence, without objection by the defense, an extract copy of a morning report reading as follows:

"Cortez, Antonio C. 39268732
Pvt. Co. 'D' 413th Infantry

Extract Copy of Morning Report of—

Co. 'D' 413th Infantry

Fur. to AWOL 25th July, 1943

Co. 'D' 413th Inf. Camp Carson Colo. April 16th 44
I, James J. Nyers 1st Lt. 413th Inf, certify that I am the commanding officer of Co. 'D' 413th Inf and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Camp Adair, Oregon for the dates indicated in said copy which relates to Antonio C. Cortez, 39268732 Pvt. Co. 'D' 413th Infantry

/s/ James J. Nyers
1st Lt 413 Inf"

Accused's return to military control was established by the introduction of a duly authenticated morning report of his present organization.

Accused, after having been advised of his rights as a witness, elected to remain silent, and no evidence was presented in his behalf.

4. The facts in this case are identical with those in CM 318685, Sustaite, and accordingly the decision here must be governed by the rule there announced that the entry on the morning report "Fur. to AWOL 25th July 1943", containing no reference or relation to the accused, in itself is insufficient to support the findings of the court, and the statement of the certifying officer in the certificate authenticating the extract copy of the report that such entry related to the accused cannot be considered as substantive evidence; appearing not as part of the entry but

in the certification alone it is hearsay and inadmissible. No other evidence being adduced to prove initial absence without leave the prosecution has failed to prove its case.

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

W H Johnson Jr., Judge Advocate

Joseph J Stern, Judge Advocate

(Dissent), Judge Advocate

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

MAY 28 1947

JAGQ - CM 321773

UNITED STATES	)	FORT ORD, CALIFORNIA
v.	)	Trial by G.C.M., convened at Fort MacArthur, California, 4 March 1947. Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five (5) years. Branch United States Disciplinary Barracks, Camp Cooke, California.
Private ANTONIO C. CORTEZ (39268732), attached Headquarters Detachment, 6004 ASU, Post Operating Company, Fort MacArthur, California.	)	

DISSENT by SCHENKEN, Judge Advocate

I do not concur in the conclusion that the certificate portion of WD AGO Form No. 44 (10 July 1943) cannot be considered as substantive evidence. The opinion of the Board of Review in CM 318685, Sustaite, has been carefully studied and, in my opinion, the conclusions therein are not in accord with the applicable law.

Two citations in the Sustaite opinion require special comment — In re Kostohris Estate, 96 Mont. 226, 29 P (2) 829, 835 and Wigmore on Evidence, 3d Ed., Sec. 2108, 1678.

The Kostohris Case

The Kostohris case was decided by the Supreme Court of Montana (10 Feb 34) on the basis of a state statute (par. 10568, Rev. Code 1921), the wording of which is not similar to the wording of paragraph 117a, MCM. In that case, a certificate of the Director of the Veterans Administration was offered in evidence, stating that he had personally examined the records in his custody and the attached "four sheets" represented "a true, correct, and complete statement of payments of disability and insurance." It appeared that the data involved had been assembled from various records. Sec. 10568 of the Montana Revised Code, 1921, provided that "official documents (in the Departments of the United States) may be proved * * * by the certificate of the legal custodian thereof." There appears no authority in the Montana Revised Code for the admission in evidence of an "official statement in writing" such as provided for in paragraph 117a, MCM, p. 121.

Opposed to the Kostohris case are decisions of the Supreme Courts of Missouri and Colorado giving more liberal interpreations of similar state statutes.

In the case of Friddy v. Boice, 99 S.W. 1055, the Supreme Court of Missouri found (22 Dec. 06) no error in the lower court's receiving copies of part of the records of the Census Bureau as proof of the age of a person named therein. The certificate attached thereto reads in part as follows:

> "Pursuant to Sec. 882 of the Revised Statutes, I hereby certify that the annexed pages are true copies of the original schedules showing the members of the families of Wm. P. Linvill and James J. Priddy of the county of Jackson, state of Oregon, as enumerated in the month of June 1930, the same forming a part of the records of the 11th Census of which the Secretary of Interior is the custodian ***".

The decision does not comment upon the "identification" data set forth in the certificate but it is clear that this information was necessary to identify the "annexed pages" as relating to certain families of a certain county compiled during a certain month.

In the case of Commonwealth Irr. Co. v. Rio Grande Canal Water Users' Ass'n et al, 45 (P.) (2) 622, the court received, over the defendant's objection, certified copies of certain water commissioners' reports. In this connection, the Supreme Court of Colorado (8 Apr 35) held:

> "When the exhibits were offered in evidence, counsel did not indicate to the court that there was any objection to them *** on the ground that they were not sworn to as required by the act of 1903. The defendant, therefore, is not in position to urge such objection in this court. But were it otherwise, the objection could not be sustained. The exhibits are photostats of separate pages of the reports. The state engineer certified *** (that they) are correct copies of 'portions' of the water commissioners' reports. *** The copies did not include the page containing the oath. We must assume, in the absence of evidence to the contrary - and there is none - that the reports * * * were sworn to as required by the act of 1903. We have repeatedly held that the presumption is that public officials have discharged their duties properly and in compliance with the law.
>
> "It is the statutory duty of water commissioners to sign and swear to the reports made by them to the Division Engineer who is required to file such reports, sworn to as required by law, with the State Engineer, whose duty it is to keep such verified reports in his office and furnish certified copies thereof upon proper request. The prima facie presumption is

that the several officers performed their statutory duty and that the Division Engineer accepted and filed with the State Engineer and that the latter accepted and filed and gave certified copies of those water commissioners' reports only that were sworn to as required by the act of 1903."

Wigmore on Evidence, 3d Ed.

Pertinent portions of paragraphs from Wigmore, referred to in the Sustaite opinion, are quoted as follows:

Paragraph 2108(b):

"By the exception to the Hearsay Rule for official statements, a certified copy of a public record is admissible when made by an officer having authority to furnish copies. Now this authority is universally conceded to extend merely to the furnishing of full copies, and consequently an official certificate of the effect or substances of a record is not receivable under the Hearsay exception unless by statute express authority to give such certificates has been conferred (ante 1678). The result of that principle is to require a 'verbatim' copy from official certifiers."

Paragraph 1678:

"The authority to certify a copy implies that the terms set forth by the officer as representing the original in his custody must be a literal copy, not merely the substance or the effect, of the original's terms. * * * The policy of conceding to a custodian of documents no further authority than this rests on the common-law doctrine of Completeness (post par. 2108). * * * At common law, therefore, it was entirely settled that no custodian had authority to certify any less than the entire and literal terms of the original - in short, a copy in the strict sense of the word; and the rule was applied to all varieties of documents.

* * * *

"But here the rigid logic of the courts was inconsistent with good sense and practical needs. In a vast number of cases, the tenor of a record or an entry is quickly ascertainable, is open to no difference of opinion and can be summarily stated without a literal transcription; the possibilities of harm are further diminished by the publicity of the record and its easy access for the detection

of error. Accordingly, by statute, the use of certificates of the effect or substance of a document has been widely sanctioned. * * *"

The following paragraphs, not referred to in the Sustaite opinion, are also pertinent:

Paragraph 1638:

"It cannot be doubted that the rule of Evidence, in this vast field of application, is suffering seriously from failure to expand with change of circumstances. * * * The common law implied an authority in every official to keep a record of his doings, but it did not imply an authority (beyond a few instances) to make a report or return or to make a certificate.

"*** Circumstances have so changed the entire condition of things that the primitive principle is outworn, and no longer serves the needs for such evidence.

* * * *

"In short, changes of condition make it both safe and imperative that a liberal principle of extensive scope should be recognized, as the logical modern development of the earlier principle.

"This conclusion is corroborated by the great bulk of legislation giving such an expansion in detail in every state. The thousands of statutes which expressly declare admissible the records, returns, and certificates of various specific officers prove that there is a legitimate demand in professional opinion for an enlargement of the narrow common-law rules."

Paragraph 2109:

"In general, there is a broad distinction between records which merely copy in succession for permanent reference single independent private documents each complete in itself - such as records of deeds or land-patents - and records which contain successive entries of officers as to their doings from time to time in a certain class of matters. * * * where successive entries are made by the officer in a single book, concerning many persons or pieces of property, the same person or property being dealt with in perhaps various parts of the book, it is not necessary to reproduce any but the entries affecting the subject of the litigation."

Army Regulations

One might almost conclude from the underlined words above (par. 2109) that Prof. Wigmore was referring specifically to morning reports. Certainly, the wording of the pertinent portions of AR 615-300 closely follows Prof. Wigmore's conclusions. Par. 9d of this Army Regulation (25 Mar. 44), which was in effect when instant extract was prepared, provided that when a man was dropped from the rolls as AWOL, the certified extract copy of the morning report (WD AGO Form No. 44) to be forwarded with other records to The Adjutant General, shall show:

"change of status to AWOL"

This instruction was repeated in paragraph 7a(2). And the officer preparing the extract in the instant case did exactly as directed in the AR — he listed the entry showing "Fur. to AWOL 25th July, 1943."

Paragraph 27a of the latest edition of AR 615-300 (dated 17 Mar 47) contains, for the first time, instructions as to what information should be included in WD AGO Form No. 44. The instructions are very clear; those relating to the "extract" portion read as follows:

"(5) Date of M/R on which the charge of AWOL has been entered.
"(6) Last name, first name, middle initial (and arm or service, if different from the arm or service of the reporting org.), Army serial number, and grade of absenter.
"(7) Exact quotation from the M/R of the remark pertaining to the soldier under the date shown. The remark will show the initial change of status to AWOL, together with the hour. If the M/R fails to show the hour of AWOL, corrective action will be taken as provided in AR 345-400.
"(8) * * *
"(9) Date of M/R on which the absenter has been dropped from the rolls as AWOL"
"(10) Same as 6 above.
"(11) Same tenor as 7 above — "Exact quotation", etc.

It is pertinent to note that the entries pertaining to the changes in status to AWOL and from AWOL to "dropped from rolls" (notes 7 and 11 above) are the only portion required to be "exact quotations" - and it is reasonable to conclude that the remaining contents of the "extract" are to be filled in as directed, regardless of what the original morning report might show.

(It is also interesting to note that the place where the entry was made is not recorded in extract portion of the new form but in the certificate.)

Although the form of this "extract" might be criticized, there is nothing wrong with the substantive law involved. Army Regulations make it the duty of the officer executing this extract to know that it relates to the man who is described therein by name, branch, ASN, and grade. He has the records in his custody and he has the opportunity and duty (see 14a(1) and 15a(4), AR 615-300, 17 Mar. 47) to examine them, to make certain that the entry showing the change of status relates to that particular soldier, and to record that fact on the extract form. Oftentimes the officer signing the extract certificate is also the one who made the original remark "duty to AWOL" but his act in signing the extract form is a duty aside and apart from that involved in making the original AWOL entry, and Form No. 44 becomes an Army record in the same degree as morning reports.

It seems clear to me that an analysis of the Form No. 44 certificate and the Army Regulation requiring its preparation can lead but to the one conclusion that it is "an official statement in writing" made by an officer who "had the duty to know the matter so stated and record it". As such, it falls within the exception to the general rule as to the admissibility of official writings, in full compliance with the provisions of paragraph 117a, MCM, page 121.

Manual for Courts-Martial

It is my opinion that par. 117a, MCM, is the Army's equivalent to the "thousands of statutes which expressly declare admissible the records, returns, and certificates of various specific officers ***" - see par. 1638, Wigmore on Evidence, supra.

For ready reference, pertinent portions of paragraph 117a are quoted as follows:

> "117 COURTS-MARTIAL - RULES OF EVIDENCE *** a. Official Writings - General Rule. — It is to be borne in mind that the mere fact that a document is an official report does not in itself make it admissible in evidence for it is the hearsay assertion of a person not in court. * * *
>
> "Exceptions — An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is where an official duty exists to know and to make one or more records of certain facts and events, each such record, including

a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it. For instance, the originals of an enlistment paper, * * * and morning report are competent evidence of the facts recited therein, except as to entries obviously not based on personal knowledge. As to copies, see 116 (Exceptions).

The Sustaite opinion, supra, states that the provisions of paragraphs 116 and 117a, MCM, "when read conjunctively, manifestly apply only to those official statements which have been preserved in a public document of record and which were originally recorded by a person having an official duty to know and record the facts or events contained in such statements and the proviso making admissible in evidence an 'official statement in writing * * * in * * * a certificate' must be so limited."

The opinion then concludes that the certificate is not in itself a public document of record and that the only duty of the authenticating officer is to perform the administrative task of certifying that the extract in question is a true copy of the original record.

The necessity for reading paragraphs 116 and 117a "conjunctively" is not clear — one refers to "Proving the contents of writing" in general and the other relates to "Official Writings" in particular. There is nothing in paragraph 117a which requires that an "official statement in writing" must be a "public document of record" as a prerequisite to its admissibility in evidence. The method of proving documents in general is outlined in paragraph 116a, particularly subparagraphs 4, 5 and 6 thereof. To limit paragraph 117a to public documents of record would be to reduce it to a repetition of paragraph 116a; it would deprive it of any meaning of its own.

But even conceding that paragraph 117a must be so limited, it is pointed out that paragraph 15a(4), AR 615-300, 17 March 1947, requires that WD AGO Form No. 44 be made a "public document of record" — that it be sent along with service papers, etc., to The Adjutant General. Paragraph 14a(1) of this same Army Regulation requires that other copies be sent to the Post Commander. In such cases, these forms (No.44) become "public documents of record" in at least the same sense as a morning report, guard report, etc.

The opinion in the Sustaite case, supra, cites paragraph 43b, AR 345-400, 3 January 45 as the authority for the authentication of WD AGO Form N o. 44. The provisions of AR 615-300 are not mentioned in

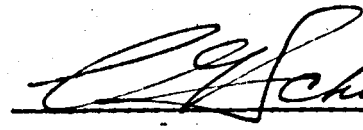
the opinion. As outlined above, paragraphs 14a(1) and 15a(4), AR 615-300 (17 Mar 47) not only make it the duty of the custodian to prepare this form (No. 44) but also provide that it shall be included in certain records sent to The Adjutant General and to the Post Commander. Similar provisions were contained in the previous edition of AR 615-300 dated 25 March 1944.

The Sustaite opinion, supra, says "the only duty of the authenticating officer is to perform the administrative task of certifying that the extract in question is a true copy of the original record." Regardless of whether the duty is an "administrative task" or "arduous labor", it is clearly a duty. Morning report AWOL entries themselves are mere administrative entries based on a search of the area; certificates on Form No. 44 are similar administrative tasks based on examination (or search) of the morning reports.

It is difficult for the writer to conceive of any situation where the acceptance of the certificate on Form No. 44 as evidence in this case would operate to the prejudice of the accused. To presume that the entry "Fur to AWOL 25 July 1943" in the present case does not relate to the accused would require a presumption that the officer signing that certificate had committed the offense of false certification or at least gross negligence in executing same. Such a presumption of crime is contrary to all basic law. But even if it were incorrect and the accused was not AWOL as charged, would it not be an easy task for the accused to prove its falsity?

Conclusion

It is therefore my opinion that the certificate portion of WD AGO Form No. 44 was properly admissible in evidence to identify the accused as the soldier against whom an entry "fur to AWOL 25 July 1943" was made on the books of the organization concerned.

 , Judge Advocate.

JAGQ - CM 321773 1st Ind

WD, JAGO, Washington 25, D. C. JUN 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 Antonio C. Cortez (39268732), attached Headquarters Detachment, 6004 ASU, 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O.212, 11 June 1947)

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

JAGQ - CM 321792

JUN 12 1947

UNITED STATES	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 19-21 March 1947. Dismissal.
	)	
Captain WILLIAM F. DYE (0-1645820), Signal Corps.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 upon the following Charges and Specifications:

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

Specification 1: In that Captain William F. Dye, Signal Section, Headquarters Third United States Army, with intent to defraud, did, at Niederursel/Frankfurt am Main, Germany, on or about 25 November 1946, unlawfully pretend to Mignon Baronin von Weimert, attorney-in-fact of Gertrud Jago, that he, said Captain Dye, would purchase for value two DKW passenger automobiles, well knowing that such pretenses were false, and by means thereof did fraudulently obtain from the said Baronin von Weimert the said DKW automobiles of a value of over fifty dollars ($50.00).

Specification 2: In that Captain William F. Dye, Signal Section, Headquarters Third United States Army, did, at Frankfurt, Germany, on or about 18 December 1946, in a statement given in the course of an official investigation make a statement in substance as follows: "This car was sold by me to Master Sergeant Meyers on the 18th of November 1946", which statement he did not then believe to be true.

Specification 3: In that Captain William F. Dye, Signal Section, Headquarters, Third United States Army, did, at Stuttgart, Germany, on or about 18 November 1946, borrow the sum of ($700.00) from Master Sergeant Wilson H. Meyers, an enlisted man of the United States Army, to the prejudice of good order and military discipline.

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

Specification 1: (Nolle Prosequi).

Specification 2: (Finding of Not Guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1 and 2 of Charge I and Charge I, of Specification 3 of Charge I, in violation of the 96th Article of War and not guilty of Specification 2 of Charge II and Charge II. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

Sometime prior to 9 November 1946, Master Sergeant Meyers advised accused, who was his motor officer in the 65th Signal Battalion, Bad Mergentheim, Germany, that he was interested in purchasing an automobile (R. 23). Accused had been in contact with Baroness von Weimert, a German civilian residing in Frankfurt who was Attorney-in-fact for her sister Mrs. Gertrud Jago for the sale of two DKW automobiles which belonged to the latter. Mrs. Jago was a British citizen who departed from Germany in 1945 and now resided in Ireland (R. 9, 51). Accused entered into a written agreement to purchase the two cars for $1200.00 (R. 9, 15; Pros. Ex. 1); he and Sergeant Meyers made the trip to Stuttgart on 18 November 1946, obtained delivery of one car and accused received the other car in Frankfurt "about a week" later (R. 16, 17, 24), at which time accused delivered twelve, 100 dollar, United States Postal money orders to the Baroness (R. 10, 11, 17, 20). He had endorsed each money order on the reverse side "Pay to William F. Dye" (R. 11, 22). A few days later, the Baroness, on being advised that the money orders were improperly endorsed requested her brother Fritz Maron to see accused about the matter (R. 11, 12, 14), but when he located him in Heidelberg, accused refused to talk to him (R. 17; Pros. Ex. 7).

Sergeant Meyers testified that the first car delivered was registered in his name with accused's consent and witness drove it to Bad Mergentheim, after paying the registration and license fees (R. 24, 25; Pros. Ex. 4). Meyers further testified that he "intended to buy" the car and at accused's request loaned him $700.00 on 9 November but the loan had no relation to the transaction involving the sale of the automobile (R. 24-26). Sometime thereafter accused signed and

delivered to Meyers a "receipt or bill of sale" on the car acknowledging a consideration of 7000 Reichmarks as partial payment (R. 25, 26). Meyers testified that he never paid accused any Reichmarks; that the Bill of Sale was given so he would have some evidence of ownership to produce if he were stopped while driving and the price of the car had never been discussed between him and accused (R. 27).

On 2 December 1946 accused was being questioned by a member of the Criminal Investigation Division concerning the purchase of the automobiles and after being warned of his rights under the 24th Article of War, denied that he had "ever given money orders to German civilians" or "ever endorsed any money orders" (R. 37). Accused was again questioned on 18 December and after signing a statement to the effect that he had sold one of the cars to Sergeant Meyers for 7000 Reichmarks (Pros. Ex. 8; R. 40-44) he later retracted that portion of his statement and signed another to the effect that the car "was not actually sold" to Sergeant Meyers but the Sergeant loaned him $700.00 and the car was registered in Meyers' name. The receipt or Bill of Sale was "in place of an I.O.U" for the money as $700.00 was the equivalent of 7000 Reichmarks (Pros. Ex. 9; R. 42, 45).

Sergeant Maury, money order clerk at A.P.O. 403, testified that the money orders in question (Pros. Exs. 2A-1) could only be cashed by accused because of the method of endorsement and that the mistake of endorsing on the "wrong line" was not uncommon, occurring in approximately five per cent of the cases (R. 31).

Accused stated in open court that he understood his rights as a witness and elected to remain silent (R. 49).

4. The gist of Specification 1, Charge I is the obtaining of property with the intent to defraud under the false pretense that accused would purchase it for value. The "false pretense", therefore, which accused is alleged to have made is one concerning an act to be performed in the future, viz.; to transfer something of value in exchange for the two vehicles, as it is not denied that one of the cars in question was delivered to accused prior to the transfer of the money orders. For a "false pretense" to be an offense it must relate to a past event or existing fact and not a representation or promise regarding a future transaction. In Wharton's Criminal Law, Vol. 2 (12th Ed.), Sec. 1439, p. 1731, the applicable rule is stated as follows:

> "* * * Thus, for instance, a false statement, that a draft which the defendant exhibits to the prosecutor has been received from a house of good credit abroad, and

> is for a valuable consideration, on the faith of which he obtains the prosecutor's goods, is within the law; a promise to deposit with him such a draft at some future time, though wilfully and intentionally false, and the means of the prosecutor's parting possession with his property, is not. So a pretense that the party would do an act that he did not mean to do (as a pretense that he would pay for goods on delivery) was ruled by all the judges not to be a false pretense, within the statute of Geo. II., and the same rule is distinctly recognized in this country, it being held that the statement of an intention is not a statement of an existing fact. ***"

Accordingly, the Board of Review is of the opinion that the specification fails to allege and the evidence is legally insufficient to support an offense based upon "false pretenses" as that crime is defined by our criminal law. However, the Board of Review does not hold that a misrepresentation or promise regarding a future transaction may not be properly charged as a violation of the 95th Article of War as conduct unbecoming an officer and a gentleman in an appropriate case and by a specification which adequately advises accused of the exact offense charged. It may well be that under certain circumstances it is "morally wrong" and condemned by the 95th Article of War for an officer to obtain property by promising to do some act in the future when he knows at the time he makes the promise that he does not intend to fulfill it, even though such is not an offense under our criminal code as applied in the civil courts. In the instant case however, the specification is couched in such loose and inarticulate language that it cannot be said to advise accused that he was charged with any offense other than one based upon the common law crime of "false pretenses" and therefore cannot be found to allege an offense under the 95th Article of War.

Specification 2 of Charge I alleges that accused made a statement in an official investigation that "This car was sold by me to Master Sergeant Meyers on the 18th of November 1946" which statement he did not then believe to be true. The evidence is undisputed that he did make the alleged statement but also shows conclusively that a short time thereafter during the same investigation he retracted it and explained the transaction as it actually happened. Further the evidence is clear that Sergeant Meyers intended to buy the car and in fact, with accused's consent, took possession and registered it in his name on 18 November. Under these circumstances it can hardly be said that because accused termed the transaction a "sale" and immediately thereafter explained it, that his actions amounted to a false official statement. Sergeant Meyers testified that he registered the car in his name because he "intended to

buy it". When a transaction amounts to a "sale" is a technical question of law and the Board of Review is of the opinion that the record of trial does not contain sufficient evidence to support a finding that accused made a statement which he believed to be untrue, and consequently that the evidence is legally insufficient to sustain the finding of guilty of this specification.

Specification 3 of Charge I alleges that accused borrowed $700.00 from an enlisted man. The accused admits this in his statement and Sergeant Meyers testified that he made the loan to him. The court found accused guilty of this specification in violation of the 96th Article of War which is proper as such an offense is not condemned by the 95th Article of War when there is no evidence to indicate an intention to defraud or deceive (CM 248934, Murray, 31 BR 389).

5. War Department records show the accused to be 26 years of age and married. He attended the University of Akron for two and one-half years and was employed as an inspector for the Goodrich Tire Company. He enlisted in the Army on 19 October 1942 and was commissioned a second lieutenant in the Signal Corps on graduating from the Officer Candidate School at Fort Monmouth, New Jersey, on 10 May 1943. He was promoted to first lieutenant 1 July 1944 and to captain 6 November 1946. His efficiency reports disclose numerical ratings of 1.6, 1.2, 5.1 and 4.8. No evidence of previous convictions by court-martial are shown and there is no record of any difficulties with the civil authorities prior to his entry in the service.

6. The court was legally constituted and had jurisdiction of the accused and the offenses charged. Except as noted above, no errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I, but legally sufficient to support the findings of guilty of Specification 3 in violation of the 96th Article of War, 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 A Johnson Jr, Judge Advocate

Joseph J Sterne, Judge Advocate

E G Schumann, Judge Advocate

JAGQ - CM 321792 1st Ind

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 William F. Dye (0-1645820), Signal Corps.

2. Upon trial by general court-martial in Germany this officer was found guilty of obtaining property under the false pretense that he would purchase it for value, and of making a false official statement, both in violation of Article of War 95; and of borrowing money from an enlisted man, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specifications 1 and 2 thereunder (obtaining property under false pretenses and making a false official statement) in violation of Article of War 95 but legally sufficient to support the findings of guilty of Specification 3 of Charge I (borrowing money from an enlisted man) in violation of Article of War 96, and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

On 18 November 1946 accused entered into an agreement with Baroness von Weimert to purchase two automobiles for the sum of $1200.00. After the cars were received he delivered twelve one hundred dollar United States Postal money orders in payment therefor endorsed as follows: "Pay to William F. Dye". The money orders endorsed in this manner could only be cashed by accused. A few days later the Baroness, upon being advised that the indorsements were improper requested her brother to see accused about the matter but accused refused to see him. Thereafter on 2 December when accused was questioned in the course of an investigation concerning the transaction he denied that he had "ever given money orders to German civilians" or "endorsed any money orders". He further admitted that he had borrowed $700.00 from a Master Sergeant Meyers, an enlisted man in accused's unit and that while Sergeant Meyers intended to purchase one of the automobiles in question from the accused,

took possession of it and had it registered in his (Meyers) name, the loan had no connection with this contemplated purchase.

4. War Department records show that the accused is 26 years of age and married. He attended the University of Akron for two and one-half years and was employed as an inspector for the Goodrich Tire Company. He enlisted in the Army on 19 October 1942 and was commissioned a second lieutenant in the Signal Corps on graduating from the Officer Candidate School at Fort Monmouth, New Jersey, on 10 May 1943. He was promoted to first lieutenant 1 July 1944 and to captain 6 November 1946. His efficiency reports disclose numerical ratings of 1.6, 1.2, 5.1 and 4.8. No evidence of previous convictions by court-martial are shown and there is no record of any difficulties with the civil authorities prior to his entry in the service.

5. Consideration has been given to letter from Congressman Walter B. Huber enclosing letter from accused's uncle and foster parent, Mr. George W. Dye, and to a letter from accused addressed to the Board of Review.

6. I recommend that the findings of guilty of Specifications 1 and 2, Charge I be disapproved and that the sentence be confirmed but in view of all the circumstances of the case including accused's excellent past record, recommend that it be commuted to a reprimand and forfeiture of $75.00 pay per month for two months, and that the sentence as thus commuted be carried into execution.

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

CW 321792

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls.
1. Record of Trial
2. Form of action
3. Ltr fr Cong Huber, w/incl
4. Ltr fr accused, 16 May/47

(G.C.M.O. 243, 10 July 1947).

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

JAGH - CM 321805

MAY 1947

UNITED STATES v. Private TRAVIS R. RAWLS (38772968), Squadron B, 2532d Army Air Forces Base Unit	)	FLYING DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Randolph Field, Texas, 18 April 1947. Dishonorable discharge and confinement for one (1) year. The Branch United States Disciplinary Barracks

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Travis R. Rawls, Squadron B, 2532nd Army Air Forces Base Unit, did, at Sheppard Field, Wichita Falls, Texas, on or about 2 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended by Civil Authorities on or about 17 February 1947, at Estillene, Texas.

He pleaded not guilty to and was found guilty of the Charge and its 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 may direct for two and one-half ($2\frac{1}{2}$) years. The reviewing authority approved the sentence but reduced the period of confinement imposed to one (1) year, designated the Branch United States Disciplinary Barracks, Camp Gordon, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War $50\frac{1}{2}$.

3. There was admitted in evidence, Prosecution Exhibit No. 1, a stipulation, showing that since 24 July 1945, accused had been a member of the Armed Forces of the United States, and, as such, a person subject to military law (R 6). An extract copy of a morning report of 3706 AAF BU (BTC) Sheppard Field, Texas, was admitted into evidence without objection by the defense (R 6, Pros Ex 2). This extract copy, prepared on WD, AGO Form No. 44, 10 July 1943, reads as follows:

"Rawls Travis R 38772968
(Last Name) (First Name) (Middle Initial) (Army serial number)

Pvt Sq M 3706 AAF BU (BTC)
(Grade) (Company, regiment, and arm or service)

EXTRACT COPY OF MORNING REPORT OF--

3706 AAF BU (BTC) Sheppard Field, Texas
(Company,troop,battery,or detachment)(Regiment or other organization)

* * * *

11 August 1946
Dy to AWOL 2 June 46
Dropped fr Rolls AWOL since 2 June 46
S/R & Allied Paper frwd

xx CLT

* * * *

16 August 1946
Sq M 3706 AAF BU (BTC) Sheppard Fld Texas
(Complete designation of command) (Station) (Date)

I, CLAUDE M TERHUNE Major AC, certify
(Name,grade, and arm or service)

that I am the commanding officer of Sq M 3706 AAF
(Complete designation of

BU (BTC) and official custodian of the morning reports
Command)
of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said com-

mand submitted at Sheppard Field Texas
(Station)
for the dates indicated in said copy which relates to

Rawls Travis R Pvt Sq M 3706 AAF BU
(Full name,Army serial number,grade and organization of person

(BTC) Sheppard Field Texas
referred to in extract copy)

s/ Claude M. Terhune
CLAUDE M TERHUNE MAJOR AC

(Grade and arm or service)"

It was stipulated by and between the prosecution, defense counsel and the accused (R 6, Pros Ex 4) that if A. B. Stuart, P. O. Box 2, Estillene, Texas, were present, he would testify as follows:

"On the 17th of February 1947, at about 10.00 A. M., in my Official Capacity as Sheriff of Hall County, Texas, I apprehended Travis R. Rawls at Estillene, Texas. He was returned to military control at Randolph Field, Texas, on the 22nd of February 1947. At the time he was apprehended he was wearing civilian clothes."

Accused, his rights as a witness having been explained to him, elected to remain silent.

4. The only question presented for consideration is whether the extract copy of morning report, set forth above, contains prima facie evidence of the inception of accused's absence without leave status. A similar case (CM 318685, Sustaite), involving the same question, was recently considered by the Board of Review, in which the Board stated:

"The prosecution apparently sought to sustain its burden of proving that accused deserted the service as alleged by an attempted showing of a prolonged period of absence without leave on the part of accused plus a stipulation that when 'arrested' he was wearing civilian clothes. In order to show the inception of accused's absence without leave status, an extract copy of a morning report of the unit to which accused allegedly belonged was introduced in evidence, which extract contained the following entries:

'10 February 1945
Dy to AWOL as of 0700 9 Feb. 45
10 March 1945
AWOL 30 das to dropped fr rolls.'

The above morning report entries, as thus extracted, are obviously meaningless, for they relate to no named or described person. They fail completely to support any

inference that it was accused who went absent without leave on 9 February 1945 and was dropped from the rolls thirty days later. The question remains, however, as to whether the statement of the certifying officer appearing in the certificate authenticating such copy that these morning report entries related to accused can be considered as substantive evidence giving meaning and effect to the apparently incomplete extracts.

"Paragraph 117a, Manual for Courts-Martial, 1928, provides in pertinent part that:

> 'An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it. For instance, the originals of an enlistment paper, physical examination paper, outline figure and fingerprint card, guard report, individual equipment record, and morning report are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge.' (Underscoring supplied.)

And in paragraph 116a, of the Manual it is provided that:

> 'In the case of a public record required by law, regulation, or custom to be preserved in file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without either first proving that the original has been lost or destroyed, or without otherwise accounting for the original.'

* * *

> 'A copy of any book, record, paper, or document in the War Department, including its bureaus and branches, or in any command or unit in the Army may be duly authenticated by * * * a signed certificate or statement indicating that the paper in question

is a true copy of the original and that the signer is the custodian of the original. Thus, "A true (extract) copy: (Sgd.) John Smith, Capt. 10th Inf. Comd'g., Co. A, 10th Inf.," would be sufficient, prima facie, to authenticate a paper as a copy of an original company record of Company A, Tenth Infantry.' (Underscoring supplied.)

"The above quoted provisions of the Manual, when read conjunctively, manifestly apply only to those official statements which have been preserved in a public document of record and which were originally recorded by a person having an official duty to know and record the facts or events contained in such statements and the proviso making admissible in evidence an 'official statement in writing * * * in * * * a certificate' must be so limited. A mere authenticating certificate stating, inter alia, that an extract copy of a certain record described in the certificate is a true copy is obviously not in itself a public document of record and thus the facts stated in such certificate have only the force and effect for which they were intended, that is, authentication. As indicated in the mentioned provisions of the Manual, the only duty of the authenticating officer is to perform the administrative task of certifying that the extract in question is a true copy of the original record. (See also par. 43b, AR 345-400, 3 Jan. 1945.) Therefore, in a prosecution for desertion or absence without leave wherein an extract copy of a morning report has been introduced in evidence to establish the inception of accused's absence without leave, only the extracted morning report entries may be employed to establish prima facie proof of such absence, the recitals in the authenticating certificate being merely sufficient to furnish prima facie proof of proper authentication and such administrative details as may be connected therewith, such as the place of submission of the morning report.

"The statement contained in the authenticating certificate in the instant case to the effect that the extracted entries applied to accused cannot, therefore, be admitted in evidence on the theory that such certificate was a public document of record and that such statement was a record of a fact appearing therein. Nor can it be considered admissible on the theory that it was but a summary of what actually appeared on the morning report in question. A certified copy must, in the absence of statutory authority to the contrary (see last paragraph of par. 117a, eighth paragraph of par. 129 and fifth paragraph of par. 152a, MCM, 1928), be a

transcription in the literal terms, an exact duplication, of the original. A mere summary of the record by the certifying officer is inadmissible (Wigmore on Evidence, 3rd Ed., se. 2108,1878; In re Kostohris' Estate, 96 Mont. 226, 29 P. (2d) 829,835). Moreover, the statement in question clearly cannot be considered 'a memorandum or record of any act, transaction, occurrence or event,' so as to be admissible in evidence under the so-called Federal shop book rule (see 28 U.S.C. 695; CM 312023, Schirmer).

"Consequently, the Board of Review holds that the extract copy of the morning report in question is incompetent to prove prima facie that accused was absent without leave on 9 February 1945 or on any specific date subsequent thereto. * * *"

5. In view of the foregoing, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty and the sentence.

A. Hortenstein, Judge Advocate

On Leave, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 321805 1st Ind MAY 9 1947

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Flying Division, Air Training Command, Randolph Field, Texas

1. In the case of Private Travis R. Rawls (38772968), Squadron B, 2532d Army Air Forces Base Unit, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the sentence be disapproved.

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

0088479

(CM 321805)

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 321830

UNITED STATES	)	12TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp O'Donnell, Tarlac, P.I.,
Captain WALLACE R. AROLD	)	9 April 1947. Dismissal and
(0-353922), Infantry	)	total forfeitures

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

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

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

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

Specification: In that Captain Wallace R Arold, Infantry, 12th Infantry Division (Philippine Scouts), did, at Camp O'Donnell, Tarlac, Philippine Islands, on or about 17 January 1947, with intent to deceive Captain Frederick W Stoll, Sales Officer, Camp O'Donnell, Tarlac, P.I., make a false official statement in writing to the said Captain Frederick W Stoll, Sales Officer, that, "Request that I be granted commissary privileges under the provisions of par 2a, AFPAC Circular #54, dated 21 June 1946. I am married and reside with my dependents at Capas, Tarlac. Request that said privileges be accorded only to my dependents, as I am not authorized to separate billets. The following are my dependents: Mrs. Wallace R Arold, wife, age 20; Housekeeper, age 25", which statement was known by the said Captain Wallace R Arold to be untrue, said false statement being made by the said Captain Wallace R Arold for the purpose of purchasing foodstuff at the Sales Commissary at Camp O'Donnell, Tarlac, P.I.

10 February 1947 (R 11). He admitted that he had made a statement to the investigating officer concerning the purchase of foodstuffs from accused, but denied that he had ever made such purchases or that he had ever paid accused any money (R 11-12).

The Inspector General of the 12th Dvision testified that the accused made a voluntary statement in which he stated that he sold to Sangil all the items which he had purchased at the commissary. The Inspector General also made a trip to Sangil's home, where he saw bottles of ginger ale and other articles similar to items sold by the commissary (R 14).

Section I, AFPAC Circular 80, 1945, prohibiting resale of items purchased from sales commissaries, was received in evidence (R 15; Prox Ex 3).

4. The accused, after being duly advised of his rights to testify, elected to remain silent, and the defense offered no evidence.

5. The evidence of accused's guilt as to Charge I and its Specification is compelling. A true copy of accused's pay voucher was received in evidence without objection. The conflict between the statements as to the residence of accused's wife shown on the pay voucher and that shown by accused's statement in his application for commissary privileges makes it apparent that either the statement or the voucher is false, and furnish sufficient proof of the corpus delicti to render admissible the accused's statement to the Inspector General that the only items set forth in his application which were based on actual facts were his name, rank, and serial number.

As to the sale of commissary purchases to a civilian, in violation of standing orders, there is a total failure of proof. It was adequately shown that the accused purchased supplies from the commissary on the dates in question, and that items similar to those offered for sale in the commissary were later found in Sangil's home. It was not shown, however, that accused ever purchased from the commissary any bottles of ginger ale or other items of the nature of those found in Sangil's possession. Sangil categorically denied that he ever purchased any foodstuffs from accused, and while he admitted that he had stated otherwise to the investigating officer, his previous statement is not evidence against the accused, since on the stand he denied the truth of the statements made to the investigating officer (CM 319857, Dingley).

There is no competent evidence in the record, aliunde the confession, tending to show that the offense charged (i.e., the wrongful resale of commissary supplies) had probably been committed. Since an accused cannot be convicted upon his unsupported confession, the findings of guilty of Charge II and its Specification cannot be sustained (MCM 1928, par 114a, p 115).

The only punishment authorized upon a conviction of a violation of Article of War 95 is dismissal. Since the only offense of which the accused was legally convicted was laid under Article of War 95, it follows that the record of trial is legally sufficient to support only so much of the sentence as provides for dismissal.

6. The accused is 36 years of age, married, and a high school graduate. He was commissioned a second lieutenant, Infantry, National Guard of the United States, on 20 March 1937. He entered upon active duty on 3 February 1941 and was promoted to first lieutenant, Army of the United States on 1 February 1942. On 19 April 1943, he was promoted to the rank of captain. War Department records show that he was commended on 2 August 1943, by Major General W. S. Paul, then commanding the 75th Infantry Division, for accused's work in connection with the training of the Division. Only two efficiency reports are available, each of which rate accused as "Satisfactory."

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed, other than those discussed above. The Board of Review is of the opinion 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 Charge II and its Specification and legally sufficient to support only so much of the sentence as provides for dismissal. Dismissal is mandatory upon conviction of a violation of Article of War 95, and no other punishment is authorized upon such conviction.

A. J. Hottenstein, Judge Advocate

McWorald Gray, Judge Advocate

Waldemar A. Solf, Judge Advocate

JAGH - CM 321830 1st Ind

WD, JAGO, Washington 25, D. C.

AUG 1 9 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Wallace R. Arold (0-353922), Infantry.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement in violation of Article of War 95 and of re-selling foodstuffs purchases from the sales commissary in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification (false official statement), legally insufficient to support the findings of guilty of Charge II and its Specification (selling supplies purchased from the commissary), and legally sufficient to support only so much of the sentence as provides for dismissal, and to warrant confirmation thereof. I concur in that opinion.

In January, 1947, accused stated in writing that his wife resided at Capas, Tarlac, P.I. This statement was submitted to the Sales Officer in support of an application for commissary privileges, which were restricted to military personnel whose dependents were living in the area. In a pretrial statement accused admitted that the statement was false, and it was shown that his wife was living in Baltimore, Maryland. As to Charge II, there was no competent evidence introduced, in addition to a confession, to show that the accused re-sold the items he purchased from the commissary.

I recommend that the findings of guilty of Charge II and its Specification be disapproved, that only so much of the sentence as provides for dismissal from the service be approved, and that the sentence as thus modified be confirmed and carried into execution.

JAGH - CM 321830 1st Ind

4. Inclosed herewith 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. 289, 25 Aug 1947).

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

JAGN-CM 321899

UNITED STATES v. Private GEORGE L. MITCHELL (34753596), 1st Platoon, 636th Ordnance Ammunition Company.	))))))))	IX CORPS Trial by G.C.M., convened at Sendai, Honshu, Japan, 8 April 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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.
(Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

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

Specification: In that Private George L. Mitchell, 1st Platoon, 636th Ordnance Ammunition Company, APO 547, did at South Camp Loeper, APO 547, on or about 15 January 1947, knowingly and willfully apply to his own use and benefit, 1 stove, tent, M-1941, complete, valued at about $4.43, and 1 blanket, wool OD, M-1934, valued at about $8.00, of a total value of $12.43, all property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Private George L. Mitchell, 1st Platoon, 636th Ordnance Ammunition Company, APO 547, did at Tagajo, Honshu, Japan, during the period 1 February to 15 February 1947, conduct himself in a manner to bring discredit upon the military service by wrongfully cohabiting with Yuriko Yuda, female Japanese National.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of Charge I excepting the words "sixty dollars ($60.00)," and substituting the words "twenty seven dollars ($27.00)," of the excepted words, not guilty, of the substituted words, guilty, guilty of Charge I, and guilty of all other Charges and Specifications, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year and six months. The reviewing authority disapproved the findings of guilty as to Charge I and its Specification, approved the sentence, reduced the period of confinement to one year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings. The only question requiring consideration is whether the record of trial is legally sufficient to support the sentence.

4. The maximum punishment for the offense set out in the Specification of Charge II is dishonorable discharge, total forfeitures and confinement at hard labor for six months (par. 104c, MCM, 1928). Maximum limits of punishment for the offense of wrongful cohabitation as alleged in the Specification of Charge III are not listed in the Table of Maximum Punishments set forth in paragraph 104c of the Manual for Courts-Martial. This offense is, however, closely related to that of being "disorderly under such circumstances as to bring discredit upon the military service" and the maximum limitations prescribed for that offense are applicable. The maximum punishment so authorized is confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period (par. 104c, MCM, 1928).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for ten months.

Edward T. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Francis Tiernan, Judge Advocate.

OCT 3 1947

JAGN-CM 321899 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, IX Corps, APO 309, c/o Postmaster, San Francisco, California.

1. In the case of Private George L. Mitchell (34753596), 1st Platoon, 636th Ordnance Ammunition Company, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 321899).

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 321915

12 JUN 1947

UNITED STATES v. Private First Class AUSTIN A. McCARSON (44120249) and Technician Fifth Grade LAVERNE E. HIGGS (12106721), both Headquarters and Service Company, 6th Engineer Combat Battalion, APO 6.	6TH INFANTRY DIVISION Trial by G.C.M., convened at Pusan, Korea, 30 and 31 January 1947. Each: 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 each of the soldiers named above has been examined by the Board of Review.

2. Accused were tried in a common trial upon the following charges and specifications:

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

Specification: In that Private First Class Austin A. McCarson, Headquarters and Service Company, 6th Engineer Combat Battalion, APO 6, did, at APO 6, on or about 18 September 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Whang, Chang Ho, a human being, by repeated blows of a blunt instrument on the head.

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

Specification 1: In that Private First Class Austin A. McCarson, ***, did, at APO 6, on or about 18 September 1946, with intent to commit a felony, viz murder, commit an assault upon Kim, Yong Jun, by willfully and feloniously shooting the said Kim, Yong Jun in the right leg, the chin and the arm with a pistol.

Specification 2: In that Private First Class Austin A. McCarson, ***, did, at APO 6, on or about 18 September 1946, with intent to commit a felony, viz murder, commit an assault upon Kim, Yong Jun by willfully and feloniously choking the said Kim, Yong Jun with his hands and his arms.

Specification 3: In that Private First Class Austin A. McCarson, ***, did, at APO 6, on or about 18 September 1946, with intent

to commit a felony, viz murder, commit an assault upon Moon, Kyong Sand, by willfully and feloniously striking the said Moon, Kyong Sand on the head with a blunt instrument.

Specification 4: In that Private First Class Austin A. McCarson, ***, did, at APO 6, on or about 18 September 1946, with intent to commit a felony, viz robbery, commit an assault upon Cha, Jung Ok by force and violence and by putting him in fear, feloniously search the person of the said Cha, Jung Ok.

Specification 5: In that Private First Class Austin A. McCarson, ***, did, at APO 6, on or about 18 September 1946, with intent to do bodily harm, commit an assault upon Cha, Jung Ok by striking him on the head and body with his fists.

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

Specification: In that Private First Class Austin A. McCarson, ***, did, at APO 6, on or about 18 September 1946, knowingly and willfully apply to his own use and benefit one (1) 3/4 ton weapons carrier of the value of more than $50.00 property of the United States furnished and intended for the military service thereof.

NOTE: The charges and specifications against accused Higgs are identical with the above, accused Higg's name being substituted for that of accused McCarson.

Each accused pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced as to either accused. 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 might direct, for the term of his natural life. The reviewing authority approved the sentence as to each accused, designated the U.S. Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence as to Charge I and its Specification

About 7:30 p.m. on 18 September 1946 the two accused, accompanied by Privates Yentzer and Beaty, left the motor pool of Headquarters and Service Company, 6th Engineer Combat Battalion, in a 3/4 ton weapons carrier. Accused McCarson drove the vehicle (R. 9,34,41). According to Yentzer's testimony, the party then proceeded toward Tongnae, Korea, to look for "some Korean women." On the way they met a jeep driver who told them that the Koreans in Tongnae "were acting up," whereupon some rocks were gathered

up and put in the back of the weapons carrier. The group then drove on to Tongnae and, since "nothing happened," they turned around and started back. On the way back, and about 35 or 45 minutes after leaving the motor pool, they saw a Korean on the road and two of the occupants of the truck, Higgs and Beaty, got out and asked him if he knew where "some Korean women" could be found. The Korean started giving the two men "a bad time" and Yentzer, who "hated those Koreans any way," got off the vehicle and hit the Korean a few times. The Korean ran away and Yentzer followed him into a rice paddy where a fight ensued. After the fight, and on his way out of the rice paddy, Yentzer saw Beaty going into the rice paddy in the direction of the Korean and noticed that Beaty dropped a piece of paper (R. 37,39,40).

In his pre-trial statement, admitted in evidence as prosecution's exhibit 4 (R. 45), accused McCarson stated that he had remained by the truck when Yentzer "tried to catch" the Korean and that although he heard scuffling in back of the truck he "couldn't see them." Accused Higgs, in his pre-trial statement admitted in evidence as prosecution's exhibit 5 (R. 45), stated that the Korean had run into a rice paddy about 250 feet away from the truck and that only Yentzer and Beaty had taken up the pursuit. Yentzer and Beaty returned to the vehicle "without saying a word about what took place."

About 8:00 p.m., 18 September 1946, a Korean farmer saw a truck stop about 50 "steps" from his home in Tongnae. A "step" is the equivalent of the length of a man's body. American voices emanated from the truck, which remained parked about five minutes. It was very dark at this time (R. 10, 11). A Korean factory worker, who lived in the same vicinity as the farmer (R. 14), heard the sound of mixed American and Korean voices coming from a nearby paddy field about 8 o'clock the same evening. These voices continued five or six minutes, finally becoming angry and "horrible," the Korean "voices" crying. After the voices had ceased an American truck passed the factory worker's home. It was dark at this time and there were no street lights on the road (R. 11-13). The next morning, the body of Whang, Chang Ho, a Korean, was found in a rice paddy about 50 "steps" from the factory worker's home. A slip of paper was lying near the corpse and the condition of the surrounding ground gave the impression that a struggle had occurred. The death of Whang, Chang Ho, had been caused by concussion of the brain which, in turn, had been caused by heavy blows from a "blunt pole or some strong fist" (R. 14,15,19,24; Pros. Ex. 1).

Evidence as to Charge II and its Specifications

Yentzer testified that after the incident in the rice paddy he got back in the weapons carrier and the group of four men proceeded on their way. About five or ten minutes later they came upon another Korean. They stopped and Higgs and Beaty got out to inquire of the Korean where some women might be found. An argument developed and Yentzer, hearing the Korean use some "swear words" which he understood, also got out of the truck and "started

was driving and Higgs sat in the front seat with him. Yentzer and Beaty were in the back and, "all the way down the road, Yentzer was beating the Hell out of this Korean." They turned into the road leading to Hot Springs and sometime later the weapons carrier went into a ditch when McCarson failed to take a sharp curve. Yentzer and Beaty then threw the Korean out of the truck and Yentzer drove the vehicle out of the ditch. After they had gone about one hundred yards, Yentzer started crying and shaking. Beaty then told Yentzer to stop the truck and, taking over the wheel himself, he drove the party back to the motor pool (Pros. Ex. 5).

The charge of quarters at the motor pool testified that accused, Yentzer and Beaty returned to the motor pool in the weapons carrier about 10:30 p.m. Yentzer's clothes were bloody, Beaty had a little blood on his trousers leg and the weapons carrier had blood all over the back of it. He noticed no blood on either accused and told Yentzer to burn his clothes, which he did (R. 34). According to Yentzer, all of the four members of his party had some whiskey out of a "coke" bottle which they had brought along with them, but all did not imbibe the same amount. Higgs, in his pre-trial statement, said that he was not drunk and that "Yentzer and Beaty were pretty drunk, but McCarson wasn't so bad" (Pros. Ex. 5; R. 39).

Kim, Yong Jun, of Pusan, Korea, and Cha, Jung Ok, Kim's visitor and friend, noticed a "middle size truck" coming down the road towards Kim's home about 8:40 p.m. on 18 September 1946. They went out to the road to investigate and heard American voices in the truck when it stopped near them. Some American soldiers got out of the truck and one of them pointed a pistol at Cha's neck. Another soldier, a "little G.I." beat Cha and then went through his pockets but found nothing there. After again beating Cha, the little soldier went over to Kim and Cha was successful in eluding the soldier who was pointing the pistol at him. While Cha was being assaulted, Kim was also being held at gun point, first by one and then by another of the group of soldiers. A third soldier beat him, pushed him into a ditch and then proceeded to choke him. Still another soldier pulled Kim's assailant away from him and then one of the attackers fired three shots, wounding Kim in the arm, leg and chin (R. 25,26,28,29). Jung, Ha Soo, Kim's mother, witnessed the assaults upon her son and Cha, and was herself searched by one soldier while another pointed a pistol at her. After the search the two soldiers led her to her room which was also searched (R. 31). Neither Kim, Cha, nor Jung, Ha Soo, could identify either accused as being among their assailants on the night of 18 September (R. 25,28,30).

Moon, Kyong Sand, of Pusan, Korea, was walking along the road on his way home from Hot Springs on the night of 18 September 1946 when an American truck stopped near him. The truck was "about middle size" with benches on both sides. In the truck were "five" American soldiers, one of whom jumped out of the truck and struck Moon. When Moon sought to escape, the driver of the truck pointed a rifle at him and the remaining soldiers in the vehicle got out. Holding Moon by his legs and arms, the soldiers loaded him into the truck. In the truck, he was held by one soldier while another went

a row with him." Higgs and Beaty asked Yentzer to "get off" the Korean and, when Yentzer failed to comply with their request, Higgs pulled him off and Beaty shot the Korean three times. After the first shot the Korean fell down but immediately got up and started to run away. The other two shots were fired while the Korean was in flight. The party then reassembled in the weapons carrier and drove away. Somewhere further along the road, they "picked up" still another Korean. While Yentzer and this Korean were "having it out" in the back of the truck, accused McCarson, who was driving, failed to negotiate a curve and the vehicle went into a ditch, throwing the Korean out. Yentzer got in the driver's seat and drove the vehicle out of the ditch. He saw the headlights of another vehicle approaching from the rear and stopped to let this vehicle pass. Yentzer then lost consciousness and did not revive until he arrived back in the motor pool. Yentzer did not see either accused hit or threaten with a gun "any Korean". He had taken a pistol with him and had given it to Beaty (R. 37-41).

Accused McCarson, in his pre-trial statement, said that after leaving the vicinity of Yentzer's first encounter, the party proceeded to a little village and stopped about fifteen yards in front of three Koreans. Yentzer and Beaty got out of the truck and started "scuffling" with them, but the two accused remained in the vehicle. McCarson heard a few shots fired. Yentzer and Beaty then came back to the weapons carrier "laughing" and the four men continued their journey. Further on, someone yelled, "Stop!" and McCarson brought the vehicle to a halt in front of another Korean. Yentzer tried to catch this Korean and McCarson "took the truck up to where they were." Yentzer put the Korean in the truck and he and Beaty proceeded to beat him while the vehicle was under way. McCarson told Yentzer to get rid of the Korean, but Yentzer refused to do so. McCarson went off the side of the road while making a turn and refused to drive the truck further, the Korean having disappeared in the meantime. Yentzer then drove back to the motor pool. Neither accused had actually beaten any of the Koreans (Pros. Ex. 4).

In his pre-trial statement, accused Higgs stated that after the occurrence in the paddy field, he and his three friends traveled "down the road" about three miles to a place where two Korean men and one woman were standing by the side of the road. Yentzer and Beaty jumped out of the weapons carrier and "grabbed" one of the Korean men. Higgs got out of the vehicle and went to a nearby house to warm his hands over a pot of coals. When he came back to the truck he noticed "the" Korean running and staggering towards a clump of trees and saw Beaty fire three or four shots at him. After the four soldiers were again reunited in the weapons carrier they drove away. They had gone about six or seven miles when Yentzer called out to another Korean who fled at their approach. Yentzer jumped out of the vehicle and pursued this Korean until he caught him. McCarson stopped the truck in front of Yentzer, and Higgs and Beaty, got out. Yentzer, assisted by Beaty, put the Korean in the truck and the party drove off again. McCarson

through his pockets. After a while, he was unloaded from the truck, at which time all "five" soldiers dismounted and set upon him. One of the soldiers hit him over the head with an iron pole, at which time he "almost fainted." Recovering from this blow, he sought to ward off another with his hands and four of the fingers of his left hand were broken. Moon then fell to the ground unconscious and did not revive until about two hours later. Not being able to stand up, he crawled to the nearest village where he was given aid. Moon was unable to identify either accused as having taken part in the attack upon him (R. 31-33).

Evidence as to Charge III and its Specification

The charge of quarters at the motor pool of Headquarters and Service Company, 6th Engineer Combat Battalion, was the dispatcher of motor vehicles for that organization on 18 September 1946. He testified that the 3/4 ton weapons carrier taken from the motor pool by accused and their two companions on the evening of 18 September belonged to Headquarters and Service Company and had not been dispatched to any one of the four men by him (R. 34,36). Yentzer, in his testimony, and accused, McCarson, in his pre-trial statement, said that the charge of quarters had given them permission to take the vehicle (R. 41,42; Pros. Ex. 4). It was stipulated by and between the prosecution, defense counsel and both accused that the value of the 3/4 ton weapons carrier referred to in the Specification to Charge III was more than $50 (R. 42).

Evidence for the Defense

Each accused, having been informed of his rights as a witness, elected to remain silent (R. 47).

4. Discussion

Charge I and its Specification

Since the evidence tends to establish that the blows which killed Whang, Chang Ho, were struck by Yentzer or Beaty, or both, and not by either McCarson or Higgs, the findings of guilty of Charge I and its specification as to each accused must necessarily be predicated on the theory that accused were aiders and abettors.

Mere physical presence at or about the scene of a crime is not sufficient to make one an aider and abettor. There must be a mental as well as a physical presence, that is, an awareness of what is about to happen or of what, based on the common experience of mankind, is likely to take place and, at least, a complicitous acquiescence in the event. Thus, on the one hand, it has been held that one who voluntarily associates himself with others in the execution of an unlawful design of so desperate a character that it must ordinarily be attended with great hazard to life is responsible for a murder committed by

his companions in the perpetration of such design, even though neither he nor his confederates specifically intended to take life and even though he rendered no active assistance, was not an eye or ear witness to the criminal act or had forbidden his companions to kill (CM 248793, Beyer, 50 BR 21,26; CM 314939, Greene,5 Bull. JAG 281; CM 302791, Kaukoreit, 59 BR 7, 23; CM 259308, Hall, 3 BR (NATO-MTO) 119, 125; CM 291497, Miller, 22 BR (ETO) 55,60; Commonwealth v. Lucas, 2 Allen (Mass.) 170; Commonwealth v. Devereaux, 256 Mass. 387). On the other hand, it has also been held that one is not to be held liable for a sudden homicide which could not reasonably have been anticipated committed by his associates during the course of a joint venture not ordinarily attended by great hazard to life or limb where he has done no overt act aiding or encouraging the crime. And one's mere presence at or about the scene of a homicide, standing alone and unaccompanied by preconcert in some plan of action likely to result in death or great bodily harm, is to be considered an overt act of encouragement of such homicide only where the circumstances point to his consent thereto and his concurrence therein (CM 310421, Smith, 23 BR (ETO) 193,199, 5 Bull. JAG 155; CM 312657, Reck, 5 Bull. JAG 207; CM 314821, Ruiz; CM 200047, Raleigh, 4 BR 233,235; CM 283439, Davis, 12 BR (ETO), 239,252).

In the instant case, although it appears that the two accused and their companions went to Tongnae in search of "some Korean women," the evidence does not warrant an inference that, before the killing, there was any common plan to gratify their lustful desires by means of overriding all opposition thereto through force and violence if that should prove necessary (see CM 286135, Bailey, 18 BR (ETO) 157). Also, the fact that accused and their party had obtained a supply of rocks after having been informed that the Koreans were "acting up" is as consistent with an inference that they were preparing for self-defense as it is with an inference that they were laying plans for an unprovoked assault upon the native populace. The evidence, then, fails to show that prior to the alleged murder accused, Yentzer and Beaty were engaged in a common enterprise of a nature likely to result in homicide. This being so, we must next inquire whether the proof will support a conclusion that either accused committed an overt act aiding or encouraging the killing of Whang, Chang Ho (CM Smith, supra, p. 201).

It may be considered, in a sense, that the presence of both accused about the weapons carrier would tend to and probably did lend some encouragement to the actions of their friends Yentzer and Beaty in the nearby paddy field. Such encouragement as this, however, is not a sufficient basis for holding accused criminally responsible, for, as we have already seen, one does not become an aider and abettor by reason of his mere presence, no matter how encouraging such presence may be to the person who actually commits the criminal act, unless it is accompanied by circumstances indicating accused's consent to and concurrence in the acts being committed. The encouragement must be intentional on the part of accused and, when the element of preconcert is lacking as it is here, it must be shown that accused had otherwise been put on notice as to what was about to occur. This the

proof herein fails to do, for there is no evidence that either accused could see what was happening in the rice paddy or that they had any knowledge whatsoever of the serious and deadly nature of the struggle between deceased and Yentzer or Beaty.

We are of the opinion, therefore, and so hold, that the findings of guilty of Charge I and its specification as to each accused must be set aside.

Charge II and its Specifications

Although neither accused was identified as being at the scene of the various assaults upon Kim, Yong Jun, and Cha, Jung Ok, or at the scene of the assault upon Moon, Kyong Sand, by any of the Korean witnesses involved therein, the circumstances surrounding the commission of these offenses, as detailed by such witnesses, bear such a strong resemblance to certain of the activities of accused and their two companions on the night in question, as described by Yentzer and each accused, as to give rise to a fair and reasonable inference that the members of this quartet were the American soldiers referred to by the Koreans. The court thus had before it evidence which would warrant a determination that both accused actively participated in these assaults, if, indeed, they did not commit some of them with their own hands. As to the assault by choking upon Kim, the court could well have concluded that the interruption of this assault by one of the soldiers, even if he were one of the accused, was merely for the purpose of clearing a field of fire for the shots immediately thereafter fired by another of their number. As to the assault with intent to do bodily harm upon Cha, though alleged in the specification to have been committed by the use of fists alone, the circumstances attending the violent fray of which this assault was but a part clearly show an intent to inflict the greatest corporal hurt possible upon the Koreans attacked. Having regard to the common experience of mankind, it cannot be said that it is impossible to do great bodily harm with fists to one who is held defenseless at the point of a gun, as was Cha (State v. Grimm, 206 Iowa 1178, 221 N.W. 804; People v. Schmidt, 66 Cal. App. (2d) 253, 152 P (2d) 1021).

At the very least, having regard to the rules we have stated above, there was ample proof to support a finding that accused were present during the progress of the assaults here decried under such circumstances as would make them aiders and abettors thereto. For one to stand by sympathetically in the presence of a vicious onslaught upon the person of another by his associates, without resentment toward his acting confederates and without concern for the victim, knowing or having reason to know that the aggression he is witnessing may run the gamut of violence, extending to attempted robbery, murder, or other heinous crime, is in itself evidence from which the triers of fact may fairly infer that he lent his approval to and cooperated in the particular assault committed (CM 285969, Sanders, 10 BR (ETO) 255, 266; CM 300447, Dale, 29 BR (ETO) 129,134; People v. Martin,

12 Cal. (2d) 466, 85 P (2d) 880,883; State v. Kneedy, 232 Iowa 21, 3 N.W. (2d) 611,615; People v. Marx, 291 Ill. 40, 125 N.E. 719, 722; 9 Halsbury's Laws of England (2d Ed) 30, note h). By virtue of Section 332 of the Federal Criminal Code (18 U.S.C. 550), which is applicable here, a principal in the second degree at common law, that is, an aider and abettor, becomes a principal in the first degree and, as such, is as criminally responsible for the acts of his confederates as though he had committed them himself (CM Sanders, supra).

Charge III and its Specification

Since the court could disbelieve the testimony of Yentzer and refuse to give credence to the pre-trial statement of accused McCarson to the effect that they had been given permission to take the 3/4 ton weapons carrier from the motor pool, accepting instead the testimony of the dispatcher to the contrary, the findings of guilty of this charge and specification as to each accused are legally supported by the evidence (par. 78a, MCM,1928).

The Sentence

From the proof adduced as to Specifications 1, 2, 4 and 5 of Charge II as to each accused, it is apparent that the various assaults therein alleged and of which each accused was found guilty, although no one of them was lesser than and included in any other, were all committed at the same time and place as part of a general melee and resulted from substantially a single application of force and violence. Therefore, as to these specifications, each accused should be given a sentence based on a single assault, that which carries the most severe punishment and is, therefore, considered the most important aspect of the criminal act committed, in this case, assault with intent to murder (CM 231710, Bearden, 18 BR 277, 284, 2 Bull. JAG 187; CM 313544, Carson, 5 Bull. JAG 202). Thus, the maximum confinement authorized as to each accused for all of the offenses as to which each may legally be held guilty is forty-five years.

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 as to each accused, legally sufficient to support the findings of guilty of Charges II and III and their specifications as to each accused and legally sufficient to support only so much of the sentence as to each accused as involves dishonorable discharge, forfeiture of all pay and allowances due and to become due and confinement at hard labor for forty-five years.

Charles E. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Stoyd, Judge Advocate

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

JAGH - CM 321952

UNITED STATES	)	FOURTH ARMY
v.	)	Trial by G.C.M., convened at Fort Sam Houston, Texas, 1 April 1947. Dismissal, total forfeitures, and confinement for five (5) years
Captain HARRY C. WALLIS (0-1534651), Medical Administrative Corps	)	

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 61st Article of War.

Specification: In that Captain Harry C. Wallis, Medical Administrative Corps, 9940th Technical Service Unit, Surgeon General's Office, Headquarters, Brooke Army Medical Center, Fort Sam Houston, Texas, did, while en route from Camp Polk, Louisiana, to Brooke Army Medical Center, Fort Sam Houston, Texas, on or about 31 December 1946, absent himself without proper leave from the service of the United States, and did remain absent without leave until he surrendered himself at Brooke Army Medical Center, Fort Sam Houston, Texas, on or about 6 February 1947.

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

Specification 1: In that Captain Harry C. Wallis, Medical Administrative Corps, 9940th Technical Service Unit, Surgeon General's Office, Headquarters, Brooke Army Medical Center, Fort Sam Houston, Texas, did, at Tinker Field, Oklahoma, on or about 30 December 1946, present for payment a claim in the amount of Seven Hundred Dollars ($700.00) against the United States by presenting said claim to J. C. Costigan, Jr., Major, Finance Officer at Tinker Field, Oklahoma, an officer of the United States duly authorized to pay such claim, for services alleged to have been rendered to the United States by the said Captain Harry C. Wallis in the months of November 1946 and December 1946, which claim was false and fraudulent and was then and there known to be false and fraudulent by the said Captain Harry C. Wallis, in that the said Captain Harry C. Wallis had theretofore, on or about 5 December 1946, at Camp Polk, Louisiana, and on or about 23 December 1946, at Hot Springs, Arkansas, received partial payments in the amounts of Seventy-Five Dollars ($75.00) and Two Hundred Dollars ($200.00), respectively, for the months of November 1946 and December 1946.

Specifications 2 to 6, inclusive, of Charge II are identical with Specification 1, except as to names, places, amounts, and dates which are as follows in the specifications indicated:

Spec.	Place of Offense	Date of Offense	Amount of Claim	Finance Officer to Whom Presented
2	Finance Office, USA San Francisco, Calif	8 Jan '47	$721.40	Col Harry Foster
3	McClellan Field, Calif	3 Jan '47	721.40	Lt Col L.B. Graham
4	Camp Beale, Calif	9 Jan '47	721.40	Lt Col William A. Sarcander
5	Las Vegas Army Air Base Las Vegas, Nev	6 Jan '47	721.40	Capt R.C. Atterton
6	Finance Office, USA Los Angeles, Calif	7 Jan '47	721.40	Lt Col A.A. Mozley

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

Specification 1: In that Captain Harry C. Wallis, Medical Administrative Corps, 9940th Technical Service Unit, Surgeon General's Office, Headquarters, Brooke Army Medical Center, Fort Sam Houston, Texas, did, at Hot Springs, Arkansas, on or about 23 December 1946, with intent to defraud, wrongfully and unlawfully make and utter to Arkansas National Bank, Hot Springs, Arkansas, a certain check, in words and figures as follows, to wit:

Camp Polk, La 81-48
~~Hot Springs, Ark.~~ 23 Dec 1946
Rapides Bank & Trust Co No.
~~ARKANSAS NATIONAL BANK~~

~~Hot Springs, Ark.~~

Pay to Cash or bearer $25.00

Twenty-five & 00/100 - - - - - - - - - - - - - - - DOLLARS

H C WALLIS Capt
O-1534651

and by means thereof, did fraudulently obtain from the Arkansas National Bank, Hot Springs, Arkansas, the sum of Twenty-Five Dollars ($25.00), United States currency, he the said Captain Harry C. Wallis, then well knowing that he did not have and not intending that he should have sufficient funds in the Rapides Bank and Trust Company, Camp Polk, Louisiana, for the payment of said check.

Specifications 2 to 13, inclusive, are identical in substance with Specification 1 with the exception of names, places, amounts, and dates which are as follows in the specifications indicated:

Spec.	Place of Offense	Date of Offense and of Check	Am't of Check and Am't Rec'd	Drawee Bank	Payee and person to Whom Uttered (if payee is "cash" it is noted)
2	Hot Springs, Ark	26 Dec '46	$ 50.00	Rapides Bk & Tr. Co Cp Polk Facility	Ark Nat'l Bk (Cash)

Spec.	Place of Offense	Date of Offense and of Check	Am't of Check and Am't Rec'd	Drawee Bank	Payee and person to Whom Uttered (if payee is "cash" it is noted)
3	#Kansas City, Mo.	21 Jan '47	$ 13.51*	1st Nat'l Bk of Salt Lake City	Mid-Continent Airlines
4	#Tulsa, Okla.	22 Jan '47	33.18*	1st Nat'l Bk of Salt Lake City	Mid-Continent Airlines
5	# New Orleans, La.	23 Jan '47	28.77	1st Nat'l Bk of Salt Lake City	Krauss Co, New Orleans, La
6	#Pensocola, Fla.	28 Jan '47	365.00*	1st Nat'l Bk of San Antonio	Elebash Jewelry Co.
7	#Brookley Fld, Ala.	28 Jan '47	50.00	1st Nat'l Bk of Mobile, Ala	Post Exchange, Brookley Fld (cash)
8	#Brookley Fld, Ala.	28 Jan '47	15.00	1st Nat'l Bk of Mobile, Ala	Brookley Fld Officers' Mess (cash)
9	#Chicago, Ill.	20 Jan '47	60.84*	1st Nat'l Bk of Ft Sam Houston	Braniff Air Lines
10	#Aberdeen Prov Grd, Md.	3 Feb '47	20.00	1st Nat'l Bk of N.Y. City	Officers' Club Aberdeen Prov Grd, (cash)
11	#Ft Wadsworth, N.Y.	4 Feb '47	50.00	1st Nat'l Bk of Aberdeen, Md	Ft Wadsworth Post Exchange
12	#Washington,D.C.	2 Feb '47	25.00	1st Nat'l Bk of San Antonio, Tex	Ambassador Hotel (cash)
13	#Ft. George G. Meade,Md	3 Feb '47	25.00	1st Nat'l Bk of N. Y. City	Ft George G. Meade Exchange

Specifications 3 to 13, inclusive, instead of alleging insufficient funds, as in the case of Specification 1, read as follows: "* * * then well knowing that he did not have and not intending that he should have any account with" the respective drawee banks named in each of the specifications, "for the payment of said check."

Specification 3: Amount of check is $13.51. As to value obtained by accused, the specification reads "* * * did fraudulently obtain from Mid-Continent Airlines, Inc., Kansas City, Missouri, one ticket for passenger air transportation from Kansas City, Missouri, to Tulsa, Oklahoma, in the amount of Thirteen Dollars Fifty One Cents ($13.51) * * *,"

Specification 4: Amount of check is $33.18. As to value obtained by accused, the specification reads "* * * did fraudulently obtain from Mid-Continent Airlines, Inc., Tulsa, Oklahoma, a ticket for passenger air transportation in the amount of Thirty-Three Dollars and Eighteen Cents ($33.18), * * *"

Specification 6: Amount of check is $365.00. As to value obtained the specification reads "* * * did fraudulently obtain from the said Elebash Jewelry Company, Pensacola, Florida, one star sapphire ring of the value of about Three Hundred Sixty-Five Dollars ($365.00), * * *"

Specification 9: Amount of check is $60.84. As to value obtained the specification reads "* * * did fraudulently obtain from the Braniff Airways, Chicago, Illinois, one ticket for passenger air transportation from Chicago, Illinois, to San Antonio, Texas, in the amount of Sixty Dollars and Eighty-Four Cents ($60.84), * * *"

The accused pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence 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 Board of Review adopts the statement of the evidence and the law contained in the review of the Fourth Army Judge Advocate, dated 23 April 1947.

4. The accused is 28 years of age, a high school graduate, and is married. He enlisted in the Army in March 1939, and was discharged for the convenience of the Government on 27 November 1942 as a Master Sergeant and was commissioned a Second Lieutenant on 28 November 1942. He was promoted to First Lieutenant on 21 July 1943 and to Captain on 21 November 1944. Attached to the record of trial are two commendations from former commanding officers of the accused, one dated 28 November 1944 by Colonel William S. Dow, Regional Hospital, Camp Polk, Louisiana (Def Ex C) and the other dated 19 May 1942 by Lieutenant Colonel O. L. Graham, 57th General Hospital, Camp Edwards, Massachusetts (Def Ex B). The latter is a recommendation for appointment as a Second Lieutenant. Also attached to the

record is a recommendation for clemency signed by the defense counsel, assistant defense counsel, and by three members of the court, one of whom was the law member. Each of the three members of the court recommended that the period of confinement be reduced to five years. War Department records show that accused was punished on 26 September 1945, under the 104th Article of War by a reprimand for failure to obey an order of a superior officer.

5. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of all specifications and charges and to support the sentence and to warrant confirmation thereof. A sentence to dismissal, total forfeitures, and confinement at hard labor for five years is authorized upon a conviction of violations of Articles of War 61, 94, and 95.

M. Hottenstein, Judge Advocate

Wilderman A. Soff, Judge Advocate

Philip B. Smith, Judge Advocate

JAGH-CM 321952 1st Ind
WD, JAGO, Washington, D. C.
TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Captain Harry C. Wallis (0-1534651), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 31 December 1946, to 6 February 1947, in violation of Article of War 61 (Spec, Chg I); of presenting six false claims against the United States, in violation of Article of War 94 (Specs 1-6, Chg II); and of making and uttering thirteen worthless checks with intent to defraud, in violation of Article of War 95 (Specs 1-13, Chg III). He pleaded guilty to all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten 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 review of the Fourth Army Judge Advocate, Fort Sam Houston, Texas, dated 23 April 1947, which was adopted in the accompanying opinion of the Board of Review as its statement of the evidence and the law applicable. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

The accused was on leave which was to terminate on or about 31 December 1946 at which time he was to report to his station at Fort Sam Houston, Texas. Accused left the home of his wife's aunt in Stillwater, Oklahoma, for Fort Sam Houston, but, according to his own testimony became involved with a gambler enroute, lost his money and his car, and returned to Stillwater. Soon thereafter he sent his wife to Fort Lewis, Washington, to her mother's home which was near an Army hospital, where his wife could have medical care while having her baby. Accused then left on a trip that took him to the West Coast, thence to Kansas City, Chicago, Tulsa, Oklahoma, and then by way of New Orleans, Mobile and Pensacola to the East Coast. He traveled north through Washington, D. C. and eventually arrived in New York. There he visited his parents, learned his wife had had a baby and decided to "turn himself in." He returned to military control at Fort Sam Houston on 6 February 1947. During this trip he made out six pay vouchers for his pay for November and December 1946. The first was for $700, the remaining five for $741.00, each. He presented these vouchers to various finance offices and received payments which totaled $4407. Before he presented these vouchers, he had already received a partial payment of $75 on his pay for November 1946, which was all that then remained due him for that month, and a partial payment of $200 on his December pay.

During his trip, the accused made and uttered worthless checks at numerous places and to numerous persons and business concerns. Of the thirteen checks described in the Specifications under Charge III, two were drawn on a bank in which accused knew he had insufficient funds and the remaining checks were drawn on banks in which he had no account. The total amount of these checks was $761.30.

The only excuse given by the accused for his acts was that he had heavy debts incurred by his first wife from whom he was divorced, that his second wife was going to have a baby, and he was worried about the situation. He stated that when he started back to Fort Sam Houston from Stillwater, Oklahoma, he had only about $45 and he thought he could raise money by gambling. Instead, he lost what little he then had. The accused's testimony shows that his family troubles and his financial difficulties may have worried him to the point where he took the desperate course of risking everything by gambling, but his conduct in presenting false claims and passing worthless checks is in no way justified thereby.

4. The accused is 28 years of age, a high school graduate, and is married. He enlisted in the Army in March 1939, and was discharged for the convenience of the Government on 27 November 1942 as a Master Sergeant and was commissioned a Second Lieutenant on 28 November 1942. He was promoted to First Lieutenant on 21 July 1943 and to Captain on 21 November 1944. Attached to the record of trial are two commendations from former commanding officers of the accused, one dated 28 November 1944 by Colonel William S. Dow, Regional Hospital, Camp Polk, Louisiana (Def Ex C) and the other dated 19 May 1942 by Lieutenant Colonel O. L. Graham, 57th General Hospital, Camp Edwards, Massachusetts (Def Ex B). The latter is a recommendation for appointment as a Second Lieutenant. Also attached to the record is a recommendation for clemency signed by the defense counsel, assistant defense counsel, and by three members of the court, one of whom was the law member. Each of the three members of the court recommended that the period of confinement be reduced to five years. War Department records show that accused was punished on 26 September 1945, under the 104th Article of War, by a reprimand for failure to obey an order of a superior officer.

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

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

CM 321952

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 298, 27 Aug 1947).

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

JAGN-CM 321970

UNITED STATES v. Private GERALD E. BOUYEA (42197570), Headquarters & Headquarters Troop, 2nd Constabulary Regiment.	))))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Munich, Germany, 4 March 1947. Dishonorable discharge and confinement for one (1) year and six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Pvt Gerald E. Bouyea, Hq & Hq Troop, 2d Constabulary Regiment, did at Freising, Germany on or about 28 January 1947, feloniously take, steal, and carry away, a Radio, the property of Pvt. Emil F. Zenisek, Service Troop, Second Regiment, valued in excess of $50.00.

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

Specification: In that Pvt Gerald E. Bouyea, Hq & Hq Troop, 2d Constabulary Regiment, did at Freising, Germany on or about 28 January 1947, have in his possession unauthorized weapons to wit: one 6.35 Cal Foreign pistol, and one Cal. 45 US Army pistol in violation of par 3 USFET Letter AG 250 GAP - AGO dated 29 April 46, subject: "Disciplinary Control."

He pleaded not guilty to all Charges and Specifications and was found guilty of the Specification of Charge I except the words and figures "in excess of $50.00," substituting therefor the words and figures, "of about $40.00"; of the excepted words, not guilty, of the substituted words, guilty; guilty of Charge I and guilty of Charge II and its Specification. Evidence of three previous convictions by summary courts-martial were introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year and six months. The reviewing authority approved the sentence, designated the 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. The only question requiring consideration is the sufficiency of the evidence to support a finding that the radio proved to have been stolen by the accused under the Specification of Charge I had a value in excess of $20.00 in order to support the sentence as adjudged and approved by the reviewing authority.

4. The accused was found guilty of larceny of a radio, value about $40.00. The only evidence submitted as to the value of the radio is as follows: Private Emil F. Zenisek, the owner of the radio, testified that he purchased the radio from Technican Fifth Grade Miller for $100.00 in script, that he had several offers of $100.00 for it and that the list price of the radio back in the States was about $30.00 to $40.00 (R. 18-20). Technician Fifth Grade Robert T. Miller testified that he sold the radio to Private Zenisek for $100.00 script, that he bought it second hand from another man and traded a watch costing $20.00 for it (R. 25-26). Major Theodore M. Ball testified that he owns a radio identical to the one alleged stolen and that the list price of his radio back in the States was $36.50 (R. 32-33). The radio was admitted in evidence and was subject to inspection of the court (R. 12; Pros. Ex. 1).

5. It has been long established that except as to distinctive articles of Government issue or other chattels which because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value; that is, what it is worth in the open market at the time and place of the offense (CM 217051, Barton et al, TM 27-255, par. 100b). Proper evidence of market value is the testimony of someone who, by virtue of his knowledge and experience, knows what that value is. It does not appear that Private Zenisek, Technician Fifth Grade Miller or Major Ball were qualified to testify as expert witnesses or were otherwise experienced in the marketing of new or used radios so as to competently express an opinion of the market value of the stolen radio at the time and place of its taking.

The fact that Private Zenisek paid $100.00 for the radio in a private, off-market transaction between himself and Miller, presumably a short time before the theft, and had also received numerous offers of $100.00 for it from various soldiers, is of no probative force to determine a market value over $20.00. At most, the purchase price and offers given for a used article under such circumstances reflect a special or peculiar value placed upon the article by the individual purchaser to himself and in no way indicates its actual value in a commercial open market. It is an accepted rule that an owner of stolen property may not testify as to its value unless he can also qualify as an expert witness, nor may the owner be permitted to testify as to any special or peculiar value the property may have for him. Neither the original cost of a second hand article, nor what it will cost to replace it is sufficient to prove its market value (CM 268007, McKinney, 44 BR 207; TM 27-255, par. 100b). Aside from the incompetency of such testimony, it is obvious that if a new radio of the type stolen sold for $36.50 (back) in the United States and if this radio was purchased for approximately $20.00 by Technician Fifth Grade Miller shortly before he sold it to Private Zenisek for $100.00 in a used and somewhat depreciated condition, the price of $100.00 and similar offers received for it in private dealings between soldiers represents a strictly isolated and inflated price which cannot be reliably accepted as a standard of value applicable to proof of the open market value for such articles. Thus the exorbitant price paid or received for the used article as measured by its original new market cost is analogous to a "black market" value placed upon it as distinguished from its intrinsic worth and under such circumstance the rationale of the theory of "market value" does not exist (CM 301154, Hufendick, 15 BR (ETO) 141). In view of the insufficiency of evidence as to value, no reasonable basis was established upon which the court could legally predicate a finding of specific value in excess of $20.00. It is immaterial that the radio itself was offered in evidence. The market value of a used radio is not a matter of such fixed and common knowledge as to justify a court in taking judicial notice of such value (CM 213952, Meyers, 10 BR 296). To permit the court on its inspection alone to find specific market value of an article "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481, Ragsdale).

Except as provided in paragraph 149g, MCM, 1928, page 173, it necessarily follows that the findings as to value of the radio cannot be sustained. The evidence is legally sufficient to support only so much of the finding as to value under the Specification as involves a finding of some substantial value less than $20.00. The maximum confinement authorized by paragraph 104c, MCM, 1928, for larceny of property of value not more than $20.00 is confinement at hard labor for six months.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of larceny by accused, at the time and place and of the ownership alleged, of a radio described in the Specification, of some substantial value not in excess of $20.00, legally sufficient to support all other findings of guilty, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Edward J. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Lucien Adams, Judge Advocate.

JAGN CM 321970 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, New York

1. In the case of Private Gerald E. Bouyea (42197570), Headquarters and Headquarters Troop, 2d Constabulary Regiment, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the finding of guilty of the Specification of Charge I be approved as involves a finding of guilty of larceny at the time and place and of the ownership alleged, of a radio described in the Specification, of some substantial value not in excess of $20.00; and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 321970).

1 Incl
Record of trial

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

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