OFFICE OF
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GENERAL
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VOL. 71

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

VOLUME 71

including

CM 322040 - CM 322979

ALSO

CM 316223 CM 319499

CM 318507 CM 320478

CM 318548 CM 321606

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WASHINGTON: 1948

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

JAGH - CM 322040 JUN 1947

UNITED STATES	)	FORT EUSTIS, VIRGINIA
v.	)	Trial by G.C.M., convened at Fort Eustis, Virginia, 15 April 1947. Dishonorable discharge and confinement for five (5) years. The Federal Reformatory
Private JAMES H. PEOPLES (RA 15219425), Headquarters Company, 9224th Technical Service Unit, Transportation Center	)	

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 94th Article of war.

Specification 1: In that Private James H. Peoples, Headquarters Company 9224 Technical Service Unit, Transportation Center, Fort Eustis, Virginia, did, at Fort Eustis, Virginia on or about 20 March 1947, knowingly and willfully apply to his own use one three quarter ton weapons carrier, without winch, vehicle valued at sixteen hundred and seventy one dollars, property of the United States Government furnished for military use thereof.

Specification 2: In that Private James H. Peoples, Headquarters Company 9224 Technical Service Unit, Transportation Center, Fort Eustis, Virginia, did, at Fort Eustis, Virginia on or about 20 March 1947, knowingly and wrongfully apply to his own use one Plymouth, Light, five passenger Sedan valued at eleven hundred and fifty one dollars, property of the United States Government furnished for military use thereof.

Specification 3: In that Private James H. Peoples, Headquarters Company 9224 Technical Service Unit, Transportation Center, Fort Eustis, Virginia, did, at Newport News, Virginia on or about 20 March 1947, knowingly and willfully apply to his own use one, one quarter ton, four by four truck valued at ten hundred and fifty one dollars, property of the United States Government furnished for the military service thereof.

Specification 4: In that Private James H. Peoples, Headquarters Company 9224 Technical Service Unit, Transportation Center, Fort Eustis, Virginia, did, at Fort Eustis, Virginia, on or about 6 February,1947, feleniously take, steal, and carry away a one fourth ton vehicle, the value of about ten hundred and fifty one dollars, property, of the United States intended for the Military Service thereof.

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

Specification: In that Private James H. Peoples, Headquarters Company 9224 Technical Service Unit, Transportation Center, Fort Eustis, Virginia, did, at Fort Eustis, Virginia, on or about 6 February, 1947, wrongfully, and unlawfully damage a one quarter ton vehicle, the value of about ten hundred and fifty one dollars, property of the United States.

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 ten years. The reviewing authority approved the sentence, remitted five years of the sentence to confinement adjudged, designated the Federal Reformatory, Chillicothe, Ohio, or such other place 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 only question in this case requiring consideration is whether the record of trial is legally sufficient to support the findings of guilty of Specification 4 of Charge I. This specification alleges that the accused "did, at Fort Eustis, Virginia, on or about 6 February 1947, feloniously take, steal, and carry away a one fourth ton vehicle, the value of about ten hundred fifty one dollars, property of the United States intended for the Military Service thereof" in violation of Article of War 94.

4. The evidence pertinent to the specification under consideration is summarized as follows:

At about 2200 hours, 6 February 1947, Private Joseph W. Davis, a night driver for the Post Motor Pool parked a jeep bearing bumper number 135 in back of the Service Club at Fort Eustis and entered the club on official business. Upon leaving the club a few minutes later he noticed that the jeep was missing (R 24).

Private Alfred W. Simkins testified that on 6 February 1947 he and the accused went to Service Club Number 2 where they noticed a parked jeep. The witness and the accused thereupon entered the jeep and "took a little ride in it" with the accused driving. The witness and accused drove around the post for a time until the accused lost control of the car and it ran into a ditch. The accused and the witness then abandoned the jeep and "got a ride to the Hospital" (R 25). Other testimony showed that the jeep had been damaged by the accident to the extent of about $100.00. (R 26).

5. Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, <u>with intent to deprive such owner permanently of his property therein</u> (MCM 1928, par 149g).

The elements of proof of the alleged offense as discussed in the Manual for Courts-Martial are as follows:

> "(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 of interest in the goods or of their value or a part of their value." (MCM 1928, par 149g, p 173).

> "and * * * that the property belonged to the United States and that it was furnished, or intended for the military service thereof." (MCM 1928, par 150i, p 185).

In our opinion the evidence shows sufficiently that the accused took and carried away without the consent of the owner the vehicle described in the specification of the value alleged, and that such vehicle was the property of the United States and furnished or intended for the military service thereof. The evidence does not, however, warrant an inference that the accused had the intent to deprive the owner permanently of his property therein. The circumstances as shown by the evidence indicate only that the accused and Simkins intended to ride around the post but that the vehicle was accidentally driven into a ditch on the post and damaged

thereby. These circumstances do not in our opinion warrant an inference that the accused intended to steal the vehicle.

6. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 4 of Charge I as finds that the accused did, at the time and place alleged, wrongfully take and carry away without the consent of the owner, the vehicle described in the specification of the value alleged, property of the United States intended for the military service thereof, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and Specifications 1, 2, and 3 thereof, legally sufficient to support the findings of guilty of Charge II and its specification, and legally sufficient to support the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of misapplication of military property of the United States as an offense of a civil nature and so punishable by penitentiary confinement by Sections 35 and 36, Criminal Code of the United States (18 USC 82, 87).

[illegible], Judge Advocate

Waldemar A. Solf, Judge Advocate

[illegible], Judge Advocate

JAGH CM 322040 1st Ind Jun 19 1947

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Fort Eustis, Virginia

1. In the case of Private James H. Peoples (RA 15219425), Headquarters Company, 9224th Technical Service Unit, Transportation Center, I concur in the foregoing holding by the Board of Review, and for the reasons stated recommend that only so much of the finding of guilty of Specification 4, Charge I, as finds that the accused did at the time and place alleged wrongfully take and carry away without the consent of the owner the vehicle described in the Specification of the value alleged, property of the United States intended for the military service thereof be approved. Thereupon you will have authority, under the provisisions of Article of War 50½, to order the execution of the sentence.

2. In view of the youth of accused, his previous satisfactory service, and the nature of the offenses of which he was properly found guilty, it is recommended that a United States Disciplinary Barracks be designated as the place of confinement in lieu of a reformatory.

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

(CM 322040).

/s/ Thomas H. Green

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 322047

U N I T E D S T A T E S	)	SECOND MAJOR PORT
	)	
v.	)	Trial by G.C.M., convened at Yokohama, Japan, 18 March 1947.
	)	
Technician Fifth Grade WALTER M. PORTER (34960479), 3444th Transportation Corps Truck Company.	)	Dishonorable discharge and confinement for six (6) years. Penitentiary.

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

Specification: In that Technician Fifth Grade Walter M. Porter, 3444th Transportation Corps Truck Company, did, at Yokohama, Honshu, Japan, on or about 1 January 1947, wrongfully and unlawfully kill Sujiko Metoki, by striking her with a vehicle operated by him.

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

Specification 1: In that Technician Fifth Grade Walter M. Porter, 3444th Transportation Corps Truck Company, did, at Yokohama, Honshu, Japan, on or about 1 January 1947, wrongfully and without proper authority take and use a motor vehicle property of the United States, of a value of more than fifty (50) dollars.

Specification 2: In that Technician Fifth Grade Walter M. Porter, 3444th Transportation Corps Truck Company, did, at Yokohama, Honshu, Japan, on or about 1 January 1947, wrongfully strike Kumiko Metoki with a vehicle operated by him.

Specification 3: In that Technician Fifth Grade Walter M. Porter, 3444th Transportation Corps Truck Company, did, at Yokohama, Honshu, Japan, on or about 1 January 1947, having caused injury to Kumiko Metoki and Sujiko Metoki, while operating a government vehicle, wrongfully fail to stop and render aid to said persons.

Specification 4: In that Technician Fifth Grade Walter M. Porter, 3444th Transportation Corps Truck Company, did, at Yokohama, Honshu, Japan, on or about 1 January 1947, having been involved in an accident while operating a government vehicle, wrongfully fail to report the same to proper authority.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. 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 of Specifications 1, 3 and 4 thereunder, and to support the sentence except as to the designation of a United States Penitentiary as the place of confinement. The only matters requiring discussion here are the legal sufficiency of the record of trial to support the findings of guilty of Charge I and its Specification, and of Specification 2 of Charge II, and the propriety of the designation of a penitentiary as the place of confinement. Only so much of the evidence as pertains to the matters indicated will be summarized.

4. Evidence for the prosecution:

At about 1500 hours on 1 January 1947 the accused was driving a two and one-half ton United States Army truck in the city of Yokohama, Japan (R. 28-29, 40-41; Pros. Ex. 1). The truck was involved in a collision at that time and place (R. 7-13; Pros. Ex. I).

Two Japanese, eye witnesses of the collision, testified in substance as follows:

Tsunekichi Hirano testified that he was walking along the road in Minami Ku, Shinizugaoka, Yokohama, and saw a truck "hit two children." He saw the truck then hit a telephone pole on the edge of the road, return to the middle of the road and continue along it. He did not "think the truck stopped." He was standing on the side of the road near the children and did not know whether there were any other children on the other side of the road but stated "there might have been." He first stated the truck was "traveling very fast" but later on cross-examination admitted he could not judge the speed of traveling trucks and would not know if it were going at a rate of 40 miles per hour or only at a rate of 20 miles per hour (R. 7-9).

Matsuji Sekina testified that he was walking along the road when he saw a truck traveling in the middle of the road at a speed of "about 40 kilometers per hour." He did not recall whether the road was muddy or dry. When the truck reached a point about 100 meters from him it suddenly "dodged, skidded, to the right of the road," struck three children and a telephone pole, "straightened up again and took the middle of the road again" and continued on without stopping. Two of the children hit were girls and one a boy. Asked the condition of the children after they had been hit, the witness stated: "I would say what I saw, the child was dead. This other kid, the older brother, was older than the sister, must have dodged the truck. He fell into the gutter, but wasn't hurt." The witness further testified that after the incident he waited until "the two children was picked up out of the gutter and the mother had carried the child home," and then he left the scene (R. 11-13).

A third Japanese witness, Tokara Metoki, testified that he was the father of three children and that he resided in house number 203, Minami Ku, Shinizugaoka, Yokohama. He further testified, in part, as follows:

"Q. What happened, to your knowledge?
A. My three children were struck by an American truck.

Q. Did you see it happen?
A. No, I did not see it.

Q. How do you know they were struck by an American truck?
A. I was told so by my wife.

IM The court will not consider the hearsay evidence.

* * *

Q. [Respecting the children] What was their condition at about 3:10 in the afternoon?

A. My oldest son, who is 11 years old, came home crying and told my wife that the youngest sister was struck and was thrown into the gutter, and he tried to pick her up himself but he was unable to and so the wife went and helped.

Q. Did you see your children in the evening of the 1st of January?
A. Yes.

Q. What was their condition?
A. As a belief of the father of the child, after the doctor had given her three injections, I thought if we looked after her and kept her warm, some miracle might happen that she might come back to life and so I stayed and watched my child. It was about 12:00 o'clock when she died.

Q. What was the name of the child that died?
A. The child that died, the name was Sujiko Metoki. Kumiko is the other daughter of mine who had a few stitches in her forehead" (R. 14-15).

Obiya Iizuka, a Japanese medical doctor, testified that "at 3:30 in the afternoon" of 1 January 1947, he attended two children named Sujiko Metoki and Kumiko Metoki, both suffering from head injuries, and that about 1700 hours 1 January 1947, Sujiko Metoki died as a result of a "fractured skull." Asked his opinion as to whether the children's injuries were "due to natural causes or external violence" the witness stated: "It was something that was caused outside and not natural" (R. 16-17).

A written pre-trial statement signed by the accused was properly admitted in evidence as prosecution's exhibit "I". It reads in part:

"* * * As I proceeded on this street a little child ran out in the street. I turned my truck to the right to keep from hitting the child. I ran against some bushes. I did not see anyone standing in front of the truck. After I hit the bushes I looked back to see if anyone was hurt. I did not see anyone so I proceeded on my way * * *."

5. <u>Evidence for the defense:</u>

The accused, being advised of his rights, elected to testify under oath. He so testified, in pertinent part, as follows:

"* * * as I was going on up there, two children were playing on the left side of the road and one ran out on the road and I cut short to miss this kid and I looked up and saw I was hitting the house and telephone pole at the time. So, I didn't see I hit anyone. When I looked back, I saw the other kid standing in the road and I didn't see anyone at all, so I drove on" (R. 44).

"Q. Had you done any drinking before going on that trip?
A. No, sir.

Q. Not at all that day?
A. No, sir.

* * *

Q. Did I understand you to testify that as you swerved over to the right, you hit some bushes?
A. Yes, sir.

Q. Did you also testify that you had hit or side-swiped a pole?
A. To my best knowledge, I believe I did hit the pole, sir.

Q. What side of the road were you driving on when you first saw these children run in front of the truck?
A. On the left.

Q. Were you going up the hill or down?
A. Up the hill, sir.

Q. Where were the children in relation to the position of the truck on the road?
A. The children was playing on the left.

Q. How far out from the curbing were they playing?
A. Just beside the telephone pole on the left about three foot in the road.

Q. And, you swerved to the right?
A. Yes, sir.

Q. Now, as you passed the spot where you had seen these children, could you see them as you passed them?
A. Well, the one I missed, I saw him.

Q. In other words, they were on the left hand side of the road, you swerved your truck to the right. Now, as you swerved to the right and passed the children, did you notice them on the side of the truck as you passed by?

A. I noticed that I had missed the little girl or boy on the left-hand side. The truck was going into the house, so I fought my wheel back and the one I saw was running out into the road.

Q. As you swerved to the right, did you see any children on the right-hand side of the road?
A. No, sir.

Q. Would you recognize that location if you saw it again?
A. Yes, sir.

Q. Do you think you could recognize it from a picture?
A. Yes, sir.

Q. I hand you prosecution Exhibit 'F9' in evidence and ask you if that locality looks familiar to you?
A. Yes, sir.

Q. Is that the locality that you are referring to where these children ran in front of your truck?
A. This side of the street on the left.

Q. Can you indicate in this picture, the pole and bush that you sideswiped?
A. This one.

TJA: The witness indicated a tree or bush and a pole located in the right center of the photograph.

Q. Can you testify, Cpl. Porter, how far the distance between that tree or bush and the telephone pole is?
A. About 20 feet, sir. That is on the left where those kids ran out.

Q. No, I'm speaking now of the distance between the bushes and the pole that you say you struck with the truck.
A. About 20 feet apart.

Q. Do you mean to say that after having hit that bush, that you traveled on the right-hand side of the street for at least 20 feet before you were able to bring your truck back to the left-hand side of the road?
A. Yes, sir.

Q. Did you lose control of the truck?
A. I couldn't get it back in time, sir.

Q. Now, you stated that the children you saw run out in front of the truck were about three feet from the curbing on the left-hand side. Was it necessary for you to pull your truck all the way over to the right-hand side in order to miss them standing out three feet from the curb?
A. Well, sir, they was playing this something which you bat. Well, they was playing and I guess the wind blowed it out in the road and he ran out in the road, sir.

Q. How fast were you traveling at the time that happened?
A. About 15 miles an hour.

Q. 15 miles an hour?
A. Yes, sir.

Q. And, after having hit the bush at 15 miles an hour, you still went 20 feet along the right-hand curve and hit the pole before you got back on the left-hand side of the road. Is that true?
A. Yes, sir.

Q. Did you stop your truck at this scene?
A. No sir, I looked back to see if the two kids was all right.

Q. But, you did not stop?
A. No, sir.

Q. How did you look back, through the rear window or the door?
A. I looked out the side through the door.

Q. By looking out through the window in the door of that cab, could you see out beyond the body of the truck?
A. Yes, sir" (R. 45, 46).

6. At the outset it should be noted that the evidential link identifying the "children," who were struck by the truck driven by accused, as Sujiko and Kumiko Metoki, is at best extremely tenuous. However, in view of the holding hereinafter expressed, it is not deemed necessary to here determine the matter and for purposes of this discussion it will be assumed that identity was satisfactorily proven.

7. Charge I and its Specification, of which accused was found guilty, alleges the offense of involuntary manslaughter in violation of Article of War 93. Involuntary manslaughter is defined in the Manual

for Courts-Martial, 1928, as:

> "* * * homicide, unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark)" (par. 149a, MCM, 1928).

The offense is the subject of the following discussion also found in paragraph 149a of the Manual:

> "In involuntary manslaughter in the commission of an unlawful act, the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by a statute or orders. Thus the driving of an automobile in slight excess of speed limit duly fixed, but not recklessly, is not the kind of unlawful act contemplated, but voluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least.
>
> "Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged; carelessly leaving poisons or dangerous drugs where they may endanger life."

There was no showing in this case that the homicide was "caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life." Major Lott of the office of the Yokohama Provost Marshal, testified that the maximum legal speed for vehicles at the place of the accident was "25 miles an hour" (R. 24). Matsuji Sekina testified the accused's truck was traveling at a rate of "about 40 kilometers per hour." Even assuming that the truck was being driven somewhat faster than the legal limit it is stated in the Manual for Courts-Martial that "the driving of an automobile in slight excess of a speed limit duly fixed, but not recklessly, is not the kind of unlawful act contemplated" (par. 149a, MCM, 1928). The accused's lack of authority to use the truck is not shown to have any such casual relationship to the accident as would support conviction upon that ground.

Obviously the homicide was not caused "in performing an act required by law," and therefore if the finding of the court as to this

Specification is to be sustained it must be supported by legal evidence in the record of trial showing the homicide to have been caused by the accused's "culpable negligence in performing a lawful act."

To be "culpable," negligence must be of such a character as to show an utter disregard for life or limb, or a total disregard for the consequences, or conduct indicating such willful disregard for the rights of others as to show wanton recklessness as to the life and limb of other persons (CM 319828, Rhimes (1947); State v. Murphy, Mo., 23 S.W. 2nd 36; Dunville v. State, Ind., 123 N. E. 689; CM 292271, Bentley, 4 BR (ETO) 221).

The issue as to whether accused was guilty of culpable negligence, in his operation of the truck when it struck the "children," was one of fact to be decided by the court from all of the evidence before it. But since, in this case, the finding of culpable negligence must rest upon inference, from the circumstance as proven, it is the duty of the Board of Review to determine whether there is, in the evidence, a reasonable basis for that inference (CM 212505, Tipton, 10 BR 244).

The evidence shows the accused was driving a truck at a speed of about twenty-five miles per hour along the middle of a straight street in the metropolitan area of Yokohama. Children were playing along at least one side of the street. The road surface was apparently in fair condition, at least without deep ruts or large holes. Suddenly the truck swerved to the extreme right side of the road, scraped a bush and a telephone pole and hit some children, swerved back into the center of the road and continued along the road away from the scene of the accident. There is no legal evidence in the record of trial sufficient to prove that accused was not a competent driver, that he was not in the full possession of his faculties at the time, that he had an unobstructed view of the children who were struck, or that he was driving at an excessive rate of speed under the circumstances. The testimony of the accused, if believed, establishes only that the truck was intentionally swerved, and otherwise tends to refute any conclusion that such act was negligent.

We do not contend that the prosecution was required to affirmatively disprove every conceivable hypothesis of innocence in this case, but we are of the opinion that, in order for this conviction to be sustained, the record of trial must show circumstances, established by competent evidence, from which it may reasonably be inferred that the accident was the result of some act, or failure to act, on the part of accused in utter disregard for life, limb, or the consequences, or with wanton recklessness, establishing his culpable negligence as a proximate cause of the homicide. We find no such evidence in the

record of trial and we therefore conclude that the findings of guilty of Charge I and its Specification cannot be sustained.

8. Specification 2 of Charge II in essence alleges that accused "* * * did * * * wrongfully strike Kumiko Metoki with a vehicle operated by him." The act is alleged as an offense in violation of Article of War 96, and since it is not shown to have been one of the "crimes or offenses not capital" made punishable thereby it must be assumed that the offense was considered to be either a disorder or discreditable conduct, as those offenses are denounced by that Article. However, we are unable to find any evidence in the record of trial to prove directly, or by legal inference, that accused's action, as alleged and proven, was criminally "wrongful" or that it constituted a violation of the 96th Article of War.

9. Article of War 42 does not otherwise authorize penitentiary confinement in this case since none of the other offenses of which accused was found guilty 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 United States, of general application within the continental United States, excepting Section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia," nor do any of such offenses come within any of the provisions of such article authorizing penitentiary confinement.

Assuming the finding of guilty of Charge I and its Specification was not erroneously used as a basis for the designation by the reviewing authority of a penitentiary as the place of confinement, it appears probable that such erroneous designation was based upon the finding of guilty of Specification 1 of Charge II misinterpreted in the light of Section 22-2204 of the District of Columbia Code. By the latter Specification it is alleged that accused "did * * * wrongfully and without proper authority take and use a motor vehicle, property of the United States, of a value of more than fifty (50) dollars."

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, Charge II, 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 (CM 321542, McCullough, (1947)).

10. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, and Specification 2 of Charge II; legally sufficient to support the findings of guilty of Charge II and all other Specifications thereunder; 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 six years at a place other than a penitentiary, Federal reformatory or correctional institution.

Edward Robinson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

On Leave, Judge Advocate.

JAGN-CM 322047 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Second Major Port, APO 503, c/o Postmaster, San Francisco, California.

1. In the case of Technician Fifth Grade Walter M. Porter (34960479), 3444th Transportation Corps Truck Company, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Charge I and its Specification, and Specification 2 of Charge II be disapproved, and that only so much of the sentence be approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six years at a place other than a penitentiary, Federal reformatory or correctional institution. Upon taking such action you will have authority to order the execution of the sentence.

2. It would appear that the sentence of the court as approved by the reviewing authority was based in large part upon the findings of guilty of Charge I and its Specification, and Specification 2 of Charge II. Since such findings must be disapproved and in view of all the circumstances of the case, it is recommended that consideration be given to a substantial reduction of the sentence to confinement.

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 322047).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 322052

JUN 18 1947

UNITED STATES v. Captain JOHN W. SHAMEL, JR. (O-399566), Air Corps.	AIR TRANSPORT COMMAND ATLANTIC DIVISION Trial by G.C.M., convened at Tulsa, Oklahoma, 17-20 December 1946. Dismissal and total forfeitures.

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

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

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

Specification 1: In that Captain John W. Shamel, Jr., Squadron A, 554th Army Air Forces Base Unit, 4th Ferrying Group, then assigned to Operating Location 554-26 LLRR, Continental Division, Air Transport Command, Tulsa, Oklahoma, then a married man, did, at Tulsa Municipal Airport, between 1 March 1946 and 27 September 1946, wrongfully, dishonorably and unlawfully live and cohabit with a certain woman not his wife.

Specification 2: (Finding of Not Guilty).

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

Specification 1: In that Captain John W. Shamel, Jr., Squadron A, 554th Army Air Forces Base Unit, 4th Ferrying Group, then assigned to operating Location 554-26 LLRR, Continental Division, Air Transport Command, Tulsa, Oklahoma, then a married man, did, at Tulsa Municipal Airport, between 1 March 1946 and 27 September 1946, wrongfully, dishonorably and unlawfully live and cohabit with a certain woman not his wife.

Specification 2: (Finding of Not Guilty).

Specification 3: (Finding of Not Guilty).

Specification 4: In that Captain John W. Shamel, Jr., Squadron A, 554th Army Air Forces Base Unit, 4th Ferrying Group, then officer-in-charge of Operating Location 554-26 LLRR, Continental Division, Air Transport Command, did, on or about 1 June 1946, wilfully and wrongfully carry an unauthorized civilian passenger, to wit, a daughter under 10 years of age, in an Army AT-6 type aircraft, number 44-81632, from El Reno, Oklahoma, which city is beyond the limits of the local flying area, to Tulsa, Oklahoma, the said Captain Shamel's duty station, in violation of paragraph 1 (2) (a) of Army Regulation 95-90, dated 24 July 1942.

Specification 5: (Finding of guilty disapproved by reviewing authority).

Specification 6: In that Captain John W. Shamel, Jr., Squadron A, 554th Army Air Forces Base Unit (4th Ferrying Group), then assigned to Operating Location 554-26 LLRR, Continental Division, Air Transport Command, did, on or about 1 June 1946, wilfully and wrongfully operate an Army AT-6 type aircraft number 44-81632 by flying to El Reno, Oklahoma, which city is outside the limits of the local flying area, without first filing a proper clearance, AAF Form 23, in violation of Army Air Forces Regulation 15-23, dated 11 May 1945, the said Captain Shamel having filed a local clearance only.

Specification 7: In that Captain John W. Shamel, Jr., Squadron A, 554th Army Air Forces Base Unit, 4th Ferrying Group, then assigned to Operating Location 554-26 LLRR, Continental Division, Air Transport Command, did, on or about 1 June 1946, wilfully and wrongfully operate an Army AT-6 type aircraft number 44-81632 in violation of Section 3, paragraph 7, Army Air Forces Regulation 85-2, dated 13 June 1945, superseded by paragraph 7, Army Air Forces Regulation 85-2A, dated 30 August 1946, in that he, the said Captain Shamel, did land at an unauthorized airport, to wit: the Airport at El Reno, Oklahoma, said airport not being in the list of authorized airports established by the Airman's Guide, the official publication of the United States Department of Commerce, Civil Aeronautics Administration, Office of Aviation Information.

Upon arraignment the defense entered a plea to the jurisdiction of the court based upon the alleged failure of the prosecution to comply with Article of War 70. The plea was denied and the defense then moved to strike each Charge and specification. After all such motions were denied, accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and Specification 1 thereof but not guilty of Specification 2, and guilty of Charge II and Specifications 1, 4, 5, 6, 7 thereof but not guilty of Specifications 2 and 3. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 5, Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Charge I, Specification 1; Charge II, Specification 1. The evidence for the prosecution shows that accused was the officer in charge of Operating Location, 554-26 LLRR of the Air Transport Command situated at the Tulsa Municipal Airport, Tulsa, Oklahoma (R. 41, 77). Although he was a married man and had a four year old daughter, accused, during the period from about 1 March 1946 to 27 September 1946, associated with and had as an overnight guest on many occasions at his quarters a woman about 25 to 30 years of age known as June Trees (R. 79, 83, 85, 109, 128). Several civilian guards testified that they observed this woman enter and leave accused's quarters, both during the day and nighttime. From about 1 March 1946 to about September 27, 1946 she was seen to enter the Base gate and go to accused's quarters from three to five times a week at various hours during the day and night. She was also seen leaving accused's quarters in the morning between 6:00 and 8:00 A.M. on a similar number of occasions (R. 51-53, 70-72, 85). Chief Warrant Officer Dierker testified that between 1 March and 27 September Miss Trees frequently came to the Base during the afternoon and asked for accused. He often met them leaving the Base together as he was coming to work in the morning about 7:40 A.M., and stated that in either August or September these encounters occurred no less than fifteen or twenty times (R. 101, 103). One of the guards in reply to a question as to whether he knew of his own knowledge that June Trees stayed with accused all night, stated, "I have handed her the papers in the morning." (R. 91) and another who knew accused was married referred to her as accused's "girl friend" (R. 63). Dierker also testified accused told him in February or March that "he has known this girl since he went to school with her" and that he "made the grade last night" (R. 106).

About 12 October 1946, Captain Edwin Walker of the 554th Army Air Forces Base Unit, Memphis, Tennessee, interviewed accused concerning

charges preferred against him after fully advising him of his rights under the 24th Article of War. In response to questions accused made replies and Captain Walker made notes during the conversation. Subsequently, Walker dictated a statement to his secretary from these notes, which dictation was transcribed and submitted to accused. After reading the statement which was revised pursuant to accused's suggestion, accused stated that it was an accurate account of what he had said. Walker testified without objection as follows:

> "* * * I asked him what the story was about having this woman in his quarters. He said that upon several occasions a girl whose name he did not divulge at that time, had stayed with him over night in his quarters at the hangar at Tulsa. I asked him how many times he meant by several and he said, 'Oh, five or six'. He further explained that upon several occasions he had first called the girl's mother and got her permission for the girl to stay overnight. He also said that the girl had occupied the other bedroom, that is, other than his own, and that they had not slept together. He said that the reason for staying overnight was that they had been in his quarters drinking and talking, since there was no other place in Tulsa, and he didn't want to drive her home with liquor on his breath, in view of the fact that the police were pretty rough about that sort of thing. He also said that he didn't want her to go home alone because there had been a crime wave in Tulsa at about that time. * * * "
>
> * * *
>
> "Q. What did the cohabitation matter which you discussed with Captain Shamel concern, with reference to time and place it is alleged to have occurred?
>
> "A. He said that it had happened not more than six times in the last four or five months, and it had happened at his quarters in the hangar at the Municipal Airport at Tulsa." (R. 136-137).

Captain Walker again interviewed the accused about 26 October 1946, and again warned him of his rights prior to the interrogation. According to Walker accused repeated what he had said during the first interview adding that "the girl had come out and prepared meals for him on some of these occasions and had cleaned up the house somewhat for him". He gave her name as Miss June Trees (R. 137, 138).

Charge II, Specifications 4, 6, 7.

About the first part of June, 1946 accused made a flight from his station at about 6:30 in the morning, informing the aircraft dispatcher that if anything arose he could be reached at El Reno, Oklahoma. Later in the day he returned in the Army AT-6, which bore number 44-81632 and had with him his four year old daughter. The accused signed a "local clearance" for that trip (R. 109, 126). El Reno, Oklahoma was not at the time and had not been within the local flying area (R. 110). Flights beyond the local flying area on "local clearance" were unauthorized (R. 114). In connection with his statement to Captain Walker on about 26 October 1946 pertaining to the offense of unlawful cohabitation, accused also made a voluntary statement concerning the aircraft violations. He told Walker that he had flown to El Reno, Oklahoma, in the early part of June, having filed only a local clearance but knowing that El Reno was outside the local flying area. His reason for so doing was that there was no "clearing agency" at the El Reno airport where he landed. Accused's wife lived at El Reno, and he admitted to Walker that upon that occasion he flew there and returned with his four year old daughter, not knowing that regulations prohibited carrying children under 10 years of age in Army aircraft. With respect to landing his plane at an unauthorized airport in El Reno, accused told Walker he had an agreement with the manager of that airport that no servicing would be provided and that the Government would incur no expense because of landings made there (R. 139, 140).

The court was requested to take judicial notice of paragraph 1a(2)(a) of Army Regulation 95-90, 24 July 1942 (R. 108), which reads as follows:

> "Authorization.—a. Commanding officers of Army Air Forces stations or higher authority in the chain of command are authorized to permit personnel of the following categories to ride as passengers in Army aircraft under their control in the following circumstances:
>
> (1) * * *
> (2) On flights which will not extend beyond the local flying area:
>
> (a) Wives, mothers, and children of military personnel of the United States who hold aeronautical ratings and who are required in the performance of their duties to participate in regular and frequent flights. Such children must be 10 years of age or over and have the permission of a parent. These flights must not exceed two in number for any person during any calendar year." (Emphasis supplied).

The court was also requested to take judicial notice of the Airman's Guide, an official publication of the Office of Information, Civil Aeronautics Administration, United States Department of Commerce, "which was in effect about the first of June 1946." This guide contains, among other things, a list of authorized airports in the United States. The trial judge advocate read to the court paragraph 7 of Section 3 of AAF Regulation 85-2, 13 June 1945 which declared as unauthorized the "use by Army aircraft of private airports which have not been leased, purchased, or otherwise acquired by the Federal Government" except under certain circumstances not here material. (On 1 June 1946, the effective regulation was AAF Reg. 85-2a, 12 December 1945, which amended 85-2 of 13 June 1945, but the amendment only added another exception to the above prohibition which is not here pertinent).

Army Air Forces Regulation 15-23, 11 May 1945 (introduced in evidence by the defense in support of its motion to strike Specification 6 of Charge II (R. 16; Def. Ex. 3)) provides a form of aircraft clearance (Form 23) to be used to clear pilots on all flights except in certain instances of which the only one applicable here is flights within local flying areas (see par. 3 of AAF Reg. No. 60-22, 12 May 1945 referred to in AAF Reg. 15-23, 11 May 1945).

4. After defense counsel's motion for findings of not guilty as to all Charges and specifications was denied, the defense introduced evidence pertaining to a specification of which the court found the accused not guilty (Chg. II, Spec. 3). The accused, upon being advised of his rights as a witness elected to testify concerning Specification 2 of Charge I and Specification 2 of Charge II, of which offenses the court also acquitted him.

5. a. Charge I, Specification 1; Charge II, Specification 1.

The accused was convicted under identical specifications of the unlawful and dishonorable cohabitation with "a certain woman not his wife" in violation of Articles of War 95 and 96. Defense counsel moved to strike both specifications on the ground that the name of the woman with whom it was alleged accused illegally cohabited was not stated therein and that such omission was prejudicial to accused in the defense of this case. The law member denied both motions subject to objection by any member of the court.

The Board of Review is of the opinion that the accused was as a matter of right entitled to have the information he requested set forth in the specifications. The prosecution as well as the defense knew the name of the woman involved because she had been interviewed during the investigation and accused himself had stated her name to

the investigating officer. It is true, therefore, that notwithstanding the failure to allege her name, the accused was fairly apprised of the offense intended to be charged by these specifications. Nevertheless, it cannot be denied that the omissions rendered the specifications defective. The general rule is that the name of one whose identity is essential to a proper description of the offense should be stated in an indictment if it is known; otherwise there should be an averment that the name is unknown, to enable the defendant to prepare his defense and to plead either a former acquittal or conviction (People v. Robertson (Ill.), 120 N.E. 539). And again, when the names of third parties enter into an offense, and are necessary for a description of the crime charged and for its identification, they must be set forth (10 Enc. Pl. and Pr., pp. 506, 507). Under our military system of jurisprudence a specification which is too uncertain and indefinite to acquaint the accused with the specific offense as to which he must defend and which might deprive him of the opportunity to offer a plea of former jeopardy in a subsequent trial for the same offense is fatally defective (Dig. Ops. JAG 1912-40, sec. 428 (10); CM 125539; CM 128775; CM 257469, Mackay, 37 BR 129).

Paragraph 73 of the Manual for Courts-Martial requires the court to take any one of the following actions when a defective specification is brought to its attention:

(1) Direct the specification to be stricken out and disregarded.
(2) Continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case.
(3) Permit the specification to be so amended as to cure such defect, and continue the case for such time as may be warranted in view of the amendment.

It is to be noted that such action is required with respect to a defective specification even though it sufficiently apprises the accused of the offense intended to be charged. In our opinion the failure of the court to take one of the two remaining actions after the motion to strike was denied injuriously affected the substantial rights of accused, because as a result thereof the accused was required to defend against an offense described in such a manner that he might thereafter be deprived of the opportunity to offer a plea of former jeopardy in a subsequent trial for the same offense. The view we have taken is not inconsistent with the provisions of paragraph 87b of the Manual for Courts-Martial which authorizes the reviewing authority to disregard certain errors occurring during a trial as a basis for disapproving a finding. The pertinent part of that paragraph reads as follows:

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

Concluding, as we do, that the accused's substantial rights were injuriously affected, the reviewing authority could not under the discretion vested in him by Article of War 37 disregard this error. The action of the court constituting fatal error, it is unnecessary to consider the evidence in support of these offenses. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specification 1 thereof and Specification 1 of Charge II.

b. Charge II, Specifications 4, 6, 7.

The prosecution's evidence, unrefuted by the defense, clearly shows that the accused on about 1 June 1946 flew an AT-6 type aircraft, number 44-81632, from his Operating Location, Tulsa, Oklahoma, to El Reno, Oklahoma and returned the same day in the same plane, bringing with him his four year old daughter. In connection with that flight he filed only a "local clearance", which under applicable regulations limited the flight to a designated local flying area that did not include El Reno. As a result of the circumstances attending this flight, accused violated Army Regulations 95-90 and Army Air Forces Regulations 15-23. The carrying of his daughter in an Army plane was manifestly in violation of paragraph 1a(2)(a) of Army Regulations 95-90, 24 July 1942, which provides that children of authorized military personnel riding as passengers in Army aircraft must be 10 years of age or over, and as such constituted a disorder to the prejudice of good order and military discipline. Accused in his voluntary statement contended he did not know the regulations prohibited transportation of minors under 10 years of age. His ignorance of the regulations, assuming that to be the fact, constitutes no defense to the offense charged. The Army Regulations are public military regulations and all military personnel are presumed to have knowledge thereof, just as is the case with public civil law (CM 267639, Tressler, 44 BR 32).

In flying to El Reno, Oklahoma, accused went beyond the limits of the local flying area authorized by the local clearance which he filed. Army Air Forces Regulations No. 15-23, 11 May 1945 (Def. Ex. 3) provides a form of aircraft clearance (Form 23) to be used to clear pilots on all flights except in certain instances, of which the only one applicable

here is that of flights within local training areas. Accused's explanation for not accomplishing Form 23 was that there was no "clearing agency" at the El Reno Airport when he landed. In our opinion the contention of defense counsel that the specification pertaining to this offense was fatally defective because the regulations in question merely set forth instructions for the accomplishment of Form 23, is untenable. From this regulation, it should have been clear to accused that he was required to file such a form in connection with the flight he made. As officer in charge of that installation he knew or should have known that he was flying outside of the local area and that such a flight was unauthorized without accomplishment of the prescribed form. The Board of Review has heretofore held that flying aircraft beyond a local flying area on a "local clearance" is a violation of Army Air Forces Regulations 15-23 (CM 254517, Bryant, 35 BR 271). Moreover, aside from the language of the specification declaring accused's act to be in violation of this regulation, it also pleads the facts involving the offense with great particularity. It cannot with any show of reason be contended that accused was not fully apprised of the offense charged or that his substantial rights were injuriously affected and the evidence amply supports the court's finding of guilty of Specification 6 of Charge II.

With respect to Specification 7 of Charge II it is to be noted that the evidence showing accused landed the Army aircraft at some El Reno airport on about 1 June 1946 was, aside from accused's own admission, entirely circumstantial. The prosecution sought to establish that accused violated Army Air Forces Regulations 85-2, dated 13 June 1945 as amended by paragraph 7, Army Air Forces Regulations 85-2A, dated 12 December 1945, which prohibited the use by Army aircraft of private airports not leased, purchased or otherwise acquired by the Federal Government but adduced no direct evidence to show that any airport in El Reno, Oklahoma was unauthorized for landing Army aircraft. It did, however, request the court to take judicial notice of the Airman's Guide "which was in effect about the first of June 1946" and which according to the trial judge advocate contained a list of authorized airports. He added that the Airman's Guide referred to showed no authorized airport at El Reno.

To prove this violation, it was necessary for the prosecution to establish that the accused landed at an airport in El Reno, Oklahoma which had not been leased, purchased, or otherwise acquired by the Federal Government. In the opinion of the Board of Review this proof is not supplied by reference to the Airman's Guide, which though an official publication of an Office of the Civil Aeronautics Administration, is at most an informational pamphlet published for the benefit of airmen. While it is true that a court-martial may take judicial notice of the general laws of the United States (MCM 1928, par. 125) and of the rules and regulations of the principal departments of the Government

prescribed pursuant to express authority of Congressional enactment (CM 259286, Calvert, 38 BR 321), this publication, in our opinion, could not be judicially noticed to establish that an airport at which accused landed an Army aircraft at El Reno, Oklahoma had not been leased, purchased, or otherwise acquired by the Federal Government. Accordingly, the evidence is legally insufficient to support the finding of guilty of Specification 7 of Charge II. It should be noted that although the specification also alleges a violation of the mentioned Air Forces Regulation dated 30 August 1946 in which reference is there made to the Airman's Guide for a list of airports authorized for use, this regulation was not in effect on the date of the offense here alleged, and therefore could not be considered by the court.

7. The Board of Review desires to comment concerning defense counsel's plea to the jurisdiction of the court on the ground that there was insufficient compliance with Article of War 70. It was contended that the investigating officer to whom the charges were referred on 20 November 1946, at Memphis, Tennessee, the place at which accused's organization was then stationed, in fact made no investigation at all but in the preparation of his report relied upon information theretofore obtained by an investigating officer at the same station. This, the defense counsel contended, was not a substantial compliance with Article of War 70. The allied papers attached to the record of trial show that charges were originally preferred against the accused at Headquarters, Southern Sector, Atlantic Division, ATC on 9 October 1946 after preliminary investigation and forwarded to the Commanding General, Atlantic Division, ATC, Fort Totten, New York. On 22 October 1946 the latter headquarters forwarded the charges to the Commanding Officer, 554th AAF Base Unit (4th Ferrying Group), accused's organization at that time, then located at Memphis, Tennessee, and directed that an investigation be made. This was accomplished, including interviews with accused and witnesses residing in Tulsa, Oklahoma. On the basis of this supplemental investigation the charges were redrafted and sworn to on 19 November 1946 and referred to an investigating officer on 20 November 1946. The report of this investigating officer also dated 20 November 1946 shows that he reinterviewed accused in connection with the redrafted charges, but did not talk to the other witnesses, whose statements previously obtained in the original investigation were attached to the report and made a part thereof. On the basis of this information he recommended trial by general court-martial and the appointing authority thereafter referred the case for trial. The determination of whether there has been a thorough and impartial investigation is a question of fact primarily for the decision of the appointing authority and in the absence of an abuse of discretion his determination is conclusive (CM 182225, Keller; CM 183183, Claybaugh; CM 204275, Lichtenfels, 7 BR 402). Assuredly there is no evidence of

an abuse of discretion by the appointing authority in this case. Neither do we see how the procedure followed was in any way prejudicial to accused's substantial rights. The investigating officer who recommended trial had before him the signed statements of witnesses who had discussed the alleged offenses with the prior investigator. Furthermore, the former also discussed the case with accused. Interviewing these witnesses again could have served no useful purpose in accused's interests. The provisions of Article of War 70 being procedural, and there being nothing to indicate that accused's rights were prejudiced by the manner in which the formal investigation was conducted, the plea to the jurisdiction of the court was properly overruled (CM 307119, (1946); 5 Bull. JAG 335, 336).

8. War Department records show the accused to be 29 years of age and married. He graduated from high school and attended university for three and one-half years, thereafter enlisting in the Army as an aviation cadet about 22 February 1940. Upon graduation from the Advanced Flying School he was appointed a Second Lieutenant in the Air Corps, Army of the United States on 15 November 1940. On 8 April 1942 he was promoted to First Lieutenant and on 19 December 1942 to Captain. He subsequently served in the India Burma Theatre and was awarded the air medal and oak leaf cluster for meritorious achievement in flying. On 23 September 1944 he received the Distinguished Flying Cross for continuous operational flights in transport aircraft over dangerous air routes, and on 10 November 1944 the oak leaf cluster was added to the Distinguished Flying Cross. He returned to the United States on 30 October 1944. His efficiency reports show adjectival ratings of excellent and very satisfactory and numerical ratings of 5.5, 5.2, and 5.3. Consideration has been given to a letter from the Honorable Elmer Thomas, Senator from the State of Oklahoma requesting clemency on behalf of accused and to a brief submitted by the civilian defense counsel to the reviewing authority.

9. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of accused, other than those mentioned above were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and Specification 1 thereof and Specifications 1 and 7 of Charge II, but legally sufficient to support the findings of guilty of Charge II and Specifications 4 and 6 thereof and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

G G Johnson, Judge Advocate

(30)

JAGQ - CM 322052 1st Ind

JAN 13 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 Captain John S. Shamel, Jr. (0-399566), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of cohabiting with a woman not his wife in violation of Articles of War 95 and 96 (Charge I, Spec. 1; Charge II, Spec. 1) and of four offenses involving violations of Army Air Forces Regulations, in violation of Article of War 96 (Charge II, Specs. 4, 5, 6, 7). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 5 of Charge II, involving the carrying of an unauthorized woman passenger in an Army aircraft, 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 Specification 1 thereof and Specifications 1 and 7 of Charge II, but legally sufficient to support the findings of guilty of Charge II and Specifications 4 and 6 thereunder and the sentence and to warrant confirmation of the sentence. I concur in that opinion, except that it is my view that the record is legally sufficient to support the findings of guilty of Charge I and its Specification and Specification 1, Charge II.

4. From about 1 March 1946 to about 27 September 1946 accused consorted with a woman named June Trees who stayed with him overnight at his quarters at the Tulsa Municipal Airport on the average of three to five nights a week. Accused admitted that on a few occasions she cooked for him and cleaned up his quarters. One of the witnesses who was employed at the airport testified that he brought morning newspapers to her in accused's quarters. Accused was married at the time and Miss Trees was generally known around the airport as his "girl friend." The Specifications which allege the offenses of illegal cohabitation were the subject of motions to strike, made by the defense counsel, because they

failed to allege the name of the woman involved. The motions were denied by the court. The Board of Review is of the opinion that this prejudiced the substantial rights of accused. The record of trial however shows that the name of the woman concerned was known to accused and the issues raised by this Specification were tried upon proof of cohabitation with this one woman. Although the name should have been alleged, it is clear that accused was not misled and that the error was harmless. The record is ample to support any possible plea of former jeopardy in the event of another trial for the offenses.

On about 1 June 1946 accused made a flight from his station at Tulsa, to an airport at El Reno, Oklahoma, where his wife and their four year old daughter lived. In making this flight, which was outside the local flying area, he failed to accomplish a Form 23 for clearance, thus violating Army Air Forces Regulations 15-23. On the return trip he had as a passenger his daughter, thereby violating Army Regulations 95-90 which prohibit the transportation in Army aircraft of minors under the age of 10 years. There is no competent proof in the record of trial that the airfield at which he landed in El Reno, Oklahoma was one unauthorized for use by Army aircraft (Charge II, Spec. 7).

5. War Department records show that the accused is 29 years of age and married. He graduated from high school and attended the University of Oklahoma for three and one-half years. He enlisted in the Army as an aviation cadet about 22 February 1940. Upon graduation from the Advanced Flying School he was appointed a Second Lieutenant, Air Corps, Army of the United States on 15 November 1940. On 8 April 1942 he was promoted to First Lieutenant and on 19 December 1942 to Captain. He subsequently served in the India Burma Theatre and was awarded the air medal and oak leaf cluster for meritorious achievement in flying. On 23 September 1944 he received the Distinguished Flying Cross for continuous operational flights in transport aircraft over dangerous air routes, and on 10 November 1944 the oak leaf cluster was added to the Distinguished Flying Cross. He returned to the United States on 30 October 1944. His efficiency reports show adjectival ratings of excellent and very satisfactory and numerical ratings of 5.5, 5.2, and 5.3.

Attached to the record of trial is a memorandum from the Commanding General, Army Air Forces which states that in his opinion the offenses arising from the violation of the Air Forces regulations are not sufficiently aggravated to require the elimination of this officer from the service. I recommend that the finding of guilty of Specification 7, Charge II, be disapproved, that the sentence be confirmed but

in view of the minor nature of the offenses of which accused was legally found guilty and in view of his creditable combat record, recommend that the sentence be commuted to a reprimand and forfeiture of $100 pay per month for three months and that the sentence as thus commuted be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of Trial
2. Form of Action - A
3. Form of Action - B

(GCMO 282, 22 Aug 1947).

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

JAGK - CM 322054

30 JUN 1947

UNITED STATES v. First Lieutenant ALONZO C. DeCOSTA (0-1104119), Corps of Engineers	TECHNICAL DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 23 April 1947. Dismissal.

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 61st Article of War.

Specification: In that First Lieutenant Alonzo C. DeCosta, Squadron C, 3704th Army Air Forces Base Unit, did, without proper leave, absent himself from his station at Keesler Field, Mississippi from about 30 October 1946 to about 13 March 1947.

He pleaded guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, 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 four months. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and forwarded the record of trial for action under Article of War 48.

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

4. War Department records show that the accused is 34-9/12 years of age. He is married and has one child. His wife filed a suit for divorce in 1946. The records do not disclose any final judgment based on this suit. He graduated from high school and attended business college for one year. He was inducted into the Army 11 April 1942. He completed Officers Candidate School at Fort Belvoir, Virginia, and on 29 September 1942 he was discharged in order to be commissioned a second lieutenant in the Corps of Engineers. On 14 November 1943 he was promoted to first lieutenant. During the war he served in North Africa and Italy and is authorized to wear five

service bars for 31-1/2 months overseas service. On 5 June 1944 he received a reprimand from his commanding officer as punishment under Article of War 104 for sending through the mails letters containing disparaging remarks concerning the forces of the United States.

5. 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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Charles L. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Gatchwood, Judge Advocate

JAGK CM 322054 1st Ind

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

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant Alonzo C. DeCosta (O-1104119), Corps of Engineers.

2. Upon trial by general court-martial the accused pleaded guilty to and was found guilty of absence without leave from 30 October 1946 to 13 March 1947 in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for four months. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and forwarded the record of trial 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 by the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation thereof.

The accused was absent without leave from his station at Keesler Field, Mississippi, for four months and 13 days. He accounts for his action by describing marital difficulties and his desire to establish a residence in Florida in order to secure a divorce from his wife.

4. This officer is 34-9/12 years of age and married. He is a high school graduate and attended business college for one year. He was inducted 11 April 1942. Upon completion of officer candidate school he was commissioned a temporary second lieutenant, Corps of Engineers. On 14 November 1943 he was promoted to first lieutenant. He served in North Africa and Italy for 31-1/2 months. On 5 June 1944 he was reprimanded by his commanding officer, under the provisions of Article of War 104, for sending letters through the mails which contained disparaging remarks concerning the forces of the United States.

5. 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.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 260, 24 July 1947).

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

JAGH - CM 322067

1947

UNITED STATES	)	ALASKAN DEPARTMENT
v.	)	Trial by G.C.M., convened at Ladd Field, Alaska, 10-12 April 1947. Dismissal, Total Forfeitures, and Confinement for two (2) years
First Lieutenant JOSEPH C. FEARS (O-1547932), Medical Administrative Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, GRAY, and SOLF, 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 Joseph C Fears, Headquarters, Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment, Task Force Frigid), did, at Ladd Field, Alaska, on or about 31 December 1946, with intent to defraud, wrongfully and unlawfully make and utter to the Officers Mess Fund, Task Force Frigid, a certain check, in words and figures as follows to wit: "31 December 1946. Bank of America West Portal Branch. Pay to Cash or order $180.00/100 One Hundred and Eighty Dollars and 00/100 Dollars. Joseph C Fears 1st Lt Task Force Frigid." and by means thereof did fraudulently obtain from the Officers Mess Fund, Task Force Frigid, One Hundred and Eighty Dollars ($180.00), he the said Lieutenant Fears, then well knowing that he did not have and not intending that he should have sufficient funds on deposit with the Bank of America, West Portal Branch, for payment of said check.

Specification 2: In that First Lieutenant Joseph C Fears, Headquarters Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment, Task Force Frigid), did, at Ladd Field, Alaska, on or about 14 February 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Officers Mess Fund, Task Force Frigid, a certain check, in words and figures as follows to wit: "14 February 1947. First National Bank, North Avenue Branch, Baltimore, Maryland. Pay to Cash or order $389.50/100 Three Hundred Dollars and 05/100 Dollars. Joseph C Fears 1st Lt MAC Task Force Frigid." and by means thereof did fraudulently obtain from the officers Mess Fund, Task Force Frigid, Three Hundred and Eighty Nine Dollars and Fifty Cents ($389.50), he the said Lieutenant Fears, then well knowing that he did not have and not intending that he should have any account with the First National Bank, North Avenue Branch, Baltimore, Maryland, for payment of said check.

Specification 3: Same as Specification 2, except the check was dated 15 February 1947 and was in the amount of $210.00.

Specification 4: In that First Lieutenant Joseph C Fears, Headquarters Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment, Task Force Frigid), did, at Ladd Field, Alaska, on or about 4 March 1947, with intent to defraud, wrongfully and unlawfully make and utter to Captain James R Green, Service Battery 9th Field Artillery Battalion, a certain check, in words and figures as follows to wit: "4 Feb 1947. First National Bank, Westard Ave Branch. Baltimore Maryland. Pay to Cash or order $379.00/100 Three Hundred Seventy Nine Dollars and no/100 Dollars. Joseph C Fears 1st Lt" and by means thereof did fraudulently obtain from Captain James R Green, Three Hundred and Seventy Nine Dollars ($379.00), he the said Lieutenant Fears, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Westard Avenue Branch, for payment of said check.

Specifications 5, 6, 7, 8, and 9, same as Specification 4, except as follows:

Spec.	Amount	Date	Payee
5	$ 100.00	4 Mar 47	Cash (Capt Wylie Cooper)
6	100.00	4 Mar 47	Cash (Capt Wylie Cooper)
7	50.00	4 Mar 47	Cash (Capt Wm. R. Bullard, Jr.)
8	120.00	4 Mar 47	Cash (Capt Wm. R. Bullard, Jr.)
9	150.00	14 Feb 47	Cash (1st Lt. John Rosene)

Specifications 10 and 11, same as Specification 4, except "North Avenue Branch," of First National Bank, Baltimore, Maryland, instead of "Westard Avenue Branch" of the same bank, and except as follows:

Spec.	Amount	Date	Payee
10	425.00	20 Feb 47	Cash (Officers' Mess Fund, Task Force Frigid)
11	375.00	20 Feb 47	Cash (Officers' Mess Fund, Task Force Frigid)

Specification 12: In that First Lieutenant Joseph C Fears, Headquarters Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment, Task Force Frigid), having on or about 28 October 1946, become indebted to the Bank of Fairbanks, Fairbanks, Alaska, in the sum of Two Hundred Dollars ($200.00) for a personal loan, and having failed without due cause to liquidate said indebtedness and having on or about 28 October 1946, promised in writing to said Bank of Fairbanks, Fairbanks, Alaska, that he would on or about 28 November 1946, 28 December 1946, 28 January 1947 and 28 February 1947, pay on such indebtedness the sum of Thirty Five Dollars ($35.00) did, without due cause at Fairbanks, Alaska, on or about 28 November 1946, 28 December 1946, 28 January 1947 and 28 February 1947, fail to keep said promise.

Specification 13: In that First Lieutenant Joseph C Fears, Headquarters Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment Task Force Frigid), did, at Ladd Field, Alaska, on or about 4 February 1947, with intent to deceive Colonel Paul V Kane, Task Force Frigid, officially state to the said Colonel Paul V Kane, that the loan made him by the Bank of Fairbanks, Fairbanks, Alaska, had been paid, which statement was known by the said Lieutenant Fears to be untrue.

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

Specification 1: In that First Lieutenant Joseph C Fears, Headquarters Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment, Task Force Frigid), having been restricted to the limits of the 300 area of Ladd Field, Alaska, did, at Ladd Field, Alaska, on or about 1 March 1947, break said restriction by going to Fairbanks, Alaska.

Specification 2: In that First Lieutenant Joseph C Fears, Headquarters Fourth Army, Fort Sam Houston, Texas (Attached to Medical Detachment, Task Force Frigid), did, at Ladd Field, Alaska, on or about 17 November 1946, borrow Eighty Dollars ($80.00) from Staff Sergeant Floyd E Ripper, Medical Detachment, Task Force Frigid, this to the prejudice of good order and military discipline.

Specification 3: Same as Specification 2 except that date of the loan was 4 December 1946, and the amount was $150.00.

Specification 4: (Finding of not guilty on motion by defense).

CHARGE III: (Finding of not guilty on motion by defense).

Specification: (Finding of not guilty on motion by defense).

He pleaded not guilty to all Charges and Specifications and was found guilty of Specifications 1, 2, 4, 5, 6, 7, 8, 9, 10, 11 and 13 of Charge I and Charge I; guilty of Specification 3 of Charge I, with the following exceptions and substitutions: "Did fraudulently obtain from the Officers Mess Fund, Task Force Frigid, Two Hundred and Ten Dollars ($210.00)" and substituting respectively the words "Did Fraudulently obtain from the Officers Mess Fund, Task Force Frigid, Thirty Dollars ($30.00)"; guilty of Specification 12 of Charge I, except the words "28 February 1947"; guilty of Charge II and Specifications 1, 2 and 3 thereunder. 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 the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

On 31 December 1946, accused presented to the Mess Officer, Task Force Frigid, Ladd Field, Alaska, his personally signed check in the amount of $180.00, drawn on the Bank of America, West Portal Branch. The Mess Officer, having first indorsed this check, had it presented to the Bank of Fairbanks where it was cashed, and the proceeds turned over

to Accused (R. 14, 15, 16, Pros. Ex. 2). On or about 5 February 1947 this check was returned, marked "Refer to Maker" (R. 16, 30, 38-40, Pros. Ex. 7, 9, 12). The accused did not have sufficient funds with the Bank of America for payment of this check (R. 44, Pros. Ex. 12). The accused, having been notified that this check had been returned, promised to make it up and on 15 February 1947 presented his personally signed check in the amount of $210.00, drawn on the First National Bank, North Avenue Branch, Baltimore, Maryland, in payment therefor (R. 17, 18, 19, Pros. Ex. 3), and received the difference of $30 in cash (R. 19, 33, Pros. Ex. 7).

On or about 14 February 1947, the accused presented to the Mess Officer, Task Force Frigid, for purpose of cashing same, his personally signed check (the figures of which carry the amount "389.50", whereas the words on the face of the check reflect "Three Hundred Dollars"), drawn on the First National Bank, North Avenue Branch, Baltimore, Maryland. After endorsing same, check was cashed and the proceeds, $389.50, were turned over to Captain Renegar, to whom accused owed that amount as a result of a gambling debt (R. 21, 22, 33, 34, 139, Pros. Ex. 4).

On or about 3 March 1947, the two checks of $210.00 and $389.50 were returned, unpaid, marked "No Account", and the Mess Fund, Task Force Frigid, was charged $599.50 (R. 23, 40, 41, Pros. Ex. 8, 10). Although accused was apprised of these facts, and promised to make good these checks, he failed to do so (R. 24).

On 4 March 1947 the accused, together with other officers, among whom were Captains Green, Cooper, and Bullard, participated in a poker game in the room of the accused. The accused acted as "banker" during the game, and sold chips to the participating players (R. 49, 50), who paid for same by check, cash, or a combination of the two (R. 50, 54, 58, 61). At the conclusion of the game, Captain Green cashed in his chips, and accused gave him his personal check in the amount of $379.00, drawn on the First National Bank, Westard Avenue Branch, Baltimore, Maryland, as payment therefor (R. 50, 51, Pros. Ex. 14). Captain Cooper cashed in his chips and as partial payment received from accused two personal checks, each in the sum of $100.00, and each drawn on the above named bank (R. 55, Pros. Ex. 15, 16). Captain Bullard, in a similar manner, received two checks personally signed by accused and drawn on the same bank, in amounts of $50 and $120 respectively (R. 61, 62, Pros. Ex. 18, 19). At the time all of these checks were made and uttered, accused had no account with the First National Bank, Baltimore, Maryland, or any of its branches and the checks were returned unpaid (R. 68, Pros. Ex. 23).

On or about 14 February 1947, during a poker game, accused paid to First Lieutenant Rosene $150.00, by means of a check personally signed by accused in like amount, drawn on the First National Bank, North Avenue Branch, Baltimore, Maryland (R. 66, Pros. Ex. 20).

The Accused had no account at such bank and the check was returned unpaid (R. 66, Pros. Ex. 23).

On or about 20 February 1947, accused presented two personally signed checks to the Mess Officer, Task Force Frigid, in amounts of $425.00 and $375.00 respectively, both drawn on the First National Bank of Baltimore, North Avenue Branch, for the purpose of cashing same (R. 26, Pros. Ex. 5, 6). The Mess Officer endorsed the checks, had them cashed, and the accused received the money therefor (R. 26, 34). The checks were returned by drawee bank marked "No Account", and the account of the Officers' Mess, Task Force Frigid, was charged $800 by its bank (R. 27, 42, Pros. Ex. 5, 6, 11).

On 28 October 1946 accused effected a personal loan in the amount of $200.00 from the Bank of Fairbanks, and executed an agreement pursuant to the terms of which he promised to make monthly payments of approximately $35.00 until the loan was liquidated (R. 130). No payment was made in November or December. About 4 February 1947, accused was called before the Commanding Officer of Task Force Frigid, and in reply to a direct question, stated that this loan had been paid (R. 119), whereas the loan was not paid until 18 February (R. 111). By 1st Indorsement, 12 February 1947, accused had promised to pay the loan in full during that month (Pros. Ex. 32).

Accused was administratively restricted to the "300 area" effective 17 February 1947 (R. 69, Pros. Ex. 24). Subsequent thereto, on or about 1 or 8 March 1947, and before the restriction had been lifted, accused visited two eating places, both outside the "300 area" as well as off the limits of Ladd Field (R. 59, 74).

On or about 15 November 1946 the accused borrowed $80.00 from Technical Sergeant Ripper, an enlisted man, subordinate to the authority of the accused (R. 75). The accused thereafter borrowed an additional $150.00 from this soldier on or about 1 December 1946 (R. 76). On neither occasion was there any discussion as to when the loan would be repaid. The loans were completely repaid by the accused during the latter part of February 1947 (R. 76, 77).

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

After being apprised of his rights by his counsel, accused elected to be sworn as a witness in his own behalf. In his testimony he admitted making and uttering the checks set forth in Specifications 1, 2, 3, 10 and 11 of Charge I (R. 123, 125, 126, 127, 129, Pros. Ex. 2, 3, 4, 5, 6). He admitted that he was informed that these checks were returned unpaid (R. 123, 129). He admitted that he had received the proceeds from the $180.00 check set forth in Specification 1 of Charge I (Pros. Ex. 2), from the $425.00 and $375.00 checks set forth in Specifications 10 and 11 of Charge I (Pros. Ex. 5, 6), and $30.00 from the

$210.00 check set forth in Specification 3, Charge I (Pros. Ex. 3). He further admitted that he had directed that the proceeds of the $389.00 check set forth in Specification 2, Charge I (Pros. Ex. 4), be turned over to Captain Renegar in payment of his gambling debt to that officer (R. 135, 136, 139).

The accused admitted further that he effected a loan from the Bank of Fairbanks on 28 October 1946 (R. 125), and executed an agreement pursuant to the terms of which he promised to make monthly payments of approximately $35.00, effective on or about 23 November 1946 (R. 130). He testified that he failed to make any payments on this loan until 17 February 1947, on which date the said loan was paid by check in the amount of $205.50, drawn on the First National Bank of Baltimore, North Avenue Branch (R. 131, 132, 136).

The accused denied that he told Colonel Kane on 4 February 1947 that the loan which he had obtained from Bank of Fairbanks had been paid (R. 132).

The accused further testified that he and his wife had a joint account at the Bank of America, and that at the time he wrote the check for $180.00 (Pros. Ex. 2) there should have been enough money in that bank to cover the check (R. 123, 128). He had made no deposits in the account since August 1946 (R. 135, 137) and did not know what his bank balance was when he left home (R. 137).

The accused stated further that before he wrote the other checks herein charged, he tried to clear up the difficulties relevant to the $180.00 check (Pros. Ex. 2). He made a telephone call to his uncle and understood him to say he would open an account for him in the amount of $1500 with the First National Bank, North Avenue Branch, Baltimore, Maryland (R. 123, 134). Further, that after this conversation, he waited "a maximum time to be sure the money was there" (R. 138). He testified that when he discovered that the checks which he had drawn on the First National Bank had been returned, he again called his uncle, who told him that he had deposited the money, and instructed him to put his initials, "R.K.F.", on the bottom of the next check to show the bank he had opened an account in accused's name. Pursuant to these instructions, the accused placed the initials "R.K.F." on checks thereafter drawn (R. 124, Pros. Ex. 3, 4). When these latter checks were returned unpaid, he dispatched a radio to his uncle requesting him to send money by telegraph but received no reply (R. 124, 125). He admitted further that he had never received a statement from the Baltimore Bank showing that the money he had requested of his uncle had been deposited, nor did he call the bank itself about the money (R. 133).

5. At the conclusion of the prosecution's case, the defense moved for a finding of not guilty of the Specification of Charge III and Charge

III, and Specifications 2, 3 and 4 of Charge II, on the grounds that the prosecution failed to present sufficient evidence for a finding of guilty on those Specifications and Charge. The motion was granted as to the Specification of Charge III and Charge III (larceny) and Specification 4 of Charge II (non-support).

The motion was denied as to Specifications 2 and 3 of Charge II. The prosecution proved that on two occasions the accused, an officer, borrowed money from an enlisted man (R. 75, 76). The testimony of the accused under oath readily admitted that he had consummated the loans as alleged (R. 126). The defense contended that since the loan made by Sergeant Ripper was in good faith, that he had no fear of getting the money back, and was in fact paid in full, the transaction was not proven to be "to the prejudice of good order and military discipline." It is considered that the evidence of the offense as charged under Article of War 96 was sufficient to establish the guilt of the accused. In the language of the Board of Review in CM 275535, Wilson (48 BR 71, 75):

> "There are numerous precedents for the proposition that it is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships (CM 230736, Delbrook (1943), 18 BR 29; 2 Bull. JAG (Apr. 1943), p. 144)."

Specifications 2 and 3 of Charge II were proved beyond any reasonable doubt, and the motion was properly overruled.

6. a. Specification 1, Charge I, alleges that the accused, with intent to defraud, wrongfully and unlawfully made and uttered to the Officers' Mess Fund, Task Force Frigid, a check for $180.00, well knowing that he did not have and not intending that he should have sufficient funds in the bank on which it was drawn to cover it, thereby fraudulently obtaining from the Officers' Mess Fund, $180.00. The uncontradicted evidence shows that he and his wife had a joint account at drawee bank; that deposits were frequently made from August 1946 (the date he last personally made a deposit) to December 1946 (Pros. Ex. 12). He testified that there should have been enough money in the bank to take care of the check (R. 123, 128). Upon being advised that the check had been returned he said he would "make it up" (R. 17), and within a day or two, did give another check, on a different bank, for it. It is true that this second check was returned unpaid; that his stated efforts to open an account at the Baltimore Bank were unsuccessful; and that he did not follow sound business practice in writing checks on such an account without further verification.

Although the wrongful making and negotiation of the $180.00 check by the accused, without first verifying the condition of the joint account, was an act which must be deemed to have discredited him in the eyes of his fellow officers, and was conduct discreditable to the military service within the meaning of Article of War 96 (CM 202027, McElroy, 5 BR 347), the transaction did not plainly involve any such degree of fraud as to demonstrate moral unfitness of accused to continue as an officer, or to constitute a violation of Article of War 95 (CM 220160, Faulkner, 12 BR 335). The giving of the check, however, under these circumstances, constitutes the lesser included offense of wrongfully failing to maintain a sufficient bank balance to meet issued checks, in violation of Article of War 96.

b. Specifications 2, 3, 10 and 11 of Charge I concern checks written by the accused on the First National Bank, North Avenue Branch, Baltimore, Maryland, with intent to defraud, wrongfully and unlawfully made and uttered to the Officers' Mess Fund, Task Force Frigid. The evidence clearly establishes the guilt of the accused. He admitted that he made and uttered the checks, and received the money therefor, except as to the $389.00 check, the proceeds of which were paid according to his instructions, and the $210.00 check for which he received only $30 in cash and his $180.00 check which had been returned unpaid. The finding of the court in the latter instance was in accord with this evidence. The accused attempted to show that by long distance telephone he had asked his uncle to open an account in the North Avenue Branch of this bank for him, but admitted that the bank had never confirmed the account (R. 133, 138). An officer of the Bank testified that there is no North Avenue Branch of said bank. It is our opinion that the findings of guilty are supported by clear and compelling evidence.

c. Specifications 4, 5, 6, 7, 8 and 9 involved checks written on the First National Bank, Westard Avenue Branch, Baltimore, Maryland, and made payable to various officers in payment of debts incurred in gambling. The evidence is uncontradicted that he never had an account in any branch of the First National Bank, Baltimore, Maryland. There is no evidence that he had ever attempted to set up an account in the Westard Avenue Branch of that Bank. Indeed, the evidence shows that the Bank had no such branch. It is our opinion that the offenses charged in these specifications were proved beyond any reasonable doubt.

d. With reference to Specification 12 of Charge I, it was clearly shown by the prosecution and admitted by the accused that he borrowed $200.00 from the Bank of Fairbanks on 28 October 1946, that the loan was to be repaid by monthly payments of approximately $35.00. He made no payments in November or December, and the first payment he made was in February 1947 when he paid the note in full. The specification does not charge that he "dishonorably" failed to keep his promise to pay. There was no evidence presented as to any dishonorable conduct by accused relative to the loan in question.

The mere failure of an officer to keep his promise to pay a debt is not a dishonorable act in violation of Article of War 95 unless the promise to pay is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 220760, Fanning, 13 BR 61). The circumstances in evidence do not prove beyond a reasonable doubt that accused made these promises with false or deceitful purposes, or that his failure to keep the promises on the date alleged was fraudulent or dishonorable. Indeed, his failure to pay is not charged as dishonorable. It follows that the proof is not legally sufficient to support the findings of guilty of this Specification as amended.

e. The issue surrounding Specification 13, Charge I (false official statement) is purely a question of fact. Every element of the offense was testified to by Colonel Kane, and the court evidently believed his testimony rather than the denial by the accused that he had made the statement. The finding of guilty is amply sustained by the evidence.

f. Specification 1 of Charge II (breach of administrative restriction) was a proper charge under Article of War 96 (2 Bull. JAG 426). Every element of the charge was proved by clear and convincing testimony.

g. Specifications 2 and 3 of Charge II (borrowing money from an enlisted man) were proved beyond any reasonable doubt by clear and convincing testimony. It was the contention of the defense that since accused testified that he at all times expected, demanded, and received proper military discipline and courtesy from the enlisted man (R. 126) and that the enlisted man was not worried about the loan and was fully repaid (R. 76), the alleged offense was not proven to be "to the prejudice of good order and military discipline." This contention is not sound, for the reasons set forth in paragraph 5, supra. Numerous other decisions of the Board of Review are to the same effect (CM 275535, Wilson, 48 BR 75; CM 272588, McGovern, 46 BR 311).

7. The record contains several exhibits which were improperly admitted in evidence without objection by the defense (Pros. Ex. 9, 10, 11, 17, 21). The facts contained therein are clearly hearsay and inadmissible. Similarly, oral evidence, hearsay in nature, was improperly admitted (R. 117, for instance). The admission of these exhibits and oral hearsay, however, are not believed to have prejudicially affected the substantial rights of the accused. There is contained in the record sufficient compelling admissible evidence to support the findings of guilty, except as noted above.

8. The accused is 29 years of age, and a high school graduate. He attended college one year, leaving to become a railroad fireman.

Following his separation from the service in 1945, he operated a service station in San Francisco, California, until he was recalled to active duty in August 1946. He was married in March 1944, and resided with his wife (an Army nurse, retired for physical disability) during 1945-46. There are no children. There is no record of criminal offenses during his civilian status.

Accused enlisted in the Maryland National Guard in July 1937, and was inducted in the grade of sergeant when that unit was federalized in September 1941. He served in the European Theatre of Operations as a noncommissioned officer from May 1942 until April 1943. He attended Medical Administration Officer Candidate School in April 1943 and was graduated therefrom as a Second Lieutenant on 3 July 1943. He served in a commissioned status in Edmonton, Canada; Camp Barkeley, Texas; and the San Francisco Medical Supply Depot, San Francisco, California. He was discharged on points from the last mentioned station on 20 September 1945. On 27 August 1946 he was recalled to active duty with assignment to Headquarters, Fourth Army, Fort Sam Houston, Texas, and attached for duty to Task Force Frigid. He arrived at Ladd Field, Alaska, on 12 September 1946 and is presently stationed thereat. His efficiency ratings during the period of his assignment with Task Force Frigid were 4.7 and -4 respectively. He made application for the Regular Army, but failed to receive a passing grade on the general survey examination. He has had no previous convictions by court-martial. He is authorized to wear the European Theatre Ribbon with one Bronze Star for the Tunisian campaign, the American Theatre Ribbon, the Asiatic-Pacific Theatre Ribbon, American Defense Ribbon, World War II Victory Medal, and the Good Conduct Ribbon. The psychiatric examination discloses that accused suffers from no physical or mental disorders and is responsible for his actions.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge I as involves a finding that the accused did, at the time and place alleged, wrongfully and unlawfully make and utter to the payee alleged the check described in the specification and obtain by means thereof the amount alleged, and that he wrongfully failed to maintain sufficient funds in the alleged drawee bank for payment of said check when presented for payment in due course, in violation of Article of War 96; legally insufficient to support the findings of guilty of Specification 12 of Charge I; legally sufficient to support the findings of guilty of Specifications 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 13 of Charge I and Charge I, Specifications 1, 2 and 3 of Charge II and Charge II; legally sufficient to support 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 forfeitures and confinement at hard labor for two years are authorized upon a conviction of a violation of Article of War 96.

A. Hornstein, Judge Advocate

R. McDonald Gray, Judge Advocate

Wallace C. Sap, Judge Advocate

JAGH - CM 322067 1st Ind

WD, JAGO, Washington 25, D. C. SEP 1? 194

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 Joseph C. Fears (0-1547932), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of fraudulently making and uttering one check on a bank in which he had insufficient funds to meet the check, of fraudulently making and uttering ten checks drawn on a bank in which he had no account, of failing to keep his promise to pay a debt, and of making a false official statement concerning that debt, in violation of Article of War 95; and of breaking restriction and borrowing money on two occasions from an enlisted man in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge I as involves a finding that the accused, did, at the time and place alleged, wrongfully and unlawfully make and utter to the payee alleged the check described in the specification, and did obtain by means thereof the amount alleged, and that he wrongfully failed to maintain sufficient funds in the alleged drawee bank for payment of said check when presented for payment in due course, in violation of Article of War 96; legally insufficient to support the findings of guilty of Specification 12 of Charge 1; legally sufficient to support the findings of guilty of all other Charges and Specifications; and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 31 December 1946 the accused cashed a check for $180.00, drawn on the Bank of America in which he had a joint account with his wife. This check was returned, marked "Refer to Maker". Other evidence showed that he had an insufficient account to pay the check, that he personally had not deposited money in the account since the preceding August, and that his wife had frequently checked on the account. From 14 February 1947 to and including 4 March 1947, he issued ten checks, totaling $2,298.50, on the North Avenue Branch and the Westard Avenue Branch of the First National Bank, Baltimore, Maryland. By deposition an officer of the First National Bank,

Baltimore, Maryland, testified that that bank had no branch by either name, and that accused had never had an account in any branch of that bank. Accused testified that he had twice called his uncle in Baltimore, from Ladd Field, Alaska, and that his uncle had promised to put $1500.00 in the North Avenue Branch. He testified that during the second telephone call, the uncle told him that he had placed $1500.00 to accused's account. Accused never received word from the bank that the money had been deposited. The $180.00 check first referred to was redeemed by accused with a check on the North Avenue Branch, First National Bank, Baltimore, Maryland, in the amount of $210.00, and he received the $30.00 difference in cash. For four of the checks, in the total sum of $1300.50, he received cash or its equivalent from the Officers' Mess Fund. Six of the checks, in the total sum of $899.00 were issued in payment of gambling debts.

On or about 1 March 1947, accused broke restriction by leaving the confines of Ladd Field after being restricted to an area within that field.

On or about 4 February 1947, accused, with intent to deceive, officially stated to his commanding officer that an outstanding bank loan had been paid, whereas in fact it had not been paid.

On or about 17 November 1946 and again on 4 December 1946, accused borrowed money, in a total amount of $230.00, from an enlisted man who was serving under him. These loans were repaid in February 1947.

4. Accused is 29 years old and completed 22 months' enlisted service prior to his appointment as a second lieutenant on 3 July 1943, including one year in the European Theater of Operations for which he is authorized to wear the ETO ribbon with one bronze star for participation in the Tunisian campaign. He was awarded the Good Conduct Ribbon. He was promoted to first lieutenant on 5 March 1945, and was relieved from active duty on points on 20 September 1945, recalled to active duty 27 August 1946, and arrived at Ladd Field, Alaska, on 12 September 1946.

5. With the exception of five offenses of which accused was found guilty, all offenses are in violation of Article of War 95. Dismissal is the maximum punishment authorized for offenses charged under that Article of War. The five remaining offenses of which the accused has been found guilty are minor in nature and evidence little or no moral turpitude or great degree of criminality. Information in the review of the Staff Judge Advocate indicates, however, that the accused wrote at least one other check (for $25) on a bank in which he had no account.

I recommend that only so much of the findings of guilty of Specification 1 of Charge I be approved as involves a finding that the accused, did, at the time and place alleged, wrongfully and unlawfully make and utter to the payee alleged, the check described in the specification, and obtain by means thereof the amount alleged, and that he wrongfully failed to maintain sufficient funds in the alleged drawee bank for payment of said check when presented for payment in due course in violation of Article of

War 96, that the findings of guilty of Specification 12 of Charge II be disapproved, that the sentence be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

2 Incls
Record of trial
Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 328, 17 Sept 1947).

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

JUN 6 1947

JAGQ - CM 322068

UNITED STATES	)	ALASKAN DEPARTMENT
v.	)	Trial by G.C.M., convened at Ladd Field, Alaska, 21 April 1947. Dismissal and total forfeitures.
Second Lieutenant RICHARD N. BAYNES (0-2082786), 46th Reconnaissance Squadron, Ladd Field, Alaska.	)	

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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Richard N. Baynes, 46th Reconnaissance Suqadron (VLR) Ladd Field, Alaska, did, at Ladd Field, Alaska on or about 7 March 1947, feloniously take, steal and carry away about $48.00 lawful money of the United States, the property of Mr. Raymond L. Newton.

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

3. Evidence for the Prosecution.

On the evening of 7 March 1947, Raymond L. Newton, Assistant Field Director, American Red Cross, Ladd Field, Alaska, entered the field

gymnasium, removed his clothes, proceeded to take a shower, and was sitting under an ultra-violet lamp with his clothes "hanging" in an adjoining room when accused walked through the gymnasium and spoke to him (R. 6, 9, 10). Thereafter he dressed and retired to his room for the night. The following morning as he started to pay for his breakfast he discovered that $48.00 in United States currency was missing from his wallet and he reported the loss to accused who was in charge of the bachelor officer quarters that day (R. 7). Accused stated that he was sorry "it happened", he would report the fact and do "what he could about it" (R. 9). Witness heard nothing further concerning the matter until 13 March, five days later, when accused came to him, stated that he had taken the money and would return it the next day, which he did (R. 10).

Mr. Newton further testified that he was positive that there was $48.00 in currency in his wallet when he entered the gymnasium and that was the exact amount returned to him by accused (R. 6, 9). He had never given accused permission to remove money from his billfold (R. 6).

The rights of accused as a witness were explained to him by the Law Member and he elected to remain silent (R. 11).

4. The offense alleged is that of larceny which is defined as follows:

> "Larceny is the taking and carrying away by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark).
>
> "Once a larceny is committed, a return of the property or payment for it is no defense to a charge of larceny. ***" (M.C.M., 1928, par. 152g).

The evidence conclusively establishes that accused did, at the time and place alleged deliberately steal the sum of $48.00 in currency from Mr. Newton, assistant field director of the American Red Cross stationed at Ladd Field, Alaska. He secreted the stolen money and inferrentially used it for his own purposes as when he admitted the theft five days later he did not possess sufficient funds at that time to make restitution. From these acts his intention to permanently deprive the owner of his property is inescapably impelled. Whether his return of the stolen money was motivated by qualms of conscience or fear of apprehension is immaterial because in neither event is the offense obliterated. As it was currency of the United States that was stolen it was not

necessary to prove its value, CM 258108, Perlman, 37 BR 313; CM 268894, Heiland, 44 BR 365 (370). The evidence establishes beyond any reasonable doubt the guilt of accused and fully supports the court's findings of guilty of the Charge and its specification.

There is attached to the record of trial a request for clemency executed by the defense counsel and three members of the court citing accused's excellent military record and his youth, and expressing the opinion that the circumstances of this particular case should not warrant dismissal. There is also attached to the record a supplementary statement of Mr. Raymond L. Newton, the victim of the larceny, executed after the sentence was announced, requesting clemency on behalf of accused. He states that accused has shown great mental concern over his actions; has learned a "severe lesson" and does not merit the severe punishment which would result from the taint of dishonor of a dismissal from the service.

5. War Department records show the accused to be 24 years of age and single. He graduated from high school in Houston, Texas, and immediately thereafter enlisted in the Army on 10 February 1941. He received basic training at Kelly Field, Texas; attended specialists school for aircraft mechanics and rose to the grade of staff sergeant. He was commissioned a Second Lieutenant, Air Corps on 1 February 1945. He entered on duty in the Alaskan Department in August 1946 where his military assignments are aerial photography and physical education instructor. There is no record of previous convictions by court-martial or other disciplinary action and his efficiency ratings are excellent.

A psychiatric examination of accused at the 206th Station Hospital, 7 April 1947 resulted in the conclusion that he was sane and responsible for his acts.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 93.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

C G Lohmann, Judge Advocate

JAGQ - CM 322068 1st Ind

WD, JAGO, Washington 25, D. C. JUN 13 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 Richard N. Baynes (0-2082786), 46th Reconnaissance Squadron, Ladd Field, Alaska.

2. Upon trial by general court-martial in Alaska this officer was found guilty of the larceny of United States currency in the amount of $48, in violation of Article of War 93. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that on the evening of 7 March 1947, Raymond L. Newton, Assistant Field Director, American Red Cross, hung his clothes in the gymnasium at Ladd Field, Alaska, while he took a shower. His wallet containing $48 in United States currency was in his trousers pocket. The following morning he discovered that the $48 was missing from his wallet and reported the loss. Thereafter on 13 March, five days later, accused came to him, admitted taking the money and said he would make restitution the next day which he did.

There is attached to the record of trial a request for clemency on behalf of accused signed by the defense counsel and three members of the court, and a supplementary statement by Mr. Newton, the victim of the larceny, to the effect that he believes accused's actions were the result of immature judgment rather than criminal intentions.

5. War Department records show that accused is 24 years of age and single. He graduated from high school in Houston, Texas and immediately thereafter enlisted in the Army on 10 February 1941. He received basic training at Kelly Field, Texas; attended specialists school for aircraft mechanics and rose to the grade of staff sergeant. He was commissioned a Second Lieutenant, Air Corps, on 1 February 1945. He entered on duty in the Alaskan Department in August 1946 where his military assignments were aerial photography and physical education instructor. There is no record of previous convictions by court-martial or other disciplinary action and his efficiency ratings are excellent.

A psychiatric examination of accused at the 206th Station Hospital, 7 April 1947 resulted in the conclusion that he was sane and responsible for his acts.

6. I recommend the sentence be confirmed and ordered executed. THG.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Rec of Trial
2. Form of Action

(GCMO 233, 26 June 1947).

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

JUN 12 1947

JAGQ - CM 322138

UNITED STATES	TECHNICAL DIVISION, AIR TRAINING COMMAND
v.	Trial by G.C.M., convened at Keesler Field, Mississippi, 22 April 1947. Dismissal and confinement for two and one-half (2½) years.
Captain WILLIAM E. LALICKER (0-1003567), Squadron K, 3704th Army Air Forces Base Unit.	

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: Violation of the 96th Article of War.

Specification 1: In that Captain William E. Lalicker, Squadron K, 3704th Army Air Forces Base Unit, did, at Biloxi, Mississippi, on or about 8 February 1947, make and utter to the W. V. Joyce Company, a certain check in words and figures as follows, to wit:

BILOXI, MISSISSIPPI 8 Feb 1947 $75.00
Pay to the order of

W. V. Joyce Co.

Seventy- five & no/100 Dollars
To Central Nat'l Bank
Junction City, Kansas /s/ W E Lalicker, Capt, AC
01003567, 403 Barthes

and did wrongfully fail to maintain a sufficient balance with the Central National Bank of Junction City, Kansas to meet payment of said check.

Specifications 2, 3, 4 and 5: Same as Specification 1 with pertinent details as follows:

Spec. No.	Amount	Date	Payee
2	$20.00	10 Feb 47	Krysti's Military Store
3	20.00	10 Feb 47	Louis E. Wentzell
4	20.00	13 Feb 47	" " "
5	10.00	20 Feb 47	" " "

Specification 6: In that Captain William E. Lalicker, Squadron K, 3704th Army Air Forces Base Unit, did, at Biloxi, Mississippi, on or about 18 February 1947, with intent to defraud, wrongfully and unlawfully make and utter to Broadwater Beach Hotel a certain check in words and figures as follows, to wit:

Biloxi, Miss., 18 Feb 1947
THE PEOPLES BANK
of Biloxi, Miss.

Pay to the order of Cash $100/00

One Hundred & no/100 Dollars

/s/ W E Lalicker, Capt, AC
01003567

and a certain check in words and figures, as follows, to wit:

Biloxi, Miss., 18 Feb 1947
THE PEOPLES BANK
of Biloxi, Miss.

Pay to the order of Cash $10/00

Ten & no/100 Dollars

/s/ W E Lalicker, Capt, AC
01003567

and by means thereof did fraudulently obtain from said Broadwater Beach Hotel, the total sum of $110.00 in United States currency, he,

the said Captain William E. Lalicker, then well knowing that he did not have, and not intending that he should have any account with the said Peoples Bank of Biloxi, Mississippi, for the payment of said checks.

Specifications 7, 8, 9 and 10, same as Specification 6, except only one check is involved with pertinent details as follows:

Spec. No.	Amount	Date	Payee
7	$20.00	20 Feb 47	John H. Martin
8	15.00	21 Feb 47	Roy Houk
9	25.00	22 Feb 47	Handelman's Store
10	20.00	24 Feb 47	Ruby Picard

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

Specification 1: In that Captain William E. Lalicker, Squadron K, 3704th Army Air Forces Base Unit, did, at Grottoes, Virginia, on or about 14 November 1946, make and utter to John T. O'Donnell, a certain check in words and figures as follows, to wit:

Pay to the order of Junction City, Ks. 14 Nov 1946

Cash $100.00

One hundred & no/100 Dollars

To the Central
5-39 National Bank /s/ W E Lalicker, Capt, AC
Junction City, Ks 01003567

and did wrongfully fail to maintain a sufficient balance with the Central National Bank of Junction City, Kansas to meet payment of said check.

Specifications 5, 6 and 7, same as Specification 1 with pertinent details as follows:

Spec. No.	Amount	Date	Place	Payee
5	$25.00	15 Feb 47	Biloxi, Miss.	Biloxi Hardware Co.
6	25.00	21 Feb 47	" "	" " "
7	25.00	22 Feb 47	" "	" " "

Specification 2: In that Captain William E. Lalicker, Squadron K, 3704th Army Air Forces Base Unit, did, at Gulfport, Mississippi, on or about 3 March 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Jones Brothers Drug Company Incorporated, a certain check in words and figures as follows, to wit:

Gulfport, Miss., 3 March 1947

Pay to the order of Cash $25.00

Twenty-five & no/100 Dollars

The Peoples Bank
Biloxi, Miss.

/s/ W E Lalicker, Capt, AC
01003567, Sqdn "K", 3704th BU.Keesler Fld.

and by means thereof did fraudulently obtain from said Jones Brothers Drug Company Incorporated, the sum of $25.00 in United States currency, he, the said Captain William E. Lalicker, then well knowing that he did not have, and not intending that he should have any account with the said Peoples Bank of Biloxi, Mississippi for the payment of said check.

Specifications 3, 4, 8 and 9, same as Specification 2 with pertinent details as follows:

Spec. No.	Amount	Date	Bank	Payee
3	$25.00	4 Mar 47	Peoples Bank, Biloxi	Jones Brothers Drug Co.
4	10.00	24 Mar 47	First Bank of Biloxi	Kimbrough and Quint Co.
8	10.00)2 checks 10.00)	22 Mar 47	" " " "	Gulf Cafe and Lounge
9	15.00	24 Mar 47	" " " "	Gulf Cafe and Lounge

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 two and one-half 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:

During the period from 14 November 1946 to 24 March 1947 accused cashed one check at Grottoes, Virginia, and 20 checks at Biloxi and Gulfport, Mississippi, in amounts varying from $10.00 to $100.00. The twenty-one checks amounted to $605.00, for which accused received cash or its equivalent. Nine of the checks, aggregating $320 were drawn on the Central National Bank of Junction City, Kansas; eight checks amounting to $240 on the Peoples Bank, Biloxi, Mississippi and four checks totaling $45 on the First Bank of Biloxi, Biloxi, Mississippi (Pros. Exs. 2-10; 12-23). There were insufficient funds in the Central National Bank, Junction City, Kansas, for the payment of said nine checks at the time each was presented (Pros. Exs. 1, 11). Accused did not maintain any account in the First Bank of Biloxi, Biloxi, Mississippi during the period the four checks were drawn on that institution, his account having been closed 15 January 1947 at the request of the bank (R. 37), and he has never had an account with the Peoples Bank, Biloxi, Mississippi on which the eight checks in question were drawn (R. 33, 34, 41). The checks have not been redeemed by accused.

4. Evidence for the Defense.

After being advised of his rights as a witness, accused elected to testify under oath (R. 38) that all twenty-one of the checks were signed by him and explained his actions as follows:

"A. Yes, sir. It all dates back about four or five months ago. I got to gambling and got in 'over my head'. Some of the people got to pushing me pretty hard. I tried to get loans - from several different banks - from everywhere down here, and couldn't. The people kept threatening to make a lot of trouble if I didn't get the money and pay them off. I have gambled ever since I have been in the Army, and have always done very well up until recently. I wrote the checks trying to cover up what I owe and tried to straighten things out, but I kept getting deeper and deeper, and kept writing checks to cover the ones I had written before, with the hope that I would start winning again, as I had done before, and could make them all good.

"Q. Captain Lalicker, you stated you have been gambling ever since you have been in the Army, will you tell the Court how long you have been in the Army?

A. Ten years and seven months.

"Q. After you were informed of the Original Charges against you, I think you wrote a few checks afterwards, is that correct?
A. Yes, sir.

"Q. Why did you do that?
A. I thought there still might be the possibility of paying off the checks that I owed, thereby making it a lot better; although, I realized I had still done wrong. It wouldn't right the wrong, but it would be better than still owing.

"Q. In other words, you were trying to satisfy these people to whom you had already written checks?
A. Yes, sir."

* * * *

"Q. What I am driving at is, was the reason for writing these checks to live off of because you had used your money to pay your debts, or was it to gamble with to try to get ahead, or to pay off the debts you arrived here with?
A. Part of the money was used to live on, but mostly it was used to gamble with to try to take care of all I owed before. Every time I wrote one I was just that deeper in." (R. 40, 44).

He never used a fictitious name or address; he obtained $500 from his mother in January 1947 and paid some of his debts but continued to gamble and never won enough to pay his remaining debts (R. 41). He attempted to reimburse his creditors by agreeing to pay a fixed sum from his pay each month but "it wasn't satisfactory to them" (R. 43). He did most of his gambling in "all of these places along the Coast" (R. 41).

5. The offenses charged were proved beyond any reasonable doubt by accused's pleas of guilty, his admissions on the witness stand and the testimony and stipulations received at the trial. Accused's testimony, in explanation of his actions, merely shows that he committed a series of offenses to obtain money with which to gamble or to pay gambling debts previously incurred. In fact, he admits writing worthless checks to obtain funds to "take up" other bad checks previously issued. The Board of Review is of the opinion that the findings of guilty are amply sustained by the evidence.

Accused was examined prior to trial by the Chief of the Neuropsychiatric Service, Keesler Field, Mississippi and found to be sane and responsible with no psychiatric abnormalties and "his thinking clear and coherent". No issue of insanity was raised at the trial.

6. War Department records show accused to be 28 years of age and married. He graduated from high school at Medicine Lodge, Kansas, and enlisted in the Regular Army, 16 September 1936. He attended Officer Candidate School in 1943 and was commissioned a Second Lieutenant, Air Corps, 28 July 1943, being subsequently promoted to First Lieutenant, 10 April 1944 and to Captain, 5 September 1945. He served on Guam from 27 January to 17 November 1945. His efficiency reports disclose numerical ratings of 5.5 and 5.4. No evidence of previous court-martial convictions or civilian criminal record is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial 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.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

E G Scherman, Judge Advocate

JAGQ - CM 322138 1st Ind

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

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain William E. Lalicker (0-1003567), Squadron K, 3704th Army Air Forces Base Unit.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of making and uttering nine checks, aggregating $320.00 on a bank in which he wrongfully failed to maintain sufficient funds to pay them (Specs. 1, 2, 3, 4, 5 of the Original Charge and Specs. 1, 5, 6, 7 of the Additional Charge) and of making and uttering with intent to defraud twelve checks, aggregating $285.00 on banks in which he had no account (Specs. 6, 7, 8, 9 and 10 of Original Charge and Specs. 2, 3, 4, 8 and 9 of the Additional Charge), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that accused from 14 November 1946 to 24 March 1947 cashed twenty-one checks at Grottoes, Virginia, Biloxi and Gulfport, Mississippi in amounts varying from $10.00 to $100.00 and aggregating $605. Nine of the checks totaling $320.00 were drawn on the Central National Bank of Junction City, Kansas, in which accused had an account but his cash balance was insufficient for the payment of the checks at the time each was presented. The remaining twelve checks aggregating $285.00 were drawn on the Peoples Bank, Biloxi, Mississippi and the First Bank of Biloxi, Biloxi, Mississippi. Accused had never had an account in the former bank and his account in the latter had been closed at the request of the bank prior to the date of issuing any of the checks here involved. At the time of the trial the dishonored checks

had not been redeemed by accused.

Accused admitted his guilt and stated that the worthless checks were issued because he had lost heavily while gambling at "places along the Coast" and was being pressed by his creditors. He issued some worthless checks to "take up" others and even uttered some after he had been advised of the charges against him.

While no issue of insanity was raised at the trial a neuropsychiatric examination resulted in the conclusion that accused was sane and responsible for his acts.

5. War Department records show that accused is 28 years of age and married. He graduated from high school at Medicine Lodge, Kansas, and enlisted in the Regular Army, 16 September 1936. He attended Officer Candidate School in 1943 and was commissioned a Second Lieutenant, Air Corps, 28 July 1943, being subsequently promoted to First Lieutenant, 10 April 1944 and to Captain, 5 September 1945. He served on Guam from 27 January to 17 November 1945. His efficiency reports show numerical ratings of 5.5 and 5.4. No evidence of previous court-martial convictions or civilian criminal record is shown.

6. By a continued course of conduct, culminating in the present trial by general court-martial, accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. R/T
2. Form of action

(GCMO 246 , 11 July 1947).

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

JAGN-CM 322156

U N I T E D S T A T E S	)	HEADQUARTERS FORT EUSTIS
	)	
v.	)	Trial by G.C.M., convened at Fort Eustis, Virginia, 21 April 1947. Dishonorable discharge and confinement for five and one-half ($5\frac{1}{2}$) years. Federal Reformatory.
Private JAMES R. BOUGHTON (42225067), 9224 Technical Service Unit-Transportation Corps, Receiving Detachment Section 1.	)	

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 1: In that Private James R. Boughton, 9224 Technical Service Unit, Transportation Corps, Receiving Detachment Section 1, Fort Eustis, Virginia, having been duly placed in confinement in post stockade, Fort Eustis, Virginia, on or about 17 May 1946, did, at Fort Eustis, Virginia, on or about 7 August 1946, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private James R. Boughton, 9224 Technical Service Unit, Transportation Corps, Receiving Detachment Section 1, Fort Eustis, Virginia, having been duly placed in confinement in post stockade, Fort Eustis, Virginia, on or about 8 August 1946, did, at Fort Eustis, Virginia, on or

about 18 August 1946, escape from said confinement before he was set at liberty by proper authority.

Specification 3: In that Private James R. Boughton, 9224 Technical Service Unit, Transportation Corps, Receiving Detachment Section 1, Fort Eustis, Virginia, having been duly placed in confinement in post stockade, Fort Eustis, Virginia, on or about 26 August 1946, did, at Fort Eustis, Virginia, on or about 4 September 1946, escape from said confinement before he was set at liberty by proper authority.

Specification 4: In that Private James R. Boughton, 9224 Technical Service Unit, Transportation Corps, Receiving Detachment Section 1, Fort Eustis, Virginia, having been duly placed in confinement in post stockade, Fort Eustis, Virginia, on or about 8 September 1946, did, at Fort Eustis, Virginia, on or about 14 September 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 James R. Boughton, 9224 Technical Service Unit, Transportation Corps, Receiving Detachment Section 1, Fort Eustis, Virginia, did, at Fort Eustis, Virginia, on or about 14 September 1946 desert the service of the United States and did remain absent in desertion until he surrendered himself at St. Louis, Missouri on or about 8 March 1947.

Accused pleaded guilty to all Specifications of Charge I and Charge I; as to the Specification of Charge II, guilty except for the words "desert" and "in desertion," substituting therefor respectively the words "absent himself without leave from" and "without leave," to the excepted words not guilty, to the substituted words, guilty; and as to Charge II, not guilty, but guilty of a violation of the 61st Article of War. He was found guilty of all Charges and Specifications and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five and one-half years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action 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 for consideration

here is the legal sufficiency of the record of trial to support the sentence.

4. The only evidence adduced by the prosecution was documentary. It clearly appears therefrom that accused escaped from confinement on each of the four occasions as alleged in the four Specifications of Charge I. It is equally clear from such evidence that the absence in desertion alleged in the Specification of Charge II had its inception in the escape alleged in Specification 4 of Charge I. These two offenses as alleged are aspects of the same act or transaction and punishment is limited to the maximum prescribed for the desertion which, in this case, is the most serious aspect thereof. CM 313544, Carson, V Bull JAG, 202.

The Table of Maximum Punishments (par. 104c, MCM, 1928), prescribes as the maximum punishment for an escape from confinement dishonorable discharge, total forfeitures and confinement at hard labor for one year. It likewise prescribes as the maximum punishment for desertion terminated by surrender after absence of more than sixty days, dishonorable discharge, total forfeitures and confinement for one and one-half years.

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 that accused be dishonorably discharged the service, forfeit all pay and allowances due or to become due, and be confined at hard labor for four and one-half years.

Edward D. Johnson, Judge Advocate.

Hugh T. Brack, Judge Advocate.

Francis H. Fuller, Judge Advocate.

(70)

JUL 3 1947

JAGN-CM 322156 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Fort Eustis, Virginia

1. In the case of Private James R. Boughton (42225067), 9224 Technical Service Unit-Transportation Corps, Receiving Detachment Section 1, 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, total forfeitures and confinement at hard labor for four and one-half years. Upon taking such action you will have authority to order the execution of the sentence.

2. Although confinement in a penitentiary is authorized for wartime desertion, it is contrary to War Department policy to confine a deserter in a penitentiary, Federal reformatory or correctional institution. It is recommended that the Branch United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

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 322156).

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.

JAGN-CM 322167

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Bamberg, Germany, 31 January 1947, 3 and 13 February 1947. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Private ODIS JERNIGAN (34292266), 971st Quartermaster Service Company.	)	

HOLDING BY THE BOARD OF REVIEW
JOHNSON, BRACK 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 96th Article of War.

Specification 1: In that Private Odis Jernigan, alias 'Jannie Deutschland,' formerly 971st Quartermaster Service Company, did, at Bamberg, Germany, on or about 25 May 1945, feloniously have carnal knowledge of Margarete Dietrich, also known as 'Gretel' Dietrich, a German national, under the age of 16 years.

Specification 2: (Nolle prosequi).

Specification 4: (Nolle prosequi).

CHARGE II: Violation of the 58th Article of War.(Nolle Prosequi).

Specification: (Nolle prosequi).

Accused pleaded not guilty to all Charges and Specifications. Specifications 2 and 4 of Charge I, the Specification of Charge II, and

Charge II were nolle prossed by direction of the appointing authority during the trial. Accused was found guilty of Specification 1 of Charge I and of Charge I 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 thirty years. The reviewing authority approved only so much of the sentence as imposes dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings. The only question requiring discussion is the legal sufficiency of the record to support the sentence.

4. Considering Charge I and its Specification in the light of the evidence contained in the record of trial it appears that accused was found guilty of feloniously having carnal knowledge of a 13-year-old German female, at the time and place alleged, constituting conduct of a nature to bring discredit upon the military service in violation of Article of War 96. That article provides that such a violation shall be punishable "at the discretion" of the court, but such discretionary punishment is limited by that portion of Article of War 45 which provides:

> "Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe * * *."

By Executive Order, published in paragraph 104c of the Manual for Courts-Martial, 1928, and as hereinafter set out in pertinent part, the President implemented Article of War 45 as follows:

> "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by custom of the service" (Emphasis supplied).

The offense of which accused has been found guilty is not specifically listed in the Table of Maximum Punishments above referred to, nor is it an offense lesser included within or closely related to any offense which is there listed. It therefore becomes necessary to determine whether there exists an authorized statute, within the purview of paragraph 104c, MCM, 1928, which prescribes a maximum punishment for the offense in

question and if so, whether such statute is applicable under the circumstances of this case.

In studying this provision of the Manual it is interesting to note that prior to the promulgation of the Presidential Executive Order of 15 December 1916 the comparable phraseology of such orders, as reproduced in Manuals for Courts-Martial, read:

> "Offenses not herein provided for remain punishable as authorized by the Articles of War and the custom of the service" (Emphasis supplied).

The words "statute or" were substituted for the words "the Articles of War and" by the Executive Order of 15 December 1916. A search of Departmental files fails to directly disclose the intendment of the change but it may be significant that the then Secretary of War, in his letter transmitting the proposed draft of the Executive Order to President Wilson for his signature stated:

> "For civil offenses of which courts-martial have concurrent jurisdiction with civil courts, the limits of punishment prescribed in the Federal Criminal Code are in no case exceeded" (Emphasis supplied).

Such a statement may certainly be said to lend strength to an interpretation of the word "statute" as including at least the provisions of the Federal Criminal Code of general application.

Past holdings by Boards of Review, in which references to this problem have been made, have not been uniform in their interpretation of the meaning of the word "statute" as it so appears in paragraph 104c of the Manual (See 402 (14) Dig Ops JAG, 1912-40; CM 162435, Huston (1924); CM 187278, Wright (1929); CM 188606, Paparis, 1 BR 129; CM 199369, Davis, 4 BR 42; CM 210762, Valeroso, 9 BR 346-348; CM 212056, Smith, 10 BR 12; CM 212412, King, 10 BR 235; CM 212505, Tipton, 10 BR 246-248; CM 218818, Artibee, et al, 12 BR 155). Among such holdings may be found instances where state statutes, territorial statutes, the District of Columbia Code, and the United States Code have been respectively held applicable in determining maximum punishment. But in no case have we found it held that the word "statute" does not include a section of the United States Code of general application or that an applicable section of the United States Code is not controlling.

Thus the rule appears to be clearly established that in fixing the legal maximum punishment applicable to any certain offense, regardless of where committed, recourse must first be had to the Table of Maximum Punishments (par. 104c, MCM, 1928) and if such offense is not there listed, and is not included within an offense there listed, or is not closely related to either, then, if the offense is denounced by a section of the United States Code of general application, the maximum penalty prescribed by the United States Code for that offense must control as the will of the

President expressed under authority of Article of War 45. It being unnecessary to the holding in this case, the Board does not here undertake to determine the proper measure of maximum punishment to be applied in cases where the offense charged is not denounced in specific terms by some applicable section of the United States Code.

Section 458 of Title 18, United States Code, provides:

> "* * * Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for the first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years. * * *"

Applying the rule last stated above the only question remaining to be answered is whether Section 458, above quoted, is a statute of such general application as to bring it within the operation of the rule.

Here again the prior holdings of Boards of Review are not in accord. Considerable confusion has arisen from failure to clearly distinguish the use of the words "ganeral application" as they appear in Article of War 42, as they have been used in defining the word "crimes" as it appears in Article of War 96, and as they are used in stating the rule as to maximum punishment as hereinabove set out.

At the outset it should be noted that these words "of general application" are not taken from any controlling Article of War, statute, or Executive Order. We are still, as a matter of fact, seeking only to determine the true meaning of the word "statute" as it appears in paragraph 104c of the Manual, and as it may thus be made applicable to this case.

The only limitation upon the enforcement of Section 458 of the Code is that contained in Section 451, Title 18, United States Code, which latter section, by its express terms, applies equally to "crimes and offenses defined in Sections 451-468 of" Title 18 of that Code. However, a study of the provisions of Section 451 leads us to the conclusion that Congress, by its passage, sought only to define rather than to limit, since the limitations found therein may, for the most part at least, be found within the Constitution of the United States. Certainly it may be said of all pertinent sections of the Code, including Section 458, coming within the purview of Section 451, that they are not, in the usually accepted sense of the terms, special, local, or private laws (See Crawford's Statutory Construction, Chap. VIII). We do not contend that section 458 has a

universal application, but we are of the opinion that it is of such a general application as to bring it within the meaning of the word "statute" as contained in paragraph 104c of the Manual (CM 280154, Mullaney, 8 BR (ETO) 254-255). It is not necessary to this holding and we do not here attempt to determine whether section 458 may be used as the basis for penitentiary confinement under Article of War 42.

It clearly appears from the record of trial (R. 43) that the court, in determining the sentence, applied as the maximum limit of punishment section 22-2801 of the District of Columbia Code, which provides in pertinent part:

> "Whoever * * * carnally knows and abuses a female child under sixteen years of age, shall be inprisoned for not more than thirty years * * *."

Applying the rule respecting maximum punishment, as contained in paragraph 104c of the Manual and as hereinabove discussed, it becomes obvious that in this case, since there is an applicable section of the United States Code (18 USC 458), that United States Code section must control in the determination of the maximum punishment which may be lawfully adjudged against accused for the commission of the offense of which he has been found guilty.

5. There remains to be established the authority of the reviewing authority to designate a United States penitentiary as the place of confinement. Such authority stems from the following pertinent portion of Article of War 42:

> "* * * no person shall * * * be punished by confinement in a penitentiary unless an act or omission of which he is 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 United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia * * *."

Section 22-2801 of the District of Columbia Code provides in pertinent part:

> "Whoever * * * carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years * * *."

Such provision must be read in conjunction with section 24-401 of the same Code, which provides in pertinent part:

"* * * Where the sentence is imprisonment for more than one year it shall be in the penitentiary * * *."

Since these provisions of the District of Columbia Code clearly furnish the authority for penitentiary confinement in this case it will not be necessary, and we do not here seek, to determine whether section 458 of Title 18 of the United States Code would be equally applicable.

6. 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 fifteen years in a penitentiary.

Edward P. Johnson, Judge Advocate.

Joseph T. Brock, Judge Advocate.

Philip A. Smith, Judge Advocate.

JAGN - CM 322167 1st Ind

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 Odis Jernigan (34292266), 971st Quartermaster Service 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 fifteen 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 322167).

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

1 Incl
Record of trial

Sec 311

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

10 JUL 1947

JAGV CM 322185

UNITED STATES v. Technician Fifth Grade WILLIAM P. WOHLGEMUTH (39418710), Company H, 26th Infantry.	HEADQUARTERS FIRST UNITED STATES INFANTRY DIVISION Trial by G.C.M., convened at Munich, Germany, 22 March 1947. Dishonorable discharge and confinement for two (2) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Technician Fifth Grade William P. Wohlgemuth, Company H, 26th Infantry, did at Augsburg, Germany, on or about 11 January 1947, wrongfully and feloniously commit an assault upon Maria Mederer by making indecent advances toward her, grasping her on the arm and about the body, pushing her against a wall, lying on her with his body, and striking her on the face and other parts of her body with his hands and fists.

Specification 2: In that Technician Fifth Grade William P. Wohlgemuth, Company H, 26th Infantry, did, at Garmisch, Germany, on or about 26 January 1947, wrongfully take and use without the consent of the owner, a motor vehicle, to wit, a one quarter ton reconnaissance truck (jeep) of the value of more than $50.00, property of Staff Sergeant Paul H. Brickell.

Specification 3: (Finding of not guilty).

The accused pleaded not guilty to all Specifications and the Charge and was found guilty of Specifications 1 and 2 of the Charge, not guilty of Specification 3 of the Charge, and guilty of the Charge. No evidence

of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of two years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration in the present case concerns the legality of designating a Federal Reformatory as the place of confinement.

4. It is well established that a Federal correctional institution or reformatory may not be designated as the place of confinement except in cases where confinement in a penitentiary is authorized by law. (CM 220093, Unckel; CM 222173, Costa; CM 226611, Smith; CM 322753, Samms).

5. 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 United States, of general application within the continental United States, excepting Section 289, Penal Code of the United States, 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.

With respect to Specification 1 of the Charge involving an indecent assault upon Maria Mederer in violation of the 96th Article of War, it has been held by the Board of Review in CM 314071, Griggs, (1946), 5 Bull. JAG 277:

> "Penitentiary confinement is not authorized, [for aggravated assault in violation of Article of War 96] since aggravated or indecent assaults are not expressly prescribed by any statute of the United States or by the law of the District of Columbia and therefore are not punishable by confinement in a penitentiary."

With respect to Specification 2 of the Charge, involving the wrongful taking and using of a motor vehicle in violation of Article of War 96, it is not improbable that the finding of guilty of this Specification was used as the basis for the erroneous designation of a Federal reformatory as the place of confinement, same being 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 a basis for penitentiary

confinement, or confinement in a Federal reformatory or correctional institution, it must affirmatively appear that the offense alleged in the Specification of which the accused is found guilty is in all essential respects the same offense as that made punishable by penitentiary confinement by the Code.

Section 22-2204 [6:62] of the District of Columbia Code, 1940 Edition, entitled "Unauthorized use of vehicles" provides 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. (Feb. 3, 1913, 37 Stat. 656, ch. 23, § 826b.)"

From the statute above set forth, it will be noted that there are three essential elements to the offense denounced, viz: (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." (CM 321542, McCullough; CM 322753, Samms; CM 322954, Swain).

Specification 2 of the Charge, above quoted, fails to allege the third element set forth in the preceding paragraph and found in Section 22-2204 of the District of Columbia Code, and for that reason the finding of guilty of that Specification cannot be used as the basis for confinement in a Federal reformatory in this case.

From the preceding paragraphs and the legal authorities therein cited, it appears that neither of the Specifications of which the accused has been found guilty provides a basis for confinement in a penitentiary, Federal reformatory, or correctional institution.

6. 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 two years at a place other than a penitentiary, Federal reformatory or correctional institution.

Wilmot T. Baughn, Judge Advocate.

John T. O'Brien, Judge Advocate.

Morgan. Springston, Judge Advocate.

JAGV CM 322185 1st Ind

WD, JAGO, Washington 25, D.C. AUG 4 1945

TO: The Commanding General, First United States Infantry Division, APO 1, c/o Postmaster, New York, New York.

1. In the case of Technician Fifth Grade William P. Wohlgemuth (39418710), Company H, 26th Infantry, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon the 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 322185)

HQS. 1st DIVISION
RECEIVED
AUG 1 2
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HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

1 Incl
Record of Trial

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D.C.

JAGV CM 322220

20 November 1947

U N I T E D S T A T E S	)	FORT JACKSON, SOUTH CAROLINA
	)	
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, 28 April 1947. Dishonorable discharge and confinement for two and one half (2½) years. United States Disciplinary Barracks.
	)	
Sergeant JAMES Q. PRENTISS (35616264), Company B, 103rd Training Battalion, 5th Provisional Training Regiment.	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, SPRINGSTON and LANNING, 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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Sergeant James Q. Prentiss, Company "B", 103rd Training Battalion, 5th Provisional Training Regiment, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 23 January 1947, feloniously embezzle by fraudulently converting to his own use one (1) Chronograph type watch, of the value of about seventy dollars ($70.00), the property of Private Atlas M. Jones, entrusted to him by the said Private Atlas M. Jones, for repairs.

Specification 2: In that Sergeant James Q. Prentiss, Company "B", 103rd Training Battalion, 5th Provisional Training Regiment, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 23 January 1947, feloniously embezzle by fraudulently converting to his own use Three Dollars and fifty cents ($3.50), lawful money of the United States, property of Private Atlas M. Jones, entrusted to him by the said Private Atlas M. Jones, for payment of repairs to Private Jones' Chronograph type watch.

Specification 3: In that Sergeant James Q. Prentiss, Company "B", 103rd Training Battalion, 5th Provisional Training Regiment, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 23 January 1947, feloniously embezzle

by fraudulently converting to his own use one (1) Seeland wrist watch of the value of about Thirty Dollars ($30.00), the property of Private Jesse L. Davis, entrusted to him by the said Private Jesse L. Davis, for repairs.

Specification 4: In that Sergeant James Q. Prentiss, Company "B", 103rd Training Battalion, 5th Provisional Training Regiment, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 23 January 1947, feloniously embezzle by fraudulently converting to his own use Seven Dollars and fifty cents ($7.50), lawful money of the United States, property of Private Jesse L. Davis, entrusted to him by the said Private Jesse L. Davis, for payment of repairs to Private Davis' Seeland wrist watch.

Specification 5: (Nolle Prosequi).

Specification 6: (Nolle Prosequi).

Specification 7: In that Sergeant James Q. Prentiss, Company "B", 103rd Training Battalion, 5th Provisional Training Regiment, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 5 April 1947, feloniously embezzle by fraudulently converting to his own use Twenty Dollars ($20.00), lawful money of the United States, the property of Captain Peter A. Dul, entrusted to him by the said Captain Dul for the purpose of paying for the cost of repairs to one (1) Chronograph type watch, one (1) Seeland wrist watch, and one (1) Bulova wrist watch entrusted to Sergeant Prentiss by Private Atlas M. Jones, Private Jesse L. Davis and Private Charles E. Pearson, respectively.

The accused pleaded not guilty to, and was found guilty of, the Charge and all 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 may direct, for five years. The reviewing authority approved only so much of the findings of guilty of Specifications 3 and 5 with regard to value of the two watches described, as involved a finding that each was "of some value less than Twenty Dollars;" 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 two and one-half (2½) years; designated the Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, 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 for the Prosecution. Privates Atlas M. Jones and Jesse L. Davis, both trainee members of the organization to which the accused belonged, gave the latter their watches about 17 and 23 January

1947 for the purpose of having same repaired in town (R 8-10, 11-13). Accused delivered the watches to Marylee Melton, a colored clerk employed at the Fort Jackson, South Carolina, Post Exchange, who in turn allegedly left these two specific watches, along with another watch, at the establishment of Mr. Albert Roof, Watchmaker, in Columbia, South Carolina. She received a separate claim check for each of the three watches which she left at Mr. Roof's place of business, and these she delivered to the accused. (R. 14,15; Pros Ex B) The latter stated that he showed the claim checks to the soldiers concerned who instructed him to keep them. Thereafter, accused put the claim checks in the pocket of his E.T.O. jacket from where they were subsequently misplaced (R 22; Pros Ex B).

In the latter part of January, Privates Jones and Davis gave accused money with which he was to obtain their watches from the watchmaker (R. 8, 12,22; Pros Ex B). Private Jones testified that the amount he gave the accused for this purpose was three dollars and one-half ($3.50) and Private Davis testified that he similarly gave accused the sum of seven dollars and fifty cents ($7.50) but accused stated he received five dollars and fifty cents ($5.50) from Private Jones and three dollars and fifty cents ($3.50) from Private Davis to defray the cost of repairs (R. 8,12,22; Pros Ex B).

On or about 4 April 1947 Privates Jones and Davis and another soldier complained to Captain Peter A. Dul, their organization commander, that they had received neither their watches nor the money advanced for repairs from the accused. Captain Dul thereupon asked accused why these soldiers had not received their watches and the accused replied that he had lost the tickets but thought he could obtain them from the jeweler by making proper identification. The accused added, however, that someone had broken into his room and stolen his wallet containing thirty-two dollars (R. 20,22; Pros Ex B). Later that day, the accused informed Captain Dul that he had been unable to borrow the money to redeem the watches but had the three soldiers dressed ready to accompany him to town to identify their watches. Captain Dul then gave the accused a twenty dollar bill to use for redeeming the watches and instructed him to take the three soldiers involved to town before the following Monday to obtain their respective watches (R. 20,22; Pros Ex B). Upon meeting the accused in the mess hall on Sunday morning, Captain Dul asked him if he had obtained the watches for the men whereupon the accused told him "it was all right." (R. 20,21) When Captain Dul learned on Monday morning that the men had not received their watches, he asked the accused the reason therefor and was informed by the accused that he had seen the jeweler and the watches were not ready. When Captain Dul demanded return of his twenty dollars ($20.00) the accused stated that he had used part of it to reclaim the watch of a fourth soldier and, as to the remainder, "he had found it necessary to spend the money that weekend." (R. 22)

4. With reference to Specifications 1 and 3 of the Charge, the evidence establishes and the accused admits that the watches of both Private Jones and Davis were entrusted to him for the purpose of having

them repaired (R. 22,23; Pros Ex B). It is equally undisputed that the watches were next given to Marylee Melton, a colored Post Exchange employee, who was to take them to a watchmaker in Columbia, South Carolina, for the repairs, and that Marylee Melton subsequently returned to the accused the claim checks from the establishment of Mr. Albert Roof which were purportedly the receipts for the watches of Privates Jones and Davis. It is also evident that demands were made upon the accused by these trainees for the return of their watches, and that the watches were never returned to them (R. 9,10,12,13,22,23; Pros Ex B). From this point on, neither the evidence adduced by the prosecution or the confession of the accused establishes the latter's responsibility for the defalcation of either watch. In addition to the uncertainty in the record as to whether Marylee Melton actually left the chromometer type watch of Private Davis at Watchmaker Roof's place of business, or simply had an estimate of the repair costs made and took the watch with her (R. 18,19,22,23), it is not shown whether the accused or some other person actually obtained the watches of Privates Davis and Jones from the watchmaker. The accused insists that he placed all of the claim checks, which were not individually identified, in his E.T.O. jacket from where they were subsequently misplaced (R. 22,23; Pros Ex B), and Mr. Roof testified for the prosecution that the accused called for the watches after some unidentified person had already obtained the watches by presenting the claim checks (R. 17,18). According to Watchmaker Roof, the accused had been in his establishment a number of times, without claim checks, asking about the watches which were not listed in his name. At the time of what presumably was the accused's last visit, it appeared that the watches had been reclaimed some ten days earlier by an unidentified person in possession of the proper claim checks. The procedure in Mr. Roof's place of business permitted reclamation of watches left for repairs either by presentation of the establishment's receipts therefor or by giving the owners' name and identifying the watch.

In the present case it is not the function of the Board of Review to weigh the evidence or to determine controverted questions of fact (AW 50½), but since the findings of guilty of Specifications 1 and 3 insofar as concerns

> (1) the fact of conversion or appropriation to accused's own use and
>
> (2) facts and circumstances showing that such conversion or misappropriation was with fraudulent intent,

rest upon inferences of fact, it is the duty of the Board to determine whether there is in the evidence a reasonable basis for those inferences (CM 212505, Tipton; CM 228831, Wiggins; CM 238972, Lowry; CM 322500, Barnes and Tarlton (1947). Considering the record in its entirety, the circumstances do not show that the accused reclaimed or received either the watch of Private Jones or Private Davis from the watch repair shop.

To the contrary, it appears from the testimony of Mr. Roof, the watchmaker, that the watches were delivered to some unidentified person, other than the accused, and that the latter called to reclaim the watches some ten days after their actual reclamation. Accordingly, there is a failure of proof that the accused converted or appropriated either the watch of Private Jones or Private Davis, as alleged in Specifications 1 and 3 of the Charge. It follows, from the absence of competent evidence establishing the physical fact of conversion or misappropriation of either watch, that there is obviously no proof of the requisite fraudulent intent.

5. The only question requiring consideration as to the legal sufficiency of the record to support Specifications 2, 4 and 7 of the Charge is the effect of the presence of Major Carlton Preer, Jr., as a member of the trial court, the latter being an officer who forwarded the charges recommending trial by general court-martial.

Major Preer, as Commanding Officer of the 3431 Area Service Unit, had, by third indorsement to the file, dated 21 April 1947, signed a recommendation that the accused be tried by general court-martial. As one of the eight members of the trial court, Major Preer did not disclose that fact at the proceedings and made no response when the prosecution asked if any member of the court was aware of any facts which he believed was to be a ground of challenge by either the prosecution or the defense (R. 3).

With respect to procedure similar to that followed in the instant case, where no disclosure of the fact of forwarding was made, the Board of Review stated in CM 232864, Carso (1943):

> "It has been held that the presence on the court of an officer who has forwarded the charges recommending trial by general court-martial is not ipso facto prejudicial error (CM 232229, Parks, and cases there cited) and that the test is whether, looking to the record as a whole, the substantial rights of accused have been prejudiced."

The Board of Review in CM 314876, Rollinson, in following the Carso case and other precedents, has recently said:

> "The indorsement forwarding the charges may be considered as a routine expression of an opinion that the charges were of a character proper for trial by a general court-martial which does not amount to an opinion as to the guilt of the accused (CM 167584, Sullivan; CM 219582, Braden). The presence on a court of an officer who has forwarded the charges recommending trial by general court-martial is not ipso facto prejudicial error. The test is whether, looking at the record as a whole, the substantial rights of the accused have been prejudiced (CM 232864, Carso)."

From the authorities above quoted, as well as from the earliest decisions on the point in question including CM 187576, Lanfair, 1 BR 59; and CM 187781, Starks, Sayles, 1 BR 79, it is clear that it is improper for an officer who forwards the charges to sit as a member of the court without a disclosure of that fact but it is not ipso facto prejudicial error, and the test is whether or not it appears from the record that the substantial rights of the accused have been injuriously affected within the meaning of Article of War 37 by the presence of such officer on the court. (CM 184519, Wright; CM 157566, Phillips; CM 155523, Summers; CM 232229, Parks, and cases there cited; CM 187576, Lanfair; CM 187781, Starks, Sayles; CM 232864, Carso; CM 314876, Rollinson).

Application of the above legal principal to the instant case requires consideration of the evidence adduced in support of these three remaining specifications:

a. Specification 2 of the Charge. The evidence establishes and the accused admits (R. 22,23; Pros Ex B), both the fact of entrustment of a sum of money to the accused by Private Jones for the purpose of paying for watch repairs, and the fact of non-return of the money to its rightful owner. Although there is some discrepancy as to the amount, since Private Jones testified the sum was three dollars and fifty cents ($3.50) and the accused stated it to be five dollars and fifty cents ($5.50), the variance is not material as to either the defalcation or to the sentence. Unchallenged in the record also stands the fact that Private Jones had demanded return of both his watch and his money from the accused, had not authorized accused to keep either, but had received neither from him (R. 9,10). It is also clear and admitted that on 5 April 1947 the accused did not have the money previously entrusted to him for watch repairs, for on that date he asked Captain Peter A. Dul "* * * if there would be any possible way to get enough money to get the watches." (R. 20,22,23; Pros Ex B).

b. Specification 4 of the Charge. It is both established and admitted that Private Davis entrusted to the accused a sum of money for the express and limited purpose of defraying the cost of repairs on his watch. Notwithstanding a discrepancy as to the amount, viz: Private Davis stated it to be seven dollars and fifty cents ($7.50), and the accused stated it to be three dollars and fifty cents ($3.50), there is no dispute as to the fact of entrustment of a sum of money for the purpose indicated. Similarly there is no conflict with respect to the fact that the money was never returned to Private Davis and that the accused did not have the money on 5 April 1947 when he found it necessary to obtain funds from his organization commander for the purpose of paying for the repairs on the watch of Private Davis and others (R. 12,20,22,23; Pros. Ex B). Private Davis' testimony that he had not authorized the accused to keep the money, was likewise unchallenged (R. 12).

c. Specification 7 of the Charge. The evidence of record, including the confession of the accused, clearly shows that Captain Peter A. Dul, the accused's commanding officer, entrusted to him on either 4 or 5 April 1947, the sum of twenty dollars ($20.00) for the sole and limited purpose of paying for repairs on the watches of Privates Jones and Davis, and another soldier, prior to the following Monday, April 7, 1947. On Sunday, April 6, 1947, Captain Dul asked accused if he had obtained the watches for the men, whereupon the accused told him "* * * it was all right." Instead of paying for the watch repairs as directed, the accused had paid for repairs on the watch of a fourth soldier with eight dollars and twenty-five cents ($8.25) of the twenty dollars ($20.00) and spent the remainder of the sum for his own purposes, because he was in a "pinch" and had found it necessary to do so (R. 20-23; Pros Ex B). When demand for return of the money was made of accused by Captain Dul on 7 April 1947, the accused admitted his defalcation (R. 21).

6. With reference to Specifications 2, 4 and 7, the evidence of record presents what is practically tantamount to an agreed statement of facts. The court was confronted not only with clear and convincing testimony, unchallenged and undisputed, except for an immaterial variance as to the amounts involved in Specifications 2 and 4 (CM 253207, Elliott, 34 BR 293,295); but it additionally had before it the voluntary confession of the accused. As to these three Specifications, it remained only for the court to determine whether or not the admitted facts amounted in law to the offenses of embezzlement, as charged. While Major Preer's presence as a member of the trial court might conceivably have had a direct bearing insofar as concerns a determination of the factual issues, it could neither reasonably nor logically have any relationship to the application of legal principles to a conceded factual situation. The latter could imaginably have been affected only by the existence of a personal animosity between the accused and that member, and to accept a gross conjecture of this character would require indulgence in two wholly unacceptable assumptions, viz., that the member violated his oath and that the accused himself failed to apprise his counsel of their animosity. In all probability Major Preer neither knew the accused nor remembered having forwarded the charges.

7. The conclusion of accused's guilt of Specifications 2, 4 and 7 is inescapable, and could in no manner have been affected by the participation of Major Preer as a member of the court. In connection with the three Specifications last mentioned, the offense of embezzlement charged in each is defined in para 149h of the Manual for Courts-Martial, 1928, as

> "* * * the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268)."

It has further been stated in connection with this offense:

"The means by which fraudulent conversion is accomplished are immaterial. It may be effected by any exercise of the right of ownership inconsistent with the owner's rights, and with the nature and purposes of the trust' (29 C.J.S. 683; People v. Beale 267 N.Y.S. 575, certiorari denied 54 S.Ct. 717; Commonwealth v. Barnes (Pa.), 162 A. 670)." (CM 276435, Meyer, 48 BR 331) (Underscoring supplied)

"'* * * There must be a criminal intent, but this intent must, of necessity, be gathered from the acts of the agent and the circumstances surrounding the particular case, rather than from his express declarations, and if the agent knowingly appropriates money belonging to his principal to his own use, even though at the time he does so he intends to restore it, it is nevertheless embezzlement within the spirit as well as the letter of the law, for when one knowingly appropriates money belonging to another to his own private use, the law presumes a criminal intent.'" (National Life & Accident Ins. Co. v. Gibson 101 S.W. 895; CM 276435, Meyer, supra). (Underscoring supplied).

With respect to each of the three above Specifications, it is clear that accused was trustee of the funds for a specific purpose, and that these funds were not used for that purpose. Equally clear is the fact that these sums were not returned to their rightful owners notwithstanding repeated demands therefor. While in "* * * the absence of a statute to the contrary, demand and refusal to pay are not necessary elements of the offense of embezzlement" (Fullerton v. Government of the Canal Zone, 8 F.2d 698; CM 276435, Meyer, supra), such are additional factors in each case indicating guilt. This is especially true when an accused admits inability to make restitution and gives inconsistent excuses therefor, or, in an extreme case such as Specification 7, advances a reason which in itself amounts to an admitted defalcation. The fraudulent course of conduct concerning the money entrusted to the accused by his commanding officer for a limited and clearly defined purpose, might well be sufficient of itself to justify the court in inferring a similar intent with respect to the funds advanced, also for a specific purpose by the two inexperienced trainees, Privates Jones and Davis. Indeed, if the accused would admittedly appropriate to his own use money belonging to a military superior, there can remain no serious doubt but that he would similarly and more readily embezzle the funds of his subordinates.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors other than those enumerated above injuriously affecting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings

of guilty of Specifications 1 and 3 of the Charge, legally sufficient to support the findings of guilty of Specifications 2, 4 and 7 of the Charge, and the Charge, and 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 one and one-half (1½) years.

Wilmot T. Baughn, Judge Advocate

George S. Springston, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGV - CM 322220 1st Ind DEC 15 1947

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

TO: Commanding General, Fort Jackson, South Carolina.

1. In the case of Sergeant James Q. Prentiss (35616264), Company B, 103rd Training Battalion, 5th Provisional Training Regiment, Fort Jackson, South Carolina, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Specifications 1 and 3 of the Charge be disapproved, 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 and one-half (1½) years. Upon taking such action you will have authority to order execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 322220)

1 Incl
Record of Trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(93)

17 JUL 1947

JAGV CM 322230

UNITED STATES v. Private ERNEST J. COOK (37669774), Company 5, Army Ground Service Forces Reception Station, Service Command Unit 1467, Fort Oglethorpe, Georgia.	SECOND AIR FORCE Trial by G.C.M., convened at Offutt Field, Fort Crook, Nebraska, 17 April 1947. Dishonorable discharge.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 69th Article of War.

Specification: In that Private Ernest J. Cook, Company 5, Army Ground Service Forces Reception Station, Service Command Unit 1467, Fort Oglethorpe, Georgia, having been duly placed in confinement in Guardhouse, Fort Oglethorpe, Georgia, on or about 7 February 1946, did, at Fort Oglethorpe, Georgia, on or about 14 April 1946, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction for absence without leave for over two and one-half months was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence, but remitted the unexecuted portion of the confinement at hard labor.

3. The evidence for the prosecution consists of an extract copy of the guard report of the Post Guard House, Fort Oglethorpe, Georgia, showing the accused in confinement on 7 February 1946; a second extract copy of the guard report of the same station showing the accused from confinement to escape on 14 April 1946; and a third extract copy of a guard report of Offutt Field, Fort Crook, Nebraska, showing the accused subsequently confined on 10 December 1946 (R. 6, Pros. Ex. 1,2 and 3).

4. The evidence for the defense consists in the accused's testimony that at the time of his departure from Fort Oglethorpe he was a trusty; that he was quartered in the annex on the side of the guardhouse; and that he had the privileges of the whole base, beyond the fenced-in confines of the prisoner's compound (R. 9).

On cross-examination the Trial Judge Advocate asked the accused a question concerning his status as a prisoner, as follows:

> "As a matter of fact, at that time your record showed that you had six previous convictions by Court Martial, didn't it?"

In response the accused replied, "Yes, Sir" (R. 11). The defense counsel immediately objected to the question and answer on the ground that consideration could lawfully be given to previous convictions only after a finding of guilty, and that even after conviction the court could consider only those convictions which had occurred during the past year. To this objection the Trial Judge Advocate replied, as follows:

> "That is true, as far as it goes, but we have here a situation in which a witness has testified as to the fact that he was a trustee prisoner. We have no way of refuting it; no way of producing the Police and Prison Officer; just the bare statement of the accused that he was a trustee. <u>This line of cross-examination is intended to impeach the witness by showing the improbability of his statement that he was made a trustee, when he had a record of six previous convictions.</u>" (R. 12, Underscoring supplied)

Following the above statement, the court was closed and upon being opened the Law Member announced that the objection of the defense counsel was sustained, and that the members of the court were not to consider any statement made concerning previous convictions by Court Martial (R. 12).

5. The specification alleges that the accused was in confinement in the Guardhouse at Fort Oglethorpe, and that on or about 14 April 1946, he did ". . . escape from said confinement before he was set at liberty by proper authority."

"Confinement imports some physical restraint" and the offense of escape from confinement imports, "Any completed casting off of the restraint of confinement . . ." (MCM, 1928, par 139<u>a</u> and <u>b</u>). In CM 201493, <u>Smith</u>, it was held that an accused who left his post without authority after having been detailed to work outside of the guardhouse without an armed guard had not broken away from physical restraint, and could not lawfully, therefore, be guilty of an escape from confinement. It was also held in that case that a breach of parole is not a lesser included offense under a charge of escape from confinement.

The above authority placed upon the prosecution the burden of establishing that the accused cast off some physical restraint on the day of his unauthorized departure. All of the other elements of the alleged offense were clearly admitted by the accused. The evidence for the prosecution on this one vital point in controversy consists solely of the four words, "From conf to escape" recorded in the morning report of 14 April 1946. The officer who made that entry was not present as a witness, and his statement could not be analyzed under the test of cross-examination. Although there is no cause to doubt his integrity, there was no way to determine his understanding of the legal, as distinguished from the administrative, significance of the words recorded. There was no way to determine whether he regarded the maintenance of physical restraint as an essential element to the offense of an escape from confinement. Although the Manual for Courts-Martial makes such an entry prima facie evidence of the events recorded, the Manual does not free it from its obvious frailty (MCM 1928, par 117).

Opposed to the unanalyzed evidence above described, was the accused's testimony denying that he was under physical restraint on the day of his unauthorized departure, and asserting that he was a trusty at that time. In view of this state of the evidence it was obvious that the credibility of the accused was the most vital issue before the court. Because of that fact, simple rules of fairness required that the court be given an opportunity for an unprejudicial evaluation of the accused's testimony. The court was deprived of that opportunity. The Trial Judge Advocate not only asked the accused the highly unfair question concerning six previous convictions, but augmented that error by proclaiming that "This line of cross-examination /was/ intended to impeach the witness by showing the improbability of his statement that he was made a trustee, when he had a record of six previous convictions."

Although the court was instructed not to consider the statement concerning the accused's previous convictions, it promptly expressed its disbelief of his testimony by finding him guilty as charged. In the case of Maytag v. Cummins, 260 F. 75, the Court announced the correct rule concerning the erroneous consideration of inadmissible evidence, as follows:

> "The general rule is that if evidence has been erroneously admitted during the trial, the error of its admission is cured by its subsequent withdrawal before the close of the trial or by a clear peremptory instruction to the jury to disregard it . . .
>
> "But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression

upon the minds of the jury that its subsequent withdrawal or the instruction to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case, and a new trial should be granted." (To the same effect see Wharton's Criminal Evidence, Sec 265, and Wigmore on Evidence, 3rd Ed, Sec 19).

In the case of Shepard v. United States (290 U.S. 96, 54 S. ct 22), Mr. Justice Cardoza reminds us that "It is for ordinary minds, and not for psychoanalysts that our rules of evidence are framed. . . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. . . . These precepts of caution are a guide to judgment here."

In the similar case of Boyd v. United States (142 U.S. 450, 35 L.ed. 1077, 12 S.Ct 292), Mr. Justice Harlan, in considering the effect of the erroneous reception of evidence of previous crimes, made the statement, as follows:

"But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendant, in that regard, was not cured by anything contained in the Charge. . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged." (underlining supplied).

Whether the corrective instructions in the present case resulted in so freeing the minds of the court from their natural distrust of a soldier, who had a record of six previous convictions and who was described as unworthy of being a trustee, as to permit it fairly to evaluate such soldier's testimony may remain theoretically in doubt. There can be no doubt, however, that to expect compliance with such instruction is to call for a ". . . .feat beyond the compass of ordinary minds" (Shepard v. United States, supra). Moreover a trial in which the members of the court are asked to perform such a feat affecting the only factual issue in question is fatally infected by extraneous and unlawful considerations and runs ". . . afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law." (United States v. Hiatt, 141 F.2d 664)

The extent to which the inadmissible evidence in this case, and the Trial Judge Advocate's prejudicial statement were deliberated upon by the court is shown by the fact that the court was cleared and closed, and that upon its reopening the Law Member announced that the objection

of the defense was sustained (R. 12). It is hardly arguable that a matter so pointedly presented to the court affecting vitally the only controverted issue in the case, and so deliberatively considered by it, could be effectively disregarded.

6. For the reasons stated, and because of the peculiar facts of this case, the Board of Review holds that the record of trial is legally insufficient to sustain the finding and the sentence.

Wilmot T. Baughn, Judge Advocate.

John T. O'Brien, Judge Advocate.

George E. Springstow, Judge Advocate.

AUG 5 1947

JAGV CM 322230 1st Ind

WD, JAGO, Washington 25, D.C.

TO: The Commanding General, Second Air Force, Offutt Field, Fort Crook, Nebraska.

1. In the case of Private Ernest J. Cook (37669774), Company 5, Army Ground Service Forces, Reception Station, Service Command Unit 1467, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. 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 322230).

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

1 Incl
Record of trial

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

JAGK - CM 322254

15 JUL 1947

U N I T E D S T A T E S	)	CONTINENTAL BASE SECTION
V.	)	Trial by G.C.M., convened at Bad Nauheim, Germany, 9 April 1947. Dismissal and fine of $400.00.
Second Lieutenant THEODORE A. WESTON (0-2011687), Infantry.	)	

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, Second Lieutenant Theodore A. Weston, 388th Transportation Corps Truck Company, did, at or near Mannheim, Germany, on or about 21 March 1947, wrongfully and unlawfully, while Officer of the Day, have carnal knowledge of Kathe Holl, a woman not his wife, in the Ladies Rest Room of the 6th Transportation Corps Enlisted Men's Club.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to pay the United States a fine of four hundred dollars ($400.00). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

On the night of 20-21 March 1947 the accused, a member of the 388th Transportation Corps Truck Company, was officer of the day. Technical Sergeant James H. Francois, 3395th Transportation Corps Truck Company, was Provost Sergeant (R. 16). Both were members of the 6th Transportation

Corps Truck Battalion stationed at Kaiser-Wilhelm-Kaserne, Mannheim, Germany (R. 15, 28). Sometime during the night of 20-21 March 1947 and before 12:30 a.m., the accused and Sergeant Francois inspected the guard post and then went to inspect the enlisted men's club. The inspection of this club was part of the duty of the officer of the day. The club employed two German girls and it was his (Sergeant Francois) duty to see that no enlisted men remained in the club molesting the girls after closing time. They arrived at the club between 12:30 and 12:45 a.m. Sergeant Francois completed his inspection and left the accused in the club (R. 15-18).

Kathe Holl, a single woman worked for the enlisted men's club at Kaiser-Wilhelm-Kaserne. She saw the accused in the club during the evening of 20-21 March 1947, however he did not remain there until closing time. After finishing her work she went to the ladies' rest room to refresh herself. While in the rest room she removed her dress. The accused entered the rest room grabbed her sleeve, pressed her "on the wash bowl" and had sexual intercourse with her. They remained in the rest room about two hours and during this time the accused had sexual intercourse with her on two other occasions. While they were in the rest room Rosi Roder came into the room. About 5:00 a.m. she told Rosi Roder that accused had intercourse with her. About 8:30 a.m. she reported the incident to Lieutenant Warren (R. 6-10).

Rosi Roder worked at the enlisted men's club as a waitress. On the night of 20-21 March 1947 she saw the accused and Kathe Holl in the ladies' rest room at the club. Kathe Holl was dressed in her underclothing. The accused was fully dressed. She made three trips to the rest room at about one half hour intervals. The first time she went into the rest room Kathe Holl was standing. On her last trip to the rest room Kathe Holl was sitting on the floor. About 5:00 a.m. Kathe Holl told her that the accused had had intercourse with her three or four times. She heard Kathe Holl tell Lieutenant Warren's secretary that the accused had intercourse with her twenty times that night. Kathe Holl's general reputation for telling the truth was good (R. 11-13).

First Lieutenant Morton Rosenthal, Medical Detachment, 6th Transportation Corps examined Kathe Holl on or about 21 March 1947. She had eight or ten black and blue marks on both her arms "and on the inner aspect of her thighs, what I would call very superficial lacerations." He was unable to determine whether or not she had had sexual intercourse just prior to the examination because he did not have the necessary equipment to make the proper laboratory tests. At the time of the investigation her hyman was not intact (R. 13-15).

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

Master Sergeant John J. Lewis, 436 Quartermaster Supply Company, testified that he had known Kathe Holl since 21 March 1947. He "found on some occasions she didn't tell the truth. I can prove it by an accident that happened a couple of days ago." (R. 20)

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NAVY DEPARTMENT

Staff Sergeant Willie Brent, Provost Section, 6th Transportation Corps Battalion, testified that he had soldiered with accused since 1942 and that the accused's reputation was good (R. 21, 22).

By stipulation it was shown that accused enlisted in the Army in 1941. Before accepting his commission he was given an honorable discharge. He received the Bronze Star for gallentry in action. He landed in France on 7 November 1944 and is entitled to wear 5 battle stars on his ETO ribbon. He is entitled to wear the Belgian Croix de Guerre. The citation awarding the Bronze Star was received in evidence as a defense exhibit (R.22).

The accused was warned of his rights as a witness and elected to make an unsworn statement to the court. He stated that he went to the club with Sergeant Francois. They checked the club and as it was a large place they checked separate parts of the club. The check was completed at eleven thirty. He left the club immediately after Sergeant Francois and reported to the Provost Office. He then checked the guards in the Kaserne with Sergeant Francois. They completed this check about 1:30 a.m. and returned to the Provost Office. He inquired of the desk sergeant about calls and found that there were no calls to be answered. Sergeant Francois then said that he was going to his quarters. The accused informed the desk sergeant that he was going to the 388th Truck Company. On the 21st of March 1947 he did not have sexual intercourse with Kathe Holl (R. 24, 25).

5. Rebuttal evidence.

Technical Sergeant Francois testified in rebuttal that he checked the guard posts with accused prior to their check of the enlisted men's club. The check at the club was made after midnight. He left the club and went to the provost marshal's office. He did not see the accused at the provost marshal's office at this time (R. 25, 26).

Lieutenant Colonel Joseph J. Borchert, commanding officer of the accused testified that he had known the accused for six weeks and that his reputation was poor (R. 29).

Major Louis S. Leatham, 6th Transportation Corps Truck Battalion testified that he had known the accused for about eight months and that his reputation was "mediocre." On cross examination Major Leatham stated that by reputation he means the manner of performing military duties and "reputation as being trustworthy" (R. 30, 31).

6. It is a violation of Article of War 96 for a person subject to military law, to engage in sexual intercourse with a woman not his wife (CM 10446 Ward, 22 BR (ETO) 297, 303). The expression "carnal knowledge" used in the specification means "sexual intercourse" (CM 4119 Willis, 11 BR (ETO), 369, 380). The evidence amply establishes that on the night of 20-21 March 1947 the accused spent some two hours with Kathe Holl, an unmarried woman, in the ladies' rest room of an enlisted men's club and during this time he had sexual intercourse with her. The fact that the accused was the officer of the day aggravates his offense, it being his duty to prevent disorders and misconducts such as he committed.

COPY

7. War Department records show the accused to be 32-2/12 years of age, married and separated from his wife. He completed two years of high school. Prior to his entry into service he was a truck driver earning $25.00 per week. He was inducted into the service 16 October 1941 and became a staff sergeant. He received a Bronze Star Medal for heroic achievement in action against the enemy on 9 December 1944 near Aachen, Germany. On 23 March 1945 he was appointed and commissioned a temporary Second Lieutenant, Infantry Army of the United States. His efficiency reports for the year 1945 are superior and excellent.

8. 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. 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 Article of War 96.

Robert T. Gilbert, Judge Advocate

Carlos E. McAfee, Judge Advocate

ON LEAVE, Judge Advocate

JAGK - CM 322254 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 opinion of the Board of Review in the case of Second Lieutenant Theodore A. Weston (0-2011687), Infantry.

2. Upon trial by general court-martial this colored officer was found guilty of having carnal knowledge of Kathe Holl, an unmarried female, in the rest room of an enlisted men's club, and while on duty as officer of the day, 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 four hundred dollars ($400.00). 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 and the sentence and to warrant confirmation of the sentence.

On the night of 20-21 March 1947 the accused was officer of the day for his organization at Mannheim, Germany. His duties required him to inspect the enlisted men's club. He made an inspection about 12:30 a.m., which was after the club had closed for the night. Kathe Holl, a single women employed by the club, was in the ladies' rest room preparing for the night. The accused entered the rest room and remained about two hours with Miss Holl. During this time he committed three acts of sexual intercourse with her. She testified that she resisted and did not consent. A medical examination made the following day disclosed that Miss Holl had black and blue marks on her arms and superficial lacerations on her thighs.

4. War Department records show the accused to be 32-2/12 years of age, married, but separated from his wife. He was a truck driver prior to his entry into service. He was inducted into the service on 16 October 1941 and became a staff sergeant. He received a Bronze Star Medal for gallantry in action near Aachen, Germany, on 9 December 1944. On 23 March 1946 he was commissioned a second lieutenant, Army of the United States.

5. The offense of fornication committed by the accused was somewhat aggravated by his status and the place of commission. The medical examination revealed that Miss Holl received some rough treatment. I recommend that the sentence be confirmed but in view of the nature of the offense and all the circumstances recommend that it be commuted to a reprimand and forfeiture of $100 pay, and that the sentence as thus commuted be carried

into execution.

6. Inclosed is a form of action designed to 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

(GCMO 314, 29 Aug 1947).

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

JAGV CM 322255

9 September 1947

UNITED STATES v. Private RAYMOND S. RUCH (45004410), Troop E, 81st Constabulary Squadron, APO 65, attached unassigned to Stockade, Headquarters 3rd Constabulary Regiment, APO 169.	)	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 7 March 1947. Dishonorable discharge and confinement for three (3) years. United States Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 93rd Article of War.

Specification: In that Private Raymond S. Ruch, Troop "E", 81st Constabulary Squadron, APO 65, US Army, having taken an oath in a trial by court-martial of Private Clarence R. Miller, Headquarters Troop, 3rd Constabulary Regiment, APO 169, US Army, before Captain Thompson L. Raney, Headquarters, 3rd Constabulary Regiment, a competent officer, that he would testify truly, did at Gaffey Barracks, Wetzlar, Germany, on or about 10 January 1947, willfully, corruptly, and contrary to such oath testify in substance that he did not go into the Special Service Building, at Gaffey Barracks, Wetzlar, Germany during the afternoon of 26 December 1946, and that he did not attempt to handle any liquor in said building on 26 December 1946, which testimony was a material matter and which he did not then believe to be true.

The accused pleaded not guilty to the Charge and the Specification. He was found not guilty of the Charge but guilty of a violation of the 96th Article of War, and guilty of the Specification except the words "was a material matter and which." Evidence of three previous convictions was considered. 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 three years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Green Haven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused was sworn as a witness in the trial by special courts-martial of Private Clarence R. Miller, Headquarters Troop, 3rd Constabulary Regiment, at Gaffey Barracks, Wetzlar, Germany, on 10 January 1947. The special order appointing the court was introduced in evidence (R. 6,7, Pros. Ex. 1). Private Miller was charged with drinking with prisoners, and being drunk while posted as a sentinel (R. 7). After the accused was sworn as a witness by the Trial Judge Advocate and the 24th Article of War and the 93rd Article of War, as pertained to perjury, explained to him, he was asked if he had entered the Special Service Building on the afternoon of 26 December 1946 (R. 7-9, 14-18). To this question the accused replied that he had not entered the building. He was then asked by the Trial Judge Advocate if any of the prisoners handled any liquor on this date to which he replied that neither he nor any of the other prisoners did (R. 7,15).

Tech Sergeant Elliot B. Taft, Service Troop, 3d Constabulary Regiment, APO 169, Wetzlar, Germany, testified that the accused was in the military service, that he had testified previously at the trial of Private Miller and that on the 26th of December 1946, the date of Private Miller's alleged offense, he was Special Service NCO for the 3d Constabulary Regiment and had liquor stored in the basement of the Special Service Building. Further, that men for the various squadrons came to the building for an issue of liquor for the Christmas holiday and that when the truck of one unit was about half loaded, he saw two additional men enter the basement of the building and attempt to pick up a case of whiskey. The case being heavy, and Tech Sergeant Taft noticing that the men were unsteady on their feet, he approached them and asked what they were doing. The two men stated that they were sent over from the guardhouse to help load whiskey. After determining that no prisoners were supposed to be there, Sergeant Taft and a Captain O'Brien instructed their guard to return them to the guardhouse. The accused was one of these two prisoners observed by Sergeant Taft in the basement attempting to load the liquor (R. 13,14).

4. After having been advised of his rights the defense offered no evidence and the accused, after having been fully apprised of his rights, elected to remain silent.

5. It is clear from the findings of the court that the accused was not found guilty of perjury, as charged, manifestly because of the lack of materiality of his testimony to the issue or matter of inquiry in the case of Private Clarence R. Miller on 26 December 1946 (R. 24).

Although the court's findings of guilty of the lesser included offense of false swearing in violation of Article of War 96, and the approval thereof by the reviewing authority, were procedurally proper (CM 192662, Rowe, 2 BR 33; CM 198262, Miller, 3 BR 225; CM 202479, Babbington, 6 BR 161; CM 205604, Mickey, 8 BR 205), the Board of Review must now determine the legal sufficiency of the record of trial to support the modified findings and sentence.

The offense before the Board is not so called "Statutory Perjury" (Section 125, Federal Penal Code of 1910 (USC 18:231)), since that offense also requires materiality of subject matter, but rather conduct of a discreditable or prejudicial nature, insofar as it affects the military establishment, in violation of Article of War 96 (para. 152c, MCM, 1928, p.191 (CM 192662, Rowe, 2 BR 33; CM 198262, Miller, 3 BR 225; CM 202479, Babbington, 6 BR 161; CM 205604, Mickey, 8 BR 205)). As stated, the offense is lesser included and related to that of perjury (ibid). Proof required for conviction of the last mentioned offense includes:

> ". . .(f) that such testimony was false, and material to the issue or matter of inquiry. . ." (para. 149j, MCM, 1928, p.175),

whereas proof similarly required for the offense of false swearing includes:

> ". . .(c) that such testimony was given or the matter in the affidavit was false." (para. 152c, MCM, 1928, p.191).

With respect to the element of proof of falsity above set forth, the Manual for Courts-Martial expressly provides in the case of perjury that:

> "The testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown in evidence tending to prove the falsity . . ." (para. 149j, MCM, 1928, p.175).

In the application of this rule, it is well settled that the limitation applies to the fact or facts about which an accused testifies rather than to the false character of his testimony under oath, viz:

> "The rule of course applies only to the proof of the fact alleged as falsely sworn, and therefore a corroboration as to the act of swearing and the words sworn is not called for." (Sec. 2042, Wigmore on Evidence, VolVII, p.280).

> "In a trial for perjury the uncorroborated testimony of a single witness is not sufficient to establish the falsity of the statement alleged to be perjured. CM 157772 (1923)." (Dig.Ops. 1912-40, p.332)

While historically the rule appears to have been the single common-law exception to the rejection of ecclesiastical rules regarding the number of witnesses, and may additionally have been borrowed from the civil law (Wigmore, supra, p. 273), there is nevertheless sound reason for its retention in a modern system of jurisprudence. Analysis of legal precedents in this country shows that the rule requiring corroboration has been adhered to in the Federal courts and all state jurisdictions with the single exception of Minnesota (State v. Storey, 148 Minn. 398, 182 N.W. 613). Reasons in support of the rule may be briefly stated as follows:

> ". . .Furthermore, a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force . . . The rule is in its nature now incongruous in our system. . ." (Sec. 2040, 2041 Wigmore, supra, p. 275).

> "At common law the evidence of one witness is not sufficient to warrant a conviction for perjury unless it is corroborated in some material particular. But for this rule, in such a case, there would be only one oath against another. The rule is founded on substantial justice, and the court should so instruct the jury." (Sec. 1397, Wharton's Criminal Evidence, Vol 3, p.2284).

Fundamentally, the same reasoning and logic is applicable also in the case of false swearing, and the rule requiring corroboration has similarly been adhered to with respect to the essentials of proof for conviction of this offense, viz:

> ". . . A conviction [for false swearing] will not be sustained unless founded on the evidence of two credible witnesses, or on that of one such witness corroborated strongly by circumstances pointing to the falsity of the statements." (Sec. 713(658) Underhill's Criminal Evidence, Fourth Edition, p.1328; State v. Miller, Missouri App. 159; Aguierre v. State, 31 Texas Cr. 519, 21 S.W. 256; Regina v. Browning, 3 Cox C.C. 437, 438).

Although the question of whether or not corroboration is necessary for conviction of false swearing has not been expressly decided by military tribunals, the only available precedent strongly indicates that the rule does apply, to wit:

"We may assume, though the question has not been authoritatively settled for court-martial procedure, that the rule applying to prosecutions for perjury, that the testimony of one witness is insufficient to convict without corroboration by other evidence, direct or circumstantial, tending to prove falsity (p. 175, MCM) applies in false swearing cases such as this one" (CM 192495, Dockery (1930)).

Aside from the testimony of one witness, Technical Sergeant Elliot B. Taft (R. 13,14), the record of trial in the instant case is wholly void of proof of falsity, either direct or circumstantial, of accused's alleged acts of (1) going into the Special Service Building at Gaffey Barracks, Wetzlar, Germany, during the afternoon of 26 December 1946, or (2) attempting to handle liquor in that building on the same date. The evidence of record being thus limited, there is a failure of legal proof of false swearing, as found by the court.

6. For the reasons stated above, the Board of Review holds that the record of trial is legally insufficient to support the findings and sentence.

Wilmot T. Baughn, Judge Advocate.

John G. O'Brien, Judge Advocate.

George S. Springston, Judge Advocate.

JAGV CM 322255 1st Ind

WD, JAGO, Washington 25, D.C.

TO: The Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, New York

1. In the case of Private Raymond S. Ruch (45004410), Troop E, 81st Constabulary Squadron, APO 65, attached unassigned to Stockade, Headquarters 3rd Constabulary Regiment, APO 169, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. 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 322255).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

((111))

24 JUL 1947

JAGV CM 322257

U N I T E D S T A T E S v. Private First Class GLENN HARTMAN (42241591), Headquarters Troop, 6th Constabulary Regiment, APO 179.	))))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Bamberg, Germany, 6 March 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, Judge Acvocates

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 and found not guilty of the Specification and Charge I, and guilty of the following Specifications and of Charge II:

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

Specification 1: In that Private First Class Glenn Hartman, Headquarters Troop, 6th Constabulary Regiment, did, on the road between Hollfeld and Bayreuth, Germany, on or about 15 January 1947, while operating a motor vehicle, wrongfully carry unauthorized persons in said vehicle, in violation of standing orders.

Specification 2: In that Private First Class Glenn Hartman, Headquarters Troop, 6th Constabulary Regiment, did, on or about 15 January 1947, wrongfully and unlawfully have sexual intercourse with Maria Meschner, a woman not his wife.

No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for a period of one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Green Haven, New York, or elsewhere

as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Accused, returning from Bamberg to Bayreuth, Germany, in a jeep, "picked up" two German girls, Maria Meschner, a housemaid, and Ilse Sawatzki, her friend, who were "hitch-hiking" a ride. A short distance from the point the girls entered the jeep accused stopped the car and left the vehicle, stating his lights were not in order. When he reentered the car he left his gloves on the hood and then told Ilse Sawatzki to get them. When, in compliance with this direction, she left the vehicle accused drove off. After driving a short distance accused told Maria Meschner that he wanted to have sexual intercourse with her. When she refused and resisted his advances, accused slapped her, took off her "panties" and had sexual relations with her, first with, then without, a prophylactic. Accused had a pistol with him and Maria testified he pointed the pistol at her when he requested intercourse and laid the pistol in the car seat during the sexual act. Thereafter accused threw her clothes out of the car and forced her to leave the vehicle (R. 10). Accused made a pre-trial sworn statement admitting sexual intercourse with Maria Meschner but contending it was without force, with her cooperation, and without the use of the pistol.

A standing order, disseminated to all drivers of vehicles verbally, prohibited the carrying of civilians in Army cars without prior authorization from the commanding officer of the troop.

4. a. <u>The Charge of fornication.</u>

"At common law fornication, according to the better view, is not a misdemeanor in this country." (Wharton's Criminal Law, Vol. II, p. 2410) The offense with which accused was charged, sexual intercourse with a woman not his wife, is similar, at civil law, to fornication, an offense generally of statutory creation, if recognized at all. Congress has not in terms declared fornication an offense in statutes of general application (cf: 18 USCA, secs 451-468 and Ex parte Isojoki, 222 Fed (9th Cir) 151, 153), but fornication is denounced by Congress as an offense when committed within any territory or district, or within or upon any place within the exclusive jurisdiction of the United States (18 USCA, secs 511, 518), and also in the District of Columbia (D.C. Code., sec 22-1001 (6:176a)). No specific Article of War makes sexual intercourse between a male member of the military forces and a female over the age of consent, not his wife, an offense.

Since accused is charged under Article of War 96, it is necessary in order to determine whether an offense has been alleged to consider the relation the words contained in the Specification, "wrongfully

and unlawfully have sexual intercourse with . . . a woman not his wife" bear to the underscored portion of Article of War 96, following:

> "ART. 96. General Article.--Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

While implication may be drawn from some opinions of the Boards of Review that crimes or offenses not capital committed in violation of public law as enforced by the civil power are punishable notwithstanding the situs of the offense, the language of the Manual, to wit,

> "* * * The 'public law' here in contemplation includes that enacted by Congress or under the authority of Congress. For example, it includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United States. A person subject to military law cannot, however, be prosecuted under this clause of the article for an act done in a State, Territory, or possession which is not a crime in that jurisdiction, merely because the same act would have exposed him to a criminal prosecution in a civil court of the District of Columbia had he done the act within the jurisdiction of such court. But such act, of course, might in a proper case be made the basis of a prosecution under one of the other clauses of this article as being a disorder, a neglect, or conduct of a nature to bring discredit upon the military service." (Par. 152c, MCM, 1928),

makes it clear that this interpretation as to local application of the laws limits punishable offenses beyond the respective territorial jurisdictions to appropriate cases involving a disorder, a neglect, or conduct of a nature to bring discredit upon the military service. (CM 211420, McDonald, 10 BR 63). In the case under consideration the offense charged was not committed in the District of Columbia, or in one of the several Territories and possessions of the United States, nor can Germany be considered a friendly foreign country, within the purview of the rule that violations of the laws of friendly foreign countries may be "chargeable as conduct of a nature to bring discredit upon the military service." (MCM, 1921, p. 463)

Unless the offense of fornication was committed in such manner as to be of a public nature or of such character as to constitute a nuisance, the civil authorities usually have not taken cognizance thereof even though in some jurisdictions they could prosecute under local statutes. The act itself cannot be classed as a disorder, or a neglect, nor can it, in the absence of special circumstances not here alleged, be said to constitute conduct of a nature to bring discredit upon the military service. Furthermore, the use of the words "wrongfully and unlawfully" can hardly be construed to add potency to the Specification since a fair construction of the language used impels to the conclusion that the gist or gravamen of the offense is the fact of sexual intercourse between two adult persons neither of whom is shown to be married. And were it necessary to concede that proof of "wrongful" or "unlawful" conduct had been adduced, which is not necessary in the instant case in view of the court's findings that accused was not guilty of rape, as hereafter discussed, still it would be difficult, if not untenable, to hold that such proof would correct or cure a Specification which did not as a matter of law state an offense. The Board is of the opinion that sexual intercourse out of wedlock is not, unless accompanied by conditions making such act a disorder, or conduct of a nature to bring discredit upon the military service, a punishable offense under Article of War 96, and cases so holding may be distinguished on the ground that minors under the age of consent were involved. (Compare CM (ETO) 4119, Willis, 11 BR (ETO) 369; CM (ETO) 3044, Mullaney, 8 BR (ETO) 245; CM 211420, McDonald, supra).

The Board has considered the facts in this case in light of the circumstances that the present charge was accompanied by a charge of rape, of which latter charge the court found accused not guilty. Such finding negatives the force and want of consent indispensable to the offense of rape and implies that the court accepted accused's version that she did in fact consent. (par. 148b, MCM, 1928). Such being the case the offense here charged is substantially similar in character to that recently considered by the Board of Review in CM 317233, Martin, where it was held that sexual intercourse consummated in the early hours of the morning on a lonely country road with the tacit consent of accused's companion, and unwitnessed, was insufficient to support the charged offense of being "wrongfully disorderly" in his relations with a female civilian under Article of War 96. Both the Martin case and the instant case may be distinguished from the recent case of CM CM 322254, Weston, simply by a reading of the following underscored portions of the specification wherein particular prejudicial circumstances adversely reflecting upon the military service have been expressly pleaded:

"Specification: In that, Second Lieutenant Theodore A. Weston, 388th Transportation Corps Truck Company, did, at or near Mannheim, Germany, on or about 21 March 1947, wrongfully and unlawfully, while Officer of the Day, have carnal knowledge of Kathe Holl, a woman not his wife, in the Ladies Rest Room of the 6th Transportation Corps Enlisted Men's Club."

b. Violation of the standing order.

Evidence sufficient to support the findings of guilty of the offense charged under Specification 1 of Charge II and of Charge II was adduced. The maximum punishment for this offense is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

5. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors other than those enumerated above injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge II, but legally sufficient to support the findings of guilty of Specification 1 of Charge II, legally sufficient to support the findings of guilty of Charge II, and legally sufficient to support only so much of the sentence as imposes confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

Wilmot T. Baughn, Judge Advocate.

(Dissent), Judge Advocate.

George S. Springston, Judge Advocate.

(116)

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

JAGV CM 322257

2 JUL 1947

UNITED STATES v. Private First Class GLENN HARTMAN (42241591), Headquarters Troop, 6th Constabulary Regiment, APO 179.	)))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Bamberg, Germany, 6 March 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

DISSENT of O'BRIEN, Judge Advocate

1. I do not concur with so much of the holding of the majority members of the Board as holds that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge II and the sentence. Following the reasoning set out in CM 211420, McDonald, 10 BR 61; CM 10446, Ward, 22 BR (ETO) 297; and CM 4119, Willis, 11 BR (ETO) 369, it is my opinion that fornication, particularly when committed under the aggravating circumstances of profligacy and coercion here shown, is "conduct of a nature to bring discredit upon the military service" within the meaning of Article of War 96. The principle of the Willis case, supra, is that fornication without aggravation is an offense within the meaning of the Article. Both the Willis and Ward cases were cited with approval in a recent opinion of this office (CM 322254, Weston). There appears to be no direct precedent to the contrary and, notwithstanding that it may be impolitic to prosecute for fornication without aggravation, I am aware of no substantial legal reason for now rejecting the principle of the Willis case. To do so would, in my opinion, be inconsistent with the policy of Congress as indicated in the Federal Criminal Code (sec. 318 (18 USCA 518)) and the District of Columbia Code (sec. 22-1001 6:176a) and might be construed as tacitly approving for military personnel conduct that has harmful potentialities for the individuals involved and the service and is, at least ostensibly, universally condemned by society as immoral.

2. The offense of fornication is punishable by confinement at hard labor for not more than six months and forfeiture of two-thirds of an accused's pay and allowances for a like period (CM 4119, supra). I

concur with the majority members' views as to Specification 1 of Charge II. It follows that, in my opinion, the record of trial is legally sufficient to support the findings and sentence.

John G. O'Brien, Judge Advocate.

JAGV CM 322257 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. OCT 7 1947

TO: Secretary of the Army

1. The record of trial and accompanying papers in the case of Private First Class Glenn Hartman (42241591), Headquarters Troop, 6th Constabulary Regiment, APO 179, together with the holding thereon by the Board of Review signed by two of the three members, the third member dissenting, are transmitted herewith, pursuant to Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724) and the act of 1 August 1942 (56 Stat. 732), for your action.

2. The accused was found guilty of Charge II and Specifications 1 and 2 thereunder, alleging, respectively, violation of standing orders and fornication. 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 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.

The majority of the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of Charge II and Specification 1 thereunder, legally insufficient to support the finding of guilty of Specification 2, Charge II, alleging fornication in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months, the maximum authorized for the offense of violation of standing orders found under Specification 1, Charge II.

I concur in that portion of the holding with respect to the finding of guilty under Specification 1, Charge II, but agree with the dissenting member of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specification 2, Charge II, and the sentence as approved by the reviewing authority.

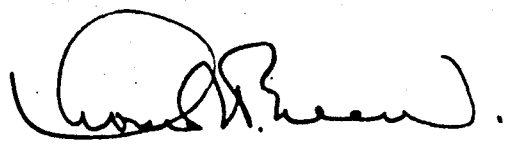
3. The holding by the majority of the Board of Review as to the Specification in question is based on the contention that, notwithstanding the evidence adduced, the Specification does not state an offense and, therefore, the findings of guilty based thereon are not sustainable. The Board acknowledges, and it is well established by the opinions of this office (CM 211420, McDonald, 10 BR 61; CM 10446, Ward, 22 BR (ETO) 297; and CM 4119, Willis, 11 BR (ETO) 369), that sexual intercourse out of wedlock is an offense under Article of War 96 when accompanied by circumstances making such act a disorder or conduct of a nature to bring discredit upon the military service. The Board maintains, however, that the aggravating circumstances constituting the disorder or neglect must

be alleged in the Specification and that where, as in this case, the aggravating circumstances are not alleged, an offense is not stated. It is with this latter view that I disagree.

In my opinion the use of the words "wrongfully and unlawfully" in the Specification, when considered in connection with the fact that the Specification is laid under Article of War 96, reasonably implies that the alleged act of sexual intercourse was committed under circumstances of a nature to bring discredit upon the military service. It follows that the Specification complies with the requirements of paragraph 29 of the Manual for Courts-Martial, 1928, and fairly apprised the accused of the offense intended to be charged. The defense did not attack the Specification by a special plea as to its sufficiency and there is no indication in the record of trial that the accused was misled.

The offense of fornication unattended by aggravating circumstances is denounced as an offense, punishable by six months confinement, by the Federal Criminal Code (Sec. 318 (18 USCA 518)) and the District of Columbia Code (Sec. 22-1001 6:176a).

4. I recommend that the action of the reviewing authority be confirmed. I inclose two forms of action, Form A to be used if you agree with the holding by the majority of the Board of Review, and Form B to be used if you agree with my recommendation.



THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Holding by B/R and dissent
3. Form of Action (A)
4. Form of Action (B)

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

(121)

17 JUL 1947

JAGV CM 322258

UNITED STATES v. Private ALBERT D. ZIMMERMANN (39716726), Headquarters Troop, 51st Constabulary Squadron, APO 225.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Regensburg, Germany, 20 March 1947. Dishonorable discharge and confinement for six (6) months. United States Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 93d Article of War.

Specification: In that Private Albert D. Zimmermann, Hq Trp, 51st Con Sqdn. did, at Passau, Germany, on or about 13 February 1947, feloniously take, steal and carry away 1 watch, value about $3.00, and 1 sweater, value about $3.00, of a total value of about $6.00, the property of Private First Class James Carlton.

Accused pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for six months. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Green Haven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that, on the morning of 13 February 1947, Private First Class James Carlton discovered that his watch (Pros. Ex. 1) and hand knit sleeveless Red Cross sweater were missing from the room which he occupied with accused (R. 12,17). Carlton, on the night before, had placed the watch in his locked wall locker and his sweater on a chair in the room (R. 12). He had placed the locker

key in his left trouser pocket and, in the morning, found it in his right pocket (R. 12). He did not see accused enter the room during the night (R. 15) and accused's bed had not been slept in, but he noticed in the morning that accused's overcoat, pistol and holster, were on a stand at the foot of accused's bed (R. 15,16,18). They had not been there when Carlton retired the night preceding (R. 15). He had not given anyone permission to take the watch and sweater (R. 14). About noon that day, Carlton reported his loss to the first sergeant and he accompanied the military police to the home of accused's "girl friend" (Paula Anertzberger) (R. 13). A sweater was found on a chair in her living room (R. 13,15). Carlton identified the sweater as being of the same color and appearance as his sweater, but was unable to identify it positively as his own (R. 13,14) (Pros. Ex. 2). It was admitted in evidence only as a sweater "identical" to accused's (R. 14).

Paula Anertzberger testified that accused came to her house early in the morning of the day of the search by the military police (R. 19). She left the house about 0700 hours (R. 21). Accused was still there (R. 21). When she returned at 1100 hours accused was gone and she saw a sweater lying on a chair (R. 20). She had not seen it in accused's possession at anytime but it was not there prior to his visit and she had no other visitors that morning to her knowledge (R. 20,21). She was unable positively to identify Prosecution's Exhibit 2 as the sweater found in her house but stated that it appeared to be the same (R. 20).

The competent evidence for the prosecution further shows, through the testimony of Captain Horace S. Secor, that at about 1800 hours, 13 February 1947, at the Provost Marshal's Office, he ordered two military police to search the accused. The military police and accused went into an adjoining office and presently one of the former came out and gave the witness a watch (Pros. Ex. 1). Captain Secor then asked accused where he obtained the watch and accused replied "This is a new blouse. I don't know how it got in my jacket." The captain did not witness the search (R. 7,8). It was stipulated that the value of the watch and sweater was $3.00 each (R. 21).

Captain Secor was also permitted to testify, over the repeated objection of the defense (which was overruled by the law member with the comment that, "That /testimony/ is perfectly all right * * *."), as follows:

> "Pfc Carlton informed me that a watch and a sweater and some candy had been stolen from his locker that night. Carlton stated, after I asked him if he had anyone under suspicion, he said 'yes, Albert Zimmermann, who sleeps in the same room with me.' I told the first sergeant to get an MP and a German policeman and search the billets - not the billets, the room

where Zimmermann's girlfriend lives. This was on or about 10:00 o'clock on the 13th of February. They got a German policeman and an MP and they searched this girl's room. At 6:00 o'clock that night, I was called to the phone by Captain Majewski, the Provost Marshal, and he said that he had the girl and Zimmermann down at the MP station and he wanted me to get down there and straighten it out. I went to the Provost Marshal's office and there was the girl and Zimmermann. Sergeant Bohner, my supply sergeant had the sweater they had found in the girl's room. I asked the girl when she saw Zimmermann and she said that he came at 0500 hours that morning and left the sweater to be washed. I asked the MP's if they found the watch and they said 'no'. I said 'search Zimmermann' they searched Zimmermann and found that watch in his blouse pocket, I believe it was his left pocket." (R. 7)

When it appeared through cross examination that Captain Secor had not witnessed the search, the defense moved that his testimony to the effect that the watch was taken from accused's pocket be stricken (R. 9). The president of the court then asked the witness what the MP said when he handed the watch to the witness, and the witness replied, "He said 'I took it from Zimmermann'." (R. 9) Shortly following this, defense counsel asked for a ruling on the mentioned motion, the court was closed, and, on reopening, the law member announced. "The motion of the defense is sustained and that part of the record - that part of the testimony will be stricken which states that the watch was found in his pocket" (R. 9). Following this, in response to questions by the prosecution, the witness testified as follows:

"Our MP station has two or three little rooms, the one is where the office is. I told the MP's to take Zimmermann in there and search him. In less than two minutes, they walked out with a watch, handed it to me and I walked over to Carlton and said 'is this your watch' and he said 'it is' I turned and gave it to the MP's and said 'keep it for evidence.'

"Q Captain, when the MP's came out of this room, did they indicate to you where they found the watch?

"A The MP that handed me the watch said he found it in Zimmermann's pocket.

"Defense: Object, it is hearsay.

"Law Member: No, you are overruled."

4. The accused elected to remain silent (R. 22).

5. "The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. CM 130415 (1919)." (Dig. Op. JAG 1912-30, sec. 1284; CM 237711, Fleischer).

6. This record contains an abundance of incompetent evidence. Captain Secor was permitted to testify as to the search of accused by the military police, even to such details as in which pocket the watch was found, although he had not witnessed the search. He was further allowed to relate that the military policeman told him that the watch was found in accused's pocket. The hearsay evidence as to the search proper appears to have been excluded by a very indefinite ruling by the law member on motion by the defense, but the hearsay evidence as to the statement of the military policeman was thereafter admitted by the law member's express ruling. It might be assumed that the members of the court did not give weight to the incompetent evidence so excluded, though even this is doubtful in view of the vagueness of the ruling, but it can hardly be assumed with respect to the afore-mentioned expressly admitted incompetent evidence which covered a vitally material point in a weak aspect of the prosecution's case, that is, accused's possession of the watch.

In connection with the sweater, Captain Secor was erroneously permitted to testify, over objection, that Miss Anertzberger told him that accused called at her home and left the sweater to be washed. This incompetent evidence was in direct conflict with Miss Anertzberger's testimony, for she stated that she did not see the sweater in accused's possession at any time. It, too, supplied a very material and otherwise uncovered link in the prosecution's case, that is, accused's possession of a sweater of questionable identity.

It is obvious that the mentioned incompetent evidence is substantial in quantity and may not be disregarded as immaterial. It remains to be determined whether the legal evidence of record is of such quality and quantity as practically to compel in the minds of conscientious and reasonable men the finding of guilty.

7. The findings of guilty of larceny of both the watch and sweater rest on the presumption arising from accused's allegedly unexplained possession of recently stolen property (para. 112a, MCM 1928). The competent evidence as to accused's possession of the watch shows, in substance, that the accused and two military policeman went into a room

together, that presently one of the military police came out of the room and handed the missing watch to Captain Secor, and that accused, on being questioned, denied knowing how the watch got in his pocket. It might reasonably be inferred from these facts that the accused was searched and that the watch was found in his pocket, but it can hardly be contended that the inference is compelling within the meaning of the foregoing quotation. The weak probative value of this evidence is manifest when considered in the light of what it apparently might have been had the military policeman testified concerning the search or had the accused's exculpatory admission constituted a confession. As it is, application of the presumption based on accused's possession of the watch as inferred from the facts here shown, at least dangerously approaches a violation of the rule that one presumption or inference cannot be raised on another. The quantity and quality of the evidence at best hardly sustains a conviction.

The competent evidence with respect to the theft of the sweater is even more tenuous. Not only is there a patent failure positively to identify the sweater found in the girl's room as the sweater taken from Carlton's room but there is also considerable doubt whether the evidence shows that the sweater was in accused's personal, conscious and exclusive possession. In the first connection, it clearly appears that the sweater was of a familiar color and style and, so far as the record discloses, it had no distinguishing markings. Recent possession of such an article has little, if any, probative value. (See Sec. 192, Vol 1, Wharton's Criminal Evidence (11th Ed)). In the latter connection, assuming that the sweater was adequately identified, the competent evidence shows only that it was found at a place where accused might have left it and there is no positive proof that it was even in his actual possession or on the premises with his knowledge or assent. The law requires such proof, and, in the absence thereof, the mere presence of the property on the premises has little significance (CM 202720, Clem, 6 BR 251). It may be conjectured that the accused, and not some other person who had access to the premises, left the sweater there, but mere conjecture does not support a conviction. It is, therefore, the Board's conclusion that the evidence as to the sweater does not in itself warrant the finding of guilty.

The Board of Review is unable to find that the competent evidence adduced in support of the larceny of the watch and sweater by the accused is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. Accordingly, the erroneous admission of the prejudicial testimony above recited injuriously affected the substantial rights of the accused and the evidence therefore does not support the findings of guilty.

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

Wilmot T. Baughn, Judge Advocate.

John F. O'Brien, Judge Advocate.

George B. Springstead, Judge Advocate.

AUG 4 1947

JAGV CM 322258 1st Ind

WD, JAGO, Washington 25, D.C.

TO: The Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, New York.

1. In the case of Private Albert D. Zimmermann (39716726), Headquarters Troop, 51st Constabulary Squadron, APO 225, 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 sentence, which holding of legal insufficiency is hereby approved. I recommend that the findings of guilty and the sentence be vacated.

2. The admission of the hearsay testimony as to accused's possession of the watch was erroneous. In view of the weakness of the remaining proof of possession by accused of the stolen articles I cannot escape the conclusion that the court was materially influenced by the hearsay testimony in reaching its findings of guilty and that it therefore affirmatively appears that the error injuriously affects the substantial rights of accused within the meaning of Article of War 37.

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

(CM 322258).

RECEIVED 11 AUG 1947 (U. A. SEC)

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

1 Incl
Record of trial

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

JUL 11 1947

JAGQ - CM 322337

UNITED STATES v. First Lieutenant CHARLES N. JONES, JR. (O-1994788), Corps of Military Police.	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 5, 19-22 February 1947. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
STERN, JOHNSON 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: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, being at the time Custodian of the Central Post Fund, Fort Lewis, Washington, did at Tacoma, Washington, on or about 23 February 1946, feloniously embezzle by fraudulently converting to his own use the entire proceeds of a sale of 30 pianos, sold by Central Post Fund, Fort Lewis, Washington, to Hopper Kelly Company, which proceeds consisted of a check in the sum of $191.60 and one combination coffee perculator and toaster and one handy vacuum cleaner of the value of $49.00, the property of said Central Post Fund, entrusted to him by the said Hopper Kelly Company, for said Central Post Fund.

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

Specification 1: Specification 1 is identical in all respects with the Specification of Charge I.

Specification 2: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, did at Fort Lewis, Washington, on or about 7 June 1946 in conjunction with Edward C. Dorn, Manager of The Peoples Store, Olympia, Washington, with intent to defraud the Central Post Fund, Fort Lewis, Washington, unlawfully pretend to said Central Post Fund, that on 7 June 1946 one maple davenport set and one occasional chair had been sold and delivered by The Peoples Store, Olympia, Washington, to said Central Post Fund for $209.45 and that there was due to said The Peoples Store from the said Central Post Fund, $209.45, the purchase price thereof, well knowing that said pretenses were false and by means thereof did unlawfully fraudulently and feloniously obtain for his own private use and benefit from said Central Post Fund the sum of $209.45.

Specification 3: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, did at Fort Lewis, Washington, on or about 20 July 1946 in conjunction with Edward C. Dorn, Manager of The Peoples Store, Olympia, Washington, with intent to defraud the Central Post Fund, Fort Lewis, Washington, unlawfully pretend to said Central Post Fund that on 20 July 1946 twenty occasional chairs had been sold and delivered by The Peoples Store, Olympia, Washington, to said Central Post Fund for $465.00 and that there was due to said The Peoples Store from the said Central Post Fund, $465.00, the purchase price thereof, well knowing that said pretenses were false and by means thereof did unlawfully fraudulently and feloniously obtain $465.00, of which sum $282.20 was returned in merchandise to said Central Post Fund on or about 29 July 1946 and the balance, $182.80 was fraudulently and feloniously retained by said Lieutenant Charles N. Jones, Jr., for his own private use and benefit.

Specification 4: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, did at Fort Lewis, Washington, on or about 15 August 1946, in conjunction with Edward C. Dorn, Manager of The Peoples Store, Olympia, Washington, with intent to defraud the Central Post Fund, Fort Lewis, Washington, unlawfully pretend to said Central Post Fund that on 15 August 1946 two 9 x 12 rugs had been sold and delivered by

The Peoples Store, Olympia, Washington, to said Central Post Fund for $145.00 and that there was due to said The Peoples Store from the said Central Post Fund $145.00, the purchase price thereof, well knowing that said pretenses were false and by means thereof did unlawfully fraudulently and feloniously obtain for his own private use and benefit from said Central Post Fund the sum of $145.00.

Specification 5: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, did at Fort Lewis, Washington, on or about 25 September 1946, in conjunction with Edward C. Dorn, Manager of The Peoples Store, Olympia, Washington, with intent to defraud the Central Post Fund, Fort Lewis, Washington, unlawfully pretend to said Central Post Fund that on 25 September 1946, 1,000 assorted phonograph records had been sold and delivered by The Peoples Store, Olympia, Washington, to said Central Post Fund for $790.00 and that there was due to said The Peoples Store, from the said Central Post Fund, $790.00, the purchase price thereof, well knowing that said pretenses were false and by means thereof did unlawfully fraudulently and feloniously obtain for his own private use and benefit from said Central Post Fund, $790.00.

Specification 6: (Nolle prosequi entered by direction of the convening authority).

Specification 7: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, did at Fort Lewis, Washington, on or about 19 November 1946 in conjunction with one, Ralph W. Woolhouse, Tacoma, Washington, with intent to defraud the Central Post Fund, Fort Lewis, Washington, unlawfully pretend to said Central Post Fund that said Ralph W. Woolhouse had repaired two pianos for the said Central Post Fund at the cost of $70.00 and that by reason thereof there was then due to said Ralph W. Woolhouse from the Central Post Fund $70.00, well knowing that said pretenses were false and by means thereof did fraudulently, unlawfully and feloniously obtain for his own private use and benefit from said Central Post Fund, $70.00.

Specification 8: In that First Lieutenant Charles N. Jones, Jr., 6006 Army Service Unit, Headquarters Detachment, Fort Lewis, Washington, did at Tacoma, Washington, on or about

> 2 January 1947 unlawfully pretend to Leonard Joseph McHugh, Manager of Coast House Material, Tacoma, Washington, that he was the owner of certain property consisting of about 18 upholstered chairs, 5 chairs with leather seats, 75 rolls of chicken wire, about 60 feet of approximately one inch pipe, 6 sections of prefabricated building and that he was entitled to sell said property on his own account, well knowing that said pretenses were false and by means thereof did fraudulently, unlawfully and feloniously obtain for his own private use and benefit from said Coast House Materials, $536.00.

After motions to strike Charge II and all of its Specifications were denied, accused pleaded not guilty to all Charges and Specifications. As to the Specification of Charge I and Specification 1 of Charge II, by exceptions and substitutions, he was found guilty of the embezzlement of "part of the proceeds of a sale of approximately 18 pianos, sold by Central Post Fund, Fort Lewis, Washington to Hopper-Kelly Company, which part of the proceeds consisted of a check in the sum of $191.60 and one combination coffee perculator /sic/ and toaster at value of $32.50." He was found guilty of the Charges and the remaining 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 at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. a. The accused was Custodian of the Central Post Fund at Fort Lewis, Washington from about 1 January 1946 to about 20 December 1946 (R. 56, 547). Central Post Funds are non-appropriated funds authorized under Army Regulations to be accumulated to provide welfare facilities, equipment, and services for the general use of the military personnel as a whole. The administration of this fund is through a custodian, either the post commander or a subordinate officer designated by him, with the advice of the Central Post Fund Council (AR 210-50).

b. Specification of Charge I; Specification 1 of Charge II.

The accused had supervision and control of a quantity of used pianos which were the property of the Central Post Fund and stored in its warehouse at Fort Lewis, Washington. These pianos, in fair to poor condition, had been deposited in the warehouse along with other surplus property at the time units reporting at Fort Lewis were deactivated (R. 84, 90). The property was not kept on any accountability records. Colonel Nazer, the

Post Commanding Officer's representative on the Central Post Fund's Council, instructed accused to take an inventory of this property and to have it entered on the records (R. 58).

Mr. Clarence Hopper of Hopper-Kelly Company, Tacoma, Washington, a firm engaged in the business of selling musical instruments and electrical appliances testified that accused came to his store in January 1946 and offered to sell him some used pianos that the Army had received from deactivated units and for which it had no further use (R. 24, 25, 46) . Although surplus property could be sold only by authorization of the Fund Council, no such authorization was granted to sell these pianos (R. 61, 73). Mr. Hopper upon expressing his interest in purchasing them, went with accused to a warehouse at Fort Lewis where he saw the pianos. The witness stated that "they were almost just worthless junk", but he and accused agreed on a price of $300 for the lot of 20 or 21 pianos and that this amount was to be applied for the purchase from Hopper of console radios of like value. The pianos were taken from the Central Post Fund warehouse in February and delivered by Army trucks at Hopper's request to the Tacoma Moving and Storage Company for storage (R. 132-136). The Post Central Fund warehouseman, Caruthers, testified that he delivered eighteen or nineteen pianos altogether and that accused told him he was trading the pianos to Hopper-Kelly for radios (R. 84, 85, 89, 90). Accused informed Hopper that the radios when received would be placed in the noncommissioned officer clubs but sometime later when the Hopper Kelly Company failed to obtain any console radios, accused called at the store and purchased a De Vogue coffee maker and toaster at a price of about $32.50, and "a broiler or roaster, or some small article to heat food with", purportedly for use in one of the clubs. Hopper made no record of the second purchase, and thereafter on 23 February 1946 when the radios had still not arrived, accused requested that he be paid the balance of the purchase price, and at accused's suggestion a check in the sum of $191.60 to complete the transaction was drawn to his order and delivered to him by Hopper (R. 25-28, 38, 44; Pros. Ex. 3). The check was cashed by accused at the National Bank of Washington, Fort Lewis Branch (R. 51-54), but accused did not turn over the proceeds to the Central Post Fund (R. 80).

c. Specification 2 of Charge II.

Accused was authorized to buy merchandise on behalf of the Central Post Fund by signing a purchase order for the items needed. When the merchandise was obtained, a receiving report was executed and this together with the seller's invoice and the purchase order furnished authorization for the issuance of a check in payment of the goods received (R. 139). All checks in payment of goods purchased by the Central

Post Fund were signed by accused (R. 139, 141). It was the duty of Miss Helen White, a clerk of the Fund, to keep a record of all property purchased or otherwise received and to enter this information from the receiving reports on stock record cards kept for that purpose (R. 160, 167). The Peoples Store, a company engaged in the general mercantile business and with its main store located in Tacoma, Washington, had branch stores in Olympia and other cities of the State of Washington (R. 168). The Central Post Fund of Fort Lewis, Washington, had a credit account on a monthly basis with this Company, the record of which was kept in the Tacoma store (R. 272, 278).

On 7 June 1946, accused signed two purchase orders directed to The Peoples Store at Olympia, Washington, requesting that it supply the Central Post Fund with certain merchandise in the aggregate amount of $1405.70 which included one davenport set and chair at $149.59 and one occasional chair at $59.95 (R. 141, 142; Pros. Exs. 6, 7). The invoices issued by The Peoples Store and the receiving reports signed by accused, all of even date with the purchase orders, and filed with the permanent records of the Central Post Fund showed on their face that all the merchandise ordered was received (R. 143, 147, 150, 151; Pros. Exs. 8-12, incl.). On the same date a check payable to The Peoples Store in the amount of $1405.70 in payment of this merchandise and signed by accused as custodian of the Fort Lewis Central Post Fund was drawn on the National Bank of Washington, Fort Lewis, Washington (R. 152; Pros. Ex. 13). Accused signed a voucher certifying that he had paid the account with The Peoples Store by that check (R. 156; Pros. Ex. 14).

Edward C. Dorn was the branch manager of The Peoples Store at Olympia, Washington from sometime prior to May 1946 until January 1947 (R. 173, 201). He was called as a witness by the prosecution but refused to testify, asserting his constitutional privilege against self incrimination. The bookkeeping system of this store provided for the making of invoices in quadruplicate. The original was sent to the main store at Tacoma, one duplicate was handed to the customer at the time of sale, the third was the delivery record, and the fourth was retained by the salesman (R. 172). The Central Post Fund's copy of the invoice showing the purchase of "1 maple Dav. Set" at $149.50 and one occasional chair at $59.95 or a total of $209.45 (Pros. Ex. 10) corresponded in all respects with the main store's original invoice except that on the latter there appeared in ink the written word "void" and beneath it the written letters "ECD". Mrs. Leda Anderson, in charge of the stock records at The Peoples Store at Tacoma testified that she was familiar with Edward Dorn's handwriting and from that knowledge she believed the cancellation of this order was accomplished by him (R. 175, 190, 191; Pros. Ex. 16). It was stipulated by the prosecution, the defense and accused that on 14 June 1946, accused

purchased for his personal benefit a Norge Refrigerator at a cost of $217.28 from The Peoples Store and without objection the invoice showing the transaction was received in evidence (R. 182, 183; Pros. Ex. 15). This invoice shows a cash sale with Dorn as the salesman and the refrigerator to be delivered to "Charles Jones, 3702 So. Jay, Tacoma". There was no credit of $209.45 on the books of The Peoples Store in favor of the Central Post Fund at any time (R. 277). It was stipulated that the Norge Refrigerator in question was found in accused's quarters and removed to Fort Lewis, Washington (R. 484). The permanent records of The Peoples Store at Olympia kept "in the normal course of the business" included daily reports of cash sales together with triplicate originals of deposit slips all in the handwriting of Mr. Dorn (R. 242-244; 250; Pros. Ex. 34). The deposit indicated on this slip was received by the National Bank of Commerce (R. 443). The report for 8 June 1946 shows two sales to the Central Post Fund, one in the amount of $750.00 and the other in the amount of $446.25 and the numbers of the sales slips covering these transactions are recorded therein. These numbers relate to the invoice involving the sale of one grand piano for $750.00 (Pros. Ex. 8) and five Philco Radios at a cost of $446.25 (Pros. Ex. 9). These two purchases total $1196.25 or $209.45 less than the Central Post Fund purchase order and check dated 7 June 1946. The daily report for 8 June 1946 does not disclose a sale to the Central Post Fund of the davenport and chair set and the occasional chair at a total cost of $209.45, but does show a cash sale to the accused in the amount of $217.28, which according to sales slip number recorded therein refers to the sale of one Norge Refrigerator (Pros. Ex. 15). There is also shown on the bank deposit slip for that day a check from the "Central Post" in the amount of $1405.70.

d. Specification 3 of Charge II.

By stipulation and with the express consent of accused five documents were received in evidence as official records of the Central Post Fund concerning a transaction of that Fund with The Peoples Store on 20 July 1946 (R. 200). These documents include a Central Post Fund purchase order for twenty occasional chairs, each at a cost of $23.25 for a total of $465.00 (Pros. Ex. 17); a customer's copy of an invoice from The Peoples Store (Pros. Ex. 18) and a Central Post Fund receiving report signed by accused (Pros. Ex. 19), each corresponding as to quantity, articles, and amount with the purchase order; a check dated 29 July 1946 in the sum of $465.00 in favor of The Peoples Store, drawn by accused as custodian of the Fund on the National Bank of Washington (Pros. Ex. 20); and a voucher signed by accused on 29 July 1946 certifying that he had paid to The Peoples Store $465.00 by that check (Pros. Ex. 21). While it was stipulated that these chairs had been picked up on the stock record account of the Central Post Fund they were never

received (R. 200; Pros. Ex. 49). The original of the invoice for the sale of these chairs which was retained by The Peoples Store was voided by Dorn, indicating a cancellation of the sale (R. 205, 229; Pros. Ex. 22). On the same day that the $465.00 was paid to The Peoples Store (29 July 1946), invoices of that concern show two pertinent transactions, one involving a sale to the Central Post Fund of seventeen floor lamps at a cost of $282.20 and another a sale to "Lt Chas. Jones, 3702 So Jay" of one General Electric Refrigerator at a cost of $188.49. Both sales were for cash aggregated $470.69 and purport to have been made by Dorn (R. 209, 211; Pros. Exs. 23, 24). The defense stipulated that accused purchased the refrigerator in question (R. 210) and that it was found in accused's quarters and removed to Fort Lewis (R. 484). The stock record account of the Central Post Fund did not show the receipt of the floor lamps indicated in prosecution's exhibit 23 (R. 215, 216).

e. Specification 4 of Charge II.

It was stipulated between the prosecution, the defense and accused that six documents identified as prosecution's exhibits 25 through 31 are a part of the permanent records of the Central Post Fund, Fort Lewis, Washington, and that the witnesses would testify these documents appear proper on their face and purport to speak the truth. The documents were received in evidence without objection (R. 219, 220). Prosecution's exhibit 25 is a Central Post Fund purchase order signed by accused and dated 15 August 1946 requesting The Peoples Store, Olympia, Washington, to deliver to the Central Post Fund various items of merchandise of a total cost of $1691.29. The last two items listed on this order call for delivery of "1 Recordio set" at $225.00 and two 9 x 12 rugs at a cost of $145.00; a total purchase of $370.00. Exhibit 26 is The Peoples Store duplicate invoice for all items set forth in the purchase order except the last two above mentioned items and at prices identical with those indicated therein. Exhibit 27 is an invoice for the recordio set at $225.00 and Exhibit 28 is the customer's duplicate invoice covering the two 9 x 12 rugs at a total cost of $145.00. Exhibit 29 is the Central Post Fund receiving report for all items ordered and is of even date with the purchase order. It bears accused's signature as receiving officer and the pencil notation "Ch #2640." Exhibit 30 is check No. 2640 of the Fort Lewis Central Post Fund dated 15 August 1946, payable to the order of The Peoples Store Company in the amount of $1691.29, signed by accused as custodian of the Fund, and Exhibit 31 is the Central Post Fund Voucher covering the transaction.

The Peoples Store's duplicate invoice retained by the store and covering the sale of the rugs is in all respects identical with prosecution's exhibit No. 28 except that the former bears the penciled notation, "Void-Cancelled-ECD". The initials were in the handwriting

of the store manager, Edward C. Dorn (R. 221, 230; Pros. Ex. 32).

On 10 August 1946 accused purchased on his own account an Easy Washer from The Peoples Store at a cost of $144.15 (R. 226-228; Pros. Ex. 33). It was stipulated that this washer was found in accused's quarters and removed to Fort Lewis (R. 484). The daily report of The Peoples Store for 14 August 1946 showed two cash sales to the Central Post Fund, one for $225.00, and the other for $1321.29 (R. 266; Pros. Ex. 35). The $225.00 sale related to the recordio set (Pros. Ex. 27) and the $1321.29 sale was covered by the invoice which included all items in the purchase order of 15 August 1946 except the two 9 x 12 rugs and the recordio set (Pros. Ex. 26). The triplicate original of the bank deposit slip, also in Dorn's handwriting, attached to the daily cash sales report for that day shows a check in the amount of $1691.29 from the Central Post Fund. The only other item for deposit on that day was "currency" of $5.26. The deposit indicated on the triplicate original was received by the National Bank of Commerce, Olympia Branch (R. 446). A sale to accused in the amount of $144.15, which was for one Easy Washer (Pros. Ex. 33) appears on that daily report.

The record of credit accounts at the main store in Tacoma showed no credit of $147.00 in favor of the Central Post Fund at any time (R. 277).

f. Specification 5 of Charge II.

It was stipulated that five documents identified as Prosecution Exhibits 36 through 40, inclusive, were part of the permanent records of the Central Post Fund and that these documents purport to show the transactions as evidenced by them in their entirety. They were received in evidence without objection (R. 280; Pros. Exs. 36-40, incl.). Exhibit 36 is a Central Post Fund purchase order dated 25 September 1946, signed by accused and addressed to The Peoples Store requesting delivery to Central Post Fund of 1000 phonograph records at 79 cents each for a total of $790. Exhibit 37 is a duplicate original invoice of The Peoples Store showing the sale of that number of records at a total price of $790. Exhibit 38 is the Fund's receiving report signed by accused showing receipt of these phonograph records on 25 September 1946. Exhibits 36, 37 and 38 are all of even date. Exhibit 39 is the check of the Central Post Fund dated 11 October 1944 in the amount of $790.00 payable to The Peoples Store bearing accused's signature as maker, and Exhibit 40 is the Central Post Fund's Voucher of like date showing payment of $790.00 to The Peoples Store.

Mr. Clydean Caruthers, the Post Central Fund warehouseman who had supervision of the phonograph record stock and maintained stock record

cards pertaining to their receipt and distribution, testified that on 3 October 1946 he had 268, 79-cent phonograph records on hand and that on 7 October 1946 he delivered to the 2nd Division on requisition 102 of these records. Subsequently, he had a conversation with accused who informed him that during his (Caruthers') absence from the station in September, one thousand 79-cent records had been received and at accused's instruction, Caruthers falsified the requisition to show delivery to the Second Division of 1102 instead of 102 of such records. He turned this requisition in to the Central Post Fund bookkeeper at the end of October. Without objection the document was received in evidence (R. 283-290; Pros. Ex. 41). It shows the delivery of 1102 79-cent records and 1670 52-cent records to the Second Division. T/5 Bowlling, property clerk of Headquarters Company, 2nd Infantry Division, who obtained the phonograph records from Caruthers, testified that he did not count them at the time of delivery, but from the distribution made the same day to the various day rooms, he knew he had received from Caruthers not more than 1376 records altogether (R. 315-317).

The $790 check mentioned above was applied to accused's personal benefit as follows (Ex. 49):

In the triplicate original bank deposit slip prepared by Dorn and attached to the daily sales report of 11 October 1946, appears an entry under the printed word "checks" reading: "Jones $790.00" (R. 365; Pros. Ex. 51). The deposit indicated by this slip was received in National Bank of Commerce, Olympia Branch (R. 447).

On 11 October 1946 accused purchased an oil furnace from The Peoples Store at a cost of $489.25. This furnace was delivered to accused's home from the store's warehouse in Tacoma (R. 359-361; Pros. Ex. 50). It was stipulated that this furnace was placed in accused's residence and that it is still there (R. 484). The records of this store show a charge against accused's account for $515.00 on 14 December 1946 for the installation of an oil furnace and a credit of $300 for a payment made by him in December (R. 300-302). The cost of the furnace ($489.25) and the $300 installation credit add up to the approximate amount of the $790 check.

g. Specification 7 of Charge II.

Ralph Woolhouse, a carpenter and furniture repairman, was employed by the Central Post Fund from about May to October 1946 and was paid in full for all services rendered by him during his employment. In October he started working for accused doing carpentry work at his house located

at 3702 South Jay Street, Tacoma, and continued until 20 January 1947. During this period he performed no service of any kind for the Fund; yet on 16 December 1946 Woolhouse received and cashed a check for $70.00 signed by accused and drawn on the bank account of the Fort Lewis Central Post Fund with the National Bank of Washington. This check was purportedly given for the repair by Woolhouse of two pianos belonging to the Fund but in fact was for labor which Woolhouse had performed for accused personally (R. 321-325; Pros. Exs. 44-48).

h. Specification 8 of Charge II.

In September or October 1946, accused appeared at the Office of the Coast House Materials, a building supply concern in Tacoma, Washington, to which he was then indebted for materials purchased to repair his home, and offered to sell Mr. McHugh, the president of the Company, certain merchandise which accused stated "was written off the books and that he could sell" (R. 100, 101). McHugh made a trip to the Post where he purchased from accused about eighteen upholstered chairs, five leather chairs, seventy-eight rolls of chicken wire, sixty feet of pipe, eight sections of cyclone fencing, two rolls of electric wire and a roll of jute rope. All items except the chairs were seen in an open shed behind the office of the Central Post Fund. The chairs were stored in one of the barracks. A price of $536.00 was agreed upon for the lot with the understanding that this amount would be credited to accused's personal account with Coast House Materials. In this connection McHugh testified:

> "A. Well, he had a bill at the store and he wanted it credited to his account because — I don't know how he acquired it, but it had been written off the books and I did not know whether he bought it for a low price and sold it for a higher price or how it was. He never stated but he said that he had this to sell and he wanted it credited to his account. So, I didn't ask him what he paid for it or what the transaction was between him and the Government, I guess." (R. 103).

The above-mentioned articles were thereafter received at that Company's place of business. On 2 January 1947 accused was indebted to this company for building materials purchased by him in the amount of $735.28 and on that date, after his account was credited with $536.00 for the above described merchandise, accused paid the Coast House Materials the balance of $199.28 due it (R. 100-105; Pros. Ex. 4). The property in question belonged to the Central Post Fund and although accused was authorized by the Central Post Fund Council on 27 September 1946 to conduct a sale of surplus property, the amount which he obtained from the sale of the property to the Coast House Materials was never received by the Central Post Fund (R. 77, 119, 122-125, 618, 620).

Accused's Confession.

On 13 January 1947 accused was interviewed at the Provost Marshal's Office, Fort Lewis, by Carl L. Duane, a C.I.D. agent, and by Robert B. Hawley, a special agent of the Federal Bureau of Investigation. They had presented their credentials and fully informed accused of his rights under the 24th Article of War. The interview began at 1700 and about thirty minutes was spent in advising accused of the information they had concerning irregularities in the Central Post Fund and his connection with them (R. 346-349). After they informed him of their knowledge concerning his transactions with Woolhouse, accused without being subjected to any force, threats or coercion of any kind related what he had done. His statement of the various incidents was typewritten by Hawley as accused related his story, the entire time consumed in this operation amounting to about two hours. After the statement was completed accused read it and stated that he desired to add a supplemental paragraph to explain the reasons for his conduct. This he did in his own handwriting and this addition was included in his statement as the last paragraph thereof (R. 354, 355, 411). Accused then signed the statement and at about 2100, Hawley and Duane took him to the Post Exchange where they had something to eat (R. 352, 464). During the course of the interrogation accused was asked whether he wanted something to eat but replied that he was not hungry although agent Hawley shared some chocolate bars with him (R. 417, 418, 464). He did request permission to call his wife, which permission was refused him, but this was toward the end of the conversation with the agents and after he had informed them of all the facts (R. 421, 424, 428).

The accused, testifying solely for the purpose of showing the involuntary character of his statement, stated his reason for signing the statement as follows:

> "Well, I was afraid, on account of I was kind of scared, and I didn't want any more trouble with them, and I was very nervous at the time. I hadn't anything to eat, and I was worrying about my wife, and I wanted to get away, and I signed it." (R. 392).

He had been taken from his home about 1630 to Military Police Headquarters where he met the two agents who did not permit him to eat until after the interview was completed. His request that he be permitted to call his wife was refused (R. 392-393). They mentioned something about the 24th Article of War but he did not hear what was said because he was at the other end of the room and his hearing was impaired (R. 439). The agents told him that they had all the facts; that it would be for his benefit if he signed the statement; and that "settlement could be made and the whole matter expedited" (R. 395, 396). They argued with him, said his

contentions were not true, and their "faces were threatening" at times. With reference to the supplemental statement, he said he wrote it because "it seemed to me like they were putting me on the spot. In my frame of mind I felt like I would have to say something to try to alleviate this damage" (R. 397, 434). After making his statement accused was placed in custody of the Provost Marshal (R. 464) .

Upon cross-examination accused was questioned concerning a letter which he wrote on 22 January 1947 while in confinement addressed to the Commanding General, Fort Lewis, Washington, in explanation of the Central Post Fund irregularities. He stated that he requested the Post Chaplain to find out his status and that thereafter the Chaplain's "opinion was that if I would write a letter of this nature, that the Commanding General in all probability would show me a great deal of leniency, and that in any case that any court may find me guilty of these alleged offenses, that it was his opinion that I would merit a suspended sentence" (R. 472-476). This letter written in the third person and consisting of seven typewritten pages, together with accused's original and supplemental statements was received in evidence over objection of the defense counsel (R. 414, 483, 615; Pros. Exs. 49, 52, 53).

The pertinent parts of accused's confession of 13 January 1947 in relation to the various offenses of which accused was found guilty are as follows:

Specification of Charge I; Specification 1 of Charge II.

"I arrived at Ft. Lewis Washington on December 3, 1945, and on January 1, 1946, I was made Custodian of the Central Post Fund. My duties were to receive and disburse monies and properties in accordance with the minutes of the Central Post Fund Council, and to account for the transactions involved.

"Some three or four months after I became Custodian of the Central Post Fund I noticed about 19 pianos in the warehouse. These were surplus pianos with no accountability on them and I suggested to the President of the Council that we get rid of the pianos. Lt. Col. Naser was President of the Council at that time and he told me to get rid of them. I got three firms in Tacoma to come in and make bids for these pianos. Hopper Kelly Co. made the highest bid for these pianos, I think it was $190.00. After they were delivered by the personnel on the post I went into Tacoma to collect for the pianos. When Mr. Hopper asked to whom the check should be made out, I told him to make it out to me personally. I cashed this check in one of the stores in town and used the money for my own benefit."

* * *

"I have in my house at 3702 South J Street, Tacoma a number of other items which I have purchased through the Central Post Fund without the stores being aware of the fact. From Karnes' Dry Goods store on Broadway in Tacoma I picked up drapes. * * *" (Pros. Ex. 49, pp 1 and 3).

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

"Approximately May or June of 1946, through Miss Helen White, property clerk of the Central Post Fund I met Mr. Ed. Dorn, manager of the Peoples Store at Olympia, Washington. This was during a period when I was trying to get hard to purchase merchandise, and Miss White thought that Ed Dorn might help me. After a number of legitimate transactions with Dorn I asked him to get me a refrigerator. He obtained for me a new General Electric refrigerator. In order to pay for this refrigerator I made out a purchase order through the Central Post Fund for 20 occasional chairs and also a receiving order for the same. The chairs were then paid for to Peoples store who billed the Central Post Fund for 20 chairs, but the refrigerator came to my house at 3702 South J. Street. Ed Dorn made some protest about this deal, but went through with it ok. Subsequently I made a number of similar transactions with Dorn by which I obtained a number of other articles. One such that I specifically remember was a transaction for 1000 phonograph records. When the 2nd Division went on manoeuvres they took all the records we had in stock. I told C. C. Caruthers who is in charge of the stock room for the Central Post Fund that we had received 1000 phonograph records and I made up a purchase order and receiving order for 1000 records at 79 cents and told Caruthers to enter the records on the stock record. And I also told him to get another signature for a receipt. But I think he told me later that he had fixed up the original receipt. For this transaction Ed Dorn arranged through the Peoples Store to get for me a furnace, and this furnace was obtained through the Western Furnace Co. Western Furnace Co. sent their bill to Peoples Store. The Cost of the furnace was $915.00 and I still owe a balance on this furnace. On an earlier transaction I obtained from the Peoples Store a large Norge electric refrigerator and an Easy washing machine. The exact details of these transactions I have forgotten. The fraudulent transactions would not come out even for the purchases I made and I maintained a running account with Peoples Store most of the time. At the present time I owe the Peoples Store approximately $665.00." (Pros. Ex. 49, p. 2).

Specification 7 of Charge II.

"In about March, 1946 I purchased the house where I am presently living at 3702 South J. Street from a Mr. Avery Winslow. I paid off his equity in the house in December 1946, after having made monthly payments and I presently owe the Central Bank of Tacoma $2000 for the balance. After I purchased this house I decided to turn it into an apartment house, with the upstairs as an apartment. To do this I contracted with two carpenters, Earl J. Stiles and Ralph W. Woolhouse to do the work. At this time we were employing PWs at Ft. Lewis to do furniture repair for the Central Post Fund. The Central Post Fund lost gradually the services of the Prisoners of War and I had to have civilian help to work in the furniture repair shop. With the approval of the Council I hired Stiles and Woolhouse to work in the furniture repair shop on the basis of a four day week. The other day, Friday, they worked for me, continuing the work on my house. After June 1, 1946, the two carpenters worked a full 40 hour week at Ft. Lewis for the Central Post Fund, but under orders from me they continued to work at my house on Fridays. Sometimes also I had them do some work for me during the middle of the week, although not very often. Some of the materials used on my house came from the warehouse of the Central Post Fund at Ft. Lewis. This consisted of paint, varnish, lumber, etc. Also after Woolhouse quit working for the Central Post Fund he received another pay check from the Central Post Fund although he did no labor for this pay check. I know that I had no right to have these men working for me during the time they were being paid by the Central Post Fund." (Pros. Ex. 49, pp. 1-2).

Specification 8 of Charge II.

"The Coast House Materials Co. of Tacoma was another company with which I had dealings in finishing my house. From them I made purchases of a 'Kitchenator' which is a sink and metal cabinet unit combined. From them I also bought paints, plywood, conduit, insulators, toilets and other plumbing supplies. Leonard McHugh, of the Coast House Materials is the man with whom I did business, and I purchased a considerable quantity of material from him for the Central Post Fund during the time I was buying things for my house. Some of the plumbing supplies were very hard to get and he obtained them for me as a personal favor. During November and December of 1946 the Central Post

Fund had a surplus property sale. All the items sold except what McHugh got were used items for which there was no accountability and the sale was authorized by the Central Post Fund Council. Leonard McHugh came out to the surplus property sale and made purchases amounting to $536.00, but he did not pay cash for these items as was required by the rules of the sale, but rather set the amount up as a credit in his books. I allowed this to happen because I thought eventually that I would be able to apply this credit against my account with Coast House Material. On January 2, 1946, expecting to be transferred away from Ft. Lewis, I went to Leonard McHugh of the Coast House Materials to settle my account which amounted to $735.28. I told Leonard McHugh to credit my account with the balance he had in favor of the Central Post Fund of $536.00 and then I paid him the difference of $199.28. I did not tell him that I was going to repay the Fund the amount he had credited to my account. But I believe that if he had any ideas about it at all he would have known that he should not be paying the account I owed him with the credit due to the Central Post Fund. He knew that the things I had purchased from him were going into my house." (Pros. Ex. 49, pp. 2, 3).

The last typewritten paragraph of this statement having been transcribed from the supplement written by accused (Pros. Ex. 52) reads as follows:

"The above transactions were the result on my part of trying to have a habitable place of residence befitting that of an officer in the United States Army. No provisions had been made by the military authorities for quarters for me and my family upon my arrival at Ft. Lewis and in view of the acute housing shortage I had one alternative left, being in a strange city, and that was the above transactions. The above items I still have and plan on returning to the post upon orders transferring me from Ft Lewis to the Walter Reed General Hospital".

The letter of 2 January 1947 (Pros. Ex. 53) after setting forth the difficulties besetting accused in acquiring adequate lodging for his wife and himself upon arriving at Fort Lewis relates that he purchased an old house which was badly in need of repairs. It explains the financial troubles which beset him in placing this house in habitable condition and then follows a narrative account of the various transactions which are the subject matter of the offenses charged. In substance by this letter accused acknowledged the commission of all the acts related in his original confession except with respect to the Hopper-Kelly transaction (Charge I, Spec., Charge II, Spec. 1). He asserted that the pianos brought $196.00

and that he bought drapes for the quarters of the Commanding General of the Second Division with the money. He did not know what disposition had been made of the drapes. (In his confession he had said that the drapes which were purchased from the Karnes Store by him were placed in his home and that he used the money from the sale of the pianos "for my own benefit".)

He referred to the cancellation of orders for merchandise which had been paid for by Central Post Funds as mere "deferral of deliveries" with no intent to defraud as "We were pressed for time and sought to work matters out until such time as we could pay our bills". The "deferred" deliveries included a davenport set and occasional chair, twenty occasional chairs, two rugs, and 1000 phonograph records. Instead of the twenty occasional chairs, the Fund received seventeen floor lamps and he obtained a General Electric Refrigerator. He also obtained from Dorn another refrigerator, a washing machine, and a furnace, payments for which were made through the credits received as a result of the deferral of delivery of the merchandise ordered by the Fund.

On page 6 of this letter and as a part of paragraph 18 thereof accused said:

> "* * * He was asked to sign a statement of his delinquent activities. Even though the agents showed every courtesy and consideration, the Lieutenant was so completely overwhelmed with emotion that he would have signed most any statement and he did sign the one presented to him.* * *"

4. The defense introduced evidence to show that when accused became custodian of the Central Post Fund at Fort Lewis, Washington, the property records were in an unsatisfactory condition. An auditor testified that durable property came in from inactivated installations and was "dumped" at Fort Lewis so fast that it was impossible to pick it up properly on stock record cards, and that under accused's administration of the fund's property, there had been an improvement so far as pertained to the keeping of property records (R. 509, 516, 517). The auditor did not conduct any general physical inventory of the durable property (R. 514, 530). He was primarily concerned with the records; that all property received by the Fund be recorded on stock record cards or otherwise properly accounted for (R. 513, 514, 530, 531). There were some discrepancies in this regard during the audit periods of November 1945 through April, May and September 1946 (R. 509, 513, 517, 519), although for the latter period he testified the overall condition of the durable property records and financial account was satisfactory (R. 529).

Miss Clementine Cook, a salesgirl, who worked for the Karnes Store in South Tacoma testified that accused came to the store with his wife in March, 1946 and purchased ten pair of drapes at a cost of $190.00. Accused told her at the time that the drapes "were supposed to be for the General's quarters." He paid cash for them stating that he had cashed a check to make the purchase (R. 539-542).

It was stipulated that the records of the Central Post Fund disclosed no entries concerning these drapes (R. 589).

Lieutenant Kossek, who succeeded accused as custodian of the Central Post Fund on 20 December 1946, testified that he executed a receipt to accused for property turned over to him after taking an inventory based upon the property entered on the stock record cards. While the receiving reports of the fund were not referred to in making the inventory, he found everything listed on the stock record cards except some drape hangers (R. 547-555). He agreed that any shortage of property which had not been charged on the stock record cards would not be disclosed by his inventory (R. 555-557).

Miss White, who was the property clerk for the Central Post Fund and whose responsibility it was to see that property listed on receiving reports was recorded on the stock record cards, testified, that a davenport and chair costing $149.50 (Chg II, Spec. 2), twenty occasional chairs (Chg II, Spec. 3) and two, 9 x 12 rugs costing $72.50 (Chg II, Spec. 4) were picked up on her stock record cards (R. 558-560). Under date of June 1946 she recorded the receipt of one davenport set and chair and one occasional chair under debit voucher 6-6, which referred to the items entered on the receiving report, received in evidence as prosecution exhibit 12 (R. 558, 559; Def. Exs. B, D). The twenty occasional chairs were entered on her records but not until 6 December 1946 when her attention was called by the auditor to the discrepancy between the receiving reports and the stock record cards (R. 560, 577; Def. Ex. B). Her stock record cards also disclosed receipt of two rugs costing $72.50 each, but her entry bore the date of 13 August 1946, as compared with 15 August 1946, on the receiving report signed by accused. Her explanation was that in some instances the merchandise was received before the purchase orders and receiving reports were made out. But she was certain she had seen the rugs in question (R. 578) and that according to a memorandum receipt they were issued to the Engineer Training Section, Special Service Officer, at Fort Washington on the same date they were received (R. 577, 585; Def. Exs. D, E). She further stated that she knew these rugs were the ones in question because "the receiving report when it comes through, it is given a number, and I put that on my warehouse debit voucher to refer back when we need to look for it, not the receiving report itself, but it is given a number, and I put that on my warehouse debit voucher" (R. 587). The receiving report in question (Pros. Ex. 29) bears the number WDV 114 and the memorandum receipt (Def. Ex. E) for the rugs sets forth the warehouse voucher number as C 115 M60. The following pertinent entries all under date of 13 August 1946 concerning rugs are shown in the stock record kept by the witness (Def. Ex. C):

Voucher	Cost	Quantity Received	Quantity Issued	Bal. on Hand	Disposition	Remarks
No.						
D109M135		2	0	2	PTI	2nd Div
WDV 114	66.95	2		4		
C 115 M60			2	2	M/R	ETC
WDV 114	72.50	2		4		

Her records also showed that two other rugs were purchased in July 1946 at a cost of $53.91 each, but these were not entered on her stock record account until 6 December 1946 when the auditor called her attention to the discrepancy (R. 566; Def. Ex. C).

Miss White had no record pertaining to the seventeen floor lamps (Pros. Ex. 23) purportedly purchased by accused on 29 July 1946. She did not know whether they had been received (R. 574). Through her work she became acquainted with Mr. Dorn, the manager of The Peoples Store at Olympia, and had purchased from him at market price merchandise which was then difficult to obtain, including a refrigerator and some nylon hose (R. 603).

After his rights as a witness were explained accused made an unsworn statement through his defense counsel to the effect that the money received from Hopper-Kelly Company was used entirely in the purchase of drapes; that the transaction was not recorded on the books of the Central Post Fund because there were no accountability records pertaining to them; and that the accused believed that his responsibility was fully discharged by purchasing drapes "for the benefit of the Government". He denied that he had any fraudulent intent with respect to any of the transactions. Defense counsel substantially restated accused's testimony concerning the advice given him by the Chaplain which resulted in his writing the letter (Pros. Ex. 53) addressed to the Commanding General, Fort Lewis, Washington (R. 610, 611, 630).

5. The Board of Review has carefully considered the eivdence pertaining to the taking of accused's statement of 13 January 1947 and is convinced that this statement was freely and voluntarily made after a full explanation of accused's rights. The Board is also satisfied that the letter which accused wrote on 22 January 1947 in further explanation of his acts was voluntary and wholly unsolicited. It appears to have been made by him after mature reflection with the hope of showing that his wrongdoing was the result of a dire financial position and for that reason his transgressions should be condoned. If there could be any doubt concerning the voluntary character of his first statement, that doubt is completely dispelled by the sentence in his subsequent unsolicited letter that he was treated by the agents with "every courtesy and consideration". In our opinion these confessions were properly received in evidence.

The prosecution's evidence demonstrates that shortly after accused assumed his duties in January 1946 as custodian of the Central Post Fund, Fort Lewis, Washington, he embarked upon a course of conduct grossly violative of his duties and responsibilities as trustee of that fund. His machinations began almost immediately after his appointment when, without authorization of the Central Post Fund Council, he sold Mr. Hopper of the Hopper-Kelly Company some eighteen worn pianos which were then in possession of the Fund at a total price of $300.00. While he originally agreed with Mr. Hopper that radios of equal value would be delivered to the Fund when received by Hopper, the Fund never received these radios. Instead, accused subsequently obtained a coffee maker and toaster set costing $32.50, some other electrical appliances and a check for $191.60. The coffee maker was eventually found in his home. According to Mr. Hopper there was on 23 February 1946 a balance of $191.60 due for the pianos after deduction for the articles which accused had purchased and on that date at accused's request he drew a check payable to accused in that amount. The accused cashed this check and the proceeds were never received by the Central Post Fund. Although the defense sought to establish that accused used this money to purchase ten pair of drapes at the Karnes store in Tacoma for use in the quarters of a General Officer stationed at Fort Lewis, the records of the Central Post Fund show no such purchase and accused's confession sets forth that he cashed the check Hopper gave him and used the proceeds for "his own benefit." It also states that he had in his home drapes which he purchased from the same store through the Fund.

Shortly after he assumed his duties, accused became acquainted with Edward C. Dorn, the manager of the Olympia, Washington branch of The Peoples Store, a general mercantile establishment which had its principal store in Tacoma, Washington. Through this association the accused developed a sordid scheme which resulted in the payment by the Central Post Fund of over a thousand dollars for property which it never received, all of which money was applied by accused in payment of purchases from The Peoples Store for his own benefit. Altogether four transactions with The Peoples Store are shown by the evidence which disclose a brazen disregard for honesty on the part of accused in his fiduciary capacity.

On about 7 June 1946, on behalf of the Fund he ordered a davenport and chair set and an occasional chair at a total cost of $209.45 from Dorn; took necessary action to show on the records of the Fund that this property had been received and payment was in order although the sale had been cancelled, and applied this amount to the purchase for his own use from Dorn of a Norge Refrigerator costing $217.28. The refrigerator was subsequently found in accused's home. Similarly on about 20 July 1946 he repeated the same action with respect to the alleged purchase of twenty occasional chairs and on 15 August 1946 with respect to two 9 x 12

rugs. The chairs cost the Fund $465.00 and although the receiving report signed by accused represented that these chairs were delivered, in fact the order for them was cancelled. The records of The Peoples Store disclose that seventeem lamps costing $282.00 were delivered to the Central Post Fund although they were never accounted for in the property records of the Fund and whether they were received must remain in doubt,but what disposition was made of the lamps is not important as accused was not charged with an offense concerning them (See Charge II, Spec. 3). This evidence, however, was introduced to show the complete transaction and how the $465.00 intended for the purchase of chairs was spent. Deducting the $282.00 for the lamps there remained $183 to be accounted for, and on the date of the alleged chair purchase the accused bought in his own name from Dorn a General Electric Refrigerator at a cost of $188.49, which refrigerator was thereafter found in accused's home.

With respect to the transaction involving the two rugs, the fraudulent pattern employed by the accused was in all respects identical with the scheme used in the previous transactions. The fund paid $145.00 for these rugs, the order for which was cancelled by accused and he thereafter received from Dorn, in place of the rugs, an Easy Washer costing $144.15. This washer was also found at accused's residence.

The testimony of Miss White, the bookkeeper who kept the stock record account cards, was offered by the defense to show that the Central Post Fund actually received all the merchandise ordered from The Peoples Store. However, it was shown that in most instances she did not see the merchandise delivered and until July 1946 merely entered on her stock record account the items shown on a list prepared from the receiving reports. It was further shown that her records had been kept in an unsatisfactory condition, in some instances items which were allegedly purchased in June and July 1946 not being recorded until December 1946 and then only after the irregularity had been called to her attention by the auditor. In view of all the circumstances, the court was warranted in rejecting her uncertain testimony concerning receipt by the Fund of the davenport set, the chairs, and the rugs.

On about 25 September 1946 accused executed a purchase order for 1000 phonograph records and on the same day signed a receiving report acknowledging their receipt by the Fund from The Peoples Store at a cost of $790.00. He also on 11 October 1946 signed a check in that amount payable to the store and drawn on the Fund's account. The Peoples Store received payment on the check, but the phonograph records were never received by the Fund. Being expendable property, these records if received would have been distributed to the various dayrooms

on the post, it being the duty of the warehouseman Caruthers, to keep an inventory and the requisitions of the organizations showing their disposition. It was shown by Caruthers that shortly after these records were purportedly received, the accused induced him to falsify a requisition of one of the Post Organizations to show distribution of 1000 more records than he had delivered to that organization. The accused also changed the inventory to reflect the receipt in the warehouse of 1000 phonograph records. On the books of The Peoples Store for 11 October 1946 (the date on which payment was made for the phonograph records) there appeared a cash transaction involving the sale to accused of an oil furnace at a cost of $489.25. On that same day the bank deposit slip prepared by Dorn showed a check for $790 received from "Jones". The Peoples Store's records also show accused opened a credit account with it in November 1946 and that his account was debited on 14 December 1946 with a charge of $515.00 for installation of a furnace. In December 1946 he made a payment of $300.00 on this account. This payment plus the $489.25 accounted for the $790.00 intended for the purchase of the phonograph records which were never received by the Central Post Fund.

In furtherance of his scheme to defraud accused used Central Post Fund money to pay wages to Woolhouse, the carpenter to whom he was personally indebted for repair work on his home. Woolhouse testified that he signed a voucher for $70.00 ostensibly for the repair of two pianos on behalf of the Fund, but actually for the carpentry work he had done on accused's home and received payment by a Central Post Fund check payable to his order in that amount and signed by accused as custodian of the Fund.

The evidence further discloses that the Central Post Fund Council on 27 September 1946 authorized the accused to conduct a sale of surplus property belonging to the Fund. Sometime in September or October 1946 the accused induced Mr. McHugh, the president of the Coast House Materials to purchase a miscellaneous assortment of this surplus property at a cost of $536.00. This property consisting of about eighteen upholstered chairs, five leather chairs, seventy-eight rolls of chicken wire, sixty feet of pipe, eight sections of cyclone fencing, electric wire, and jute rope was kept in a shed adjacent to the Central Post Fund office and in a barracks on the Post. Although the list showing the surplus property items offered for sale did not specifically contain those which accused sold to McHugh, Miss Fahey, the bookkeeper for the Fund, testified she did not believe there was a complete inventory taken of all the items to be sold from the warehouse and that "on the minor account" the custodian was authorized to sell any and all surplus property of the Central Post Fund (R. 624). Moreover, there was a quantity

of miscellaneous items offered for sale which her list did not identify and further, the items sold to McHugh were by direct evidence shown to be Central Post Fund property. Accused told McHugh that this property had been written off the books and led McHugh to believe that he (accused) owned it. He instructed McHugh to deduct this amount from his personal indebtedness to the Coast House Materials Company and on 2 January 1947, after receiving this credit, he paid the balance of his personal account to that company. At the time of trial about 90% of the property which accused had sold to McHugh was still in possession of his company.

6. Specification of Charge I; Specification 1 of Charge II.

Under these specifications the accused was found guilty of embezzling the proceeds of a sale of about eighteen pianos belonging to the Central Post Fund. These proceeds consisted of a check in the amount of $191.60 and a coffee percolator and toaster of a value of $32.50, received by accused as trustee of the Central Post Fund from the Hopper-Kelly Company in exchange for the pianos.

The Manual for Courts-Martial states that:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268).
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, express or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship." (par. 148h, MCM, 1928).

By cashing the check and retaining the proceeds the accused was guilty of its embezzlement. His two statements are in conflict with respect to the disposition made of the money received from the check. In his confession of 13 January 1947 he said, "I cashed this check in one of the stores in town and used the money for my own benefit." In the letter of 22 January 1947 he admitted that he cashed the check, but asserted that he purchased drapes for the Fund with the proceeds. Under the circumstances it was within the province of the court to decide in which statement the accused spoke the truth. The court's conclusion that accused used these funds for his own benefit is entirely justified by the supporting evidence. It is to be recalled that in the first statement accused said he had purchased drapes from the Karnes Store, through

the Central Post Fund and that these drapes were placed in his home. Moreover, the records of the Central Post Fund did not reflect the receipt of the drapes and the facts and circumstances surrounding the purchase and personal use by accused of the coffee maker as well as his demand that the check be made to him personally established with great clarity the correctness of the original statement in its application to the embezzlement charge. In view of accused's position as custodian of the Central Post Fund, a trust arose by operation of law requiring him to place the proceeds of the sale of the pianos to the credit of that fund. His failure to do so was a breach of this trust relationship, and constitutes the offense of embezzlement. Every element of the offense charged is established by the evidence beyond a reasonable doubt.

The accused was charged with and found guilty of the commission of this offense in identical specifications under the 95th and 96th Articles of War. In its civil aspect the offense is properly laid under the 93rd Article of War, but embezzlement is also an offense under the 95th Article of War, being conduct of an officer which dishonors and disgraces him (CM 267483, Bonar, 44 BR 139). It is likewise an offense in violation of the 96th Article of War, being conduct prejudicial to good order and military discipline. As offenses under Article of War 95 and Article of War 96 are not the same, conviction of an officer under both articles on the same facts is proper (McRae v. Henkes, 273 Fed. 108). 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 and Charge II and Specification 1 thereunder.

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

The accused was found guilty under each of these specifications of defrauding the Central Post Fund of Fort Lewis, Washington of specified amounts of money by falsely representing that merchandise which he had ordered from The Peoples Store had been received by the Fund. As shown above, the evidence amply demonstrates in each instance that the accused ordered and acknowledged receipt from that store of merchandise which was paid for, but never received by the Fund and that instead accused personally obtained cash and merchandise of value equal thereto.

To establish the offense of false pretenses, the prosecution must prove four essential elements, (a) the intent of accused to defraud the person or persons named (b) an actual fraud committed (c) the false pretense and (d) that the fraud resulted from the employment of the false representation (Underhill's Criminal Evidence, 4th Ed., par. 696). There can be no question from the evidence discussed above that each of these elements was established beyond any reasonable doubt in connection with the transactions involving The Peoples Store. Accordingly, the

Board of Review is of the opinion that the record of trial is legally sufficient to support the court's findings of guilty with respect to Specifications 2, 3, 4 and 5 of Charge II.

Specification 7 of Charge II.

The accused under this Specification was found guilty of falsely pretending to the Central Post Fund that it was indebted to Ralph Woolhouse in the sum of $70.00 for services rendered and of thereby defrauding the Fund by obtaining that sum for his own use. Here again all the essential elements of the offense were fully and completely established, the witness Woolhouse himself testifying that he received the $70.00 from Central Post Funds for services which he had rendered to accused personally after a showing that accused had signed a receiving report falsely establishing that the Fund was indebted to Woolhouse in that amount for work performed. The uncontradicted evidence clearly establishes this offense and accordingly, is legally sufficient to support the finding of guilty of Specification 7 of Charge II.

Specification 8 of Charge II.

Accused was found guilty under this Specification of falsely pretending to the Coast House Materials that he was the owner of certain merchandise and of fraudulently obtaining from this company $536.00 by means of that false pretense. Throughout the transaction with Mr. McHugh of Coast House Materials accused's conduct was calculated to mislead and cheat. He well knew that he was not the owner of the property and that he had no title to transfer. His representations and acts to the contrary were obviously false and fraudulent and with intent to defraud. His acceptance of the $536.00 credit applied to his personal account with that company furnishes conclusive evidence of his pernicious motives. The evidence is legally sufficient to support the findings of guilty of this Specification.

7. Numerous objections to the admissibility of evidence and to procedure were made by defense counsel during the course of the trial. So, too, defense counsel voiced his objection to the pleadings by motions to strike, all of which were overruled. Some of these objections have been answered in the course of our opinion, but there remain certain questions raised by the record which we believe require our consideration.

At an early stage of the trial, a member of the court, Colonel Kern, was challenged by the defense counsel on the ground that during a brief recess of the court, he was observed speaking to a military witness who had just completed his testimony. The member stated in effect that he had discussed with the witness matters totally unrelated

to the trial, whereupon the court was closed. When the court was reopened the president announced that the challenge was not sustained by secret written ballot and the challenged member sat during the remainder of the trial. The record of trial does not show affirmatively that Colonel Kern withdrew and took no part in the deliberations and vote upon the challenge against him. Assuming that he remained present during the court's deliberations (and of this there is no showing), we would still not be justified in finding the proceedings were invalidated thereby unless it clearly appeared that as a result, some injury had been done to the accused's substantial rights (MCM, 1928, par. 58f). In this case the court's ruling in not sustaining the challenge was proper. It is not apparent from the record that any substantial right of the accused was injuriously affected by the apparent failure of Colonel Kern to withdraw during the court's deliberation on the challenge, and therefore this procedural irregularity, if in fact it did occur, does not invalidate the proceedings (CM 199838, Friedman, 4 BR 171).

Objection was made by the defense counsel to the testimony of witnesses employed by The Peoples Store concerning entries in their books of account and to the entries themselves. It was his position that such testimony was inadmissible on the ground that it had not been shown that these records had been made by and under the supervision of the witnesses testifying therefrom. In our opinion all of objections relating to these entries were properly overruled. In civil courts, records kept in the usual course of business have been made generally admissible in evidence, as an exception to the hearsay rule. This is true not only in many state courts but also in the federal courts. The pertinent federal statute (28 U.S.C., sec. 695, 49 Stat. 1561) announces the rule that any writing made as a record of any transaction is admissible in evidence "if it shall appear that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight, but they shall not affect its admissibility." It clearly appears from the evidence that all these records were made in the usual course of The Peoples Store business and that it was the business of The Peoples Store to make such records. Accordingly they were admissible without the testimony of the person making the entries, lack of personal knowledge being a matter affecting the weight and not the admissibility of the documents (CM 261107, Duboff, 40 BR 131).

Defense counsel's motions to strike all specifications of Charge I and Charge II on the ground that the offenses were improperly laid under

Article of War 96, were also properly denied by the court. We have heretofore indirectly considered the merits of these motions in pointing out that embezzlement is an offense under Articles of War 95 and 96 as well as under Article of War 93. The same reasoning is applicable to the offense of false pretenses. In fact, it is not preperly chargeable under Article of War 93 as contended by defense counsel, because the offense of false pretenses is not made punishable by that article. Neither is Article of War 94 applicable as the offenses charged did not involve frauds against the Government. We find in the record of trial no errors prejudicial to the substantial rights of accused.

8. War Department records show that accused is 30-10/12 years of age and single in 1942. The record of trial discloses that he has since married but the date is not shown. He graduated from high school and attended college for three years, thereafter being engaged in business for himself as a public accountant from 1938 to 1940. In 1939 he enlisted in the National Guard of the State of Texas and in November 1940 entered upon active duty in the Army of the United States when his unit was called into Federal service. Thereafter, he was an officer candidate at the Army Administrative School, University of Florida, and upon satisfactory completion of the course was appointed a Second Lieutenant in the Army of the United States on 10 February 1943. This was a limited service appointment because of deficient hearing previously incurred through illness. On 23 October 1943 he was promoted to the grade of First Lieutenant and served overseas from February 1944 to October 1945. His efficiency reports show four ratings of Superior, two of Excellent, three of Very Satisfactory, and two of Satisfactory.

9. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support 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. Confinement in a penitentiary is authorized by Article of War 42 for the offense of false pretenses, (where the amount involved is $50 or more), recognized as an offense of a civil nature and so punishable by confinement for more than one year, by Section 1301 of Title 22 of the District of Columbia Code (See CM 276617, Inglett, 48 BR 390).

Joseph P. Stern, Judge Advocate

W. H. Johnson Jr, Judge Advocate

C. J. Schuyler, Judge Advocate

JAGQ - CM 322337 1st Ind

WD, JAGO, Washington 25, D. C. JUL 23 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 Charles N. Jones, Jr. (0-1994788), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of embezzling a check amounting to $191.60 and a combination coffee percolator and toaster, value $32.50, received by accused as part of the proceeds of a sale by him as trustee of about eighteen used pianos belonging to the Central Post Fund, Fort Lewis, Washington, in violation of Articles of War 95 and 96 (Spec. 1 of Charge I; Spec. 1 of Charge II); of fraudulently obtaining for his own use and benefit from the Central Post Fund, Fort Lewis, Washington, the respective sums of $209.45, $182.80, $145.00 and $790.00, an aggregate total of $1257.25 by falsely pretending in each instance that this Fund had received merchandise of equal value from The Peoples Store of Olympia, Washington (Specs. 2, 3, 4 and 5 of Charge II); of fraudulently obtaining for his own use and benefit from the Central Post Fund, Fort Lewis, Washington, the sum of $70.00 by falsely pretending that the Fund was indebted in that amount to a named employee (Spec. 7 of Charge I), and of fraudulently obtaining from the Coast House Materials Company of Tacoma, Washington, for his own use and benefit the sum of $536.00, by falsely pretending that property sold to that company in that amount was his own (Spec. 6 of Charge II), well knowing that the pretense in each instance was false, all of said offenses being in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, 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 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.

Accused was the custodian of the Central Post Fund of Fort Lewis, Washington. In January or February 1946, he sold 18 surplus pianos, property of this fund, to the Hopper-Kelly Company for $300.00 under an agreement that the Fund would receive property of equal value in exchange therefor. Instead, however, he received from the Hopper-Kelly Company a combination percolator and toaster, value $32.50 and a check for $191.60 on 23 February 1946, all of which he converted to his own use and benefit. On 7 June 1946, he ordered from The Peoples Store of Tacoma, Washington, on behalf of the Central Post Fund one davenport set and one occasional chair at a total cost of $209.45; on 20 July 1945, 20 occasional chairs at a cost of $465.00; on 15 August 1946, 2 rugs at a total cost of $145.00; and on 15 September 1946, 1000 phonograph records at a cost of $790.00. In each instance, payment was made by the Central Post Fund to The Peoples Store for the merchandise on accused's representations in writing that the items for which payment was made had been received. Instead, however, accused in concert with one Edward C. Dorn, Manager of The Peoples Store, contrived a plan whereby the orders for the above described property were cancelled and in lieu of the property for which the Fund had paid, accused obtained from Dorn for his own use one Norge Refrigerator at $217.28, one General Electric Refrigerator at $188.49, 1 Easy Washer at $144.15, and one oil furnace at $489.25. He applied the remainder of the proceeds amounting to about $300 and derived from the cancelled orders to the payment of his indebtedness to The Peoples Store for installation of the furnace in his home. On 19 November 1946 he paid to Ralph Woolhouse, a carpenter, $70.00 with Central Post Fund money, representing that the Fund was indebted to Woolhouse for services rendered when in fact the accused himself, and not the Fund, owed Woolhouse this amount for carpentry work performed on accused's home. In October or November, 1946 accused sold to the Coast House Materials Company of Tacoma, Washington, a quantity of surplus property belonging to the Fund, for $536.00. In consummating this sale he falsely held himself out to be the owner of the property and thereby induced the Coast House Materials Company to credit his personal account with that amount.

4. War Department records show the accused is 30-10/12 years of age and was single in 1942. The record of trial discloses that he has since married but the date is not shown. He graduated from high school and attended college for three years, thereafter being engaged in business for himself as a public accountant from 1938 to 1940. In 1939 he enlisted in the National Guard of the State of Texas and in November 1940 entered upon active duty in the Army of the United States when his unit was called into Federal service. Thereafter, he was an officer candidate at the Army Administrative School, University of Florida, and upon satisfactory completion of the course was appointed a second lieutenant in

the Army of the United States on 10 February 1943. This was a limited service appointment because of deficient hearing previously incurred through illness. On 23 October 1943 he was promoted to the grade of first lieutenant and served overseas from February 1944 to October 1945. His efficiency reports show four ratings of Superior, two of Excellent, three of Very Satisfactory, and two of Satisfactory.

5. On 1 July 1947, Mr. Herman G. Nami, Attorney of San Antonio, Texas, appeared before the Board of Review and presented oral argument on behalf of accused. His remarks and comments have received consideration.

6. I recommend that the sentence be confirmed and carried into execution and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 286, 27 Aug 1947).

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

JAGH - CM 322366

1 AUG 1947

UNITED STATES	)	FIFTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 710, 27 February 1947,
First Lieutenant ROBERT D. PRINCE	)	Dismissal.
(O-2083465), 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 Specifications:

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

Specification 1: (Finding of not guilty)

Specification 2: In that First Lieutenant Robert D. Prince, Headquarters & Headquarters Squadron, Fifth Air Force, APO 710, did, at Nagoya, Honshu, Japan, on or about 21 December 1946, after striking and injuring a person, to wit: Tokushige Mizuno, with a government vehicle, wrongfully leave the scene of the accident.

Specification 3: In that First Lieutenant Robert D. Prince, Headquarters & Headquarters Squadron, Fifth Air Force, APO 710, did, at Nagoya, Honshu, Japan, on or about 21 December 1946, after striking and injuring a person, to wit: Tokushige Mizuno, with a government vehicle, fail to report said accident to proper authorities.

Specification 4: In that First Lieutenant Robert D. Prince, Headquarters & Headquarters Squadron, Fifth Air Force, APO 710, did, at Nagoya, Honshu, Japan, on or about

> 21 December 1946, after striking and injuring a Japanese national, one Tokushige Mizuno, with a government vehicle, wrongfully and to the prejudice of good order and military discipline say to Corporal Norvel E. Saunders and Corporal Jacob T. Kaminsky, both of whom were occupants of his vehicle at the time of the accident and personnel subject to military law, "Say nothing about it", or words to that effect.

The accused pleaded not guilty to the Charge and all Specifications thereunder. He was found not guilty of Specification 1, guilty of Specification 2, 3, and 4, and guilty of the Charge. No evidence of previous convictions was introduced. The accused was sentenced "to be dismissed from the service and to forfeit all pay and allowances due or to become due from that time on". The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Fifth Air Force Judge Advocate, APO 710, dated 7 May 1947.

4. The accused is 28 years of age, married, and the father of one child. He completed grade school and one year of high school, leaving school in 1935. As a civilian he was employed as a floor sander and finisher from 1939 to September 1942 and a welder's helper from September 1942 to April 1943.

He enlisted in the Army 1 July 1935 and served until 25 September 1937 in the Coast Artillery in the Canal Zone. He was inducted 25 April 1943 and served as an enlisted man until 13 March 1944. From 14 March 1944 to 31 January 1945 he was an Aviation cadet. He was commissioned a second lieutenant, Air Corps, on 1 February 1945. The date of his promotion to first lieutenant is not disclosed by any information contained in his War Department 201 file. Two Efficiency Reports on file in the War Department show that the accused was rated "Unknown" as a second lieutenant for the period 1 July 1945 to 31 December 1945 and that for the period 1 July 1946 to 31 December 1946 he was rated "Excellent" as a first lieutenant.

The testimony in the record of trial shows that about eight days after the accident accused went to the hospital to see the Japanese who was injured. He gave him a new bicycle and paid his hospital expenses.

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 and to support the sentence as modified by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of Article of War 96.

A. Hoffenstein, Judge Advocate

Walderner A. Solf, Judge Advocate

Philip H. Smith, Judge Advocate

JAGH - CM 322366 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 for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert D. Prince, (0-2083465) Air Corps.

2. Upon trial by general court-martial, this officer was found guilty of wrongfully leaving the scene of an accident, after striking and injuring a Japanese civilian with a government vehicle, (Spec 2. CHC); of failing to report the accident to proper authorities, (Spec 3. CHC); and of wrongfully saying to two enlisted men who were riding with accused at the time of the accident, "Say nothing about it," (Spec 4. CHC) all in violation of Article of War 96. He was sentenced "to be dismissed from the service and to forfeit all pay and allowances due or to become due from that time on". The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying review of the Fifth Air Force Judge Advocate, APO 710, dated 7 May 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 is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

On 21 December 1946 the accused, accompanied by four enlisted men, was driving a jeep in Nagoya, Honshu, Japan, on the way to Komaki Army Airdrome, after having attended a basketball game. They stopped at a cabaret after leaving the game, and drank some beer. At about 2200 they left the cabaret and were proceeding along a street in Nagoya. It was dark, but the street was dry. The vehicle which accused was driving struck a Japanese civilian who was riding a bicycle and injured him to such an extent that he was hospitalized for about eight days. The accused did not stop the jeep, but continued on to the Komaki Army Airdrome. After the accident, he spoke to two of the enlisted men riding with him and asked them if they say what happened. When they replied that they did, he told them to say nothing about it. He further stated that if they had anything against him they had a chance to get even.

Accused did not report the accident to anyone and made out no accident report as was required in case of motor vehicle accidents. There was some evidence tending to show that the accused was exceeding the speed limit at

the time of the accident, but he was found not guilty of Specification 1 which alleged driving in a reckless manner in excess of the speed limit of 20 miles per hour. There was also some evidence that the victim was riding his bicycle too far towards the center of the street and in attempting to turn toward the side of the street, where he was supposed to ride, he rode in front of the jeep. The record further shows that the bicycle involved in the accident had no light.

About eight days after the accident accused went to the hospital to see the Japanese who was injured. He gave him a new bicycle and paid his hospital expenses.

4. The accused is 28 years of age, married and the father of one child. He completed grade school and one year of high school, leaving school in 1935. As a civilian he was employed as a floor sander and finisher from 1939 to September 1942 and a welder's helper from September 1942 to April 1943.

He enlisted in the Army 1 July 1935 and served until 25 September 1937 in the Coast Artillery in the Canal Zone. He was inducted 25 April 1943 and served as an enlisted man until 13 March 1944. From 14 March 1944 to 31 January 1945 he was an Aviation cadet. He was commissioned a second lieutenant, Air Corps, on 1 February 1945. The date of his promotion to first lieutenant is not disclosed by any information contained in his War Department 201 file. Two efficiency Reports on file in the War Department show that the accused was rated "Unknown", as a second lieutenant for the period 1 July 1945 to 31 December 1945 and that for the period 1 July 1946 to 31 December 1946 he was rated "Excellent", as a first lieutenant.

5. Upon consideration of all the facts in this case, 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 three months and that the sentence as thus commuted be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 290, 25 Aug. 1947).

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

JUN 17 1947

JAGQ - CM 322377

UNITED STATES v. Private JOHN S. BRZUCKI (12273765), Detachment, 2nd Major Port, Transportation Corps, APO 317.	KOBE BASE UNITED STATES ARMY Trial by G.C.M., convened at Kobe Base, Kobe, Japan, 25 April 1947. Dishonorable discharge and confinement for life. Federal Penitentiary, McNeil Island, Washington.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John S. Brzucki, Detachment 2nd Major Port, Transportation Corps, did, at Kobe, Honshu, Japan, on or about 30 March 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kenkichi Matsui, a human being by shooting him with a carbine.

Accused pleaded not guilty to, and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Federal Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

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

4. Murder is the unlawful killing of a human being with malice aforethought, without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par. 148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death. An intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life.

The evidence clearly establishes that accused, at the time and place alleged, used a deadly weapon in a manner likely to and which did in fact cause the death of a Japanese civilian. The actions of accused in injecting a live shell into the chamber of his carbine; pointing the gun at the victim and "allowing" the firearm to be discharged with the fatal result that a human being was killed certainly manifests a reckless disregard of human life.

While the evidence tending to prove the "degree" of intoxication of accused is conflicting there can be no doubt but that he had been drinking. This fact is shown by his actions in "flipping a cigarette by Colonel Millison's feet"; staggering walk, flushed face and "foolish actions." The alcohol blood test showed a "level of 0.5" which is insignificant but as the time it was made is indefinite the accuracy of the finding is of little value in determining the condition of accused at the time of the shooting. The noncommissioned officer who was in charge of the guard detail of which accused was a member testified that when they arrived at the pier, accused "didn't look drunk or any thing". The question of accused's degree of intoxication is one of fact for the court to determine from all the evidence in the case and the Board of Review is of the opinion that there is sufficient competent evidence in the record of trial to support the findings of guilty by the court which negative the fact that accused was so intoxicated that he was not legally responsible for his actions.

A neuropsychiatric examination of accused resulted in the findings that while he possessed a tendency toward pathological intoxication or abnormal and unusual response in his behavior when under the effects of alcohol, he was so far free from mental defect, disease or derangement as to be able, at the time of the alleged act to distinguish right from wrong, adhere to the right, and at the time of trial to cooperate intelligently in his defense.

5. Consideration was given to letters from Congressman Edward J. Hart, Congresswoman Mary T. Norton, Commander John E. Schroder of the New Jersey American Legion, Mr. Frank A. Verga, attorney for accused's family, and numerous organizations in the vicinity of accused's home. The Board of Review also held a hearing attended by the following persons:

Mr. and Mrs. Stanley Brzucki, parents of accused
Congressman Edward J. Hart
Mr. Stewart, representing Senator H. Alexander Smith
Arthur D'Elia, Commander, Fitzgerald-Holota Minn. Post
Veterans of World War II, Jersey City, N.J.
Conrad J. Vuocolo, Adjutant " " " "
Salvatore J. Vuocolo, Post Judge Advocate " "
Mr. Blainey, Commander of Amvets of N.J.
Frank A. Verga, attorney for accused.

It was emphasized at this hearing that clemency should be extended on the basis that accused was only 17 years of age at the time of this offense (he was 18 on 10 May 47), that he was of previous good character, that he had only 7 months' training before being sent to Japan, that he did not drink before entering the Army, that he drank 12 cans of beer immediately preceding his being placed on guard duty, that his condition was such that he should not have been posted as a guard or given a lethal weapon and that he was so drunk he should not be held legally responsible for his acts. A petition was presented, signed by 6,000 individuals in accused's home area (northern New Jersey) expressing the opinion that the sentence was too severe and urging that clemency be extended. It was also represented that many organizations and individuals in New Jersey feel very strongly in this case and believe that the sentence should be substantially reduced.

6. The charge sheet shows accused to be 18 years of age. He enlisted in the Regular Army at Jersey City, New Jersey, 20 May 1946 for three years with no prior service. There is no evidence of any previous convictions by court-martial.

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. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the United States Code.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

[illegible], Judge Advocate

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

JAGK CM 322437

15 JUL 1947

UNITED STATES	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Kitzingen, Germany, 11 March 1947. Dismissal and total forfeitures.
Second Lieutenant JOHN W. WOODRUFF (0-1340607), 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 Charges and Specifications:

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

Specification: In that, Second Lieutenant John W. Woodruff, E Troop, 10th Constabulary Squadron, did, at Aschaffenburg, Germany, feloniously take, steal, and carry away one (1) pair riding boots of the value of about $10.00 and one (1) Leica camera of the value of about $54.30, property of a person or persons unknown, which had been sequestered by the United States Government as evidence, on or about 9 December 1946.

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

Specification 1: In that Second Lieutenant John W. Woodruff, E Troop, 10th Constabulary Squadron, did, at Kitzingen, Germany, on or about 7 January 1947, with intent to deceive Major G. Edwin Scott, officially state to the said Major G. Edwin Scott, that "He knew nothing about any of the missing articles of evidence except a pair of riding boots" which statement was known by the said Second Lieutenant John W. Woodruff to be untrue.

Specification 2: (Finding of Not Guilty)

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge II and Specification 1 thereof but not guilty of Specification 2, of Charge II. He was found guilty of Charge I and its Specification except the words "one (1) pair of riding boots of the value of about $10.00 and," of the excepted words, not guilty. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five (5) years. The reviewing authority approved only so much of the sentence as involved dismissal from the service and total forfeitures and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the Prosecution.

On 9 December 1946 personnel of Troop "E", 10th Constabulary Squadron, located at Aschaffenburg, Germany, raided the apartment of a civilian named Pandew and confiscated a large quantity of items of personal property which had allegedly been acquired on the black market (R. 7, 14). The accused was commanding officer of the 2nd Platoon of Troop "E". Pencilled notations listing the confiscated property were made by Franz Kress, a civilian employee of the United States Constabulary and Urf Kurczyk, a German civilian policeman. This property was stored in the arms room of accused's platoon (R. 10). Several weeks after the raid a typewritten inventory of the property was prepared (R. 12). A Leica camera was among the articles taken from the Pandew apartment (R. 8,11,14).

Sometime in January 1947, T/5 Robert J. Dolan, Special Investigation Section, Headquarters, 10th Constabulary Squadron, proceeded to Aschaffenburg to investigate the alleged theft of some of the property confiscated in the "Pandew case." He interrogated the accused who told him he knew nothing about it. On 7 January 1947, T/5 Dolan received from accused a pair of German riding boots and a sleeping bag which he marked and placed under lock and key. (R. 23, 24)

Major G. Edwin Scott, Provost Marshal, 10th Constabulary Squadron, testified that several days prior to 9 January 1947 he sent agent Dolan to Aschaffenburg to "investigate the facts and circumstances involving the disappearance of certain items of property that were held as evidence in a case against a Yugoslav named Pandew." Dolan had returned a sleeping bag and a pair of boots, the only missing property that had been located. On 9 January 1947 Major Scott went to Aschaffenburg and interrogated accused who made "some statement to the effect that none of the property had shown up, that they had made a shakedown of the billets." Later the same day accused told Major Scott that "if you can wait till Saturday I can have some of this property returned to you." Major Scott became insistant and demanded to know who had the property and accused replied "Lieutenant Hammerstone." (R. 26). (On motion of defense counsel, the statement concerning Lieutenant Hammerstone was stricken from consideration by the court).

The accused then took Major Scott to his quarters and delivered to him certain items of personal property stating, "This is part of the missing articles." Major Scott asked accused if he had any other items that he wanted to turn in and which had not been declared and accused reached between the springs and mattress of his bed and brought out a Leica camera which Major Scott handed to Agent Dolan to be tagged. Pros. Ex. 1 was identified by the witness as being similar in type to the Leica accused delivered to him (R. 27-28).

T/5 Robert J. Dolan was recalled and positively identified the aforementioned exhibit as being among the items taken from accused's quarters and handed to him by Major Scott to be tagged (R. 29).

First Lieutenant Jesse Hammerstone, C Troop, 10th Squadron, was called as a witness for the prosecution and asked if he had ever seen the accused with a Leica camera. The witness refused to answer claiming privilege against self incrimination. The president ruled that to give answer would in no wise incriminate the witness and directed him to answer. The witness stated that he had seen accused with such type camera and that he had seen him with a pair of riding boots which was among the "stuff" that was confiscated. He had not seen the boots in accused's room however (R. 31).

T/5 Austin A. McKinney, "C" Troop, 10th Constabulary Squadron, testified that he was present when the raid was conducted on 9 December 1946 and that he saw a pair of German riding boots and two cameras which were confiscated (R. 33).

Major G. Edwin Scott was recalled to the stand and stated that "I asked the lieutenant what he knew about the theft of property, the Pandew property and he said he didn't know anything except about a pair of boots and that was the only item he knew anything about, was a pair of boots, that he had been given permission by the CID Agent, Mr. Stewart, to retain those boots." This statement was made by accused before the witness went to Aschaffenburg (R. 34).

On or about 10 January 1947 the accused made a sworn written statement to Captain George E. Brashear, CAV, S-2 of the 10th Constabulary Squadron. Captain Brashear testified that prior to taking the statement he warned accused of his rights. The defense objected to the introduction of the statement in evidence on the ground that Captain Brashear thought it was made in December 1946 or a month prior to the date shown thereon. After argument by counsel, the defense requested the president of the court to rule of the admissibility of the statement inasmuch as there appeared to be a discrepancy in the date shown on the writing and the date given by the witness. After the witness had identified the statement, however maintaining doubt as to the exact date it was given, the court ruled that it was admissible and the writing was received in evidence as Pros. Ex. 4. By his sworn statement accused admitted that while the case was being investigated he had in his possession certain items of property which were

"all taken from the evidence of George Pandew" including a Leica camera and a pair of German boots. He stated further "I took the Leica camera from the arms room and put it in my quarters. I took it with the intent to keep it. When Major Scott came up I turned the camera over to him***." Accused also stated that he had knowledge of other items that were taken from the evidence, listing such items and naming another officer whom he asserted had taken the property (R. 19-22, Pros. Ex. 4). It was stipulated that the camera, Leica No. 326393, had a value of $54.30 (R. 39, Pros. Ex. 5).

4. For the Defense.

Franz Kress who had previously testified for the prosecution was called as a witness for the defense. He stated that on the night of the raid he made pencil notes of the property confiscated and that sometime later he and Mr. Kurczyk made a typewritten inventory. He was positive that only one camera, a Leica, was among the property taken from the Pandew residence. Without objection there was received in evidence a typed copy of the inventory referred to by the witness (R. 40, Def. Ex. A). The inventory lists two cameras, a "Leyka" with light meter and case and a "Juvilett" with case. The witness explained the discrepancy by stating that he never saw the other camera (R. 40-42). The defense also called Herr Ulf Kurczyk who explained the manner in which the confiscated property was listed and stated that two cameras, a Leica and a Juvilett were among the property (R. 47-48).

Captain George E. Brashear was questioned at length by the defense with regard to the statement or confession made to him by accused and previously received in evidence as Pros. Ex. 4. The witness asserted that he presented to accused a list of some 20 items missing from the evidence (Pandew) and accused requested that he take the confession which was voluntarily made and "of his own free will" (R. 51).

Second Lieutenant Lloyd E. Webb, 10th Constabulary Squadron, testified that he had known accused since his graduation from Officer Candidate School, Fort Benning, Georgia, in 1945, that accused stood high in his class, was an able officer, excellent leader and that if anyone said Lieutenant Woodruff was a thief he "would say they were a liar" (R. 55).

After explanation had been made to accused of his rights he elected to remain silent and no further evidence, material to the offenses of which the accused was convicted, was presented by either side.

5. By his sworn written statement, which is conclusively shown to have been voluntarily executed and with full knowledge of his rights, accused admitted to his squadron S-2 that he took a Leica camera from the property held as evidence in the Pandew case, "with the intent to keep it." He also admitted that when the investigation was being made concerning the missing property he had knowledge of the probable whereabouts of other missing items exclusive of the pair of riding boots. The former declaration constitutes a confession to the larceny alleged in the

Specification and Charge I, the latter being a confession that his statement made to Major Scott (during the investigation) was known by accused to have been untrue. An accused however cannot be convicted legally upon his unsupported confession and we are required to look to the other evidence, either direct or circumstantial, or both, to determine if, excluding the confession, such evidence tends to show "that the offense charged has probably been committed." Par 114 (a) Page 115 MCM 1928.

No witness in the case testified positively that the Leica camera, confiscated from the apartment of Pandew and placed with the other property in the arms room, was missing therefrom under circumstances which would indicate that it had been stolen. This would have been the more orthodox manner for the prosecution to have presented its case. However, it is shown that an extensive search was being conducted "involving the disappearance of certain items of property held as evidence in a case against a Yugoslav named Pandew" (Major Scott, page 26), and further, Captain Brashear asserted that he presented to accused a list of such missing property prior to taking the confession. Accused was the commanding officer of the platoon making the raid and had access to the property confiscated. All the evidence tends to show that the Leica camera was one of the items confiscated and accused, prior to making his confession, removed the camera from between the mattress and springs of his bed and turned it over to Major Scott, the provost marshal. Such evidence, part of which may be considered as circumstantial and part direct tends to show that the larceny had probably been committed. It is not required that the evidence of the corpus-delicti, aliunde the confession, be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or that it cover every element of the charge, or connects accused with the offense. (CM 314092 Bishop, CM 266691 Venable, 3 BR (NATO) 391, 394; CM 272987 Anderson, 3 BR (NATO) 77, 82; CM 210693, Alexander, 9 BR 331, 336 review of cases.)

With regard to Specification 1 Charge II and upon the same principles of law heretofore set forth, the surrender by accused to Major Scott of confiscated property other than the riding boots is sufficient evidence corroborative of the confession to show that the statement previously made to Major Scott was, at the time it was made, known by accused to have been untrue.

6. War Department records show that accused is 20 years of age and was a student at Ohio State University when he was inducted into the Army as a private in April 1945. On 15 February 1946 he was appointed second lieutenant, Infantry, Army of the United States. No efficiency reports are available, however the record shows accused to have an Army general classification test score of 137.

7. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 for violation of Articles of War 93 and 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 322437 1st Ind

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

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and opinion of the Board of Review in the case of Second Lieutenant John W. Woodruff (0-1340607), Infantry.

2. Upon trial by general court-martial this officer was found guilty of the larceny of one (1) Leica camera of the value of about $54.30, ownership unknown, which had been sequestered by the United States as evidence, in violation of Article of War 93, and, with intent to deceive, officially stating to Major G. Edwin Scott that "he knew nothing about any of the missing articles of evidence except a pair of riding boots" which statement was known by accused to be untrue, 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 5 years. The reviewing authority approved only so much of the sentence as involved dismissal and total forfeitures and forwarded the record 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 and the sentence and to warrant confirmation of the sentence.

4. On 9 December 1946 accused's platoon raided the apartment of a civilian at Aschaffenburg, Germany, and confiscated numerous items of personal property allegedly acquired on the black market. Among the items confiscated was a Leica camera and a pair of German riding boots. The property was inventoried by civilian employees of the United States Constabulary and stored in the arms room of accused's organization. Subsequently numerous items of the property appear to have been missing and an investigation was conducted to locate the missing articles. Accused was interviewed by Major Scott, the Provost Marshal, and he (accused) turned over to Major Scott the German riding boots, stating that he knew nothing about any of the other items of missing property. Shortly thereafter accused went to his room and secured the Leica camera, taking it from between the springs and mattress of his bed. He voluntarily admitted the taking of the camera, with intent to keep it, and also admitted that when he made the statement to Major Scott he knew of the whereabouts of other items of the missing property.

5. At the time of the commission of the offenses accused was 19 years of age. He appears to have been an outstanding young officer and all members of the court-martial hearing the case recommended suspension of the sentence in a petition dated 15 March 1947 and addressed to the Commanding General,

United States Constabulary. They cite, among other reasons for clemency, the confused status and reckless handling of confiscated and abandoned property in the European Theater. Accused's squadron commander, in a letter through channels to the Commanding General, United States Constabulary, dated 22 March 1947, requested suspension of the sentence, asserting that accused was young and inexperienced but an excellent officer. He also stated that there had been a common practice in the theater of reckless handling of property of which ownership was in doubt. The Commanding General, Third Constabulary Brigade, did not concur in the recommendation of accused's squadron commander and set forth his reasons therefor.

Considering all the circumstances of the case, I recommend that the sentence be confirmed but commuted to dismissal, a reprimand and forfeiture of $100 pay per month for two months, and that the sentence as commuted be ordered into execution but that the execution of the dismissal be suspended during good behavior.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 291, 25 Aug 1947)

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

JAGN-CM 322445

UNITED STATES	)	SECOND ARMY
V.	)	Trial by G.C.M., convened at New Cumberland, Pennsylvania, 26 March 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private JEROME KENNEDY, JR. (36027090), Detachment of Patients, Valley Forge General Hospital.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and SMITH, 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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Jerome Kennedy, Jr., Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at the Branch Bank, Phoenixville Trust Company, at Valley Forge General Hospital, Phoenixville, Pennsylvania, on or about 23 November 1946, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "Winnetka State Bank, Winnetka, Illinois. Pay to the Order of Cash - Seventy-five and no/100 Dollars, $75.00, Jerome Kennedy, Jr.,", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Private Jerome Kennedy, Jr., Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at the Branch Bank,

Phoenixville Trust Company, Valley Forge General Hospital, Phoenixville, Pennsylvania, on or about 25 November 1946, with intent to defraud, falsely make in its entirety, a certain check in the following words and figures, to wit: "Winnetka State Bank, Winnetka, Illinois. Pay to the Order of Cash - One Hundred and no/100 Dollars, $100.00 Jerome Kennedy, Jr.," which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that Private Jerome Kennedy, Jr., Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at Valley Forge General Hospital, Phoenixville, Pennsylvania, on or about 25 November 1946, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "Winnetka State Bank, Winnetka, Ill. Pay to the Order of Millard Luther - Thirty-two and no/100 Dollars, $32.00, Jerome Kennedy, Jr.," which said check was a writing of a private nture, which might operate to the prejudice of another.

Accused pleaded not guilty to, and was found guilty of, all Specifications and the Charge. 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 approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. In view of the holding of the Board of Review as hereinafter stated it is deemed unnecessary to summarize in detail the evidence introduced at the trial.

4. Each Specification in essence alleges that accused did at a designated time and place "with intent to defraud, falsely make in its entirety, a certain check * * * [set out in haec verba and alleged to have been signed by accused using his own name as maker], * * * a writing of a private nature, which might operate to the prejudice of another.

Each Specification clearly purports to allege an offense of <u>forgery</u> which is defined as:

> "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice. (Clark)" (par. 149j, MCM, 1928).

Respecting each check transaction the evidence is uncontroverted that accused made and signed the check, using his own name as maker; that he represented the check to be his personal obligation; and that the payee named in the check accepted it with the understanding that it was accused's personal check just as it appeared to be on its face. Each check was exactly what it purported to be and thus a genuine instrument, and as a genuine instrument it could not, without further negotiation, impose any apparent or actual legal liability upon any person other than the accused. Such checks do not constitute a basis for charging the offense of forgery as defined above.

In 1922 the Board of Review, in a similar case, held:

> "Accused was charged with the forgery of a check, the evidence showing that it was signed by him in his own name, that it did not purport to be other that what it was, and that it was understood by all concerned to be accused's check. None of the elements of forgery appear and the evidence is not sufficient to support the findings of guilty. CM 154131 (1922)" (Sec. 451 (27) Dig. Ops. JAG 1912-40).

The Board of Review is of the opinion that the rule so stated is equally applicable in this 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.

Edward J. Dunican, Judge Advocate.

Joseph E. Brack, Judge Advocate.

Philip R. Smith, Judge Advocate.

JAGN-CM 322445 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Second Army, Fort George G. Meade, Maryland.

1. In the case of Private Jerome Kennedy, Jr. (36027090), Detachment of Patients, Valley Forge General Hospital, 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 322445).

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.

JAGN-CM 322483

UNITED STATES	)	HEADQUARTERS FORT BRAGG
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bragg, North Carolina,
Private QUAY R. STINNETTE	)	29 April 1947. Dishonorable
(34594986), Detachment #3,	)	discharge and confinement
3420 Area Service Unit,	)	for eighteen (18) months.
Station Complement.	)	Post Guardhouse.

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 58th Article of War.

Specification: In that Private Quay R. Stinnette, 34594986, Detachment Number Three, 3420 Area Service Unit, Station Complement, Fort Bragg, N. C., but then a member of Special Reassignment Detachment Section 1, 1460 SCU, Camp Butner, N. C., did at Camp Butner, N. C., on or about 13 May 1945 desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Bragg on or about 21 March 1947.

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 for eighteen months. The reviewing authority approved the sentence, designated the Main Post Guardhouse, Fort Bragg, North Carolina, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The following exhibit was introduced by the prosecution and admitted in evidence without objection.

"Stinnett, Quay R 34594986
(Last name) (First name) (Middle initial) (Army serial number)

PFC Spec Reasgmt Det Sec 1 1460 SCU
(Grade) (Company, regiment, and arm or service)

EXTRACT COPY OF MORNING REPORT OF —

Spec Reasgmt Det Sec 1 1460 SCU
(Company, troop, battery, or detachment) (Regiment or other organization)

28 May 1945

A/U TDy to AWOL 0600 13 May 45

Spec Reasgmt Det Sec 1 1460 SCU Cp Butner NC 28 May 45
(Complete designation of command (Station) (Date)

I, JAMES J. DOOLEY, Capt., Inf., certify that I am the commanding officer of Spec Reasgmt Det Sec 1 1460 SCU and official
(Complete designation of command)
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 Butner, North Carolina
(Station)
for the dates indicated in said copy which relates to Quay R.
(Full
Stinnette, 34594986, PFC Spec Reassgmt Det Sec 1 1460 SCU
name, Army serial number, grade and organization of person referred to in extract copy)

James J. Dooley
(Signature)

JAMES J. DOOLEY, CAPT., INF.
(Grade and arm or service)"

It was stipulated that "accused surrendered himself at Fort Bragg, North Carolina, on or about 21 March 1947."

No witnesses were called, the prosecution adduced no more evidence and the accused, being advised of his rights declined to testify or to introduce any evidence on his own behalf.

4. The only evidence to sustain the court's finding is prosecution's exhibit 1 above set out. The evidentiary value of such exhibit is limited to the words:

"28 May 1945

A/U TDy to AWOL 0600 13 May 45"

The omission of the name of the accused from the body of the exhibit, as distinguished from the certification thereof, is such as to render it of no probative value in this case (CM 318685, Sustaite, 1947). There being no other evidence to prove the unauthorized absence of accused it follows that the finding of the court cannot be sustained.

5. For the reasons states the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Edward J. Robinson, Judge Advocate.

(ABSENT TDY), Judge Advocate.

James P. Cullen, Judge Advocate.

JUN 1 0 1947

JAGN-CM 322483 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Fort Bragg, North Carolina.

1. In the case of Private Quay R. Stinnette (34594986), Detachment #3, 3420 Area Service Unit, Station Complement, 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 322483).

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 322487

UNITED STATES v. Private AMOS M. DINKINS (RA 33425342), 2305 Transportation Corps Car Company	)	UNITED STATES FORCES IN AUSTRIA Trial by G.C.M., convened at Vienna, Austria, 9-11, 14, and 15 April 1947. To be hanged by the neck until dead

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Amos M Dinkins, 2305 Transportation Corps Car Company, did, at Vienna, Austria on or about 14 March 1947 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gertrude Paschinger, a human being, by beating her with his fists and kicking and stamping upon her with his feet.

He pleaded not guilty to, and was found guilty of, the charge and its specification. No evidence of any previous conviction was introduced. All the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority approved the findings of guilty, except the words "and with premeditation," approved the sentence and forwarded the record of trial for action pursuant to Article of War 48 with a recommendation that "that portion of the sentence adjudging that the accused be hanged by the neck until dead be commuted to confinement at hard labor for the term of his natural life and that, as so commuted, the entire sentence be ordered executed."

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

At the time of the alleged offense and for several months prior thereto, the accused was assigned to the 2305 Transportation Corps Car Company in Vienna, Austria. His principal duties were to train for and participate as a boxer in various boxing tournaments (R 36-37, 47, 80, 90, 102).

On or about 18 December 1946, the accused met Gertrude Paschinger, the deceased, a small slender Viennese girl in Vienna, Austria. She was approximately 5 feet tall and weighed approximately 110 or 120 pounds (R 22, 44, 135; ProsEx 13, R 163). Shortly after they met, the accused and the deceased became intimate and met frequently at the 2305 Enlisted Men's Club, the "Club 13" (R 17, 19, 45). When the club closed they would spend the night in a room of the apartment occupied by Frau Paschinger, the mother of the deceased (R 19, 23, 28, 34). On 27 February 1947, the accused went to Germany with the unit boxing team. Upon his return on 6 March 1947, his interest in the deceased appeared to have waned and he went to her home on only four occasions thereafter, but he spent the night with the deceased each time and made his last overnight visit on 11 March. On the afternoon of 14 March he went to the apartment but the deceased was not home. However, the accused visited with Frau Paschinger and was very friendly and gave her a package of cigarettes when he departed (R 24).

The accused often told Frau Paschinger that he loved the deceased (R 21). However, their relationship was marked by frequent quarrels. On one occasion the accused admitted to the mother that he had fired a shot but he stated that he had fired down a street and did not shoot at the deceased (R 22). In spite of the differences, Frau Paschinger was under the impression that the accused and the deceased remained on good terms until the night of the homicide (R 28, 31).

At approximately 1930 hours on 14 March 1947 Private Holmes was in the Cafe Schweigler. The accused came in alone and joined Fraulein Seidenberger. This girl had had an appointment to meet him that night in the cafe (R 70, 74). Private Holmes invited them to his table for a drink (R 47, 54, 62). The deceased was also present in the room. She saw the accused and walked up to him and engaged him in a conversation. Shortly thereafter he slapped her twice (R 48, 55, 63, 74). The accused told the deceased not to "run after him because he had a new girl friend" (R 64, 73-74, 79). She looked angrily at the accused and departed. Accused told Fraulein Seidenberger and Holmes that he would like to know where the deceased had gone. He then went into the hall with Fraulein Seidenberger. The deceased was still there and she accosted him once again. The accused and Fraulein Seidenberger thereupon re-entered the cafe (R 64, 74-75). The accused was not heard to threaten the deceased (R 79).

The deceased left the building and walked across the street. Holmes followed her and engaged her in conversation and asked her to come to his room. She acceded, and accompanied him to his room and engaged in intercourse with him. They later left the room and were about to emerge into the street when deceased saw the accused approach with Fraulein Seidenberger. They drew back and after the accused passed, she and Holmes left the building and parted company (R 49, 56, 63). Holmes rejoined the accused's group and told him that he had had intercourse with the deceased. The accused laughed and said, "Okey, that's nothing." They then entered the "Club 13" (R 49, 56, 65). The accused went to the office in an attempt to secure the admittance of Fraulein Seidenberger. Holmes and his girl went into the club and proceeded to dance (R 50).

At about 2100 hours (R 111) the accused returned from the office and had just rejoined Fraulein Seidenberger at the club entrance when the deceased walked in and again asked to speak to the accused. The accused agreed and asked Fraulein Seidenberger to come outside with them (R 65, 75). Fraulein Seidenberger then stood at the entrance and the accused and the deceased turned right and proceeded to walk along the Lichtensteinstrasse. The accused had his arm around the waist of the deceased. They did not appear to be arguing (R 123, 128, 134). They stepped inside the doorway of a building for a few minutes and suddenly the deceased ran out. The accused pursued her and overtook her after a few steps. He knocked her to the ground and proceeded to stamp upon her head. She raised her head but it was kicked down again (R 112, 116, 123, 127, 130, 135, 138; Pros Exs 8, 9, 10). The accused stamped upon the deceased from eight to twelve times (R 117, 131, 139). The blows were delivered within the space of approximately one minute (R 116). The deceased emitted but one scream and then did not move nor make a sound again (R 65-66, 76, 88, 112, 124; Pros Ex 2). The scene of the incident was lighted by a street lamp (R 78, 119; Pros Ex 5).

Fraulein Seidenberger approached the accused and he told her to summon Holmes. She did so and returned with Holmes within a few minutes (R 50, 65, 66, 67). The accused was kneeling over the deceased and was cradling her head in his arms (R 50, 65), when Private Hawkins (R 37, 40, 42, 50; Pros Exs 1, 2), Private Carter (R 82, 86, 88; Pros Ex 6), and Private Hopson (R 103, 107; Pros Ex 2) came out of the club (R 113). Accused told Hawkins that "he had hit her" (R 37, 43, 51, 57) and told Carter "I hit her and I know I shouldn't have did it" (R 82, 88).

The accused attempted to lift the deceased to her feet two or three times but on each occasion she slumped to the ground once again (R 77, 113, 117). None of the witnesses testified that they saw her head strike the pavement when she fell. The accused then requested the soldiers to secure transportation so that he could take the deceased to a hospital. Soon thereafter, Private Wilson, another colored soldier from the same organization, drove up with a weapons carrier and the deceased was placed

in the vehicle (R 38, 83, 91, 97, 104; Pros Exs 3, 7). Fraulein Seidenberger picked up the gloves and bag of the deceased (R 67) and gave them to one of the soldiers; Hopson picked up one shoe (R 104). Fraulein Seidenberger and the soldiers identified the deceased as the girl who was lying on the sidewalk (R 44, 65, 84, 101). The accused stated that he thought the deceased was not seriously hurt and that he did not want to take her to the hospital (R 92, 99). He admitted to Wilson that he had "beat her" (R 92).

He asked for and received permission to take the deceased to Wilson's room, whereupon they proceeded to 18 Halbgasse and the deceased was carried upstairs and laid on a bed (R 39, 84, 104, 109). The accused and Hopson bathed her face with cold towels (R 39, 93, 104, 111). Over her eye the deceased had a cut which was one and one-half inches long. Her eyes were shut, her nose was bleeding and her face was swollen (R 94, 101-102, 105). She stirred slightly and the accused thereupon said that she would be all right in the morning. He then requested Wilson to secure some smelling salts and a first aid man. Hawkins, Wilson, and Carter then departed (R 95, 99). The accused and Hopson continued to minister to the deceased. While they were so engaged, the accused told Hopson that deceased had "pulled a knife on him outside the club and he had hit her and kicked her one or two times" (R 105, 110). Wilson returned after a short period of time and reported that he could not find the aid man. He asked again whether the accused wanted to take the deceased to a hospital but the accused replied in the negative and Wilson again departed (R 95-96). Hopson left soon thereafter. He returned the following morning and the accused told him that he thought the deceased was dead. The accused then turned himself in to the military police (R 106-107, 111).

At approximately 1100 hours the morning of 15 March, Doctor Myrcko, a physician employed by the Municipal First-Aide Organization, proceeded to Wilson's room at 18 Halbgasse. He found the corpse lying on a bed. The face was blue and swollen and blood was running from her nose and throat (R 147; Pros Ex 11). It was the doctor's opinion that she had been dead six hours (R 147-148). Herr Paschinger was summoned and he identified the body as that of his daughter, Gertrude Paschinger (R 150; Pros Ex 11).

The body was picked up and delivered to the Institute of Forensic Medicine and on 17 March, Professor Schwarzacher of the Institute performed an autopsy on the body of the deceased, which he identified from a photo (R 159; Pros Ex 11). The autopsy (R 163-166; Pros Ex 13) disclosed the following facts:

> The deceased was 151 cm long and her muscles were "not very strong."

There were groups of small round abrasions—three millimeters in diameter—on the badly swollen face of the corpse. The abrasions on the fact were contained within other ring-like abrasions approximately ten millimeters in diameter (R 164, 176, 181, 238; Pros Ex 16).

There were several fractures of the nasal bone.

Small bruises were present on various parts of the body.

A gaping fracture appeared on the lower right portion of the skull extending from the suture which is between the upper and lower part of the skull to the base of the skull.

Extravasations of liquid and slightly coagulated blood below the soft cerebral membranes, particularly above the right half of the brain (R 168; Pros Ex 13, R 163, Pros Ex 14, R 180).

It was the opinion of Professor Schwarzacher that the cause of death was brain paralysis occasioned by a hemorrhage of the brain which was precipitated by the above-mentioned skull fracture (R 166, 180; Pros Ex 14) and the nature of the injury was such that deceased could not have survived even though she were extended prompt expert medical attention.

On direct examination, Dr. Schwarzacher testified that the skull fracture could have been caused by pressure or blows on the front of the skull while it was resting on a solid base (R 178).

On cross-examination he was asked the following hypothetical question:

"* * * In your opinion, if a female, while in a state of unconsciousness and while she was completely limp and without control of her body and muscles, if such female were lifted from a hard pavement to a height of four or five feet * * *. And said female slipped from the grasp of her lifter and fell to the pavement and her head hit the pavement full force, would the impact, in your opinion, of her skull on the pavement cause a fracture of that skull in the case of a female?" (R 180).

The record shows the following reply (through the interpreter (R 158)).

"Under the described circumstances there is a possibility for such a fracture, but in such a case the soft part of the brain must be injured" (R 180).

On examination by the court, the witness was asked, "In what portion of the head does the soft part of the brain appear?" He replied:

> "The question is not right. The reason is that there is a skull and on the outer side of the skull are the so-called soft portions, the skin" (R 181).

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

The only duties that the accused had since joining his unit in December 1946 were to train for the European Theater boxing tournament. He trained conscientiously and did not cause any trouble in the company. The company commander stated that he always conducted himself in an excellent manner (R 202-204).

Several soldiers of accused's organization testified as the the accused's efforts to sever his relationship with the deceased (R 192-193, 197, 200, 212) the reluctance of the deceased to part with the accused and her persistence in following him to the club and various cafes in spite of his requests that she leave him and his girl friend alone (R 186, 190, 198, 206-207, 210, 212). These soldiers testified that the accused did not at any time tell them that he was going to harm the deceased. Private Leroy Fleming further testified that on 7 March 1946, the deceased remarked, "if she couldn't have Dinkins, he wouldn't have another girl and another girl wouldn't have him" (R 196, 199).

After his arrest, the accused was interrogated by the Criminal Investigation Division. He spoke freely and did not withhold any information (R 205, 215). The accused gave a knife to one of the agents. It was the property of the deceased and she always carried it in her handbag (R 182, 215; Def Ex B).

After his rights as a witness were explained to him by the law member, the accused elected to be sworn as a witness (R 217-218) and testified that he is 26 years of age, that he was inducted on 10 February 1943 and that he served with a fighter group in the European Theater for seventeen months. He met the deceased during the latter part of December 1946. They kept company constantly and were intimate until the middle of January 1947. His interest waned at that time and he tried to sever the relationship. But the deceased persisted in seeing him and she wrote a letter to the accused in January 1947 in which she protested her love for him even though he beat her and shot at her (R 227, Def Ex A). However, the accused made dates with other girls and kissed them in front of the deceased but the deceased could not be dissuaded. He even slapped her on several occasions in order to discourage her, but without success (R 219-220).

Accused met Fraulein Seidenberger on 12 March. He had another date with her on the 13th and took her to the Cafe Schweigler. During the evening he left the table and in his absence the deceased came in and spoke to

Fraulein Seidenberger and told her that she would make the accused "kaput" because of the way in which he treated her (R 225). The accused returned to the table and directed the deceased to leave him alone, but when he accompanied Fraulein Seidenberger to her room that night, the deceased followed them (R 226). The accused made another date with Fraulein Seidenberger for the next day and on the 14th the accused proceeded to Cafe Schweigler to keep his rendezvous. Private Hopson accompanied him. The deceased followed them and requested to speak to the accused; however, the accused ignored her and continued on to the cafe. She followed the accused into the cafe. The accused was aware of this and deliberately embraced Fraulein Seidenberger in her presence, whereupon the deceased approached the accused. The accused became "peeved" and ordered her out of the cafe. She refused to go, so the accused slapped her. The deceased looked at him angrily and stated that that would be one night the accused would not forget and she then departed. Private Holmes absented himself from the table. After waiting a short while for his return, the accused and his party departed for "Club 13" (R 221).

While the accused was engaged in securing admission for Fraulein Seidenberger, the deceased walked in and again requested to speak to the accused, who then suggested that they go outside to talk. They stepped into the vestibule of the club and the accused asked her what she wanted. The deceased replied that the accused was driving her crazy and that she was going to make him "Kaput." She then raised her hand and accused noticed that she had a little silver knife. The accused testified, "I had no fear of the knife. I wasn't afraid that she was going to hurt me. It was just the idea that she wanted to hurt me that provoked me" (R 222, 226, 230, 233). The accused struck her on the face. Her knees sagged, but the accused held her up and pushed her into the street. He followed, cursed her, and told her to leave. She did not comply, so the accused twisted her arm behind her and led her along Lichtensteinstrasse. She resisted, and when he released her, she raised the knife again and still wanted to hurt him. A feeling of anger came over the accused that "almost blinded" him. "My eyes were just jumping or burning and I knew that I am more than apt to do her harm. I slugged her." The accused was in a blind fury and was too angry to control his actions. When he struck her the second time, she fell to the ground and he stamped on her twice, but when he saw blood, he desisted and attempted to pick her up (R 222, 226, 231, 234-235). The accused never planned - nor had he the incentive - to harm the deceased (R 226). The accused did not recall stepping into a doorway with the deceased after he had left the club (R 230).

He succeeded in getting the deceased to her feet but she slipped out of his grasp to a sitting position and her head fell backward and struck the sidewalk (R 222, 232). He detected Fraulein Seidenberger in the shadows and called for her to summon help. A crowd of civilians began to

gather and the accused covered the head of deceased with his jacket. He saw the knife of the deceased on the sidewalk so he placed it in his pocket for fear that the civilians would think that he had cut her (R 222, 229, 232).

Private Wilson drove up and the accused placed her in the vehicle. He decided that she was not seriously injured so he did not think it was necessary to take her to a hospital. Instead, he took her to Wilson's room. One of the other soldiers brought her pocketbook, in which she always kept the knife (R 233). He ministered to the deceased during the night. At about 0500 hours he noticed that she had stopped breathing. At 0900 hours after Hopson returned he surrendered to the Military Police (R 224-225).

5. The accused stands convicted of killing Gertrude Paschinger willfully, deliberately, feloniously and with malice aforethought, by beating her with his fists and kicking and stamping upon her with his feet.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM 1928, par 148a, p 162).

An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner or which is done in self-defense on a sudden affray" (MCM 1928, par 148a, p 163). The elements of proof as stated in the Manual for Courts-Martial are:

> "(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) that such killing was with malice aforethought."

It is uncontradicted that Gertrude Paschinger died as a result of injuries inflicted by the accused within approximately eight hours after the injuries were inflicted. On the other hand, it is also obvious from the fact that the accused did not in any way attempt to conceal his act, that he assaulted the deceased in a fit of spontaneous rage.

The problems presented by the record are enumerated and discussed below:

a. Was the killing of the deceased excusable? (i.e., Did the accused act in self-defense?)

b. Was the fatal injury inflicted intentionally during his attack upon the deceased, or accidentally while he attempted to assist her to her feet after his assault upon her?

c. Was there adequate provocation for the accused's acts?

Self-Defense

The accused testified that after he took the deceased to the vestibule of the club and asked her what she wanted, she replied that accused was driving her crazy and that she was going to make him "kaput." She then raised her hand and the accused noticed that she had a pocket knife in her hand. The accused thereupon struck her. Her knees sagged, but the accused held her up and pushed her into the street. He twisted her arm behind her and forced her along the Lichtensteinstrasse. He told her to leave and cursed her. When he released her she raised her knife again, whereupon he struck her twice, knocking her to the ground, and then proceeded to stamp upon her head.

The version of the attack narrated by the accused on the stand is not corroborated by any of the witnesses and it was evidently rejected by the court. The evidence is undisputed that the accused told his fellow soldiers that "he had hit her" and "I know that I shouldn't have did it" (R 33, 43, 82, 88). The latter statement is particularly significant because it is characteristic of repentance for wrong-doing rather than misgiving for repulsing an attack. These remarks were uttered by the accused before he had the opportunity for reflection and apparently the court gave them infinitely more credence than the story that accused subsequently told Hopson in the room (R 105, 110), for by that time the accused had had time to weigh the seriousness of his offense. The fact that the accused failed to mention the knife to his comrades and the further fact that no one else saw the knife, although some of the accused's comrades picked up other personal possessions of the deceased, discredits the belated contention of the accused that he concealed the knife so that by-standers would not think that he had cut the deceased.

Even if it were conceded that the deceased did attack the accused at the exit of the "Club 13" the circumstances of the case do not show self-defense.

> "To excuse a killing on the ground of self defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * *. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, * * * has retreated as far as he safely can" (MCM 1928, par 148, p 163).

The accused admitted on the stand that he was not apprehensive of bodily harm for he was not afraid of the knife and that he was motivated in striking the deceased by anger rather than by fear. Furthermore, the accused did not attempt to retreat from the fray at any time.

Consequently it is clear that the accused could not avail himself of the doctrine of self-defense.

Accidental Injury

The defense attempted to show that the fatal injury was sustained by the deceased as a result of a fall to the sidewalk when she slipped from the accused's grasp as he tried to lift her to her feet.

Several eyewitnesses testified that the accused attempted to lift the deceased to her feet after his rage had subsided, but on each occasion she slumped to the ground. The accused testified that he succeeded in getting the deceased to her feet but she slipped out of his grasp to a sitting position and fell backward striking her head on the sidewalk. The accused's statement relative to the deceased's head striking the sidewalk was not corroborated by any of the eyewitnesses, nor was it corroborated by the circumstantial evidence.

In this connection Dr. Schwarzacher testified that the skull fracture which was the ultimate cause of death could have been caused by blows on the front of the skull while it was resting on a solid base. In answer to a hypothetical question propounded by the defense, he stated that a skull fracture such as deceased suffered could have been caused by a fall from a height of four or five feet, but that in such an event there would have to be an injury to the soft portion of the skull, i.e., the skin covering the injured portion of the skull. (Although the record shows that the witness referred to "the soft part of the brain" (R 180), this is obviously either an error on the part of the interpreter or a slip of the tongue, for on examination by the court the witness explained that his previous statement pertained to "the so-called soft portion, the skin" (R 181)). The report of autopsy shows no abrasion or lacerations on the skin covering the lower right portion of the skull where the fracture was located.

It is self-evident, even without the use of medical testimony, that the accused's repeated stamping on the deceased's face with great force while her head rested on the sidewalk was infinitely more likely to produce a skull fracture than the relaxed fall of a limp girl from a sitting position. Even under the remote possibility that the fatal injury was caused by a fall, the court would have been warranted in concluding that such a fall occurred when the accused seized her after she ran out the doorway and threw her to the sidewalk.

Accordingly we are of the opinion that the defense contention that an accidental fall was the proximate cause of death is not tenable.

Provocation

Since it is obvious that the accused struck and stamped on the deceased in a fit of spontaneous rage, the most serious problem presented by the record is whether he acted under sufficient provocation to destroy the presumption of malice arising out of the circumstances under which the homicide was committed. The Manual for Courts-Martial defines malice aforethought in the following terms:

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused. An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person * * * although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; * * *" (MCM 1928, par 148a, p 164).

In discussing the presumption of malice, Winthrop stated:

> "In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the facts and circumstances of the killing as committed no defense appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held murder in law" (Winthrop's Military Law and Precedents, 2d Ed (1920 Reprint) pp 672-673).

In Corpus Juris it is said:

> "A specific intent to kill does not enter into the definition of murder at common law or under statutes declaratory thereof; it is sufficient if the unlawful killing is with malice aforethought either express or implied, and a homicide may be malicious, and hence may be murder, although there was no actual design to take life. If an unlawful act, dangerous to, and indicating disregard of, human life, causes the death of another, the prepetrator is guilty of murder, although he did not intend to kill. Thus, if an assault was made upon deceased, not with the design of killing him, but of inflicting great bodily harm upon him, it is murder if his death is caused thereby; and it is murder where death results from an assault or other unlawful act, intentionally done in such a manner as was likely to cause death or serious bodily harm, even though there may have been no actual intent to cause death or great bodily harm, but the injury intended must be such as involves serious consequences, either in endangering life or leading to great bodily harm, and death or great bodily harm must have been a reasonable or probable consequence of the act" (29 C.J., sec 69, pp. 1095-1096).

In the instant case the evidence shows that the accused stamped upon the deceased's head with great force eight or twelve times. From this evidence the court was legitimately justified in concluding that the accused commenced and persisted in his attack upon the deceased not only for the purpose of inflicting great bodily harm upon her, but with the specific intent to kill her - unless the accused acted in hot blood caused by adequate provocation.

The definition of voluntary manslaughter and its distinction from murder are thus stated:

> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought. The intent to kill being formed suddenly under the influence of violent passion or emotion which, for the time being, overwhelms the reason of the accused. It is * * * the uncontrollable passion, aroused by adequate provocation, which for the time being renders the accused incapable of reasoning and unable to control his actions" (1 Wharton's Criminal Law, sec 423, pp 640-642).

"The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter" (Stevenson v. United States, 162 U. S. 313, 320, 40 L. Ed., 980, 983). (Cf: Jerry Wallace v. United States, 162, U. S. 466, 40 L. Ed., 1039; John Brown v. United States, 159 U. S. 100, 40 L. Ed., 90). (See CM 246548, Maxwell, 2 BR (ETO) 251).

The two elements of (1) uncontrollable passion and (2) adequate provocation are thus analyzed:

"The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and the formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time; and the grade of the offense is fixed by the preponderance of passion, or the legal presumption that the act was malicious and for motives of revenge. Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and a control of his actions" (1 Wharton's Criminal Law, Sec 426, pp 646-647).

"Malice is not an ingredient of manslaughter. Malice being present, passion and anger, whatever their extent or degree, will not serve to reduce an unlawful killing to voluntary manslaughter" (ibid. Sec 426, p 659).

"Such passion must be produced by due and adequate provocation, and be such that would cause an ordinary man to act upon the impulse of the moment, engendered by such passion, and without due reflection and the formation of a determined purpose. The moving cause of the action of the accused in any given incident under investigation may be either such anger as above described, or fear, or terror of such a character or degree as to render the accused incapable of cool reflection.

What may reasonably inspire these feelings is not viewed alike." (ibid., Sec 426, pp 647-649).

"Deliberate and cruel use of superior strength implies malice. Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the latter acting in the heat of blood upon provocation, he killing the agressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault, nor in all cases even by a blow. Violent acts of resentment, bearing no proportion to the provocation or insult, particularly where there is a decided preponderance of strength on the part of the party killing, and where the punishment is deliberate and cruel, constitute murder, if death ensue from the attack" (ibid., Sec 602, p 815).

"Where the mortal blow is deliberately given after the deceased is helpless, the offense is murder. Where a party, after he has got the better of the other, holds him prostrate and defenseless, the reception of a prior blow will not reduce the grade to manslaughter. This proposition, in fact, is a corollary of that which makes a blow no mitigating provocation when there is a manifest disparity of strength between the parties. For even where no disparity at first exists, the principle holds good when by the result of the conflict one party is disarmed, or becomes otherwise helpless" (ibid., Sec 604, p 817).

Even if full credence were given to the accused's version of Gertrude Paschinger's assault upon him with a knife, the circumstances as related by him are not such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man. The disparity in the strength of the accused, a well trained boxer, and the deceased, a small, slender, and weak girl was so great that it is doubtful if a manslaughter finding would have been warranted had the fatal blow been struck immediately after her alleged assault, for the accused stated that he was at no time apprehensive of bodily harm. All doubts vanish, however, when it is considered that the accused deliberately stamped upon her head while she lay prostrate and helpless on the sidewalk. The authorities are uniform, that to reduce a homicide to manslaughter, where there is a disparity of strength between the parties, the provocation must be extreme and amount to a serious battery.

In the leading Stedman's case (1704) Fost, C.L. (Eng) 292, the defendant Stedman, a soldier ran hastily toward an affray in a street. A woman cried out, "You will not murder that man, will you?" Stedman replied, "What is that to you, you bitch?" The woman struck him on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled, Stedman pursued her, and stabbed her in the back.

"It seemed to Hold, C. J., that this was murder, a single box on the ear from a woman not being sufficient provocation to kill in such a manner, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was ruled clearly to be no more than manslaughter. The smart to the man's wound, and the effusion of blood might possibly have kept his indignation boiling to the moment of the attack"(cited in Wharton, op cit, Sec 602, footnote, p 816).

The rule in Stedman's case has been seriously questioned by American authorities. In Commonwealth v. Mosley (1846, 4 Pa. 264), the court said:

"If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Under this view of the law I have always doubted Stedman's case" (See also CM 238138, Brewster, 24 BR 173).

In the instant case the court was, of course, not under any obligation to believe the accused's testimony relative to the assault with a knife. If that part of accused's testimony is disbelieved, the remaining incidents of provocation are merely the deceased's annoying persistence in pursuing the accused, the creation of embarrassing scenes in the presence of his new girl friends, and her threats that if she could not have the accused, no other girl would have him.

Threats, words of reproach, and annoying behavior standing by themselves have uniformly been regarded as inadequate provocation to reduce a homicide to manslaughter (Allan v. U. S., 164 U. S. 528; Wharton's op cit, Sec 584; CM 228571, Dockery, 16 BR 249, 256; CM 236723, Coker, 23 BR 109; CM 239710, Parker, 25 BR 247, 250; CM 243294, Thompson, 27 BR 333; CM 245726, Vest, 29 BR 265, 275; CM 246417, Berry, 30 BR 20; CM 248793, Beyer et al, 50 BR 21, 43; CM 252242, Reichl, 50 BR 53, 63).

Accordingly we are of the opinion that the evidence supports the findings of guilty of murder as modified by the reviewing authority.

6. In the review of the Staff Judge Advocate it is stated:

"The accused is a colored soldier 26 years of age. He has a Group II AGCT Score of 114. He was born and raised in Pittsburgh, Pennsylvania. His mother is living; his father, who was formerly a laborer in a foundry, died in 1945. He has a younger

brother, a war veteran, who is employed as a laborer in a steel mill. He has a sister who is a housewife. The accused completed high school and was in the middle third of his class. He starred in football and track and was president of a student athletic association. After his graduation he attended Smith College in North Carolina for two years, majoring in Languages and Philosophy, and was a member of the boxing and football teams. He discontinued his schooling in December 1941 at the age of 21 in order to marry. He married in 1942 but is now estranged from his wife, who became unfaithful while he was overseas. When he left school the accused first secured employment as a trucker on the railroad and earned $100.00 a month. He remained in this position for one month and then secured employment in a department store as a paint mixer and earned $125.00 per month. His earnings were inadequate, so after one month he found employment in the steel mills, as an open hearth laborer and earned $175.00 a month. He remained at this job until he entered the Army in February 1943. Neither he nor any member of his family has ever experienced any difficulties with the civilian authorities.

"The accused was inducted into the Army in February 1943. He was assigned to the Air Corps and took his basic training at Jefferson Barracks, Missouri. Upon the completion of this course of training he was sent to an armament school at Lansing, Michigan. When this training was concluded he was sent to the 332nd Fighter Group, in April 1943. He moved overseas with this unit in January 1944 and went to Italy. He earned six battle stars and was promoted to the grade of sergeant. In March 1945 he was returned to the United States to train with the 447th Bombardier Group, which was destined for the Pacific. The unit, however, was deactivated soon after V-J Day and the accused was discharged in October 1945. He entered the Maritime Service Training School and later joined the Merchant Marine and completed a one month cruise to South America. Upon his return he re-enlisted in the Army, in March 1946, and was returned to the European Theater in May. After several assignments he joined his present organization in Vienna in December 1946. The accused has never been tried by a Court-Martial and has had only one company punishment, for being absent without leave, while serving in the United States."

7. As indicated above the reviewing authority recommended that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of accused's natural life.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 322487 1st Ind

WD, JAGO, Washington 25, D. C. SEP 2 1947

TO: 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 Private Amos M. Dinkins (RA 33425342), 2305 Transportation Corps Car Company.

2. Upon trial by general court-martial this soldier was found guilty of the murder of a Viennese girl, in violation of Article of War 92. 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 hanged by the neck until dead. The reviewing authority approved the findings of guilty except so much of the findings as involve a finding that the killing was done with premeditation, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48 with a recommendation that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of accused's natural life.

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 as modified by the reviewing authority and the sentence and to warrant confirmation of the sentence. In view of all the circumstances in the case including the accused's previous good record, the fact that the homicide was committed in a fit of spontaneous rage although not upon adequate provocation, the absence of premeditation, and the recommendation of the reviewing authority, I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of the natural life of accused, that the sentence as thus commuted be carried into execution and that a United States penitentiary be designated as the place of confinement.

4. Inclosed is a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry the foregoing recommendations into effect, should it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Draft of letter
3 - Form of Executive action

(G.C.M.O. 17, 16 Oct 1947)

(Dept of the Army)

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

OCT 9 1947

JAGQ - CM 322498

UNITED STATES	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 17 March 1947. Dismissal.
Captain FREDERICK A. TRUMPF (O-415745), Signal Corps.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Frederick A. Trumpf, Headquarters Troop, 97th Constabulary Signal Squadron, did at Bamberg, Germany, on or about 31 October 1946, wrongfully receive from Technician Fifth Grade Jerry R. Runyan in exchange for two (2) bottles of gin the sum of twenty-five dollars ($25.00), an amount in excess of the established price.

Specification 2: In that Captain Frederick A. Trumpf, Headquarters Troop, 97th Constabulary Signal Squadron, did at Bamberg, Germany, on or about 25 November 1946, wrongfully receive from Technician Fifth Grade Jerry R. Runyan in exchange for twelve (12) bottles of whiskey the sum of two hundred dollars ($200.00) an amount in excess of the established price.

Specification 3: In that Captain Frederick A. Trumpf, Headquarters Troop, 97th Constabulary Signal Squadron, did, at Bamberg, Germany, in exchange for ten (10) bottles of American Whiskey, wrongfully receive from Technician Fifth Grade Jerry R. Runyan, on or about 23 December 1946 the sum of $60.00 and on or about 28 December 1946 the sum of $70.00, both sums being in excess of the established price.

Accused pleaded not guilty to and was found guilty of the Charge and its three Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. Evidence for the Prosecution.

In the latter part of October 1946 accused overheard Technician Fifth Grade Jerry R. Runyan, mail clerk of the 97th Constabulary Signal Squadron, Bamberg, Germany, telling another enlisted man that he knew where he could sell some liquor (R. 7). Two or three days later accused advised Runyan that he had two bottles of gin he would sell for $25.00 so they went to accused's quarters where Runyan received the gin; sold it to Technician Fourth Grade Fitzsimmons for $25.00 and delivered the money to accused the same day (R. 7, 14). About one month later Runyan went to accused's office pursuant to the latter's request and accused asked him to sell a case of whiskey stating he (accused) "wanted $200.00 for it - if I wanted to sell ten bottles at $200 I could have the other two bottles, or if I wanted to sell the whole case I could have all over $200" (R. 14). Runyan took the case of whiskey, sold it to Fitzsimmons for $210.00, returned $200.00 to accused and retained $10.00 (R. 8-13). Thereafter, during the Christmas holidays, accused advised Runyan that he had another case of whiskey he would sell, so Runyan took the case from accused's quarters, sold three bottles for $60.00, seven bottles for $70.00, and drank "the other two" himself (R. 9). Accused required that Runyan sell the whiskey at certain prices and the witness had several discussions with accused relative to the selling price. He testified that at first, accused "wanted $25 a bottle and he couldn't get it, then he brought it down to $20 and it didn't sell so good and he told me he was kind of hard up and told me to sell it for $10." (R. 12). Runyan further testified that enlisted men could not purchase intoxicants by the bottle but only by the drink; that accused did not insist that he sell the whiskey for him and that he did not "think less of accused as an officer" because of these transactions but did not feel accused was "accommodating" him or the other enlisted men because he (accused) was "making something" on the sales (R. 11, 13).

When accused was interrogated on 28 January 1947 by a member of the Criminal Investigation Division he admitted the sales charged in Specifications 1 and 2 but was not questioned concerning the sale alleged in Specification 3 (R. 27).

The established price at the officer clubs in Bamberg during the period in question for gin was $1.70 per bottle and for whiskey was $2.60 or $2.65 per bottle. This same price prevailed when organizations drew rations of spirits from the Class VI Supply Officer (R. 24-25).

The rights of accused as a witness were explained to him and he elected to remain silent (R. 29).

4. The evidence establishes beyond any doubt that on three separate occasions accused sold liquor to enlisted men at unconscionable prices. In fact in one transaction the price he demanded was so excessive it had to be reduced in order to sell the intoxicants. For an officer who has the privilege of purchasing gin at $1.70 per bottle and liquor at $2.65 per bottle to sell the same to enlisted personnel for $12.50 and $20.00 per bottle respectively is clearly conduct unbecoming an officer and a gentleman as he is unquestionably engaged in "black market" operations. This is not a case of an isolated sale of liquor by accused to an enlisted man for the latter's personal use as the evidence is uncontradicted that accused on three separate occasions delivered liquor to Runyan for sale to other enlisted men at prices set by accused which were clearly unconscionable. Accused's actions are condemned by the 95th Article of War as it has been held that the exaction of usury from a soldier is conduct unbecoming an officer and a gentleman (Winthrop's Military Law and Precedents (Reprint, 1920), p. 716, fn. 45). In CM 12453, Marshall; 25 BR (ETO) 179, it was held that an officer who charged an unconscionable amount to transfer money for a soldier was guilty of a violation of the 95th Article of War. The Board of Review is of the opinion that the evidence proves the offenses charged beyond any reasonable doubt and that the conduct of accused clearly violated the 95th Article of War.

Consideration has been given to a brief filed on behalf of accused by Mr. T. L. Foley, attorney of Hayward, California.

5. War Department records show that accused is 32 years of age and married. He graduated from high school in Berkley, California in 1935 and attended business college for two years. He was employed as insurance clerk with the Home Owners Loan Corporation for four years prior to entering on active duty as a First Lieutenant in the National Guard on 14 August 1941. He was promoted to Captain on 16 October 1942. His efficiency reports show ratings of excellent and very satisfactory. No previous convictions by court-martial or difficulties with civil authorities are shown.

6. The court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally

sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

W. H. Johnson Jr, Judge Advocate

C. H. Schenken, Judge Advocate

A. N. Kane, Judge Advocate

JAGQ - CM 322498 1st Ind

JAGO, Dept of the Army, Washington 25, D. C. OCT 1947

TO: The Secretary of the Army

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 Frederick A. Trumpf (O-415745), Signal Corps.

2. Upon trial by general court-martial in Germany this officer was found guilty of wrongfully receiving from an enlisted man $25.00 in exchange for two bottles of gin (Spec. 1), $200.00 for twelve bottles of whiskey (Spec. 2) and $130.00 for ten bottles of whiskey (Spec. 3), all being amounts in excess of the established price, in violation of the 95th Article of War. 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. 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 accused, while stationed in Bamberg, Germany, heard Technician Fifth Grade Runyan, an enlisted man in his unit, say that he could sell some liquor, whereupon accused stated that he had two bottles of gin he would sell for $25.00. On 31 October 1946 accused delivered the gin to Runyan who sold it to another soldier for $25.00 and gave accused the money. Approximately one month later accused advised Runyan that he had a case of whiskey "he wanted $200.00 for" and Runyan could have "all over $200.00" he could get for it. Runyan sold the whiskey for $210.00 to another enlisted man, returned $200.00 to accused and retained $10.00. Again, during the Christmas holidays, accused gave Runyan a case of whiskey to sell for him at $20.00 per bottle, but after some three weeks when only three bottles were sold at that price accused told Runyan to sell the residue at $10.00 per bottle. Runyan sold seven bottles for $70.00, drank two and returned $130.00 to accused. Accused knew that the intoxicants were being sold to enlisted personnel.

The established price at the officer clubs in Bamberg during the period in question was $1.70 per bottle for gin and $2.65 for whiskey and its sale was rationed.

5. War Department records show that accused is 32 years of age and married. He graduated from high school in Berkeley, California in 1935 and attended business college for two years. He was employed as insurance clerk with the Home Owners Loan Corporation for four years prior to entering on active duty as a First Lieutenant in the National Guard on 14 August 1941. He was promoted to Captain on 16 October 1942. His efficiency reports show ratings of excellent and very satisfactory. No previous convictions by court-martial or difficulties with civil authorities are shown.

6. In view of the fact that accused's actions virtually amounted to "black market" transactions 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 it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 63. 24 Nov 1947)

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

JAGK - CM 322499

23 JUL 1947

UNITED STATES	)	FLYING DIVISION, AIR TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Randolph Field, Texas, 13-19 February 1947. Dismissal and to be fined six thousand five hundred dollars ($6,500).
Lieutenant Colonel JOHN W. WILLIAMS (0-220282), Air Corps	)	

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

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1. The record of trial in the case of the officer 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 94th Article of War.

Specification 1: In that Lieutenant Colonel John W. Williams, Air Corps, did, at Bryan Army Air Field, Bryan, Texas, on or about 15 May 1946, feloniously take, steal and carry away, the following described articles:

	Nomenclature	Amount	Price
8900-700030	Refrigerator Electric, 9 Cu Ft. Cap AC 115V, 1 PH, 60 Cyc.	1	$115.00 (Finding of not guilty)
8100-200000	Air Compressor, portable, 2 stage 5 CFM, Cap. AC., Spec. 5007-A, Gas Motor driven, not less than 2 H.P.	1	154.00 (Finding of not guilty)
8600-118101	Cabinet, filing, steel insulated CAP size, 10 x 15, 1 drawer wide, 2 drawers high, 1/2 Hr heat resisting, combination.	1	95.00
8110-46200	Machine, floor polishing, concentrated weight type, electric, 15-inch diameter, brush spread, motor 1/2 H.P., AC 110V, single phase, 60 cycle. Machine w/stand equipment.	1	83.00 (Finding of not guilty)

8100-24800	Drill Press, Bench type, 14-inch swing, 1/2 inch chuck cup. Motor A.C., 1/2 H.P., 220V., 1 phase, 60 cycle, 1725 R.P.M., Spec. 50093.	1	$87.00 (Finding of not guilty)
7900-644480	Sander, belt, electric 2 inch belt	1	78.75 (Finding of not guilty)
8600-284600	Desk, typewriter, steel, 60 inches x 34 inches and 30 1/2 inches high; compartment in left side.	1	46.00
8100-340000	Grinder, Bench, 2-wheel, 6-inch diameter, motor AC, 1/4 H.P., 110V, 1 phase	1	32.00 (Finding of not guilty)
7900-241950	Drill, portable electric 1/4-inch 110V.	1	20.10 (Finding of not guilty)
	Motor, electric, Westinghouse, 3/4 H.P., type F.J., AC, 1 phase, 0/5 amp.	2	100.00 (Finding of not guilty)
54-T-5511	Typewriter, L.C. Smith, 12-inch carriage, Serial Number 1A1695087	1	75.00 (Finding of not guilty)

of the total value of $885.85, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Lieutenant Colonel John W. Williams, Air Corps, being at the time Commandant of Bryan Army Air Field, Bryan, Texas, did, at Bryan Army Air Field, on or about 14 June 1946, feloniously embezzle by fraudulently converting to his own use $1000.00, the property of the United States intended for the military service thereof, intrusted to him, the said Lieutenant Colonel Williams, by Mr. Brazos A. Varisco.

He pleaded not guilty to the charge and specifications. He was found guilty of Specification 1 of the Charge except as to the items followed by the notation, "Finding of not guilty," guilty of Specification 2, and guilty of the Charge. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the military service and to be fined six thousand five hundred dollars ($6,500). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

The accused was the commanding officer of the Bryan Army Air Field, Bryan, Texas, from October 1945 to 13 June 1946 (R. 24,46). This installation was ordered to deactivate effective 31 October 1945. Thereafter it was ordered

to activate in December 1945 and then ordered to deactivate effective 30 December 1945 (R. 68,69). In December 1945 the salvage officer at Bryan Field, acting pursuant to the provisions of Technical Manual 38-505, dated 24 April 1944, sold to the post exchange a large amount of salvage property. The post exchange then conducted a sale and resold this property to individual purchasers. The property consisted of tools and equipment and amounted to "thousands of items." The "sales were restricted to military personnel the first two days, civilian employees the next two days, and the last day it was open to the public." Many officers and enlisted men stationed at the post purchased property at this sale (R. 57, 105-107). Between December 1945 and August 1946 other Government property, both surplus and salvage, was sold in "small lot sales" (R. 79,84,248,251,252). Government property of the type and kind (except typewriters and floor sanders) set forth in Specification 1 of the Charge was sold at Bryan Field in these sales (R. 32).

On 7 June 1946 Mr. Brazos A. Varisco of Bryan, Texas, was at Bryan Field attempting to purchase surplus Government property. While talking to the accused he offered $1000 for some salvaged projectors. The accused said that he would consider the offer and give a decision on Tuesday. On Tuesday, 11 June 1946, Mr. Varisco went to Bryan Field and the accused accepted the offer previously made. Mr. Varisco gave the accused his personal check (Pros. Ex. 17) in the sum of $1000 and received from the accused a receipt (Pros. Ex. 18) and the property purchased (R. 81-86). This check was made payable to "J. W. William" and was indorsed "John W. Williams," "Mrs. John W. Williams" (Pros. Ex. 17).

On 13 June 1946 the accused was transferred from Bryan Air Field to Carlisle Barracks, Pennsylvania (R. 46,47,271). Mildred Zimmerman, a civilian employee at Bryan Field, conversed with Mrs. Williams, wife of the accused, on the morning of 13 June 1946, at which time she saw a check for $1000 in Mrs. Williams' possession (R. 271).

F. C. Willard, Vice President of the South Main Street Bank, Houston, Texas, testified that Mrs. John W. Williams opened an account with his bank on 9 May 1946. On 14 June 1946 she deposited Check Number 1069 on the First State Bank and Trust Company of Bryan, Texas, in the sum of $1000. This check was drawn by Brazos A. Varisco and payable to J. W. William. On 12 July 1946 she authorized the bank to pay checks drawn by John W. Williams (R. 105, Pros. Ex. 31).

On Saturday, 24 August 1946, Second Lieutenant Robert J. Harberding and Master Sergeant James C. Hunt, both members of the C.I.D., went to Bryan Air Field to investigate a report that Government property was missing from the field. They interviewed several people and then went to Houston, Texas, arriving there on Sunday, 26 August 1946. They secured a search warrant for and searched accused's home at 424 Hawthorne Street, Houston, Texas. In the house they found the property described in Specification 1 of the Charge (R. 6-21). Captain William Henry Harrison Smith, Air Corps, the commanding

and accountable officer of Bryan Army Air Field, was present at the time the search was made. He testified, "I went into the house and all around the house, pointing out property that at one time was Government property that had been at Bryan Army Air Field at one time" (R. 22). Captain Smith also identified stock record cards and vouchers as being official records in his custody and pertaining to Government property at Bryan Air Field (R. 24). A stock record card and supporting vouchers pertaining to each item of property set forth in Specification 1 of the Charge was introduced into evidence. These records show the receipt and disposition of the property.

Mildred Zimmerman, Supervisor of the Stock Record Accounts at Bryan Army Air Field, testified that these records showed some items of property to be missing (R. 56,58).

The stock record card and vouchers relating to steel filing cabinets were introduced as Prosecution Exhibits 5a to 5h inclusive (R. 25,60). According to these records Bryan Air Field was never short any steel filing cabinets (R. 60,61,77,268).

The stock record card and vouchers relating to typewriter desks were introduced as Prosecution Exhibit 9a through 9d (R. 25,69). According to the records two desks "were evidently lost because the records were adjusted by an Inventory Adjustment Report" (R. 268). This report was made and posted on 8 August 1946 (Pros. Ex. 9d). In August 1946 at about the time the salvage officer left the field they were unable to adjust the records and for this reason a search for vouchers and records was instituted. Concerning the search Miss Zimmerman testified,

> "We made a complete search for any vouchers or paper work processed which had not come to our section, and it seems some tools were stored in another building and sales held from another building and we discovered quite a few Forms 447, which is Property Issue Slips and Turn-in Slips and salvage records signed by the salvage officer which had not come to the Stock Records Account for posting."

These forms were executed on 15 December 1945 (R. 56,57).

The steel cabinet and typewriter desk found in accused's home were introduced into evidence as Prosecution Exhibits 21 and 25, respectively (R. 94). The cabinet was valued at $95.00 and the desk at $46.00 (R. 97).

Major E. B. Van Blarcom, Finance Department, Randolph Field, testified that he was the custodian of the records of the Finance Department at Randolph Field. He identified Prosecution Exhibit 30a as being a "Schedule of Collections" showing the payment of $1000 by the accused and Exhibit 30b as a letter dated 30 December 1946, from accused, accompanying the remittance.

This remittance was forwarded by accused on 3 January 1947 and received 8 January 1947. The Schedule of Collections and accompanying letter stated the reason for the remittance to be:

> "1. Attached hereto is cashiers check No. 3283 of the Schertz State Bank, Schertz, Texas in the amount of One Thousand dollars ($1000.00) payable to the Treasurer of the United States, which is an amount paid by Mr Brazos A. Varisco of Bryan Texas for surplus property he purchased from salvage sales of Bryan Army Air Field on 11 June 1946.
>
> "2. This money was paid by Mr Varisco to me by check and I gave him a receipt for the property. The Salvage Officer was absent at the time and I told Mr Varisco that he could make the check to me and I would indorse it to the Salvage Officer so he could cash it. The Salvage officer only accepted cash for sales. I indorsed the check and believed I put it on the Salvage Officers desk. The next day (12 June 1946) I received telegraphic orders to report to Carlisle Barracks, Pa not later than the 13 June 1946 for overseas orders and in my hurry to clear the Station and pack I hastily gathered up papers from my desk and put them in a folder, giving them to my wife together with some money which I told her to deposit to her account as I was going overseas and would not need it. When she got home she found the $1000.00 check of Mr Variscos mixed up with the papers and believing it to be mine, deposited it to her account. I knew nothing of this until after I was overseas several months." (Pros. Ex. 30b)

Major Blarcom searched the records of his office and was unable to find any other record of a remittance of $1000.00 for surplus or salvage property sold to Mr. Brazos A. Varisco on 11 June 1946 (R. 103).

4. For the Defense

Hailey Ramsey worked for the Quartermaster at Bryan Army Air Field from 8 June 1943 to 9 August 1946. At the beginning of the year 1946 Lieutenant Summers was the salvage officer and the accused was the commanding officer at the Field. In March 1946 he offered to buy a refrigerator from Lieutenant Summers but was informed the refrigerator had been sold to Colonel Williams. He then tried to buy the refrigerator from Colonel Williams, but Colonel Williams would not sell it (R. 114-119).

Mr. Douglas M. Pitts, a former civilian employee at Bryan Field, was present when Mr. Ramsey offered to purchase a refrigerator from Lieutenant Summers, at which time Lieutenant Summers stated that the refrigerator was the property of Colonel Williams (R. 120-123).

Harry Lee Logan, Bryan, Texas, formerly an officer in the Army but now a lieutenant colonel in the Reserve Corps, testified that while in the Army he was stationed at Bryan Field and served as executive officer to the

accused. He knew that the accused purchased property at the Post Exchange sale in December 1945 and that the accused also purchased other property. Prior to his release from the Army in May 1946 he inquired of the accused about purchasing a desk and file cabinet which was then being used in the office. The accused told him that he was going to buy these articles. Thereafter Mr. Logan saw the accused pay some money to Lieutenant Summers and state, "This is for the desk." The cabinet (Pros. Ex. 21) and the desk (Pros. Ex. 25) were similar to the ones referred to in the above transaction (R. 128-130). On cross-examination Mr. Logan stated that he had also purchased property at the post exchange sale but he did not get a receipt for his purchase (R. 131).

Mr. A. B. Rogers was an officer on duty with the Army and stationed at Bryan Field from January 1943 to January 1946. He attended the post exchange sale and purchased property. The accused was present at the sale and stated that he was going to buy an air compressor, a drill press, bench grinder and other small hand tools. An enlisted man was going to do the actual buying for the accused and this enlisted man did buy property at the sale(R. 135-140).

On 12 June 1946 Vernon D. Hill, Glen Borum, Private First Class Frank E. Mikuda, Private First Class Gerald T. Bishop and Private First Class John S. Dean, all enlisted men stationed at Bryan Field, moved Lieutenant Colonel Williams' furniture and personal belongings from Bryan Field to Houston, Texas. Their instructions from Colonel Williams was to "take my personal possessions and leave the Government property." They moved among other things a desk, file cabinet and typewriter (R. 141-158,159-162).

Major Larry J. Sheehan, Randolph Field, was acting Inspector General and as such made inspections at Bryan Field on 15 May 1946 and 15 July 1946. These inspections disclosed "no major irregularities or deficiencies noted." These inspections did not cover a complete physical check of all property, however, spot checks were made and a detailed inspection was made on certain items of property (R. 167-170).

Wade W. Stewart, Jr. was a civilian employee at Bryan Field from March 1943 to November 1946. In December 1945 the salvage officer sold property to the post exchange under authority of Technical Manual 38-505, and thereafter sales of salvage and surplus property were made. They were authorized to make these sales by letter from the authorities at Kelly Field (R. 171-183).

Francis Lally, a civilian employee at Bryan Field from June 1943 to August 1946, testified that the accused purchased property at the post exchance sale and at other sales. He saw a refrigerator, drill press, grinder and compressor with Colonel Williams' name written on the tags, which was the normal method of identifying property sold to any person. He tried to purchase motors from Lieutenant Summers but was informed they had been sold

to the accused. On two occasions he saw the accused give Lieutenant Summers money. The first transaction was in May 1946 and "He handed it to Lieutenant Summers and said it was for these purchases." The second time he saw the accused give Lieutenant Summers money he did not know the reason for the transaction. Many sales were made at the Field but the records of the sales were not made up until a later date (R. 183-190).

Mrs. John W. Williams, wife of accused, testified that on 11 June 1946 she and accused drove from Bryan, Texas, to Houston, Texas. At dinner time the accused received information by telephone that he had been ordered to report to Carlisle Barracks. They returned to Bryan Air Field between 10:30 a.m. and 11:00 a.m., 12 June 1946. While in his office the accused gave her a folder, saying, "Here are all our personal papers. Now you take these and take care of them." He also gave her about two hundred dollars in cash. She took the papers to their quarters where she discovered that a check (Pros. Ex. 17) for $1000 was included therein. She never mentioned this check to her husband as she assumed it belonged to him. The accused often loaned money. He also played poker. It was not unusual for accused to give her large sums of money, and on one occasion he gave her thirteen or fourteen hundred dollars which he had won in a poker game. The accused left Bryan Air Field on 13 June 1946 for Carlisle Barracks. From Carlisle he went to Camp Stoneman and then to Seattle. From Seattle he went to Korea. The next time she saw her husband was on 23 December 1946. The $1000 check was in her purse on 13 June 1946 with some private papers and some two or three hundred dollars in cash. She deposited this check to her personal account in the Main Street Bank of Houston, Texas (R. 191-212).

Travis B. Bryan, President of the First National Bank, Bryan, Texas, testified that the accused's reputation was favorable in every respect (R. 133,134).

Colonel E. W. Napier was the acting commander of Randolph Field in June 1946. In June he received a telephone call from accused who stated that he had overseas orders and was required to report to Carlisle Barracks "within the next couple of days" and requested air transportation which was granted. He had not received any prior information that accused was being sent overseas, however, such information normally came to his attention (R. 284).

The 66-2 A.G.O. form pertaining to accused was introduced as Defense Exhibit I-1 and 2. This form shows accused's assignments, ratings, rank and other pertinent data including a large number of superior reports for performance of duty (R. 283).

Mr. Wade Stewart was recalled as a witness and testified that accused's reputation was excellent (R. 282).

By the accused

The accused was warned as to his rights as a witness and elected to testify. He identified his W.D.A.G.C. 66-2 Form and detailed his various assignments while serving in the Army. He was commanding officer of Bryan Army Air Field from 21 October 1945 to 13 June 1946. In December 1945 the post received authority to sell salvage property through the post exchange. The sale was held and he purchased a bench grinder (Pros. Ex. 26), drill press (Pros. Ex. 23), air compressor (Pros. Ex. 20) and "quite a few small hand tools." These purchases were made for him by an enlisted man named Pier. He also identified other articles found in his home and listed in the specification as property purchased by him. Some of these articles were purchased from Bryan Field and others from civilian establishments (R. 218-224).

Concerning the cabinet and desk (the two items he was found guilty of stealing) he testified that he purchased the cabinet for $35.00 and the desk for $40.00 (R. 221,222,235). These items had been tagged as surplus but were not removed from his office (R. 241).

> "The cabinet and the desk were purchased by submitting a bid under a name in a small lot sale. I knew on previous sales of desks about what they were bidding on them. I submitted a bid under another individuals name for these two articles and bid what I thought would make the purchase." (R. 240)

The cabinet and desk remained in his office until he was transferred from the Field, at which time he had them taken to Houston, Texas (R. 225,226,227, 241). He purchased these items from Lieutenant Summers (R. 235).

On 11 June 1946 accused sold some projectors to Mr. Varisco for $1000.00. Mr. Varisco stated, "Well I do not have that much cash with me and I will pay it by check." The accused replied, "That is fine but you will have to make the check out to Lieutenant Summers or myself so we can cash it and get the money on it because the Salvage Officer accepts nothing but money or Cashiers checks." The check was made out to accused and he indorsed it and started to put the check on the salvage officer's desk. The telephone rang and while he was talking Mr. Gilcrest, President of Texas A. and M. College and two or three professors came into his office. He showed them some buildings formerly used as school rooms and barracks (R. 229). He did not remember seeing this check again but was under the impression that he had left it on the salvage officer's desk (R. 230). He gave Mr. Varisco the receipt introduced as Prosecution Exhibit 18. He obtained the receipt from Lieutenant Summer's desk (R. 229). On the evening of 11 June 1946 he went to his home in Houston, Texas. Later that evening he received a telephone call from the Adjutant at Bryan Field who stated that a telegram had been received ordering him to Carlisle Barracks for temporary duty and then overseas. Prior to this time he had not been advised that orders were being issued (R. 238). He returned to Bryan Field on 12 June 1946 and made arrangements

to have his personal effects and furniture sent to his home in Houston. His instructions to the people who moved his things were, "Don't take any of the Government property" (R. 226). He did not know that the check was in his wife's possession and never discussed it with her, nor did they have any correspondence concerning it prior to his return to the United States in December 1946 (R. 239). He left Bryan Field on 13 June 1946 and went to Carlisle Barracks. He left Carlisle Barracks on 6 July 1946 and went to Camp Stoneman for two weeks. He left Camp Stoneman and went to Seattle from where he embarked for the Orient on 1 August 1946. He arrived in Korea on 21 August 1946. On 23 December 1946 he arrived at Randolph Field (R. 216). After his arrival at Randolph Field he learned that the check had not been transmitted to the proper person and on 30 December 1946 he sent a cashier's check to the Finance Officer (R. 231).

After leaving Bryan Field he drew three checks of $50.00 each on his wife's account. His wife wired him $50.00 while he was at Carlisle Barracks. These checks were the only ones he cashed on his wife's account (R. 215, 216).

5. Rebuttal evidence

Mr. W. C. Baker, Bryan, Texas, submitted bids on small lot sales. In April 1946 he submitted a bid for property which included a desk and cabinet, but when his bid was accepted the cabinet was not among the articles received by him (R. 243).

Captain Smith was recalled as a witness and identified records of small lot sales (R. 248). Prosecution Exhibit 33a was an abstract of bids received. Lot No. 24 was bid upon by and sold to the Baker Tire Company. This property included a cabinet (R. 248, Pros. Ex. 33a,b,c).

Mildred Zimmerman was recalled and testified that their records showed three cabinets at Bryan Field. Two cabinets were sent to salvage and one remained on Memorandum Receipt in the Base supply office. This cabinet was at the field at the time of trial. In her opinion the reputation of accused was bad (R. 262,263).

6. By the Court

The court received as evidence the telegram ordering the accused to Carlisle Barracks for duty (R. 274, Court Ex. AA). This telegram was dated 11 June 1946.

Captain W. E. Davis, Air Corps, Randolph Field, testified that about one month prior to Colonel Williams' transfer to Carlisle Barracks he knew that such orders were going to be issued. He did not know if this information had been transmitted to the accused (R. 277,278).

7. Specification 1 of the Charge

The accused was found guilty of larceny of a desk and cabinet, property of the United States furnished and intended for the military service. The evidence discloses that desks and cabinets owned by the Government were located at Bryan Army Air Field. A desk and a cabinet similar to those owned by the Government were found in accused's possession. The field was deactivated and many items of Government property including desks and cabinets were sold as surplus and/or salvage property. The stock records relating to this property were, in some cases, posted as much as eight months after property was sold. The stock records showed that two desks were missing and these records were adjusted by a report of survey on 8 August 1946 some two months after the accused had been transferred from Bryan Field. The evidence does not disclose when the loss of these two desks occurred. The records also disclosed that all cabinets were accounted for. The accused admitted that he removed the desk and cabinet from Bryan Field, but contends that he purchased these items at sales held at the field. This evidence is substantiated by witnesses who testified that they tried to purchase the property and were informed that the accused had purchased it. One witness saw the accused pay money to the salvage officer for "the desk."

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong to another with intent to deprive such owner permanently of his property (MCM, 1928, par. 49g, p. 171).

The proof required is: (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, (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 (CM 266894, Heiland, 44 BR 365,370).

Applying the above rules to the cabinet alleged to have been stolen one can readily see that the conviction of larceny of this article cannot be sustained. The evidence shows that no cabinets were missing from Bryan Field. There was therefore no trespass or taking of a cabinet from its owner. (CM 250426, Hecht, 32 BR 361,368.)

The evidence relating to the desk shows that on 8 August 1946 an inventory adjustment report was made because they were short two desks at Bryan Field. It is also shown that accused was transferred from Bryan Field on 13 June 1946 and at the time he left the field he sent a desk to his home. The record is silent as to whether or not any desks were short at the time accused was at Bryan Field. Likewise the record fails to show that the action of accused in sending a desk to his home caused a shortage of desks at the field.

While possession of recently stolen property may be sufficient to raise an inference that it was stolen by the possessor, it does not dispense with the necessity for proof that the property was in fact stolen. Proof of possession of property alleged to have been stolen without evidence that such property was in fact stolen is not sufficient to support a conviction of larceny (CM 263054, Glazer, 41 BR 175,177; CM 226734, Brown, 15 BR 139, 145; CM 248379, Wilson, 31 BR 231,236).

Under the evidence adduced in this case it was possible for the desk to have come into accused's possession by means other than theft. In fact the evidence adduced by the defense tends to show that the property came into accused's possession by purchase. The evidence offered by the prosecution showed that desks were sold. Property sold by the Government could of course be lawfully removed from the field.

Property condemned as salvage or declared surplus and subsequently sold to the public in accordance with existing regulations loses its character of Government property furnished and intended for the military service (CM 210763, Pelletier, 9 BR 351,353).

Inasmuch as the prosecution failed to prove that the desk in question was taken by trespass it failed to prove one of the essential elements of larceny (CM 190709, Odgen, 1 BR 229).

For the reasons stated above we are of the opinion that the evidence is insufficient to establish beyond a reasonable doubt that the desk and cabinet, which were removed from Bryan Field by accused, were in fact stolen.

Specification 2 of the Charge

This specification alleges an embezzlement by accused of $1000.00, property of the United States and entrusted to him by Brazos A. Varisco. The proof in support of this charge shows that accused sold Government surplus property to Mr. Brazos A. Varisco and in payment therefor accepted Mr. Varisco's check in the amount of $1000.00. This check was not delivered to the salvage officer. In fact it was indorsed by the accused and his wife and deposited in his wife's personal banking account.

Under such circumstances the proof is sufficient, at most, to establish an embezzlement of the check and not the $1000.00 which is the proceeds of the check.

In discussing a similar case the Board of Review said:

"*** The evidence shows that checks for the respective amounts involved were entrusted to accused for the purpose of applying them in payment of specific obligations of the fund, but that he diverted them (in one case forged an alteration in the designation of the payee), indorsed and cashed them and failed to pay over or account

for the proceeds. Though accused's dishonest purpose no doubt continued after the checks were cashed, it is positively shown that the fraudulent conversion in each case was accomplished before the checks were cashed, for each was deliberately diverted from its intended purpose and wrongfully indorsed prior to payment by the bank. The embezzlements of the checks (if it was embezzlement rather than larceny) were thus complete before the proceeds reached accused's possession. The checks having been embezzled, it was not possible for accused again to embezzle the proceeds, as charged. His application to his own use of the moneys was but an incident of his fraudulent conversion of the checks. The evidence does not, therefore, show embezzlement of the moneys. ***" (CM 191076, Porter, 1 BR 231,237).

"'Embezzlement of personal property is an offense separate and distinct from embezzlement of the proceeds of the property, and a finding of guilty of one under an allegation of the other constitutes a fatal variance' (CM 217383, Nelson, 11 BR 251,252, Sec 451(20), Dig Op JAG 1912-40; CM 188571, Simmons, 1 BR 127, 128; CM 189741, Mulkey, 1 BR 184,195; CM 218647, Moody, 12 BR 125, 126). Where an accused was alleged and found to have embezzled certain sums of money, and the evidence showed that 'checks for the respective amounts involved were entrusted to accused for the purpose of applying them in payment of specific obligations *** but that he *** indorsed and cashed them and failed to pay over or account for the proceeds,' the Board of Review held that

> 'Proof of embezzlement of the checks does not support the findings of embezzlement of the moneys, for the two offenses are separate and distinct and proof of one is fatally at variance with findings of guilty of the other' (CM 191076, Porter, 1 BR 237, 238; see CM 220061, Barnes, 12 BR 334; CM 243794, Moore, 28 BR 100)." (CM 310329, Kadin, 61 BR 255,258.)

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

Chester E. Gibbs, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 322499 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Flying Division, Air Training Command, Randolph Field, Texas.

1. In the case of Lieutenant Colonel John W. Williams (O-220282), Air Corps, I concur in 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, and for the reasons stated 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, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:

(CM 322499).

H

1 Incl
Record of trial

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

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

JAGN-CM 322500

U N I T E D S T A T E S	)	SAN FRANCISCO PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Oakland, California, 15 April 1947. Both: Dishonorable discharge and confinement for two (2) years. Federal Reformatory.
Private WILLIAM G. BARNES (42177002), and Private JAMES A. TARLTON (33377464), both Transient Debarkees, Oakland Army Base.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and SMITH, 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 were tried in common trial upon the following respective Charges and Specifications:

BARNES

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

Specification: In that, Private William G. Barnes, Transient Debarkee, Oakland Army Base, Oakland 14, California, did, while aboard the United States Army Transport General Brewster at sea, on or about 8 January, 1947, feloniously take, steal, secrete, and carry away one (1) 127 Brownie Reflex camera, of a value of about four ($4.00) dollars; one (1) Parker "51" fountain pen of a value of about twelve dollars and fifty cents ($12.50); one (1) Eversharp plastic fountain pen of a value of about seven dollars and fifty cents ($7.50); one (1) Eversharp pen and pencil set with gold tops, of a value of about twelve ($12.00) dollars; one (1) "Zippo" type cigarette lighter of a value of about two dollars and fifty cents ($2.50); one (1) set (three piece) white silk pajamas, of a value of about fifteen ($15.00) dollars; one (1) white silk kimono with flowered design on the back, of a value of about forty five ($45.00) dollars; one (1) pink silk nightgown of a value of about fifteen

($15.00) dollars; one (1) green silk robe of a value of about thirty ($30.00) dollars; one (1) bottle "Blue Grass", Elizabeth Arden's toilet water, of a value of about three ($3.00) dollars; one (1) Eveready penOtype flashlight of a value of about one dollar and twenty five cents ($1.25); one (1) 520-roll "77" camera of a value of about ten (10) dollars; one (1) ladies' chain-type necklace of a value of about ten ($10.00) dollars; one (1) ladies insignia ring bearing the initials "R.P.D." from South Easter Oklahoma 1261", of a value of about fifty ($50.) dollars; one (1) silver ring with black plate and silver head of a knight, of a value of about fifty (50) dollars; one (1) white silk nightgown, of a value of about fifteen ($15.00) of a total value of about two hundred and eighty-two dollars and seventy five cents ($282.75); mail from an authorized depository, the property of the United States.

CHARGE II: Violation of the 89th Article of War.

Specification: In that Private William G. Barnes, Transient Debarkee, Oakland Army Base, Oakland 14, California, being aboard the United States Army Transport General Brewster at sea, did, at sea, on or about 8 January, 1947, commit a depredation upon the #2 hold of said United States Army Transport General Brewster belonging to and operated by the United States Army Transportation Corps, and situated at sea, by unlawfully entering the same and removing articles of baggage and mail from said #2 Hold of the General Brewster.

TARLTON

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

Specification: In that, Private James A. Tarlton, Transient Debarkee, Oakland Army Base,Oakland 14, California, did, while aboard the United States Army Transport General Brewster at sea, on or about 8 January, 1947, feloniously take, steal, secrete, and carry away one (1) Waterman Commando fountain pen of a value of about twelve ($12.00) dollars; one (1) Medana, water resistant, shock resistant, seven jewel, stainless steel wrist watch of a value of about forty ($40.00) dollars; one (1) white silk kimono with red dragon stitched on, of a value of about fifty ($50.00) dollars; one (1) silk jacket with flower design and "made in china" on it, of a value of about thirty ($30.00); one (1) white silk nightgown of a value of about twenty-five ($25.00) dollars; one (1) white silk scarf and three (3) white silk handkerchiefs with oriental designs,

of a value of about fifteen ($15.00) dollars; of a total value of about one hundred and seventy-two ($172.00) dollars, mail from an authorized depository, the property of the United States.

CHARGE II: Violation of the 89th Article of War.

Specification: In that Private James A. Tarlton, Transient Debarkee, Oakland Army Base, Oakland 14, California, being aboard the United States Army Transport General Brewster at sea, did, at sea, on or about 8 January, 1947, commit a depredation upon #2 hold of said United States Army Transport General Brewster belonging to and operated by the United States Army Transportation Corps, and situated at sea, by unlawfully entering the same and removing articles of baggage and mail from said #2 hold of the General Brewster.

Each accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Accused Barnes 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. Accused Tarlton 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 four and one-half years. As to accused Barnes the reviewing authority approved the findings except as to the values set out in the Specification of Charge I, approved the sentence but reduced the period of confinement to two years. As to accused Tarlton the reviewing authority approved the findings except as to the values set out in the Specification of Charge I, approved the sentence but reduced the period of confinement to two years. The Federal Reformatory, El Reno, Oklahoma was designated as the place of confinement for each accused, and the record of trial forwarded pursuant to Article of War 50½.

3. Evidence for the prosecution.

a. In general.

Hold number 2 of the ship General Brewster was entered while the ship was enroute to the United States and articles of baggage, footlockers, bags, etc., were broken or torn open and apparently ransacked (R. 8, 9, 13).

R. F. Nielson, Postal Inspector, testified that he was unable to state whether Hold 2 was a recognized depository for United States Mail under Postal Laws and stated that "even a mail bag may be called an authorized depository for mail matter" (R. 57) (Underscoring supplied). Mr. Nielson further testified as follows:

"Q. Mr. Nielson, as a Postal Inspector, is there any way to identify the articles that were shown you and which were alleged confiscated from the accused as ever being in the mails of the United States.

A. The only evidence we would have, sir, is the admission of the man, himself, and those articles at the time the man was apprehended was in his possession with the initials by the investigating officer.

Q. You say the admission of the man, himself, there are two accused, do you mean both of them have admitted that to you?

A. No, sir, the only statement I received, sir, was from Mr. Barnes.

Q. Did Tarlton ever make a statement to you?

A. He didn't make a statement to me, no, sir.

Q. Then, there would be no way actually, to identify the articles which you saw, that is any particular one of those articles, as ever being in the actual mails of the United States?

A. There would not, sir, as a matter of fact, it would be rather difficult if not impossible to tell which articles came from the mails or which articles came from the foot lockers unless, we went to the trouble of addressing mail or questionnaires to each sender and then try to identify the articles these men might have on them" (R. 59).

Each accused stated he had not removed anything from the mails (R. 36).

b. As to accused Barnes.

Accused Barnes admitted that he had been in Hold No. 2, had broken into foot lockers and had taken certain items of property (R. 21-25; Pros. Ex. D). He further admitted that he and others had moved a "mail bag" from the lower hold to the twin decks of Hold No. 2 (R. 26, 35). Mat Wolsey, a witness for the prosecution, testified that he saw Barnes enter Hold No. 2, and saw Barnes "with a mail bag" (R. 49, 51). All of the items of property set out in Specification 1 were admitted by accused to have been found in his possession. A number of the items admittedly taken by accused were introduced in evidence as Prosecution's Exhibit B (R. 29). All of the above admissions were made to an officer, Lieutenant Allen E. Wilmore, who was investigating the incident (R. 11). Prosecution's Exhibit D, a written pre-trial statement of the accused Barnes, was introduced as "exhibits not to enlarge the testimony of the witness" (R. 47).

c. As to accused Tarlton.

Accused Tarlton admitted to an investigating officer that he had articles in his possession that had come from Hold No. 2 of the General Brewster or had been taken from the cargo of number two hatch of the General Brewster (R. 17, 18, 19, 20, 22). A number of the articles introduced in evidence as Prosecution's Exhibit A were identified by

witness Lieutenant Allen E. Wilmore as having been taken from the possession of Tarlton (R. 21). The written pre-trial statement of accused Tarlton (Pros. Ex. C) which admitted he had in his possession all of the articles set out in Specification 1 against him, was admitted "as exhibits not to enlarge the testimony of the witness" (R. 47).

4. Evidence for the defense.

First Lieutenant Allen E. Wilmore who investigated the incident for the Intelligence Office testified for the defense. He stated that he took statements from eight different persons and could not remember whether either of the accused made any statement that they had removed any object from the mail (R. 34).

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

5. Under the Specification of Charge I (Violation of the 96th Article of War) as to each accused, it is specifically alleged that the accused "did * * * feloniously take, steal, secrete, and carry away '* * * certain described articles of personal property of certain values * * *' mail from an authorized depository, the property of the United States." The Specification was designed to set forth an offense denounced by Sec. 317, Title 18, United States Code, and although the language of the Specification does not, in all particulars, conform with the provisions of the statute, the case was tried as a violation thereof (R. 7-8). That section of the statutes reads as follows:

"317. (Criminal Code, section 194, amended.) Stealing, secreting, or embezzling mail matter. Whoever shall steal, take, or abstract, or by fraud or deception obtain, from or out of any mail, post office or station thereof, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag, or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or whoever shall steal, take, or abstract, or by fraud or deception obtain any letter, postal card, package, bag, or mail, which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted; or whoever shall take any letter, postal card, or package out of any post office or station thereof, or out of any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or

secrets of another, or shall open, secrete, embezzle, or destroy the same, shall be fined not more than $2,000, or imprisoned not more than five years, or both."

While the Specification is not drawn in the exact language of the statute it appears that the Specification substantially sets forth the offense sought to be charged in sufficient and understandable language and to sufficiently apprise each accused of the offense with which he is therein charged. The gravamen of the statutory offense is the abstracting or removal of any article or thing contained in any package "from or out of any mail, post office or station thereof, or other authorized depository for mail matter * * *" (CM 272987, Anderson, 3 BR (NATO-MTO) 83). The purpose of the act is to preserve the sanctity of the mails and not to punish the theft of another's property. Hence it is not necessary to allege or prove all the elements of larceny, such as value or ownership, since the offense though in effect alleging a larceny, is not restricted to that offense (Thompson v U.S., 202 F. 401; Bowers v U.S., 148 F. 379; U.S. v Trosper, 127 F. 476-1904). However, an essential element of the offense which must be established to sustain conviction thereunder is that the article stolen, abstracted or removed was in fact mail matter taken from or out of the mail, post office, station or authorized depository for mail matter (CM 248379, Wilson, 31 BR: 236-237).

The direct evidence tending to establish this essential element is in the testimony of Mr. Nielson, the Postal Inspector. He testified that he could not definitely state that Hold No. 2 of the ship General Brewster was an authorized depository for United States mail. He did testify, however that "even a mail bag may be called an authorized depository for mail matter" (underscoring supplied) (R. 57). There is no question but that such statement is legally correct as it has been held in McKee v Johnston 109 Fed. 2nd 273 that, "a locked and registered mail pouch consigned by postal authorities to a named destination is an authorized depository for the mail matter contained in it." But in this case the proof relative to the "mail bags" does not meet the requirements of the definition as set out in the McKee case supra, and is insufficient to establish that any of the bags in question were recognized depositories of United States mail, in that there is no showing that they were locked, registered or were consigned by postal authorities to a named destination. This failure of proof precludes any possibility of a presumption or inference that the contents of the bags were in fact, United States mail. Continuing, there was no direct evidence introduced to prove that the articles taken by the accused were, in fact, in the mails of the United States. The Postal Inspector, Mr. Neilson, testified the only way he could determine that the articles taken by the accused had been in the mails of the United States would be by the admission of the accused or through questionnaires addressed to the senders of the stolen articles. No other evidence on this point was offered. There is no showing in the record of trial as to the means or manner by which the contents of the bags in question came to be therein, or how the bags themselves came to be in Hold No. 2 of the General Brewster. In the case of U.S. v Rapps, 28 Fed 818, 830, it was held that, "a letter or packet, to become part of the mail matter, within the meaning of Revised Statutes 5467, 5469,

18 USC 318, 317; punishing the stealing of such matter, must get into the mail in some of the ordinary ways provided by the postal authorities." The evidence not only fails to establish that the articles in question entered the mail through one of the "ordinary ways" provided by postal authorities but definitely reveals that no attempt was made to make such a showing. In the absence thereof there is no reasonable basis on which the court could base a finding that the articles in question ever became part of the mails of the United States.

To reiterate, although there is some evidence to show that the accused Barnes moved a "mail bag" from the lower hold to the twin decks of Hold No. 2 and even though a mail bag may be an authorized depository for mail matter under some circumstances, which circumstances were not proven here, there is no showing that the contents of the bag involved contained United States mail or were consigned in an authorized depository for United States mail. In the absence of such essential proof, there is no reasonable theory upon which the findings of the court as to each accused can be sustained.

It is noted that Photographs of Hold No. 2 showing considerable disorder and damage to foot lockers and bags marked "U.S. Mail" were admitted by the court "* * * for identification purposes, not received as an exhibit, just for identification" (R. 11). Under this qualified ruling the photographs may not be considered as competent evidence in the case.

It is further noted that several of the witnesses, as well as the statements of the accused, made free use of the terms "mail" and "mail bags." The record of trial does not establish that any of such witnesses, with the possible exception of Postal Inspector Nielson who testified that he could not say that any of the articles in question had ever been a part of the mails, or either of the accused, possessed the requisite special knowledge or experience to establish their competency to testify as to whether any of the articles in question were, in a legal sense "United States mail", or that the bags in question, or any of them, were, in a legal sense "United States mail bags." In the absence of a showing of such competency, the testimony and evidence in this respect was inadmissible and constituted mere conclusions which are of no probative value. The evidence in this case may be said to create a strong suspicion that the articles found in each accused's possession were mail and were stolen from Hold No. 2 of the ship General Brewster, and that it was an authorized depository for mail matter, but justice according to law demands proof of each essential element of an offense beyond mere suspicion or surmise to sustain a conviction. (CM 248379, Wilson, supra).

Each accused is charged (respective specification 2) with committing a depredation on Hold No. 2 of the General Brewster by "unlawfully entering the same and removing articles of baggage and mail" therefrom. The evidence shows that each of the accused entered Hold No. 2, caused some damage, and/or removed specified articles of property therefrom. They are charged, however, only with unlawfully entering and removing, not with damaging or injuring the property involved. The former does not constitute a depredation within the meaning and intent of the lawmakers

in enacting Article of War 89 and the deficiency in the Specification cannot be cured by resort to the proof. (Dig Ops JAG 1912-40 Sec. 452 (20)). Article of War 89 was enacted to replace the old Articles of War 54 and 55 which were as follows:

> "Article 54. Every officer commanding in quarters, garrison, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished as a court-martial may direct.
>
> "Article 55. All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish ponds, houses, gardens, grain field, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States (unless by order of a general officer commanding a separate army in the field), shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct."

The intendment of Article of War 89 is best expressed in the following excerpt from the Hearing before the Committee on Military Affairs, United States Senate, 9 February 1916, relative to the Articles of War.

> "We now come to article 89, 'Good order to be maintained and wrongs redressed.' Articles 54 and 55, which it is designed to replace by this new article, are perhaps the most archaic provisions of our code. The existing provisions of our statute law were taken from the British articles, and date in our law from 1775. Their purpose is to protect civilians from disorderly and riotous acts on the part of the military. Winthrop refers to the existing law as —
>
> incomplete and unsatisfactory, especially as it leaves in doubt what classes of injuries are in view — whether injuries to the person only or injuries to the property as well as person; and also fails to indicate in what manner and by what instrumentality the reparation for such injuries is to be effected.
>
> But this is only a very partial enumeration of the defects of the existing law. For example, the application of the existing law is to 'citizens of the United States.' If the soldier damage anyone who does not occupy the status of citizen, the remedy of the article does not avail in such a case. This was perhaps its most notable defect, but there were many other indefinite and obscure provisions, and commanding officers have sometimes been reluctant to act upon it. The usual application of the article is to conditions like this:

A command is marching across the country and makes temporary camp. The property of some citizen adjacent to the camp is raided or disturbed. This article says to the commanding officer, 'You shall see that reparation is made so far as a part of the offender's pay will go toward such reparation.' Ordinarily there is the element of concealment to deal with. Members of the raiding party protect each other. The law takes the view that where there is such concealment, so that the individual trespassers can not be discovered, the trespass is chargeable to the command, and under prescribed procedure of general orders we have heretofore undertaken to assess damages and to make payments. We have been going ahead without authority of statute law to make stoppages of pay against the entire command to reimburse a citizen for whatever loss he may have sustained. It is time that this practice received the definite sanction of statute law. What the new article provides is fairly summarized as follows:

"Article 89 is a consolidation of the punitive parts of existing articles 54 and 55. It omits certain language of the existing articles archaic in character and not descriptive of modern conditions. Likewise there has been omitted the provision which limits the application of the law to 'citizens of the United States,' inasmuch as all persons resident within the United States are equally entitled to the protection of its laws. The word 'depredation' has been inserted with a view to making the article cover all injuries to property. (Underscoring supplied) The words 'part of' preceding the words 'the offender's pay' have been omitted in order to make the article more definite and effective. The words 'beating or otherwise illtreating any person' have been omitted, for the reasons (a) that as offenses against persons they are denounced in proposed articles 92 and 95; and (b) because of the difficulty in fixing the money value to constitute reparation for personal injuries, particularly in view of the fact that the actual extent of physical injury is by no means immediately apparent, and because, further, of the comparatively infrequent claims for reparation for purely personal injuries which have been made in the past. The proposed article is made applicable to all persons subject to military law, as the offense here denounced is quite as likely to be committed by retainers to the camp and persons accompanying or serving with the armies in the field as by officers and soldiers.

"The administrative part is provided for in the next

article, which I am considering out of its place. It is article 104." (Now Article of War 105).

It appears then that the Specification of Charge II contains first a bald legal conclusion that an offense of "depredation" was committed, followed by an allegation of acts which purport to, but on their face do not, constitute such an offense. Since the word "depredation," as used here, is by its very nature descriptive we are of the opinion that in determining what, if any offense is alleged by the Specification, the word "depredation" must be considered as surplusage. Thus clarified of its ambiguity we find that the Specification does allege an offense of unlawful entry in violation of Article of War 96.

Although unlawful entry is not a lesser included offense of depredation, i.e., the element of unlawful entry is not necessarily one of the essential elements included in all offenses constituting a depredation or in other offenses properly chargeable under Article of War 89, nevertheless, as in this case, the allegation, "* * * unlawfully entering the same and removing articles of baggage and mail from the said No. 2 hold of the General Brewster," constitutes the gravamen of the offense charged, and being as it is, an act denounced and made punishable under Article of War 96, conviction upon proof thereof is authorized (A.W. 37; par. 87b, MCM, 1928, p. 74). Since the Specification, as drawn, so patently discloses the particular act charged, the fact that it failed to constitute an offense of depredation under Article of War 89 as intended, does not preclude trial and findings of guilty thereunder nor would such findings prejudice accused's substantial rights, since the Specification was sufficient to apprise him of the particular act complained of and which he was being called upon to defend (par. 78c, (Exceptions and Substitutions), MCM, 1928, p. 64-65; CM 118078, CM 147387, Dig. Ops. JAG, 1912-40, Sec. 394 (2); CM 154185, Dig. Ops. JAG, 1912-40, Sec. 428 (7); CM 155621, Dig. Ops. JAG, 1912-40, Sec. 451 (16)).

The question remains whether the evidence is legally sufficient to support the offense of unlawful entry in violation of Article of War 96. To support this offense, the evidence must show that the alleged unlawful entry into Hold No. 2 of the ship General Brewster was unauthorized or that it was prohibited by the official orders or regulations. In this connection, the testimony of First Lieutenant Wilmore (R. 21, 25, 26, 28, 34, 35), the testimony of Mat Wolsey (R. 49-50) and that of R. F. Nielson (R. 57) comprises the only evidence relative to either accused's entry into and conduct within Hold No. 2 of the ship. While this testimony indicates that the actions and conduct of each accused within the hold was malicious and unlawful, there is not a scintilla of evidence in the record of trial to show that either accused's initial entry into

the hold of the ship was unlawful, unauthorized or prohibited. On the other hand, although the foregoing testimony indicates that accused Barnes admitted going into the hold for the purpose of pilfering the cargo contained therein, neither accused was charged with unlawfully entering the said hold with the specific intent of committing a felony or criminal offense, and consequently, evidence of such intent will not support the inference that such entry was unlawful, unauthorized or prohibited in the first instance. Under these circumstances, it is just as probable that accused's presence in the hold was authorized as their conduct therein would indicate a probability that it was not. Where the only competent evidence is circumstantial, it must, in order to be sufficient to support a conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt (CM 153330; CM 169811, Dig. Ops. JAG, 1912-40, Sec. 395 (9).

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

Edward J. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Philip L. Smith, Judge Advocate.

JAGN-CM 322500 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, San Francisco Port of Embarkation,
Fort Mason, California.

1. In the foregoing case of Privates William G. Barnes (42177002), and James A. Tarlton (33377464), both Transient Debarkees, Oakland Army Base, I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence as to each accused be vacated.

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

(CM 322500).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGV - CM 322501

9 DEC 1947

U N I T E D S T A T E S	)	FIRST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Bad Tolz, Germany, 22 March 1947. Dishonorable discharge and confinement for one (1) year. United States Disciplinary Barracks.
Private ALFRED G. SALGADO (19237402), Headquarters Company, Third Battalion, 26th Infantry Regiment, APO 1,	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, SPRINGSTON and LANNING, 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 93rd Article of War.

Specification: In that, Private Alfred G. Salgado, Headquarters Company Third Battalion, 26th Infantry, having taken an oath in a trial by Special Court-Martial of himself, before 2nd Lt. Richard J. Zaborski, Trial Judge Advocate, that he would testify truly, did, at Nurnberg, Bayern, Germany, on or about 4 October 1946, wilfully, corruptly, and contrary to such oath, testify in substance as follows: on 21 August 1946 he left the limits of his restriction to the limits of the Furth Kaserne when he saw a friend in trouble, for the purpose of getting his friend out of trouble and to bed, which testimony was a material matter, and which testimony he did not then believe to be true.

The accused was tried originally on the above Specification and Charge on 15 November 1946, at Nurnberg, Germany, by a general court-martial duly appointed by the Commanding General, First U. S. Infantry Division, APO 1, U. S. Army. The sentence was disapproved and a rehearing ordered by the reviewing authority on 4 February 1947.

Upon the rehearing the accused pleaded to the Specification of the Charge "guilty except the word 'wilfully'" and to the Charge "guilty." The court and the reviewing authority, however, treated the plea as one which was improvidently entered and as if a plea of "not guilty" had been entered to both the Specification of the Charge and the Charge. He was

found guilty of the Specification of the Charge and the Charge. Evidence of three previous convictions was considered. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Green Haven, New York, or elsewhere as the Secretary of the Army may direct as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

The accused purportedly was tried the early part of October 1946 by a special court-martial appointed by paragraph 3, Special Order No. 194, Headquarters, 26th Infantry, APO 1, U. S. Army, 29 August 1946 (Pros Ex 2, R. 10) upon a Specification alleging that the accused, being restricted to the limits of the company area, did, at Furth, Germany, on or about 21 August 1946 break said restriction in violation of Article of War 96, as shown by Special Court-Martial Orders No. 159, Headquarters, 26th Infantry, APO 1, U. S. Army, 15 October 1946 (Pros Ex 1, R. 7), which was introduced for the sole purpose of showing the Specifications and Charges on which the accused was tried by special court-martial, "and nothing else" (R. 7).

Lieutenant Colonel Arthur W. Hodges, Jr., testified that he was president of a special court-martial during the month of October 1946 (R. 8) which tried the accused for a breach of restriction the early part of October. According to Colonel Hodges the accused was sworn as a witness in his own behalf by the trial judge advocate of the said special court-martial (R. 9, 10) and testified in substance that on 21 August 1946 he (the accused) had been standing at the gate of the Furth Kaserne, in which his company was quartered at the time, with the sentinel who was at that gate and who was a friend of his, when a pass truck stopped at a distance of approximately 100 yards outside of the gate, at which time a fight started; that the accused recognized a friend of his, whom he thought had been drinking, so he ran out to get his friend in order to put him to bed (R. 10).

The testimony of the accused at the special court-martial was given in explanation of his having broken his restriction. Colonel Hodges could not remember whether the accused was questioned as to whether his going out to the truck was the only time he had broken his restriction but that the "intent" of his testimony was that he had not been in breach of restriction up until that point and that the accused did testify that that was the only time he had broken his restriction (R. 26, 27).

Sergeant Ulyse Leger (R. 11-13) and Private First Class George Van Dorn (R. 13-15) each testified that they left the company area with the accused in a truck at about 5:30 p.m., 21 August 1946 to go to the

Bavarian Room, Nurnberg, where they, including the accused, remained for the evening, returning to the company area in the "liberty" truck after the Bavarian Room closed at about 10:30 p.m. When the "liberty" truck arrived outside of the gate a fight started and shortly thereafter they were all taken to the orderly room by Captain Cooch. Private Jared H. Wiggins (R. 15-18) corroborated the testimony of Leger and Van Dorn testifying that he was the driver of the truck in which Leger, Van Dorn and the accused returned to the company area on the evening of 21 August 1946 stopping the truck about 100 yards outside the gate, whereupon the accused tried to take the truck away from him and a fight ensued.

(It should be noted here that at the first trial of the instant case, upon which rehearing was ordered, Sergeant Leger and Private First Class Van Dorn in their sworn testimony, placed this incident as occurring on 7 August 1946).

Captain Francis H. Cooch heard the noise occasioned by the fight outside the gate and upon investigation thereof he had Sergeant Leger, the accused and some others report to him at the orderly room of "I" Company (R. 18-20).

4. Evidence for the Defense.

The accused was advised of his rights. He was then sworn and testified in substance that he did not go into Nurnberg on 21 August 1946 nor was he in the truck which returned from Nurnberg that night (R. 22). He remained in the company area and drank about a half liter of schnapps and was standing by the gate when the truck pulled up and stopped about 50 yards outside the gate. He went out to the truck to assist his friend, Private First Class Gay. He never had any trouble with any of the witnesses who testified against him except Wiggins with whom he had a fight on the night in question and he did not know why they testified as they did but that they had lied (R. 21-26).

5. The falsity of the accused's testimony at the trial by special court-martial was established by the testimony of Sergeant Ulyse Leger (R. 11-13), Private First Class George Van Dorn (R. 13-15) and Private Jared H. Wiggins (R. 15-18).

All of the necessary and essential elements of the crime of perjury have been established in the instant case except that the perjured testimony was given in "a certain judicial proceeding or course of justice." (MCM, 1928, par. 149i, p 175).

The Specification of the Charge alleges that the accused testified under oath, administered by the Trial Judge Advocate, in a trial of himself by a special court-martial on or about 4 October 1946.

It must be established by competent evidence that the special court-martial before which the challenged testimony was given was a legally

constituted judicial proceeding (CM 321643, Rowell, CM 323744, Rice, CM 324396, Redmon, and cases there cited).

A special order appointing the special court-martial was introduced in evidence, however it is contended that the mere proof of the appointment of a special court-martial is not sufficient to establish that the court which actually sat was legally constituted. The record of trial before the special court-martial in question was not introduced in evidence. It, therefore, cannot be determined whether the officers who were duly appointed were the only ones who were present, nor can it be determined without reference to the record of trial that those who sat were duly qualified.

As a matter of fact it appears from an examination of the Special Order (Pros Ex 2) that a Captain Francis A. Cooch III, 26th Infantry, was named as a member of the special court-martial and upon examination of the record of trial in the instant case it also appears that a Captain Francis H. Cooch, 26th Infantry, was present in the company area and was in fact a witness to a part of the proceedings to which the alleged perjured testimony pertained. An examination of the allied papers accompanying the record of trial in the instant case reveals that the said Captain Francis A. Cooch III and Captain Francis H. Cooch are one and the same person and that he was the company commander of I Company, 26th Infantry. He (Captain Cooch) was obviously an interested party to the proceedings before the special court-martial, he may have been a witness for the prosecution or he may have been the accuser. If either of the above alternatives were in fact true and Captain Cooch did in fact sit as a member of the special court-martial the entire proceedings of the court would have been null and void (CM 302975, Machlin, 59 BR 343). This, however, could not be determined without an examination of the record of trial which was not before the court.

In the Rowell case (supra) the record of trial before the special court-martial in question was introduced in evidence and was before the court but there was not included in the record the special order appointing the court. The Board in its opinion said -

> "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."

In the instant case the converse is true, there being no record of trial in evidence to show the court met pursuant to the special order appointing it (which was in evidence) "there is no proof that such court was duly constituted."

There was no other evidence before the court to prove that the special court-martial alleged in the Specification of the Charge was a legally constituted judicial proceeding unless the Special Court-Martial Order (Pros Ex 1) can be so considered. The Special Court-Martial Order,

however, cannot be considered by the court for the simple reason that the Trial Judge Advocate in introducing the Special Court-Martial Order, after some discussion with the Defense Counsel, stated that it was being introduced "for the charges and specifications and nothing else." It is too elementary to warrant discussion, that a court can consider only the evidence which is before it or only such evidence of which it is authorized to take judicial notice. A general court-martial is not authorized to take judicial notice of a special court-martial order (MCM, 1928, par 125, p 135).

If the special court-martial order had been put in evidence in toto then the court could have assumed the special court-martial was legally constituted as was pointed out by the Board in the Redmon case (Supra).

> "* * * it (Special Court-Martial Order) might well have permitted a fair and legitimate assumption that the special court-martial in question had been duly constituted, for the reviewing authority publishing a promulgating order has the duty to first determine that the proceedings upon which it is based are legal and regular" (par 87b,d, MCM, 1928; CM 323744, Rice).

The burden of proving the essential elements of the crime of perjury, with which the accused was here charged, was upon the prosecution and that burden was not sustained as it failed to prove that the alleged perjured testimony was given before a special court-martial which was legally constituted and had jurisdiction over the person of the accused and over the offense for which he was on trial (MCM, 1928, par 149i; Rowell (Supra)).

6. For the reasons above stated, the Board of Review holds that the record of trial is legally insufficient to support the findings and sentence.

Wilmot T. Bangs, Judge Advocate

George H. Springston, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGH CM 322501 1st Ind

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

TO: Commanding General, First Infantry Division, APO 1, c/o Postmaster, New York, New York

1. In the case of Private Alfred G. Salgado (19237402), Headquarters Company, Third Battalion, 26th Infantry Regiment, I concur in the foregoing holding by the Board of Review and 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 322501).

1 Incl
Record of trial

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

THE ADVOCATE GENERAL'S OFFICE

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

JUN 30 1947

JAGQ - CM 322536

UNITED STATES	)	KOREA BASE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Headquarters Korea Base Command, APO 901, 18-19 April 1947. Dismissal and confinement for two (2) years.
	)	
Second Lieutenant WILLIAM H. FINNIE (0-1331933), Infantry.	)	

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 64th Article of War.

Specification 1: (Disapproved by the Reviewing Authority).

Specification 2: In that Second Lieutenant William H. Finnie, 609th Transportation Corps Port Company having received a lawful command from Captain William A. Williams, his superior officer, not to strike a Korean girl, did at Inch'on, Korea, on or about 14 March 1947, willfully disobey the same.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant William H. Finnie, 609th Transportation Corps Port Company, did at Inch'on, Korea, on or about 14 March 1947, wrongfully strike a Korean girl, on the face with his hand, conduct unbecoming an officer and a gentleman.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Charge II but guilty of Specifications 1 and 2 of Charge I, Specification 2 of Charge II and of

Charge I and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 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 two (2) years, designated Branch, United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record of trial pursuant to Article of War 48.

3. Evidence for the Prosecution.

At approximately 1900, 14 March 1947, Captain William A. Williams, Chemical Corps, accompanied by Lieutenant Glover went to accused's quarters in Inch'on, Korea. The quarters were also occupied by Lieutenants Snowden and Thomas (R. 15 and 23). Captain Williams entered Lieutenant Snowden's room in which three Korean houseboys were talking to a Korean girl known as Mary and he described the events that ensued in the following language:

> "A. During this time there were three Korean houseboys present who were talking with some Korean girl, who was also present, and Lt. Finnie came into the room and he became abusive and began to curse the girl and say something about some clothing that she had taken belonging to him, and this girl jumped up and said something about getting the M.P.'s and go to her house and search it, if he thought that she had the clothing, and Lt. Finnie at that time struck the girl in the face. And I jumped up then and told Lt. Finnie, 'Don't hit the girl any more,' and he became abusive and told me that it wasn't any of my damn business and did I want to take up her part of the conversation or argument or brawl, whatever you call it. And while he was talking to me, he struck her again, and the third time he struck at her, he struck a glancing blow which hit me in the corner of my eye. At that time, Lt. Thomas walked into the room from his part of the house. I had not seen him come in, and he said, what was going on. Lt. Finnie attempted to strike the girl again and Lt. Thomas grabbed Lt. Finnie and a short struggle ensued. After the little fracas had broken up, Lt. Finnie left the room, went up to his room, and I told the girl that she had better leave the house." (R. 15).

Captain Williams and Lieutenants Glover and Thomas then departed for the officers' club where they stayed for about an hour and when they returned to the quarters they found the Korean houseboys talking and "jabbering incoherently"; the Korean girl, Mary, was "sobbing hysterically" and there were two basins filled with bloody water in the room (R. 16, 17). There was blood on her shoes and clothes and her face was swollen and "pretty well bruised and beaten up" (R. 17). The three officers then went to accused's room where the following action occurred:

> "* * * We entered Lt. Finnie's room. I sat down on the foot locker near the window. Lt. Glover stood by the table near the door, and Lt. Thomas stood by the stove with his back to the stove. I don't recall just who asked the first question now, but at any rate, the trend of questioning was 'Why did you do it, Finnie?' Whereupon Lt. Finnie replied, 'If that is all you men came in here to talk to me about, get the hell out of my house. I don't want to discuss it any further with any of you.' And Lt. Thomas said something about this being 'my house, too, and things that happen to you in my house also effect me.' And he said, 'I don't care to discuss it with you men. Get out of my house.' Whereupon Lt. Finnie reached underneath his bed and pulled out a Japanese — what appeared to be a Japanese samurai sword. He walked to the door and he opened it and he said, 'Get out!' and he attempted to unsheath the weapon and at the same time Lt. Glover jumped across the hall and grabbed him and fell on top of him, caving in a door directly across the hall.
>
> I rushed across and pulled Lt. Glover off of the top of Lt. Finnie and had him outside in the hall, holding on to him. Lt. Finnie struck at me and we grappled all over the hall out in front and he got away and he went out the front door. That is the last I saw of Lt. Finnie. * * *" (R. 16).

They then reported the incident to the Criminal Investigation Division.

Captain Williams testified that when accused struck the girl in his presence he told accused:

> "A. I told Lt. Finnie not to strike her. Whether or not I worded it in the phraseology of going through the routine of telling Lt. Finnie that this was an order, I did not do that. I simply told him, 'Do not strike her again.'

"Q. But you intended that as an order?
A. I intended it to be understood as an order, sir.

"Q. And after you gave that order to Lt. Finnie, he struck the girl again?
A. He did, sir."

* * *

"Q. Then what was her statement to Lt. Finnie immediately after?
A. I got up and told Lt. Finnie not to hit the girl any more.

"Q. You got up?
A. That is right.

"Q. Told him not to hit her?
A. That is right, I did.

"Q. You didn't ask him a question but gave an order?
A. I told Lt. Finnie, 'Don't strike the girl again, Lieutenant.'" (R. 16, 17, 18).

He further admitted that he struck accused during the "fracas" when accused had the sword (R. 17).

Lieutenants Thomas and Glover corroborated the testimony of Captain Williams in all pertinent details (R. 6-9, 22-26), including the fact that accused struck the girl after Captain Williams had ordered him to refrain from doing so (R. 10, 35).

Jeon, Kum Yo, known as Mary, testified that she often went to the officer's quarters in question to obtain water and when she arrived there on the evening of 14 March 1947 one of the houseboys asked her to come in to "get warm" (R. 35, 36). While she was in the room by the stove accused and another officer entered; accused stated that "I took some of his clothes" which was denied and he "hit me three times" (R. 36). Later when "one officer left" accused again struck her and she described the event as follows:

"Q. Were you struck again that night?
A. At that time, the telephone rang. The officer that came in later, went out to answer the phone. The officer that had struck me, came to the bed where I was sitting and started to say bad words to me. The officer than struck me about three times again and my nose started to bleed.

"Q. How much time had elapsed or had passed between the first occasion of being struck and the second occasion of being struck?
A. About ten minutes, sir.

"Q. Was it the same officer who struck you the second time?
A. Yes, sir, it is the same officer." (R. 36, 37).

Kim Yong Ha, houseboy at the "quarters" testified that "Mary" was struck "about three or four times" by accused while she was "sitting down" and "another officer" who was present told "Lieutenant Finnie not to hit the girl" (R. 42).

4. Evidence for the Defense.

First Lieutenant Edward H. Lewin, 1st Provisional Military Police Battalion testified that on 14 March 1947 he was officer of the day at the police station in Inch'on Korea and at approximately 2150 accused reported that "some brother officers had beaten him up and threw him bodily out of his quarters" (R. 43). Accused did not desire to prefer charges but requested the witness to accompany him to his quarters and "see that he wasn't molested". When they arrived at accused's quarters they found an agent of the Criminal Investigation Division already present so witness departed (R. 44).

First Lieutenant Charles H. Jackson, Staff Sergeant Emory Forward, and Pai Sung Mok (houseboy) testified that accused on several occasions prior to 14 March 1947 had told the Korean girl known as Mary "to leave the house and not to return" (R. 45, 46).

Accused, after having his rights as a witness explained to him, elected to testify under oath (R. 56) that when he entered his quarters on 14 March 1947 he walked into Lieutenant Glover's room, saw Captain Williams, Mary, and a Korean houseboy there and asked the girl Mary when she was going to return his trousers. She denied having them and he "told her to get out" whereupon:

"* * * She said that she didn't have to get out, that she knew the Provost Marshall and she knew the M.P.'s and she would go to them. I became rather vexed and more or less hysterical and I slapped her, and Capt. Williams asked me, 'Why do you hit the girl?' I said, 'Captain, you know why I hit the girl.' The captain knew about the trousers before this and he knew exactly why I hit her, the background to hitting, but really it was just a spontaneous thing. When she denied it, I got so angry, I slapped her.

So Lt. Thomas came into the room after I had slapped her three times. Lt. Thomas came into the room. I was standing on the edge of the sand box, right on the corner of it, like this (indicating), and as I went to slap, Lt. Thomas was standing here (indicating), and he grabbed me and swung me around and hit me on the back of the neck. When he hit me, I fell down and what made me so angry with him is that he thought I was getting ready to hit the girl again, and the girl was sitting six feet away from where I was standing. And he swung me and hit me and it swung me around. We had a little scuffle there. No more blows were struck. * * *

* * * *

"About thirty minutes after they had been to the Club, the telephone rang. I want in to answer the telephone and on the way back I heard this girl still in the room. So I went in there and I told her to get out again and I told her to stay away from the house, 'Don't ever come back.' She jumped up in my face again, started beating on my chest this time hysterically, so I took her arms to lead her out and she turned around and my elbow hit her right on the nose, and blood came off her nose and started running down on her dress and shoes.***" (R. 57).

He further testified that when Captain Williams and the three Lieutenants returned from the club he advised them that he did not desire to discuss the matter and for them to "get out" of his room (R. 58).

5. Specification 2 of Charge I alleges that accused having received a lawful command from Captain Williams, his superior officer not to strike the Korean girl, willfully disobeyed the same. The proof required for conviction of the offense of willful disobedience is as follows:

"(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command" (M.C.M., 1928, par. 134b).

The willful disobedience which must be shown must amount to

"an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A.W. 96" (MCM, 1928, par. 134b).

Tested by the foregoing it is clear that accused is guilty of willful disobedience of the order as alleged. There is no question but that Captain Williams was accused's superior officer and that the order was one he had not only a right but a duty to give under the circumstances. Captain Williams testified that when he told accused "Don't hit the girl any more" he intended it as an order; that accused heard him and willfully disobeyed the order is manifested by his immediate response that it "wasn't any of my (Captain Williams) damn business." Accused admits he struck the girl several times and Captain Williams, Lieutenants Thomas and Glover, Kim Yong Ha (houseboy) and the victim testified that accused struck her after Captain Williams ordered him not to do so. While accused testified that Captain Williams did not give him an order but merely asked him "why do you hit the girl" the court rejected the uncorroborated testimony of accused and in so doing, acted clearly within its province.

While the order alleged to have been disobeyed was not couched in the phraseology of a military order nevertheless it was a definite statement addressed to accused "not to do a certain act". In CM 233762, Wilson, 20 BR 103 (108), it was held that a statement "don't take that jeep" was a sufficient military order on which to base a conviction for its violation under Article of War 64.

Specification 2 of Charge II alleges that accused wrongfully struck "a Korean girl, conduct unbecoming an officer and a gentleman". That accused did strike the girl several times on the face with his hand is admitted. Whether his actions amounted to conduct in violation of the 95th Article of War depends upon all of the facts and circumstances of the case. The mere fact accused believed she had wrongfully retained some of his clothing and he had previously told her to "get out and not return" to the house is no defense to the assault and battery he committed upon her. However in view of the fact that accused may have had some provocation for his actions and that the assault and battery occurred in quarters, it is the opinion of the Board of Review that the evidence is not sufficient to sustain a finding that accused's conduct showed beyond a reasonable doubt that he was morally unfit to be an officer or to be considered a gentleman as contemplated by the 95th Article of War. Such actions were however a

violation of Article of War 96 (CM 237229; Baldwin, 23 BR 333, 337).

The Board of Review is of the opinion that the evidence establishes beyond a reasonable doubt the offenses of willful disobedience of the lawful order of a superior officer in violation of Article of War 64 and of wrongfully striking a Korean girl in the face with his hand in violation of Article of War 96.

6. War Department records show accused to be 26 years of age and married. He enlisted in the Army on 8 April 1941, graduated from Officer Candidate School, Fort Benning, Georgia, and was commissioned a Second Lieutenant, Infantry, on 6 February 1945. His efficiency reports show entries of 1.9, 3.7 and 4.0 with notation that he lacks ambition and requires constant supervision. He was tried by general court-martial on 29 August 1946 for being drunk and disorderly while in uniform and was found not guilty by the court.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder, legally sufficient to support only so much of the findings of guilty of Charge II and Specification 2 thereunder as involves findings of guilty of the Specification in violation of Article of War 96 and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 64 and 96.

W H Tinson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

E L Schenken, Judge Advocate

JUL 15 1947

JAGQ - CM 322536 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 Second Lieutenant William H. Finnie (O-1331933), Infantry.

2. Upon trial by general court-martial in Korea this officer was found guilty of drawing a weapon against his superior officer (Spec. 1, Charge I), of willfully disobeying the lawful command of his superior officer (Spec. 2, Charge I), in violation of Article of War 64, and of wrongfully striking a Korean girl on the face with his hand (Spec. 2, Charge II), in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge I (drawing a weapon against his superior officer), approved the sentence, but reduced the period of confinement to two (2) years, designated Branch, United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder (willful disobedience), legally sufficient to support only so much of the findings of guilty of Charge II and Specification 2 thereof (assault on the Korean girl) as involves findings of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof.

4. The evidence shows that at approximately 1900, 14 March 1947, Captain William A. Williams, Chemical Corps, accompanied by Lieutenant Glover went to the accused's quarters in Inch'on, Korea, as a casual visitor. The quarters were also occupied by Lieutenants Snowden and Thomas. Captain Williams entered Lieutenant Snowden's room in which three Korean houseboys were talking to a Korean girl, known as Mary, and accused came into the room shortly thereafter. Accused stated that Mary

had taken "some of his clothes" and when this was denied accused struck her in the face with his hand. Captain Williams told accused "Don't hit the girl any more, Lieutenant", whereupon accused stated that it wasn't any of his (Captain Williams') "damn business", struck the girl again, and as he attempted to slap her a third time Lieutenant Thomas seized his arm. Captain Williams advised the girl to leave the house and then in the company of Lieutenants Glover and Thomas departed for the Officers' Club where they stayed for approximately an hour. When they returned to the quarters they found the Korean houseboys "jabbering incoherently", the Korean girl, Mary, "sobbing hysterically" and two basins filled with bloody water. There was blood on the girl's clothes and shoes, her face was swollen and she was "pretty well bruised and beaten up". The girl Mary testified that after the three officers left the quarters for the Officers' Club accused had entered the room, slapped her three times in the face which caused her nose to bleed.

Accused admitted the assault on the girl but denied that Captain Williams ordered him to cease striking her, stating that he (Captain Williams) merely asked him "why do you hit the girl".

5. War Department records show that accused is 26 years of age and married. He enlisted in the Army on 8 April 1941, graduated from Officer Candidate School, Fort Benning, Georgia, and was commissioned a Second Lieutenant, Infantry, on 6 February 1945. His efficiency reports show entries of 1.9, 3.7 and 4.0 with notation that he lacks ambition and requires constant supervision. He was tried by general court-martial on 29 August 1946 for being drunk and disorderly while in uniform and was found not guilty by the court.

6. On 30 June 1947, Mr. Jesse O. Dedmon, Jr., Attorney, appeared before the Board of Review and presented oral argument and a written brief on behalf of accused. Consideration has been given to the brief and argument presented.

7. I recommend that the sentence as approved by the reviewing authority be confirmed, but in view of all the facts and circumstances including the circumstances connected with the giving of the order disobeyed, recommend that the sentence be commuted to a reprimand and forfeiture of $100 pay per month for three months and that the sentence as thus commuted be carried into execution.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 256, 23 July 1947)

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGH - CM 322545

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
	)	
v.	)	Trial by G.C.M., convened at Headquarters PHIBCOM, APO 358, 12 December 1946. "Dishonorable discharge," total forfeitures and confinement for five (5) years
	)	
Second Lieutenant ULYSSES EPPINGER (O-1333948), Transportation Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, 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 Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Second Lieutenant Ulysses Eppinger, 3448th Transportation Corps Truck Company, did, at Rizal, Philippines (APO 75), on or about 10 October 1946, feloniously take, steal, and carry away about one thousand thirty seven (1,037) cases of ice cream mix, value of about $10839 and about seventy-one (71) cases of assorted candies and other merchandise value of about $1761, of a total value of about $12,600, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Nolle Prosequi).

He pleaded not guilty to the Charge and the two Specifications thereunder. At the close of the prosecution's case, a nolle prosequi was entered as to Specification 2. The accused was found guilty of Specification 1 and the Charge. 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

five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence contained in the review of the Philippines-Ryukyus Command Judge Advocate, dated 7 May 1947.

4. Competent evidence was adduced to show that on 8 October 1946, accused went to the Guadalupe Dock, Rizal, Philippine Islands, and told Lieutenant Claudio, officer of the guard, that he was going to remove some merchandise therefrom, but nothing was removed that night. The next day, Lieutenant Claudio reported the incident to his commanding officer. At about 2100 hours the following night accused returned to the dock and told Lieutenant Claudio "that he is going to load that night," to which the latter replied, "it is a moonlight night and there were many patrols around and many peoples." Accused removed nothing from the dock that night. The next day, 10 October 1946, Lieutenant Claudio reported the conversation of the preceding evening to his commanding officer and to the operations officer, who instructed Lieutenant Claudio to "play the part and let him go ahead and load as long as I give them (the commanding officer and the operations officer) enough time so that necessary preparation can be made."

At about 2100 hours that same evening, accused returned to the dock, remarked that it was a "wonderful night" (it was raining) and asked "whether he can load that night." Lieutenant Claudio replied that he could. Accused then said to the Sergeant of the Guard (Sgt Valdez): "I am expecting an LCM very shortly will you inform me when the LCM arrives?" Shortly thereafter a LCM arrived, whereupon Valdez informed accused of this fact, and they went over to the craft. Accused looked over the crew, told them to "go ahead," and they proceeded to load the LCM with a total of about 1,099 boxes of candy, ice cream mix, and various other supplies, all of which belonged to the United States. Accused told Sergeant Valdez not to let anyone come on the dock during the loading, and then left and rejoined Lieutenant Claudio in a nearby tent. After the LCM was loaded and had left, Sergeant Valdez went and told Lieutenant Claudio to arrest the accused, which he did.

The LCM was captured by the Military Police sometime thereafter on the south bank of the Pasig River, where its crew was engaged in unloading the supplies. When the boat containing the Military Police approached, the crew stopped unloading and tried to escape. The cargo being unloaded, was identified as that taken earlier in the evening from the Guadalupe Dock.

The accused, in an unsworn statement, denied any knowledge of the incident except the fact that he was on the Guadalupe Dock on the night of 10 October 1946, and was arrested there by Lieutenant Claudio. He stated further that he had gone to the dock on that evening in search of Lieutenant Jackson, who owed accused some money.

5. The five elements of proof of the offense of larceny of military property in violation of Article of War 94 are:

> "(a) The taking by the accused of the property as alleged; (b) The carrying away by the accused of such property; (c) That such property belonged to the United States and that it was furnished or intended for the military service thereof; (d) That such property was of the value alleged, or of some value; and (e) The facts and circumstances of the case indicate that the taking and carrying away were with a fraudulent intent to deprive the owner of his property or interest in the goods" (MCM 1928, par 149g, p 173; par 150i, p 185).

The evidence shows that on the night of 10 October 1946 the property in question was taken from Guadalupe Dock, which was used by the United States Government for the loading and unloading of military supplies, by the crew of a LCM. Lieutenant Claudio testified that the accused was on the dock that night, and had been there the two previous nights to make the necessary arrangements for removing the property. Sergeant Valdez was told by accused that the LCM would arrive and he reported the arrival to accused who ordered the crew to "go ahead" and load the vessel. The crew did as ordered, and after it had been loaded the vessel moved away from the dock. There was ample competent evidence to show that the taking and carrying away of the property in question were done by an unauthorized crew on the express orders of the accused. Notwithstanding the fact that those in charge of the dock made it easy for accused to effect the taking and carrying away of the property, it did not amount to a consent on the part of the Government, since the criminal design originated with accused.

> "If the criminal design originates with the accused, and the owner or his agent or servant does not suggest the design or actively urge the commission of the crime, the mere fact that the owner, suspecting the accused, in person or through his servant or agent exposes the property, neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property or avail himself of the facilities furnished, will not amount in law to a consent, although the agent or servant, by the instructions of the owner, appears to cooperate in the execution of the crime" (32 Am. Jur. 913-914, par 27 and cases cited; see also 36 C.J. 760, par 96).

While there was some conflicting testimony as to the ownership of the property, Lieutenant Jackson, the officer in charge of the dock, testified that the supplies accused removed from the dock and which were later recovered, were the property of the Quartermaster. He identified the property as belonging to the United States, by the markings on the boxes, as shown by photographs of the recovered property. The Board of

Review is of the opinion that the property was identified as belonging to the government, and was furnished or intended for the military service (CM 208895, Zerkel, 9 BR 59, 61; CM 254498, Miller, 35 BR 267). The evidence also shows that the property carried away was of the value alleged and greatly in excess of $50.00.

There is no evidence that accused had any authority to take supplies from the dock. Indeed, the evidence reveals that he was assigned to a replacement depot and was under orders to rejoin his old unit the following day. When recovered, the supplies were being unloaded from the LCM on the south side of the Pasig River at a spot opposite a brewery and a refining company, and there were no signs of a government installation nearby. The facts and circumstances as shown by the record of trial clearly indicated that the taking of the property from Guadalupe Dock was with the intent to deprive the government thereof.

6. The accused was 25 years of age on 15 November 1946. He attended high school through the eleventh grade, but did not graduate. From 1942 to 1944 he was employed in construction work. He was inducted into the military service on 9 June 1944, and was commissioned a second lieutenant on 14 April 1945.

Efficiency reports of the accused of record, in the Department of the Army, show that he was rated "4.4" (Excellent) for the period 1 July to 31 December 1945, and "Satisfactory" for the period 1 January to 30 June 1946.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for five years is authorized upon a conviction of a violation of Article of War 94.

R Rottenstein, Judge Advocate

John G. Hall, Judge Advocate

H W Lynch, Judge Advocate

JAGH - CM 322545 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 5 1949

TO: The Secretary of the Army

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 Ulysses Eppinger (O-1333948), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of larceny of various Quartermaster supplies (ice cream mix, powdered eggs, and assorted candies), property of the United States, furnished and intended for the military service, of a total value of about $12,600, in violation of Article of War 94. 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 for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Philippine-Ryukyus Command Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence in the case. The Board is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 8 October 1946, accused, who was assigned to a replacement depot and was under orders to join a unit, went to Guadalupe Dock, Rizal, Philippine Islands, which dock was operated by the United States and used for loading and unloading military supplies, and told the officer of the guard that he was going to load some supplies. Nothing was removed from the dock by accused that night. The next night he returned and asked if he could load the supplies, but the officer of the guard told him that it was moonlight and too many people were around the dock. These two conversations with accused were reported by the officer of the guard to his superiors, who told him to co-operate and let accused load the supplies, and that they would prepare to apprehend him. On the night of 10 October 1946, when accused returned to the dock it was raining. He said it was a "wonderful night" and asked if he "can load," and was told that he could. Accused said that he was expecting an LCM, which arrived shortly thereafter. He instructed the crew of the LCM to load the supplies. After the craft was loaded and left the dock, accused was arrested, and military policemen pursued the LCM. They found it tied up on the Pasig River, at a place not near any government installation, and its crew was engaged in unloading the cargo. The members of the crew tried to escape, but some of them were detained and the property, consisting of over a thousand boxes of ice cream

mix, candies, and other supplies were recovered. This property was identified as that which previously had been taken from the Guadalupe Dock.

The accused made an unsworn statement in which he denied all of the foregoing facts except that he was present and was arrested on Guadalupe Dock on 10 October 1946. He stated that he had gone there for the purpose of collecting a debt.

4. The accused was 25 years of age on 15 November 1946. He attended high school through the eleventh grade, but did not graduate. From 1942 to 1944 he was employed in construction work. He was inducted into the military service on 9 June 1944, and was commissioned a second lieutenant on 14 April 1945.

Efficiency reports of the accused of record, in the Department of the Army, show that he was rated "4.4" (Excellent) for the period 1 July to 31 December 1945, and "Satisfactory" for the period 1 January to 30 June 1946.

5. I recommend that the sentence be confirmed and carried into execution, and that an appropriate United States penitentiary 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

JAGK - CM 322546

17 JUL 1947

UNITED STATES	)	PANAMA CANAL DEPARTMENT
v.	)	Trial by G.C.M., convened at Fort Clayton, Canal Zone, 6 May 1947. Dismissal and total forfeitures.
First Lieutenant CHARLES H. BARTON (O-707597), Air Corps	)	

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

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

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

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

Specification 1: In that First Lieutenant Charles H. Barton, 20th Troop Carrier Squadron, Albrook Field, Canal Zone, did, at Albrook Field, Canal Zone, on or about 8 February 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Albrook Field Officer's Club, a certain check, in words and figures substantially as follows, to wit:

8 February 1947 No. _____
CHASE NATIONAL BANK
Balboa, C.Z.
PAY TO THE ORDER OF Albrook Officer's Club $ 25.00
Twenty-Five dollars and no cents DOLLARS
/s/ CHARLES H. BARTON

and by means thereof, did fraudulently obtain from the Albrook Officer's Club about $25.00, lawful money of the United States, the said 1st Lt Charles H. Barton then well knowing that he did not have and not intending that he should have sufficient funds in the Chase National Bank for the payment of said check.

Specification 2: In that First Lieutenant Charles H. Barton, 20th Troop Carrier Squadron, Albrook Field, Canal Zone, did, at Howard Field, Canal Zone, on or about 2 March 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Howard Field Officer's Club, a certain check, in words and figures substantially as follows, to wit:

CHASE NATIONAL
Bank
Balboa, Canal Zone
City & State

2 March 1947
Date

PAY TO THE
ORDER OF HOWARD FIELD OFFICER'S CLUB $ 25.00

Twenty-five Dollars and no cents DOLLARS

/s/ CHARLES H. BARTON
Name

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and by means thereof did fraudulently obtain from the Howard Field Officer's Club about $25.00, lawful money of the United States, the said 1st Lt Charles H. Barton then well knowing that he did not have and not intending that he should have sufficient funds in the Chase National Bank for the payment of said check.

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

Specification 1: In that First Lieutenant Charles H. Barton, 20th Troop Carrier Squadron, Albrook Field, Canal Zone, having been restricted to the limits of his base, did, at approximately 2300R on or about 28 February 1947, break said restriction by going to Rio Abajo, Republic of Panama.

Specification 2: In that First Lieutenant Charles H. Barton, 20th Troop Carrier Squadron, Albrook Field, Canal Zone, did, on or about 28 February 1947, wrongfully enter the Blue Goose, Sabanas Road, Rio Abajo, Republic of Panama, which, under the provisions of AR 600-900 had been declared "Off Limits" by Letter, Headquarters Panama Canal Department, subject: Off Limits Restrictions, dated 15 February 1947.

Specification 3: In that First Lieutenant Charles H. Barton, 20th Troop Carrier Squadron, Albrook Field, Canal Zone, having received

> a lawful order from Major Emmet M. Shanley, 3rd Base Complement Squadron, Albrook Field, Canal Zone, to not cash any more checks at the Albrook Field Officer's Club, the said Major Emmet M. Shanley being in the execution of his office, did, at the Albrook Field Officer's Club, on or about 8 February 1947, fail to obey the same.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit 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

Sergeant Paul H. Penn, AC, Finance Office, Albrook Field, Canal Zone, was, during the times hereinafter mentioned, employed by the Albrook Field Officers Club, his duties including the handling of the receipts and the cashing of checks for the members. On 8 February 1947 the accused, in the presence of Sergeant Penn, executed a check to the club in the amount of $25 which was cashed by the sergeant who delivered to accused $25 of the club funds. The check was returned by the drawee, Chase National Bank, Balboa, Canal Zone, on 10 February 1947 with the notation, "Not Sufficient Funds." This check and the notation slip thereto were received in evidence without objection as Prosecution Exhibits 1 and 2 (R. 12-18,25,61).

On cross-examination Sergeant Penn related an incident whereby he cashed a check for accused when he allegedly was under the influence of alcohol. It was revealed that this testimony concerned a $50 check and the law member ruled that such evidence would be disregarded by the court (R. 19-20).

Sometime in November 1946 Major Emmet M. Shanley, AC, the officer in charge of the Albrook Field Officers Club, gave accused a direct order to not cash any more checks at the club. Major Shanley did this in the course of his duties to safeguard the club funds, and the order was never rescinded. The check dated 8 February 1947 was cashed in "violation" of such order (R. 26-27). On cross-examination the Major asserted that he thought he had instructed all the employees of the club to refuse to cash checks for accused (R. 28). In response to further questions by the defense Major Shanley stated that he had seen accused in a drunken condition three or four times (R. 29). In answer to a question propounded by the court the witness stated that, to his knowledge, the club had never been reimbursed its loss on the check (R. 30).

Major William C. Markley, AC, club officer of the Howard Field, Canal Zone, Officers Club, identified a check in the sum of $25 signed "Charles

H. Barton" which he testified was cashed by personnel of his club on 2 March 1947. He knew that $25.00 of club funds were given to the person presenting such check - because "our accounts were in balance" and the check was stamped and indorsed for collection by the club steward. This check drawn on the Chase National Bank, Balboa, Canal Zone, was returned by the bank on 5 March 1947 with notation slip, "Insufficient Funds," attached thereto. Both the check and notation slip were received in evidence without objection as Prosecution Exhibits 3 and 4 (R. 31-33, 61). On 22 April 1947 Major Markley received a money order reimbursing the club its loss on this check (R. 34).

Mr. Thomas F. Gregory, Balboa, Canal Zone, a banker connected with the Chase National Bank, stated that he knew accused and was familiar with his signature. He identified the signatures appearing on Prosecution Exhibits 1 and 3 as being that of the accused. Mr. Gregory also identified, and there was received in evidence without objection a certified true copy of the ledger sheet of accused's checking account at the Chase National Bank, Balboa Branch, for the period 31 December 1946 to 27 March 1947. The ledger shows that accused's account was overdrawn at all times from 27 January to 27 March 1947. On 8 February 1947 the account was overdrawn $30.46 and on 2 March 1947 it was overdrawn $24.63. On the day following the date of overdraft Mr. Gregory stated that a notice of overdraft was mailed to accused and that he personally called accused on two or three occasions telling him to "come around" and straighten out his account. On each occasion accused promised to take care of the matter (R. 50-58).

On 15 February 1947 and pursuant to AR 600-900, 5 April 1946, Subject: "Repression of Prostitution," the Commanding General, Panama Canal Department, issued orders placing numerous houses and establishments "off limits," prohibiting all military personnel, when not acting in an official capacity and on orders from competent authority, from entering such places. An establishment known as the "Blue Goose" on Sabanas Road, Rio Abajo, was among the places listed. At about 2300 hours on 28 February 1947 Second Lieutenant Hunter J. Spear, 549th Military Police Company, found accused in the Blue Goose dressed in "essentially civilian clothes" and placed him under arrest. Accused had been drinking but was not drunk and stated to the arresting officer that he did not know the place was off limits (R. 36-40; Pros.Exs. 5,6).

Copies of the above-mentioned order had been posted on the officers bulletin board of accused's squadron on 20 February by Master Sergeant James R. Wenz, and standard operation procedure in the 20th Troop Carrier Squadron required that each officer read the bulletin board daily and initial the "initial sheet" attached thereto. Without objection there was received in evidence the initial sheets of the 20th Troop Carrier Squadron for the period 10 February to 26 February 1947. Master Sergeant Wenz identified accused's initials as being on these sheets for 11,13,14,15,18,20,25 and 26 February 1947 (R. 42-46; Pros. Ex. 9).

By agreement of the parties it was stipulated that on 24 February 1947 accused was legally restricted to the limits of his base (20th Troop Carrier Squadron, Albrook Field, Canal Zone) for a period of one week (R. 49; Pros.

Ex. 10).

4. Evidence for the Defense

Captain Norman E. Blomgren, AC, who had testified for the prosecution, was called by the defense and stated that on 2 April 1947 accused made good the check given by him to the Albrook Field Club on 8 February 1947. The defense announced that it had no further witnesses, that accused had been advised of his rights as to taking the stand as a witness, making an unsworn statement, or remaining silent and that he elected to remain silent (R. 60).

5. Charge I and its Specifications

The evidence conclusively shows that accused's account was overdrawn at his bank during the entire period 27 January to 27 March 1947. He was seasonably notified of such fact in writing and on more than one occasion by telephone. On 8 February and on 2 March he issued the checks set forth in the specifications against his overdrawn account. Under such state of facts it can reasonably be inferred that he issued the checks with full knowledge that he did not have and not intending that he should have sufficient funds on deposit to meet payment thereof. The transactions were therefore fraudulent as alleged. The only proof adduced by the defense to overcome the inference of fraud is the evidence that both the Albrook Field Club and the Howard Field Club were reimbursed the loss each sustained within about two months after advancing the money on the respective checks. This is not sufficient to remove the taint of fraud initially attaching to such transactions (CM 257069, Bishop, 37 BR 7,13; CM 259234, Holliday, 38 BR 293, 297; CM 236069, Herdfelder, 22 BR 271,275; CM 280898, Donnelly, 53 BR 403, 411). The issuance of checks under the foregoing circumstances constitutes an offense in violation of Article of War 95 (CM 253638, Kent, 35 BR 9,14, citing cases).

With regard to Specification 3 of Charge II, the proof shows very conclusively that Major Shanley, in the performance of his duties to safeguard the interests of the Albrook Field Club had on some date in November 1946 officially ordered accused to cease and desist cashing any checks at this club. We think that such order was not an attempt to unreasonably interfere in accused's personal affairs but was a valid, lawful military order, the Major having cause to believe that accused's checks were worthless. The cashing of the check at the club on 8 February 1947 was therefore a failure to obey Major Shanley's order.

On 24 February 1947 accused was restricted to his base for one week. On 28 February he was found in the "Blue Goose" on Sabanas Road, Rio Abajo, Republic of Panama, an establishment shown to have been placed "off limits" by the Commanding General, Panama Canal Department. Such "off limits" order was promulgated under the express mandates contained in AR 600-900, 5 April 1946, entitled "Repression of Prostitution."

By leaving his base and being found in the above named place accused broke his restriction as alleged in Specification 1, and wrongfully entered the Blue Goose in violation of the off-limits order mentioned in Specification 2, all in violation of Charge II. There was no unreasonable multiplication of charges. The exceptions contained in the Off Limits Restrictions dated 15 February 1947, viz, entry in an official capacity and on competent orders, clearly would not apply to accused because he had been prohibited from leaving his base, and further, he was dressed in civilian clothes and was not performing any military duties whatsoever. The court-martial did not attribute to accused's statement, when arrested, that he did not know the Blue Goose was "off limits," such weight as to relieve him of responsibility for his misconduct. He had initialed the bulletin board which displayed the off limits order, on at least three occasions prior to his visit to the Blue Goose. We agree with the court that accused was chargeable with knowledge of the fact of which he pleaded ignorance. If in fact he failed to read the order placing the establishment off-limits he would not be relieved of the responsibility of compliance therewith inasmuch as

> "Disobedience of superiors based on such indifference as the accused's failure to read the written orders manifests, is patently a neglect to the prejudice of military discipline, indicating a lack of any real conception of a subordinate officer's responsibility to his superiors." (CM 235676, Davis, 22 BR 201,209.)

6. War Department records show that accused is 30 years of age and unmarried. After his graduation from high school he was employed as a grading equipment operator for a construction company. He was inducted into the Army as a private on or about 18 January 1942 and was commissioned a second lieutenant, Air Corps, AUS, on 7 January 1944. His efficiency reports average "Excellent." On three occasions since being commissioned as an officer accused has been punished under Article of War 104 for misconduct similar in character to that for which he was convicted herein.

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

Robert E. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

(On Leave), Judge Advocate

JAGK - CM 322546 1st Ind

WD, JAGO, Washington 25, D. C. JUL 21 1947

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, 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 Charles H. Barton (0-707597), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully, with intent to defraud, making and uttering two checks, each in the amount of $25.00, well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of same, in violation of Article of War 95 (Spec. 1 and 2, Chg. I); of breach of restriction, of wrongfully entering an off-limits area and of failing to obey a lawful order "to not cash any more checks" at the Albrook Field, Canal Zone, Officers Club, in violation of Article of War 96 (Specs. 1,2 and 3, Chg. II). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

Some time in November 1946 Major Emmet M. Shanley, AC, Club Officer of the Albrook Field, Canal Zone, Officers Club, gave accused an order not to cash any more checks at the club. The club officer gave this order pursuant to his duties to protect the assets of the club. The order was never rescinded. On 8 February 1947 accused procured an employee of the club to cash a check for him drawn on the Chase National Bank, Balboa, Canal Zone, in the sum of $25, receiving therefor the face amount of the check in cash from the club funds. On 2 March 1947 accused cashed a check in a like amount at the Howard Field, Canal Zone, Officers Club. Both checks were returned by the drawee bank with notations "insufficient funds." Accused's account had been overdrawn at the drawee bank for the entire period 27 January 1947 to 27 March 1947, inclusive, and he had been notified of such condition of his account in writing and by telephone on several occasions. Approximately two months subsequent to the issuance of the checks both clubs were reimbursed their loss by money orders sent each. On 15 February 1947, and pursuant to AR 600-900, 5 April 1946, Subject, "Repression of Prostitution," the Commanding General, Panama Canal Department, had by published order declared certain civilian establishments within the area of his command, including the Blue Goose, Sabanas Road, Rio Abajo, Republic of Panama, to

be off limits to all military personnel not authorized to enter such places on official business. A copy of such order had been posted on the bulletin board of accused's squadron on 20 February 1947 and he had initialed the initial slip evidencing that he had read the order on three different occasions prior to 28 February 1947. On 24 February 1947 accused was restricted to the limits of his base for one week. On 28 February he was found at the Blue Goose, Sabanas Road, Rio Abajo, by a military police officer and placed under arrest.

4. The records show that accused has been punished under Article of War 104 on three separate occasions prior to his offenses herein and for misconduct of a character similar to that for which he was convicted in this case. I recommend that the sentence be confirmed and carried into execution, but that the forfeitures imposed be remitted.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 315, 29 Aug. 1947).

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

JAGQ - CM 322548

JUN 19 1947

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at Hamilton Field, California, 6 May 1947. Dismissal and confinement for one (1) year.
First Lieutenant JOHN J. OLIVER (O-766651), Air 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 58th Article of War.

Specification: In that First Lieutenant John J. Oliver AC., formerly assigned Squadron B (Tng OPNS) 3028 AAF Base Unit (PS ADV SE) AC, Luke Field, Phoenix, Arizona, now Attached Unassigned Squadron A, 401st AAF Base Unit, Hamilton Field, California, did, at Luke Field, Phoenix, Arizona, on or about 24 August 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Idaho Falls, Idaho on or about 19 January 1947.

CHARGE II: Violation of the 96th Article of War. (Nolle Prosequi).

Specification 1: (Nolle Prosequi).

Specification 2: (Nolle Prosequi).

Accused pleaded guilty to, and was found guilty of, the Specification of Charge I, except the words "desert the service of the United States and did remain absent in desertion" substituting therefor the words "absent

himself without proper authority and remain absent without proper authority", of the excepted words, not guilty, of the substituted words, guilty. He pleaded not guilty to Charge I but guilty of a violation of the 61st Article of War. He was found not guilty of Charge I but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. Evidence for the prosecution.

Accused absented himself without proper authority on 24 August 1945 from Luke Field, Phoenix, Arizona (Pros. Ex. #2; R. 6). He was apprehended by an agent of the Federal Bureau of Investigation at Idaho Falls, Idaho, on 17 January 1947 and returned to military control 19 January 1947 at Fort Douglas, Utah (R. 6, 7; Pros. Ex. #3).

4. Evidence for the Defense.

Accused, after being advised of his rights as a witness elected to testify under oath (R. 7) that when he arrived at Luke Field he was assigned as instructor on flight duty, but was "taken off" flying status because of an allergic rhinitis and placed on duty as a dispatcher of student pilots and planes in training operations (R. 7, 8). He was sent to the allergy clinic where he was given some 90 "shots" and it was three months before "they found out what was wrong with him". He developed headaches, drank some because of them and had so much time on his hands that it was "bad for him mentally as well as physically" (R. 9). Consequently, his attitude toward the Army changed and he requested release from duty but was advised he could not be discharged for "sometime" and shortly thereafter he went absent without leave (R. 10).

He was apprehended "about 19 January 1947" by the Federal Bureau of Investigation, placed in the county jail, and two days later transferred to the military authorities at Fort Douglas, Utah, where he was placed in confinement (R. 8, 9). On 7 March 1947 he was brought to Hamilton Field and confined for five weeks. He specifically denied any intent to desert but was unable to say when or where he intended to return to the service and while absent worked on a cattle ranch in Northern Idaho for four and one-half months and for the Yellow Cab Company in Idaho Falls for six months (R. 11). The reason he absented himself without leave was to "get out" of the desert and go to a cool climate. His behavior and cooperation while in confinement awaiting trial were excellent (R. 12).

Mrs. John Oliver, mother of accused, testified that she contacted Colonel Bechtol regarding her son's absence and was advised that accused was "gone"; he had been sick and was "grounded" but his whereabouts was unknown. Accused had never been in any trouble prior to his entrance in the service, he was a "perfect child" and his record was excellent as a cadet (R. 12, 13).

5. The offense of absence without leave was proved beyond any reasonable doubt by accused's plea of guilty, his admissions on the witness stand, and the extract copy of the morning report of his organization. The termination of the unauthorized absence by apprehension was established by stipulation and was admitted by accused. Accused's testimony in explanation of his offense, was at best in mitigation and not in defense thereof. The fact he was dissatisfied with his assigned duty and was undergoing treatment for allergic rhinitis was by no stretch of the imagination, a reason for going absent without leave and remaining in that status for a period of seventeen months. The Board of Review is of the opinion that the findings of guilty are amply sustained by the evidence.

6. War Department records show accused to be 25 years of age and married. He was employed as a crane operator in a steel yard in Richmond, California, prior to entry in the service. He served in an enlisted status from 28 November 1942 to 7 February 1944 when he was commissioned a Second Lieutenant, AUS, and assigned to the Air Corps upon graduation as an air cadet. He was promoted to First Lieutenant 22 August 1945. His efficiency reports show ratings of satisfactory and very satisfactory, with the notation that he is lacking in initiative and attention to duty.

7. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

Eric G Schenman, Judge Advocate

JAGQ - CM 322548 1st Ind

JUL 1 1947

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John J. Oliver (O-766651), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of absence without leave from 24 August 1945 until he was apprehended on 19 January 1947, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 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.

4. The evidence shows that accused absented himself without proper authority from Luke Field, Phoenix, Arizona, on 24 August 1945 and remained in that status until he was apprehended by an agent of the Federal Bureau of Investigation at Idaho Falls, Idaho, on 19 January 1947. As a witness in his own behalf accused admitted the offense, explaining that he was dissatisfied with his assigned duty after he was relieved from flying status and desired to get away from the desert because of his allergic rhinitis.

5. War Department records show that accused is 25 years of age and married. He was employed as a crane operator in a steel yard in Richmond, California, prior to entry in the service. He served in an enlisted status from 28 November 1942 to 7 February 1944 when he was commissioned a Second Lieutenant, AUS and assigned to the Air Corps upon graduation as an air cadet. He was promoted to First Lieutenant 22 August 1945. His efficiency reports show ratings of satisfactory and very satisfactory, with the notation that he is lacking in initiative and attention to duty.

6. The review in this case of the Staff Judge Advocate for the reviewing authority contains the statement that the apprehension of accused was precipitated by the fact he was a parole violator after a conviction and sentence to fourteen years imprisonment by a civil court for the offense of embezzlement, and the civil authorities of the State of Idaho have indicated a desire that he be delivered to them for further confinement as a parole violator when he is released by the military authorities.

7. In view of all the facts and circumstances in the case I recommend that the sentence be confirmed and carried into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 247, 11 July 1947).

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

JACH - CM 322551

JUL 29 1947

UNITED STATES v. First Lieutenant BLAKE S. SHEPPARD (O-584116), Air Corps	)	ALASKAN DEPARTMENT Trial by G.C.M., convened at Fort Richardson, Alaska, 5 May 1947. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, GRAY and SOLF, 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 specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Blake S Sheppard, Air Corps, 53rd Airways Detachment, did, at Fort Richardson, Alaska, on or about 17 April 1947, feloniously take, steal and carry away twenty-five dollars ($25.00), lawful money of the United States, property of First Lieutenant William A Boutwell, Air Corps.

Specification 2: In that First Lieutenant Blake S Sheppard, ***, did, at Fort Richardson, Alaska, on or about 17 April 1947, feloniously take, steal and carry away one silver dollar ($1.00), lawful money of the United States, property of Captain Robert P Mace, Air Corps.

Specification 3: In that First Lieutenant Blake S Sheppard, ***, did, at Fort Richardson, Alaska, on or about 17 April 1947, feloniously take, steal and carry away two dollars ($2.00), lawful money of the United States, property of Mr John Waruk.

He pleaded not guilty to, and was found guilty of, the charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances

due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced two witnesses to the alleged larceny, Captain Mace and Mr. John Waruk, neither of whom knew accused prior to the time of the alleged offense (R. 6,11). The former testified that he was awakened at about 0300 hours on 17 April, while sleeping on the first floor of Barracks Building 406, Transient Officers' Quarters, Fort Richardson, Alaska, and found an "individual" at the foot of his bed going through his clothes (R. 6,7). At that time he did not recognize the individual, as it was rather dark (R. 7). He could, however, see practically everything in the barracks and observed that this person was wearing khaki shorts and a white T-shirt. He saw him go to Lieutenant Buel's bed, go through the pockets of a pair of trousers (R. 7), and then go to another bed (identified as Lieutenant Boutwell's bed), where he "was fooling around with the clothing at the head of that bed" (R. 7). This person then went into the latrine, came out, turned off the light and went back upstairs (R. 8). Witness also testified that he saw this person standing by Mr. Waruk's bed, that "Mr. Waruk jumped up, looked into his pants pocket and went up stairs after him" (R. 8) Witness later discovered that a silver dollar was missing from his pocket (R. 8).

Mr. Waruk who occupied a bed on the other side of the room from the beds of Captain Mace, and Lieutenants Buel and Boutwell, was awakened at about 0300 hours by the shaking of his bed. At that time dawn had broken and objects were clearly distinguishable (R. 12). He saw the "figure of a man," wearing khaki shorts and a white T-shirt (R. 20), withdraw his arm from the foot of his bed and walk away rapidly to the bottom of the stairs. He recognized the man due to "his stocky build and the type of dress he was wearing, and due to the fact of his hair and general appearance" and later identified this person as "Lieutenant Sheppard", the accused (R. 11). Waruk then got up, found his wallet unzipped, and two one-dollar bills missing therefrom (R. 12). He then went upstairs, where he noticed the accused, who was then halfway down the hall, "dash in behind this bed at a fairly fast rate of speed" (R. 20,35) and stand against the wall some distance from his (accused's) own bed (R. 21-22). In answer to a question by the court - "What did you say to him?" Mr. Waruk stated:

> "When I approached him, I asked him if he had seen anyone walking around downstairs. He replied, 'no.' I asked him if he had seen anyone downstairs or upstairs and he said no. I asked him if he had been downstairs and he said, 'No, it wasn't me.' I then told him I had some money missing from my wallet and asked if he knew anything about it, and he said 'No, it wasn't me.' I asked him where he slept and he pointed out his bed. I said, 'Show me,' and he walked to the last half of the hall and I went with him. He showed me his bed, then I went back downstairs." (R. 21)

When Mr. Waruk returned downstairs, Lieutenant Boutwell was awakened and upon investigation found that $25.00 was missing from his pocket, one $5.00 bill and one $20.00 bill (R. 14). Captain Mace had seen the prowler about whom he had testified "over by" Lieutenant Boutwell's bed (R. 17). The Military Police were called and Lieutenant Boyce, CMP, reported to the building. He went to the bed of accused, awakened him, and accompanied him to Military Police Headquarters (R. 29), where accused's pocketbook and belongings were inspected (R. 18). His pocketbook contained "two $1.00 bills, one $5.00 and a $20.00 followed by two other $20.00 and a $10.00" (R. 18). Beside the pocketbook, there was in his possession a silver dollar and some other change.

At the time Lieutenant Boyce reported to the building "it was fairly light. It was not broad daylight" (R. 19). When Major Olson, another Military Police Officer, went to the Military Police Orderly Room at about 0300 or 0330 hours it was "fairly light", "just breaking dawn, not entirely light" (R. 19,20).

4. The accused, having been apprised of his rights as a witness, elected to be sworn and testified that on the evening of 16 April he was in town with some friends and had been drinking over a period of six hours. He returned to the post in a taxi at about 0230 hours (R. 31,33), at which time "I wasn't sober at all" (R. 34), and went to bed. He went to sleep and sometime later awoke and went downstairs to the latrine to get a drink of water. He came back upstairs, still half asleep and groggy from drinking, and "turned in at the wrong place." When he started back to his bed, Mr. Waruk came up to him and they had a conversation during which he told Mr. Waruk that he had been downstairs to the latrine, that he had seen no one around downstairs, and then pointed out his bed to Mr. Waruk. "As he (Mr. Waruk) said he had some money missing, I took my billfold out of my trousers pocket and put some loose bills in my wallet and put it under my pillow and went to sleep" (R. 31). Later, an "MP" told him to get up and get dressed and they took him to headquarters, where his belongings were examined (R. 32). He testified that he had gone to the latrine on the lower floor of the building in which he slept, and that Mr. Waruk followed him upstairs and questioned him (R. 32,34).

Major Olson when recalled as a witness for the defense testified that a pen and pencil set was reported missing. When asked by whom the loss of the set was reported, he replied, "I don't recall - someone on the first floor - perhaps one of the three gentlemen concerned here." Lieutenant Boyce when recalled as a witness by the defense and asked, "How was the pen and pencil brought to your attention?" replied, "When we first entered Building 406 and were met by two gentlemen, someone mentioned that a pen and pencil were missing." After a search, this item was not found (R. 27,30).

Captain Rowe testified that he had known accused "very well" for about four months, was very closely associated with him during this period, and

the honesty and integrity of accused had never been questioned (R. 24-25). Mr. Huff, an employee of War Assets Administration, had had daily contact with accused over a six months' period, had never had occasion to question his honesty, and "would vouch for him as I would for anyone I had known only six months" (R. 25-26).

5. The accused pleaded not guilty to and was found guilty of stealing various sums of money from two fellow officers and a civilian, all quartered in the same barracks, in violation of Article of War 93.

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong to another, with intent to deprive such owner permanently of his property.

> "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." (MCM, 1928, par. 149g, p. 173.)

Since it was currency of the United States that was alleged to have been stolen, it was not necessary to prove its value.

The prosecution introduced evidence which shows that on the night of 16-17 April 1947, the accused and the three victims of the alleged larceny were quartered in the same barracks at Fort Richardson, Alaska. Captain Mace testified that he was awakened at about 0300 hours on the morning of 17 April and saw someone going through his clothes. This same individual then went to other beds in the room, including that of Mr. Waruk. After standing by the latter's bed for some time, this person then went upstairs followed by Mr. Waruk.

Mr. Waruk testified that at about 0300 hours on the morning of 17 April he was awakened by the shaking of his bed and saw the "figure of a man" withdraw his arm from the foot of his bed and walk rapidly toward the stairs. Dawn had broken and objects were clearly distinguishable at this time. According to a weather report by the United States Department of Commerce, Weather Bureau, the weather in this part of Alaska was clear and sunrise was at 4:33 a.m. on the morning of 17 April 1947. Mr. Waruk stated that he recognized this person standing by his bed due to "his stocky build and the type of dress he was wearing, and due to the fact of his hair and general appearance," and later identified this person as the accused. The

building in which the alleged larceny was committed was used as quarters for transient officers, and neither Captain Mace nor Mr. Waruk knew accused prior to the time of the incident in question. Mr. Waruk, upon seeing this man walk toward the stairs, jumped out of bed, examined his clothing and upon finding two dollars missing from his wallet followed him upstairs. When he reached the top of the stairs, accused, who was then half way down the hall, and the only other person up in the upper story of the building, "dashed" in behind a bed and stood against the wall some distance from his (accused's) own bed. Upon being asked by Mr. Waruk, "If he had been down stairs" he said, "No, it wasn't me" and when asked if he knew anything about the money missing from Mr. Waruk's wallet he replied, "no, it wasn't me."

There is an apparent conflict between the sworn testimony of accused and the testimony of Mr. Waruk relative to whether accused told the latter he had or had not been downstairs when interrogated as to this fact on the night of 16-17 April. The accused did admit, however, that Mr. Waruk followed him upstairs and that they, thereafter, engaged in a conversation relative to the loss of certain money.

The evidence shows that the money in question was stolen at the time alleged. The evidence further shows that money of the denomination, amount and kind reported missing was found, among other money, in accused's possession shortly after the victims of the larceny discovered their losses.

6. After the prosecution had rested its case, the defense entered a motion for a finding of not guilty, which was properly denied by the court.

The defense, apparently, based its motion on what it considered a failure on the part of the prosecution to introduce sufficient evidence to connect accused with the alleged larceny. In the opinion of the Board of Review this contention was untenable. The evidence clearly shows that the person Captain Mace saw searching his and other officers' clothing was the same person Mr. Waruk followed upstairs. Both witnesses testified that this person was dressed in khaki shorts and a white T-shirt. The accused admitted that Mr. Waruk followed him upstairs and engaged him in conversation. When Mr. Waruk reached the top of the stairs, accused, who was the only other person up at that time, "dashed" behind a bed, some distance from his own, and stood by the wall. Mr. Waruk later identified the person whom he followed upstairs as "Lieutenant Sheppard," the accused. Prior to the incident accused was unknown to him.

The defense laid considerable stress on the fact that someone quartered on the first floor of the Transient Officers' Quarters reported a pen and pencil set missing and notwithstanding a thorough search of accused's belongings, the set was not found. Apparently the defense felt that this fact tended to prove that someone other than accused committed the larceny

of which he was charged.

It is to be noted that the testimony introduced, relative to the loss of the pen and pencil set, was very indefinite and lacking in probative value. Indeed, no competent evidence was introduced showing that the larceny of a pen and pencil set was ever committed, and for that reason the testimony introduced relative thereto was of no effect. It is further to be noted that no evidence was introduced as to when the pen and pencil set was found to be missing. For all that appears in the record the set may have been missed by the owner for several days.

Accused testified that he had been drinking during the evening of 16 April and "wasn't sober at all" at 0230 hours, 17 April, when he went to bed. He also stated that he was groggy from drinking when he went to the latrine a half an hour later. In his sworn testimony, however, he recited in detail his actions just prior to and during the incident in question. Mr. Waruk stated that when he confronted accused on the second floor of the barracks he (accused) was sober. Based on this testimony the court was justified in finding that at the time of taking the money in question, accused was not so under the influence of liquor as to be incapable of forming the intent to steal.

7. The accused is 33 years of age, reached the 11th grade in high school and is married. He served three years in the National Guard from 1935 to 1938 and entered the Army as an enlisted man in March 1941. After he was graduated from Air Force Officers' Candidate School, he was commissioned second lieutenant, Army of the United States, and called to active duty on 11 December 1943. On 21 August 1945, he was promoted to the rank of first lieutenant. His efficiency rating from 1 July 1944 to 8 April 1947 is "Excellent."

Consideration has been given to a brief on behalf of accused, prepared and sent to the President on 29 May 1947 by Dorothy D. Tyner, Attorney at Law, and a letter dated 16 May 1947 from Vance Cherbonnier to the Secretary of State, State of Missouri, which was referred to this office.

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 and total forfeitures is authorized upon a conviction of a violation of Article of War 93.

[signature], Judge Advocate

(Dissent), Judge Advocate

Wahlemar A. Salf, Judge Advocate

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

JAGH - CM 322551

AUG 29 1947

UNITED STATES	ALASKAN DEPARTMENT
v.	Trial by G.C.M., convened at Fort Richardson, Alaska, 5 May 1947. Dismissal and total forfeitures.
First Lieutenant Blake S. SHEPPARD (0-584116), Air Corps	

DISSENTING OPINION BY
GRAY, Judge Advocate

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1. I do not concur in the opinion of the majority of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of the charge and the specifications thereunder.

2. In this case the Board of Review is authorized to judge of the credibility of witnesses, and to weigh all the evidence to determine whether it is sufficient to prove, beyond a reasonable doubt, that accused did commit the offense of larceny as alleged in the three specifications. 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 Op JAG 1912-40, Sec 395(56); CM 153479), I, as a member of the Board of Review, attach importance to the fact that the court in this case has by its findings accepted the testimony of Captain Mace and Mr. Waruk, and rejected the conflicting testimony of the accused. I have likewise given consideration to the fact that accused, by his own testimony, admitted that he was, at or about the time the prowler was seen, on the first floor of the building.

But in weighing the evidence I, as a member of the Board of Review, may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions are, strictly speaking, legally justified by evidence appearing in the record. Briefly stated, I am allowed a difference of opinion. I, too, must be convinced of accused's guilt beyond a reasonable doubt (CM 243818, Smith, 28 BR 111, 118; CM 274812, Tracy, 47 BR 332). I am not so convinced.

3. It is uncontroverted that the money was stolen from the three officers. It is patent that in order to sustain the conviction the identification of the accused as the person who committed the offense must be established beyond a reasonable doubt. I have weighed the testimony of Captain Mace and Mr. Waruk, together with evidence in support of their identification of accused, and find in it contradictions, vagaries and generalities which, when viewed along with the testimony of the accused, and the testimony as to his character, leave me with what I conceive to be a reasonable doubt of the accused's guilt. Let us consider some of these contradictions and circumstances, first as to the testimony of the identifying witnesses:

a. Captain Mace: He was the first to see the prowler. He was awakened at 3:00 a.m., and saw an "individual" at the foot of his bed. At that time he did not recognize the individual as being the accused. He had never before seen the accused. At that time "it was just about dawn, the sun hadn't come up yet" (R 9), but it was not difficult to see practically everything in the barracks, and he distinguished the prowler as wearing khaki shorts and a white T-shirt (R 10). Until after the identity of the accused was admittedly established, at a subsequent time and on a different floor of the building, and after accused had been out of sight for an interval, the foregoing is all to which Captain Mace testified as to his identification of the prowler.

It is recognized that a real observer of an event may honestly describe it and still have slight contradictions in his testimony. But it is submitted that when Captain Mace's testimony is considered carefully, and his own behavior is analyzed, the credibility of his story is at least doubtful. He testified that:

(1) He awoke and found the prowler at the foot of his bed; the prowler then proceeded to the left of his bed and to two other beds in that direction; then retraced his steps and went into the latrine (by following which course he had to re-pass Captain Mace's bed), came out of the latrine, stood at the foot of the stairs, turned off the lights, and went upstairs (stairs and latrine were to the right of Captain Mace's bed) (R 7-8);

(2) He observed the prowler standing by Mr. Waruk's bed (the other side of the bay from Captain Mace's bed), and the prowler then went upstairs (R 8); and that

(3) He saw the prowler around the bed occupied by Lieutenant Boutwell, which was at the right of the bed occupied by Captain Mace (R 16, 17).

During this activity by a prowler, or three prowlers, Captain Mace made no move, made no outcry, asked no questions, and was content to permit the prowler to prowl without molestation. And he remained in this state of suspended animation until after the prowler, or prowlers, had left that floor of the building and until after he saw Mr. Waruk jump

out of bed, ascertain that his pockets had been pilfered, and follow the intruder upstairs (R 7-8). Only after Mr. Waruk returned from upstairs did Captain Mace terminate his hibernation, reveal his knowledge of the events of the evening, and ascertain that his silver dollar was missing. Captain Mace's observations of the course taken by the prowler are most contradictory, and his conduct during such questionable activities on the part of the prowler, or prowlers, was the epitome of caution.

b. Mr. Waruk: He was the second and only other man to observe the prowler. He was awakened by the shaking of his bed, and noticed the "figure of a man" withdraw his arm from the foot of his bed and walk "rapidly away to the foot of the stairs". At that time the sun had not risen, though dawn had broken, and features, objects and colors were clearly distinguishable; it was fairly light. He recognized the accused "due to his stocky build and the type of dress he was wearing, and due to the fact of his hair and general appearance" (R 11,12). The prowler was wearing a white T-shirt and khaki shorts (R 20). Here the prowler disappeared from the view of the witness.

Mr. Waruk then got up, examined his clothes, and found the pocket of his trousers unbuttoned and his wallet unzippered, empty, and two one-dollar bills missing therefrom (R 11-12). It must be assumed that so careful an investigation required some lapse of time and that during such time the prowler was out of sight. Mr. Waruk then went upstairs, did not go into the small room at the top of the stairs, but observed the accused, who was the only person awake in the large open bay, halfway down the hall on the left hand side next to a bed not his own (R 20). Mr. Waruk approached accused who in answer to questions denied that he saw anyone downstairs, had been there himself, or knew anything about the missing money. Accused then showed Mr. Waruk where he slept (R 21). Mr. Waruk saw no money in the hands of accused during this conversation (R 13).

4. An analysis of the evidence in support of the above identification of the accused as the prowler who committed the offense, indicate that it falls into two categories; clothes, and money.

As to clothes, both Captain Mace and Mr. Waruk testified that the intruder wore khaki shorts and a white T-shirt. Sometime after the event, when examined by Major Olson, the accused was found to be wearing khaki shorts. The prevalence of khaki shorts among male Army officers, particularly in overseas theaters, is such that the similarity of such apparel worn by the prowler and the accused, is not of great probative value.

As to the money, testimony was received that a silver dollar, two one-dollar bills, a five-dollar bill, and a twenty-dollar bill were stolen (R 8, 12, 14). When Major Olson examined the pocketbook of

accused, he found therein "two $1.00 bills, one $5.00 and a $20.00, followed by two other $20.00 and a $10.00" (R 18). None of these bills were identified as those stolen. Great emphasis is placed on the sequence in which the bills were arranged within accused's wallet. A silver dollar and other smaller change were found in accused's possession (R 18). I do not feel that the possession of currency in such denominations and arranged in such sequence within the wallet of an Army officer, without further identification, lends substantial weight to the theory that a part of such currency was that which had been stolen, or that such possession has any material value toward the identification of the culprit. (See Wigmore on Evidence (3rd Ed) Sec. 154)

Of all the money found in the possession of the accused, the silver dollar appears to be the most incriminating. Captain Mace, from whom it was stolen, either carried that coin as a talisman, or received it in the normal course of business. If the latter, it must be assumed that silver dollars are in general use in Alaska and if this is true it is not unreasonable that the accused, likewise, received it in change in a commercial transaction. In such event, the accused's possession of such a coin would not be unusual nor would it be damaging evidence against him. On the other hand, Captain Mace may have carried the coin as a talisman. But if this were true, he undoubtedly would be familiar with the date, or special markings thereon, and could have readily identified the coin in such manner. The record is devoid of any such identification. I cannot but conclude, therefore, that possession of this coin by the accused is of no probative value toward the identification of the accused as the thief.

5. From the same floor of the same building and on the same evening a pen and pencil were reported to have been stolen, and were the objects of an intensive search by the officers investigating the reported theft of money (R 27, 30). Had these items been found among the possessions of the accused, that fact would have been of substantial value in implicating the accused with the other thefts committed at the same time and place. But they were not found, though the personal effects of the accused were searched thoroughly and completely (R 27,29). There is no evidence that accused could have hidden those articles if he had taken them. In fact the evidence as to his activities during the interim precludes such fact, and the building itself was searched completely (R 29).

My colleagues on the board have stated that the testimony introduced relative to the loss of the pen and pencil was very indefinite and of little probative value. With such statement I cannot agree. It is readily admitted that such items were not proved to have been stolen. Evidence of this fact would have merely encumbered the record when the items were not found. But evidence that the pen and pencil were reported as missing at the same time as the money to the officer investigating the thefts, by someone who roomed on the same floor as the persons who were the victims of the theft of money,

coupled with evidence that after a thorough search of the effects of the accused no such articles were found, is certainly evidence of probative value tending to show the innocence of the accused of the theft of the money. Such evidence was properly admitted and was worthy of careful consideration (See 32 C.J.S. 19).

6. A careful scrutiny of the testimony of the prosecuting witnesses, even before considering the testimony of the accused, leaves me with what I conceive to be a reasonable doubt of accused's guilt. This doubt is intensified by a careful study of the testimony by the accused. He testified that during the preceding evening he had been drinking quite a bit until about 2 a.m. when he returned to camp and went to bed. He later woke up, went downstairs to the latrine and got a drink of water, returned upstairs and, "still about half asleep" and "groggy", turned in at the wrong place. He turned about and met Mr. Waruk, and engaged in a conversation with him which was substantially that to which Mr. Waruk testified except that he testified that he told Mr. Waruk that he had been to the latrine. He then showed Mr. Waruk his (accused's) bed, got into it, and went to sleep.

Before Mr. Waruk came upstairs, the accused had had little time within which to conceal stolen articles or money. Mr. Waruk accosted him before he had returned to his bed, but saw nothing in accused's hands at the time, though accused walked from the place of the conversation to the other end of the hall with him (R 21). If accused was in fact the prowler seen downstairs by Captain Mace and Mr. Waruk, it may be assumed that he wore only khaki shorts and a white T-shirt. It would have been only natural for Mr. Waruk to have carefully scrutinized the accused for material evidence of the theft which had been committed, and which he was investigating, yet he saw nothing (R 12). Accused then went to bed (R 32).

I find nothing inherently unreasonable or suspicious in this explanation by the accused as to why he wasn't in bed. In fact, had the accused been in fact the thief, I think it would be reasonable to assume that he would in fact have been in his own bed, feigning sleep. He had time to do so.

The doubts which I entertained as to the guilt of the accused before considering his testimony, are strengthened by a careful scrutiny of it.

7. In brief, I do not believe that the evidence set forth in the record is sufficient for a reasonable man to identify, beyond a reasonable doubt, the accused as the prowler seen by Mr. Waruk and Captain Mace.

8. Since the question upon which I differ from the opinion of the majority of the Board of Review is not one of legal interpretation, but only goes to the weight of the evidence, I feel that I should invite attention to uncontradicted testimony by the accused to the effect that after Major Olson, the officer who investigated these thefts, had completed his investigation and returned to the Provost Marshal's Office

he returned to the accused his belongings and said that he could go (R 32). It was only after accused had accepted such statement, returned to the barracks and packed his things, and arrived at the station (some hour and a half later), when Major Olson met him and confined him to quarters. There is nothing in the record to indicate that any evidence incriminating the accused was uncovered between the time he was released from the Provost Marshal's Office and the time he was re-apprehended at the station — or even between the latter time and the date of trial. I, therefore, do not believe it irrational to assume that Major Olson, who was thoroughly familiar with the case, entertained a reasonable doubt as to the guilt of the accused.

9. In cases of this type, where there is conflict in the testimony and where the issue of guilt or innocence of an accused is in delicate balance, the good character of accused for honesty or integrity may play an important part in tipping the scales of justice in his favor. Three of his close associates over the six-months period prior to this incident testified that his honesty or integrity had never been questioned during that period. There was no evidence of previous convictions of accused during his approximately six years of service. The evidence of good character and record, while inconclusive of his alleged offense in this instance, must not be overlooked along with the other evidence presented.

10. After a careful and thorough examination of the whole record of trial, and an examination of the brief filed by civilian counsel for accused, I am of the opinion that the proof therein is not such as to exclude every reasonable hypothesis except that of accused's guilt.

11. For the reasons stated above, I am of the opinion that the record is not sufficient to support the findings of guilty of the Charge and Specifications thereunder.

W. McDonald Gray, Judge Advocate

JAGH- CM 322551 1st Ind

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

TO: 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, the majority opinion of the Board of Review and the dissenting opinion of one member, in the case of First Lieutenant Blake S. Sheppard (O-584116), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of larceny of twenty-five dollars, one silver dollar and two dollars, all lawful money of the United States, property of a Lieutenant Boutwell, a Captain Mace and a Mr. Waruk, respectively, in violation of Article of War 93 (Spec 1, 2, 3, of Chg). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On the night of 16-17 April 1947, the accused and the three victims of the larceny among others were quartered in the same transient officers' barracks at Fort Richardson, Alaska. Captain Mace was awakened at about 0300 hours on the morning of 17 April and saw someone going through his clothes. This same individual then went to other beds in the room, including that of Lieutenant Boutwell and Mr. Waruk. The latter was awakened at about this time and saw someone withdraw his arm from the foot of his bed and walk rapidly toward the stairs. Mr. Waruk recognized this person standing by his bed due to "his stocky build and the type of dress he was wearing, and due to the fact of his hair and general appearance" and later identified this person as the accused. Neither Captain Mace nor Mr. Waruk was acquainted with accused prior to this incident. Mr. Waruk upon finding two dollars missing from his wallet followed this person upstairs. When he reached the top of the stairs, accused, who was then half way down the hall, and the only other person out of bed in the upper story of the barracks, "dashed" in behind a bed and stood against the wall some distance from his (accused's) own bed. Upon being asked by Mr. Waruk, "If he had been downstairs", accused said, "No, it wasn't me", and when asked if he knew anything about the money missing from Mr. Waruk's wallet he again replied, "No, it wasn't me."

Upon investigation Lieutenant Boutwell found that a $20 bill and a $5 bill were missing from his pocket and Captain Mace discovered a silver dollar missing from his pocket.

The Military Police were then called and upon their arrival at the barracks accused was awakened and his pocketbook and belongings were

inspected. In his pocketbook were "two $1.00 bills, one $5.00 and a $20.00 followed by two other $20.00 and a $10.00". Beside the pocketbook, there was in accused's possession a silver dollar and other change.

4. The accused is 33 years of age, reached the 11th grade in high school and is married. He served three years in the National Guard from 1935 to 1938 and entered the Army as an enlisted man in March 1941. After he was graduated from Air Force Officers' Candidate School, he was commissioned second lieutenant, Army of the United States, and called to active duty on 11 December 1943. On 21 August 1945, he was promoted to the rank of first lieutenant. His efficiency ratings from 1 July 1944 to 8 April 1947 are "Excellent".

Consideration has been given to a brief on behalf of accused, prepared and sent to the President on 29 May 1947 by Dorothy D. Tyner, Attorney at Law, and a letter dated 16 May 1947 from Vance Cherbonnier to the Secretary of State, State of Missouri, which was referred to this office.

5. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

Cm 322,551

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

Dept of the Army, GCMO 4, 13 Oct. 1947).

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

JUN 18 1947

JAGK - CM 322565

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Otsu, Honshu, Japan, 18 April 1947. Dishonorable discharge and confinement for life. United States Penitentiary, McNeil Island, Washington.
	)	
Sergeant WILLIAM L. OSBURN (RA 6655630), Company A, 35th Infantry.	)	

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

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

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

CHARGE: Violation of Article of War 92.

Specification: In that Sergeant William L. Osburn, Company A, 35th Infantry, did, at Otsu, Honshu, Japan, on or about 18 February, 1947, forcibly and feloniously, against her will, have carnal knowledge of Shigeko Sowa.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

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

4. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge whether emission occurs or not. The offense may be committed on a female of any age. Both the force and

the want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par. 148b).

The evidence clearly establishes that force was used and that the victim did not consent, but in this case we have an unusual situation in which the victim of the assault, a child of eleven (11) years of age, could not give any competent testimony of an affirmative nature to the effect that penetration actually occurred. She testified that she did not know "what he (accused) tried to do". Proof of penetration, beyond every reasonable doubt is, of course, essential; but such proof need not be direct nor is it necessary that it be shown by testimony of the outraged female. Proof of this element of the offense by circumstantial evidence may be made and it is sufficient if facts be proven from which penetration may be inferred (Wharton's Criminal Law (12 Ed.) sec. 697, p. 936, and cited cases).

In Word vs. State, 12 Texas Appeals 174, there had been no testimony of the prosecutrix regarding the penetration because the assailant had beaten her into insensibility. The court sustained the conviction upon evidence of facts and circumstances from which the penetration was inferred and stated:

> "It would be a monstrous doctrine that villians who had rendered their victims insensible in order to effect their purpose should be freed from punishment because the victim could not swear positively to the act of penetration accomplished upon her during her state of insensibility."

This doctrine applies equally to a case where the victim, because of her tender age and lack of understanding concerning acts of intercourse could not testify to the act of penetration.

In the instant case Mitsuo Sowa, Shoichi Uno, Lieutenant William J. Glunz and the victim all testified that accused was lying on top of the victim under such circumstances which indicated that he was having sexual intercourse with her. No one was able to say that he saw a penetration of the private parts of the victim by the privates of the accused.

When the evidence of the attendant circumstances and conditions is examined, however, it appears evident, beyond all reasonable doubt that the only design accused could have had in mind was sexual intercourse with the victim. He forcibly removed her slacks, which left her naked from the waist down to her knees, opened the fly of his pants, exposing

his penis which was "hard and straight" and lay on top of the victim "wiggling his hips" in such motion as to suggest sexual intercourse. He was so intent upon his purpose that he had to be "lifted off from the girl". Lieutenant Glunz testified to the condition of accused's privates immediately after he was taken from the girl and from which alone it could reasonably be inferred that accused had penetrated the girl's private parts with his penis (CM 249224, Hope, 32 BR 69).

It is not consistent with reason to believe that any male would associate with a female under such circumstances, for the sole purpose of fondling her person or gratifying his own desires or passions by merely lying in close proximity to her body and it requires no exceptional credulity to draw the reasonable inference that, the accused, having complete control over a partially disrobed victim did, as evidenced by his unmistakable position and motions, and the condition of his penis, penetrate the private parts of the girl to some degree, however slight.

In addition to the above facts, a physical examination of the victim showed lacerations of the vaginal wall, a fresh rupture of the hymenal membrane and bleeding from the vagina. The evidence further reveals that the victim, several days after the incident, developed definite symptoms of, and was treated for, the identical venereal disease from which accused was suffering at the time of the assault.

Under these circumstances the Board of Review is of the opinion that penetration was proved beyond any reasonable doubt as was every other element of the offense charged.

5. The charge sheet shows accused to be 36 years of age and single. He enlisted in the Regular Army 21 January 1930 and has served therein continuously since that date.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory, upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable under section 278, Criminal Code of the United States (18 U.S.C. 457).

W H Johnson Jr, Judge Advocate

Joseph J Waters, Judge Advocate

E Schenker, Judge Advocate

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

JAGN-CM 322600

U N I T E D S T A T E S v. Private First Class JAMES D. SHORT (35998983), 556th Quartermaster Clothing & Equipment Repair Detachment and Private ISRAEL LUCAS (44192538), Company D, 3186th Signal Service Battalion.	))))))))))))	KOBE BASE Trial by G.C.M., convened at Kobe, Japan, 30 April 1947. Short: Dishonorable discharge and confinement for ten (10) years. Penitentiary. Lucas: Dishonorable discharge and confinement for twenty (20) 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 were tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Israel Lucas, Company D, 3186th Signal Service Battalion and Private First Class James D. Short, 556th Quartermaster Clothing and Equipment Repair Detachment, acting jointly, and in pursuance of a common intent, did, at Akashi, Honshu, Japan, on or about 3 April 1947, feloniously take, steal and carry away from the presence of Masao Matsumoto, two watches, the property of Masao Matsumoto, value about $40.00.

Specification 2: In that Private Israel Lucas, Company D, 3186th Signal Service Battalion and Private First Class James D. Short, 556th Quartermaster Clothing and Equipment Repair Detachment, acting jointly, and in pursuance of a common intent, did, at Akashi, Honshu, Japan, on or

about 3 April 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Junji Matsuoka, 987.50 yen, value about $19.75, one leather billfold, value about $5.00, the property of Junji Matsuoka, of a total value of about $24.75.

Specification 3: In that Private Israel Lucas, Company D, 3186th Signal Service Battalion and Private First Class James D. Short, 556th Quartermaster Clothing and Equipment Repair Detachment, acting jointly and in pursuance of a common intent, did, at Akashi, Honshu, Japan, on or about 3 April 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Heibun Komoto, 1700 yen, value about $34.00, one watch, value about $20.00, the property of Heibun Komoto, of a total value of about $54.00.

Each accused pleaded not guilty to the Charge and all Specifications. Each accused was found guilty of Specification 1 of the Charge except for the figure $40.00, substituting therefor the figure $13.00, of the excepted figure, not guilty, of the substituted figure, guilty; guilty of Specification 2 of the Charge except for the words "and by putting him in fear," of the excepted words, not guilty; guilty of Specification 3 of the Charge except for the figures $20.00 and $54.00, substituting therefor the figures $15.00 and $49.00, of the excepted words, not guilty, of the substituted words, guilty; and guilty of the Charge. Accused Short 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. Accused Lucas 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 twenty years. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the prosecution:

At a little past 1900 the evening of 3 April 1947 the two accused entered the second hand shop of Masao Matsumoto, Kajiya-cho, Akashi City (R. 7). Lucas asked to be shown two watches. After Lucas had looked at the watches for awhile they were replaced inside the counter (R. 10, 11). Lucas then went behind the counter, grabbed the two watches and the two accused ran away (R. 11). The accused were apprehended together in a hotel near Akashi at about 0100, 4 April 1947. Lucas had, among other things, three watches on his person (R. 19, 22). Matsumoto identified Prosecution's Exhibit 1, which was one of the watches taken from Lucas, and Prosecution's Exhibit 2, as being the watches taken from him (R. 9). Florian Lambert, a qualified watch expert, estimated the value

of Prosecution's Exhibit 1 to be $7.00 or $8.00 and Prosecution's Exhibit 2 to be $6.00 (R. 17, 18).

At about 2030 or 2040 the evening of 3 April 1947, Junji Matsuoka, 611 Kajiya-cho, Akashi City, was going to a meeting and "got right in between the two soldiers." The one in back grabbed him, turned him around and the other soldier searched him. His billfold, containing money was taken and he was knocked off to one side (R. 12). He was not afraid, and tried to resist the taking of the wallet. He was unable to identify either of the soldiers (R. 12, 13). When accused Short was apprehended at 0100 4 April 1947, he was searched and a wallet, Prosecution's Exhibit 3, found on his person (R. 19, 20). Matsuoka identified Prosecution's Exhibit 3 as being the wallet taken from him (R. 12).

On the evening of 3 April 1947, at about 2030, Heibun Komoto, Oakashi-cho 3 chome, Akashi City, was riding a bicycle in front of Hayasaki station in that city. After he got off his bicycle someone grabbed him, took his watch, searched him "and took money also." He did not resist because he was afraid (R. 16, 17). Two men did this, one stood in front of him and the other searched him. He could not remember the faces of the soldiers but one was taller than the other (R. 14, 16). When accused Lucas was apprehended three watches were taken from him. Two of the watches were small and the other was larger, and a Waltham. Prosecution's Exhibit 4 was a Waltham, and was recognized by Corporal Sydney B. Walden, who took the watches from Lucas (R. 19). Komoto identified Prosecution's Exhibit 4 as the watch taken from him by the two soldiers (R. 15). The watch, Prosecution's Exhibit 4, was estimated to be of a value of $15.00 by a qualified watch expert (R. 18).

After the defense specifically stated they had no objection a statement admittedly signed by Short was introduced in evidence. The court was cautioned that the statement was admissible only so far as it pertains to Short. The statement, read in evidence, is as follows:

> "Approximately 1800 April 3, 1946 I and blank left Motomachi station for the Japanese hotel in Fujie. (pronoun) got of the train at Fujie station walked back to Akashi. Blank got the idea of robbing a small stand so (pronoun) went in. Blank robbed the Japanese of two watches. (Pronoun) stopped 4 or 5 Japanese on the street and robbed them of money and blank robbed one of a watch. (Pronoun) then rode a Japanese motocycle back to the Japanese hotel. (Pronoun) stayed there until apprehended by the M.P.'s" (R. 21, 22).

<u>Evidence for the defense</u>:

Private First Class Morris Mallette testified he knew Lucas

and had sold him a watch something like Prosecution's Exhibit 4, in December (R. 24, 25). Private First Class Jack Daniels testified he knew Lucas and had sold him a watch in December. Of Prosecution's Exhibits 1, 2, 4, it was more like Prosecution's Exhibit 2 (R. 26). It "* * * imitates the watch I sold * * *" (R. 27).

On being advised of their rights as witnesses, accused Lucas elected to remain silent, accused Short elected to make a sworn statement. He testified that he was questioned for about five hours, spread over a period of about four days (R. 28). The CIS Agent kept pounding at him and he finally signed the statement that was introduced in evidence. His eyes were bad at the time so he did not read it before signing. "I had been there for eight days, that is one thing, I was hungry and sleepy and in other words, I was just worn out and wanted to get somewhere where I could get some rest" (R. 29). He was told that if he would go ahead and sign everything would be all right. He was warned about his rights before signing the statement, but does not remember whether or not the 24th Article of War was read to him (R. 30). On the night of 3 April 1947 "we" had a date with two girls but they did not show up so "we" went to this hotel and went to bed (R. 29).

4. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the finding of guilty as to Specification 1; legally sufficient to sustain the finding of guilty as to accused Short of Specification 2; and legally sufficient to support the finding of guilty as to accused Lucas of Specification 3. Discussion will therefore be limited to a consideration of the sufficiency of the record to legally sustain the finding of guilty as to Lucas of Specification 2; and the finding of guilty as to Short of Specification 3.

With respect to the robbery of Junji Matsuoka there is nothing in the record of trial to directly connect accused Lucas with the offense, there was no identification by the victim and none of the property alleged to have been taken from this victim was traced to Lucas.

Likewise with respect to the robbery of Heibum Komoto there is nothing in the record of trial to directly connect accused Short with the offense, there was no identification by the victim except that one of the soldiers who attacked him was shorter than the other, and none of the property alleged to have been taken from this victim was traced to Short.

The evidence does prove that both accused jointly engaged in a larceny at about 1900 3 April 1947; that the robberies alleged in Specifications 2 and 3 took place about 2030 or 2040 the same evening; that accused were apprehended together at about 0100 4 April 1947, one in possession of the fruits of one such robbery and the other in possession of the fruits of the other robbery; and that accused Short

committed "4 or 5" robberies that night. While it is true that the facts as established by the record create a suspicion of concerted action of the two accused during all of the offenses charged, however, it has been repeatedly held, and is well established, that mere suspicion or conjecture do not warrant a conviction (16 C J 779, and cases cited). The following has been frequently quoted, with approval, by the Board of Review (CM 197408, McCrimon, 3 BR 111; CM 206522, Young, 8 BR 271; CM 207591, Nash et al, 8 BR 359), with respect to circumstantial proof:

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

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to sustain the findings of guilty of Specification 1; legally sufficient to support the finding of guilty of Specification 2 as it pertains to accused Short only; legally sufficient to support the finding of guilty of Specification 3 as it pertains to accused Lucas only; legally insufficient to support the finding of guilty of Specification 2 so far as it pertains to accused Lucas; legally insufficient to support the finding of guilty of Specification 3 so far as it pertains to accused Short; legally sufficient to support the sentence as to accused Short; and legally sufficient to support only so much of the sentence of accused Lucas as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years and six months.

Edward D. Johnson, Judge Advocate.

Lloyd P. Brack, Judge Advocate.

Lawrence R. Dudley, Judge Advocate.

(294)

JUL 16 1947

JAGN-CM 322600 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Kobe Base, APO 317, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class James D. Short (35998983), 556th Quartermaster Clothing and Equipment Repair Detachment, and Private Israel Lucas (44192538), Company D, 3186th Signal Service Battalion, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that as to accused Short the finding of guilty of Specification 3 be disapproved; that as to accused Lucas the finding of guilty of Specification 2 be disapproved and that as to accused Lucas 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 years and six months. Upon taking such action you will have authority to order the execution of the sentences.

2. In view of the youth of accused and all the other circumstances of the case, it is recommended that the period of confinement in each case be reduced to five and one-half years.

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

(CM 322600).

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.

JAGN-CM 322627

U N I T E D S T A T E S	)	CONTINENTAL BASE SECTION
v.	)	Trial by G.C.M., convened at Furth, Germany, 15, 23 and 24 April 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Master Sergeant H'EARL C. DAVIS (14050013), 3798th Transportation Corps Truck Company, 122d Transportation Corps Truck Battalion.	)	

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 96th Article of War.

Specification 1: In that Master Sergeant H'Earl C. Davis, 3798th Transportation Corps Truck Company, having been assigned Government Billets for the accommodation of dependents, did, at Eibach, Germany, on or about 2 February 1947 to about 1 March 1947, wrongfully and knowingly misuse said billets, in that he, the said Master Sergeant Davis, permitted the use of rooms therein to be used for immoral purposes; to wit; to be used for a haven for couples carrying on sexual relations, to the prejudice of good order and military discipline.

Specification 2: In that Master Sergeant H'Earl C. Davis, 3798th Transportation Corps Truck Company, having been assigned Government Billets for the accommodation of

dependents, did, at Eibach, Germany, on or about 2 February 1947 to about 1 March 1947, wrongfully and unlawfully misuse said billets, in that he, the said Master Sergeant Davis, did transact illegal business therein.

Specification 3: (Finding of not guilty).

CHARGE II: (Violation of the 94th Article of War. Disapproved by the Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

Accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 3 of Charge I but guilty of all other Charges and Specifications 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 three years. The reviewing authority disapproved the findings of guilty of Charge II and the Specification thereunder, approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, 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.

3. 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. The only aspect of the case requiring consideration is the legal sufficiency of the record of trial to support the sentence.

Accused was found guilty under two Specifications, one alleging misuse of government assigned billets during a specified period, by permitting rooms therein to be used for immoral purposes (Spec. 1), and the other alleging misuse of government assigned billets during the same specified period, by "transacting illegal business therein" (Spec. 2). In addition to the misuse alleged in Specification 1 the evidence shows no "illegal use" other than the sale on such premises of commissary purchased food at profitable prices as alleged in Specification 3, of which accused was found not guilty, and the sale on the premises of liquor for profit. It is apparent from the allegations of Specifications 1 and 2 that accused is primarily charged with the offense of misusing government assigned billets over a specified period of time. While it may be that the various "illegal uses," to wit, the use of rooms therein for immoral purposes and the sale of liquor and foodstuffs on the premises for profit, constitute separate

and distinct offenses, they nevertheless are, in fact, but proven incidents establishing the primary offense charged. Consequently both Specifications are but different aspects of the same transaction, the misuse of the billets, and punishable only for the more important aspect thereof (MCM, 1928, par. 80a). Each Specification of which accused was found guilty is without doubt a disorder to the prejudice of good order and military discipline, in violation of Article of War 96, the maximum punishment for which is confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period for each offense (MCM, 1928, par. 104c). Inasmuch, however, as Specifications 1 and 2 of Charge I are but different aspects of the same transaction the maximum authorized punishment to which accused may be subjected in this case is confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par. 104c).

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty as approved by the reviewing authority, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

Edward I. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Francis J. Tuohy, Judge Advocate.

AUG 4 1947

JAGN CM 322627 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Continental Base Section, APO 807, c/o Postmaster, New York, New York

1. In the case of Master Sergeant H'Earl C. Davis (14050013), 3798th Transportation Corps Truck Company, 122d Transportation Corps Truck Battalion, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated recommend that only so much of the sentence be approved as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. 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 322627).

1 Incl
Record of trial

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

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

JAGN-CM 322633

16

UNITED STATES	)	HEADQUARTERS FORT BRAGG
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 29 April 1947. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private William J. Higgins (34175120), Detachment #3, 3420 Army Service Unit, Station Complement.	)	

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 58th Article of War.

Specification: In that Private William J. Higgins, Detachment Number Three, 3420 Army Service Unit, Station Complement, Fort Bragg, North Carolina, but then of 22nd Anti-Aircraft Battery, Camp Davis, North Carolina, did, at Camp Davis, North Carolina, on or about 27 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Elizabeth City, North Carolina, on or about 22 January 1947.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification of the Charge except the words "apprehended at Elizabeth City, North Carolina," substituting therefor the words "returned to military control." Of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. 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 a period of five years. The reviewing authority approved the sentence, 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 50½.

3. The following exhibit was introduced by the prosecution and admitted in evidence without objection.

Higgins	William	J.	34175120
(Last name)	(First name)	(Middle initial)	(Army serial number)

Pvt.	22nd Battery, AAA School, CAC
(Grade)	(Company, regiment, and arm or service)

EXTRACT COPY OF MORNING REPORT OF —

22nd Battery, AAA School, Camp Davis, N. C.
(Company, troop, battery, or detachment) (Regiment or other organization)

27 December 1943

Fr dy to AWOL 0730

/s/ Austin C. Line,
/t/ AUSTIN C. LINE,
Captain, C. A. C.,
Commanding.

22nd Battery, AAA School, Camp Davis, N. C.	28 Dec. 43
(Complete designation or command((Station)	(Date)

I, Austin C. Line, Captain, C.A. C., certify that I am the commanding officer of 22nd Battery, AAA School 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 Davis, North Carolina, for the dates indicated in said copy which relates to William J. Higgins, 34175120, Pvt. 22nd Battery, AAA School, Camp Davis, N. C. organization of person referred to in extract copy).
(Name, grade, and arm or service) (Complete designation of command) (Station) (Full name, Army Serial number, grade and

Austin C. Line
(Signature)

AUSTIN C LINE, CAPTAIN, C.A.C.
(Grade and arm or service)"

It was stipulated that accused returned to military service on or about 22 January 1947.

No witnesses were called, the prosecution adduced no more evidence and the accused, being advised of his rights declined to testify or to introduce any evidence on his own behalf.

4. The only evidence to sustain the court's finding is prosecution's exhibit 1 above set out. The evidentiary value of such exhibit is limited to the words:

"27 December 1943

Fr dy to AWOL 730"

The omission of the name of the accused from the body of the exhibit, as distinguished from the certification thereof, is such as to render it of no probative value in this case (CM 318685, Sustaite, 1947). There being no other evidence to prove the unauthorized absence of accused it follows that the finding of the court cannot be sustained.

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.

Edward J. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

[illegible], Judge Advocate.

JUN 27 1947

JAGN-CM 322633 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Fort Bragg, North Carolina

1. In the case of Private William J. Higgins (34175120), Detachment #3, 3420 Army Service Unit, Station Complement, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty and 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 322622).

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 322654

25 JUL 1947

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Brooklyn,
	)	New York, 22 April 1947. Dismissal,
First Lieutenant STEVE G. LACH	)	total forfeitures and confinement for
(O-1300983), Infantry	)	one year and three months. Penitentiary.

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 93rd Article of War.

Specification: In that First Lieutenant Steve G. Lach, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, Transport Exchange Officer, aboard the USAT ZEBULON B. VANCE did, on board the said USAT ZEBULON B. VANCE between on or about 3 March 1947 and on or about 6 April 1947 feloniously embezzle by fraudulently converting to his own use United States currency of the value of Five Thousand Four Hundred Forty-Eight Dollars and Fifty-Five Cents ($5,448.55), the property of the Transportation Corps Vessel Exchange Fund, an agency of the United States Government, entrusted to him by the said Transportation Corps Vessel Exchange Fund.

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

Specifications 1,2,3,5,6: Nolle Prosequi.

Specification 4: In that First Lieutenant Steve G. Lach, ***, did, on board the said USAT ZEBULON B. VANCE, on or about 5 April 1947, wrongfully borrow the sum of One Hundred ($100.00) Dollars from Corporal Eugene Schofield.

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

Specification: In that First Lieutenant Steve G. Lach, ***, did, on board the said USAT ZEBULON B. VANCE, between on or about 22 March 1947 and on or about 25 March 1947, feloniously

embezzle by fraudulently converting to his own use four cases of cigarettes containing 200 cartons of cigarettes, of the value of about $160.00, the property of the Transportation Corps Vessel Exchange Fund.

He pleaded not guilty to the Specification and Charge I, guilty of Specification 4 of Charge II and of Charge II, not guilty of the Specification and the Additional Charge. He was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence but reduced the period of confinement to one year and three months, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 6 March 1947 the United States Army Transport Zebulon B. Vance sailed from New York. It reached Bremerhaven, Germany, during the voyage and returned to New York on 10 April 1947. On this voyage Lieutenant Colonel Louis Roth was Transport Commander, Captain Seneca B. Burchard was Assistant Transport Commander, First Lieutenant John A. Lamb was Transport Service Officer, and the accused was the Exchange Officer (R. 10,13,18,28,35,40,43).

Between 7:00 p.m. and 8:30 p.m., on 25 March 1947, while the transport was at Bremerhaven, Germany, Ernest Fred Klaschka, the refrigeration engineer, suggested to the accused that cigarettes be sold. Concerning the sale he testified: "I approached Lieutenant Lach with a proposition that I'd sell cigarettes, and every third carton, or case, according to the quantity, would be sold for the Lieutenant" (R. 35). Carmello C. Giannini, master-at-arms, was to receive a third of the profits (R. 28,35,57). Klaschka, Giannini, together with the accused, and an unidentified person went to the exchange storeroom. The accused opened the storeroom, took four cases of cigarettes, and "passed them out through the door" to Klaschka and Giannini who carried them to the fantail of the transport (R. 29,35,36). The cigarettes were transferred to a German boat, taken ashore and sold by Klaschka. From the proceeds of this sale Klaschka gave accused $320.00, Giannini $140.00, and kept the remainder for himself. Cigarettes were sold aboard ship at 80 cents a carton, which amounted to $40.00 a case. In order for the exchange books to balance it was necessary that $160.00 be paid to the exchange. This $160.00 was included in the $320.00 given to the accused (R. 31,36,38,55).

By stipulation it appeared that the four cases of cigarettes had a value of $160.00 and were the property of the Transportation Corps Vessel Exchange Fund (R. 37, Pros. Ex. 1).

On the night of 5 April 1947 Corporal Eugene Schofield, Enlisted Men's Carpenter Division, New York Port of Embarkation, loaned the accused $100.00. The accused gave as his reason for borrowing this money, "He wished to play cards, he said." On 6 April 1947 the accused executed a receipt of loan whereby he acknowledged owing Corporal Schofield $200.00. This receipt included $100.00 which accused had borrowed prior to 5 April 1947 (R. 43,44, 45; Pros. Ex. 2).

On the morning of 6 April 1947 Lieutenant Colonel Roth, the transport commander, received a report that accused had been gambling with members of the crew. He informed the accused of this report, temporarily suspended him from his duties as exchange officer, and directed that an inventory of the Exchange be made. Lieutenant Colonel Roth, Captain Burchard, Lieutenant Lamb and accused went to the exchange office where "Lieutenant Lach opened the safe, took out the cigar box with money, and said, 'That is all the money I have.'" Upon being asked, "Where are the receipts from the Exchange Sales?" the accused stated, "I lost it. I gambled it away." The money on hand amounted to $25.08. An inventory disclosed that the accused was short $5448.55 in his accounts. This shortage was the money received for cash sales made by the Exchange during the voyage (R. 10,11,14,15,20,23, 63-66).

On 11 April 1947 the accused, after appropriate warnings as to his rights, made a voluntary statement concerning his actions aboard the Transport Zebulon B. Vance. This statement was received in evidence as Prosecution Exhibit 3. The accused stated that on 15 March 1947 his accounts were in order. About the 18th or 19th of March he began playing poker with members of the crew and in the game he lost about $2,000.00 belonging to the Exchange fund. When Klaschka approached him with a proposition to sell cigarettes he agreed in the hope that he would be able to replace his losses of the Exchange funds. He went to the storeroom and gave Klaschka and Giannini four cases of cigarettes. Klaschka gave him $320.00 as his part of the proceeds of the sale of the cigarettes. He continued to gamble during the rest of the trip and lost more of the Exchange funds. He borrowed $100.00 from Corporal Schofield in order to continue gambling. He was relieved of his duties as Exchange officer and a checkup disclosed that he was short in his accounts (R. 49, Pros. Ex. 3).

4. For the Defense

Olin E. Teague, a Member of Congress from Texas, testified that during the war he was a lieutenant colonel in the Army and that the accused was a member of his command during six months of combat. During this time the accused was a good officer and of excellent character. His duty did not require him to make an efficiency report for the accused but if he had made such a report he would have rated the accused as superior (R. 24-27).

Ernest Fred Klaschke was recalled as a witness for the defense and testified that the Exchange was to be paid $160.00 from the sale of cigarettes

regardless of the amount they received for them, and that the $160.00 was to be paid if they lost money on the deal (R. 55,56).

By stipulation it appeared that if Mrs. Steve G. Lach, wife of accused, were present she would testify:

> "Sir, I hate myself for making such a statement for we do love one another more than anything in the world and there has never been anything wrong between us. But ever since Steve came back from overseas there has been something lacking, the majority of the time he is perfect. Then come the moments when at times he acts as if he doesn't care what goes on, then there are times when he has a few drinks and all he can talk about is what happened. Yes, it is interesting to listen to but it just doesn't sound right to me. As for being routines, no, I think he has never hurt anyone but me. Not by beating or insulting, just some things that he does. Except for what has happened now." (R. 58, Def. Stip. 1)

A photostatic copy of accused's Form 66-1 showing his various ratings, assignments and other data relating to his service was introduced by the defense (R. 58, Def. Stip. 2).

5. Charge I, the Additional Charge and the Specifications thereunder

Each specification alleges embezzlement in violation of Article of War 93. One charges the embezzlement of $5448.55, property of the Transportation Corps Vessel Exchange Fund, and the other charges the embezzlement of four cases of cigarettes of the value of about $160.00, property of the same fund.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268; MCM, 1928, par. 149h, p. 173).

The evidence conclusively shows that the accused was in charge of the Exchange aboard the United States Army Transport Zebulon B. Vance and as such officer he was in possession of property belonging to the Transportation Corps Vessel Exchange Fund. During a voyage of this transport he sold property belonging to the Exchange and received cash therefor. Thereafter he gambled and lost this money amounting to $5448.55. An inventory of his accounts revealed the shortage and the accused in his statement admitted that he had gambled with the money. The fraudulent appropriation of the money of the ownership alleged is therefore adequately established.

On 25 March 1947 the accused agreed with some enlisted men to remove four cases of cigarettes belonging to the Exchange from the transport and

sell them in the black market in Germany. This transaction was completed and after the sale the accused received $320.00 of which $160.00 was to go into the Exchange Fund so that the Exchange records would show no loss. When the accused delivered these four cases of cigarettes to his accomplices for sale in the black market he fraudulently appropriated them to an unauthorized use and thus committed the offense of embezzlement. That accused intended to make restitution for the cigarettes by eventually paying into the Exchange fund an amount of money equal to the value of the cigarettes taken, is no legal defense to the charge of embezzlement (CM 275342, Doffs, 48 BR 31,37; CM 276435, Meyer, 48 BR 331,338).

Specification 4, Charge II

The evidence establishes and the accused by his plea of guilty admits that on the 5th of April 1947 he borrowed the sum of $100.00 from Corporal Eugene Schofield. The borrowing of money from enlisted personnel by officers has been consistently held to be a violation of Article of War 96 (CM 275535, Wilson, 48 BR 71,75).

6. War Department records show the accused to be 29-8/12 years of age and married. He is a high school graduate. From March 1936 to June 1941 he was enrolled in the Civilian Conservation Corps. He was inducted into the service on 28 January 1942. He graduated from Officers Candidate School and received a temporary appointment as a second lieutenant, Infantry, Army of the United States, on 23 November 1942. On 23 May 1944 he was promoted to first lieutenant. He served in the European Theater of Operations from 23 May 1944 to 27 November 1945. He is entitled to wear the Combat Infantryman's Badge and the Bronze Star Medal with Oak Leaf Cluster in addition to his theater ribbons. His efficiency reports, with the exception of one submitted after the offenses charged herein, are "Excellent."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 93 and 96 and confinement in a penitentiary or other correctional institution is authorized upon conviction of the crime of embezzlement of property of a value of $50.00 or more.

Chester D. Silvis, Judge Advocate

Carlos E. McAfee, Judge Advocate

(On Leave), Judge Advocate

(308)

JAGK - CM 322654 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, 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 Steve G. Lach (0-1300983), Infantry.

2. Upon trial by general court-martial this officer was found guilty of embezzling $5448.55 in United States currency and four cases (200 cartons) of cigarettes, property of the Transportation Corps Vessel Exchange Fund, in violation of Article of War 93, and of wrongfully borrowing $100.00 from an enlisted man in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence but reduced the period of confinement to one year and three 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.

During March and April 1946 accused was the exchange officer aboard the United States Army Transport Zebulon B. Vance. He gambled with enlisted men aboard ship and lost $5448.55 belonging to the Exchange. While in Bremerhaven, Germany, on 25 March 1946 accused took four cases of cigarettes from the Exchange store room and his accomplices later sold them on the black market. The accused received $320.00 from the proceeds of the sale. He planned to apply $160.00 of this money to the Exchange fund so that it would show no loss. On 5 April 1946 he borrowed $100.00 from Corporal Schofield in order to continue gambling.

On 6 June 1947 the Commanding General, New York Port of Embarkation, forwarded a sworn statement made by accused wherein he expresses his intention to repay the $5490.00 embezzled by him while exchange officer aboard the Transport Zebulon B. Vance.

4. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution and that a United States 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

(GCMO 281, 22 Aug. 1947).

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

JAGH - CM 322695

16 SEP 1947

UNITED STATES	)	CARIBBEAN AIR COMMAND
v.	)	Trial by G.C.M., convened at Atkinson Field, British Guiana, 10 April 1947. Dismissal, total forfeitures, and confinement for two (2) years
Second Lieutenant PATTISON E. THOMAS (0-2050675), Medical Administrative Corps	)	

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 93rd Article of War.

Specification: In that, Second Lieutenant Pattison E. Thomas, MAC, 28th Airdrome Squadron, did, at Atkinson Field, British Guiana, on or about 6 October 1946, feloniously embezzle by fraudulently converting to his own use $288.00 (TWO HUNDRED & EIGHTY-EIGHT DOLLARS) U.S. Currency, the property of the Non-Commissioned Officers Club, Atkinson Field, British Guiana, entrusted to him for the Non-Commissioned Officers Club Treasury by said 1st Lieutenant William F. Grace, Jr.

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

Specification 1: In that Second Lieutenant Pattison E. Thomas, MAC, 28th Airdrome Squadron, did, at Atkinson Field, British Guiana, on or about the 22nd of October 1946, with intent to deceive, wrongfully and unlawfully make and utter a certain check in words and figures as follows, to wit:

"15/X54715 ANN ARBOR, MICHIGAN 22 Oct 1946

THE NATIONAL BANK OF ANN ARBOR, MICHIGAN

Pay NON-COMMISSIONED OFFICERS CLUB, ATKINSON FIELD Bearer
BRITISH GUIANA, APO 857 c/o PM, Miami, Florida

TWO HUNDRED AND EIGHTY-EIGHT & 00/00 DOLLARS -------

/s/ Pattison E. Thomas
2d Lt. MAC 0-2050675
353d Sta. Hosp., APO 857
c/o Postmaster, Miami, Fla."

$288.00

he, the said 2nd Lt. Pattison E. Thomas, then well knowing that he did not have, and not intending that he should have, any account with The National Bank of Ann Arbor, Michigan, for payment of said check.

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 and of Charge II and Specification 1 thereunder. Of Specification 2, Charge II 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 for three years. The reviewing authority approved only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years, and forwarded the record of trial for action under Article of War 48.

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

In October 1946, the accused was Officer in Charge of the Non-Commissioned Officers Club at Atkinson Field, British Guiana (R 7, 13). On or about 3 October 1946 Master Sergeant James C. Rose, the Secretary-Treasurer of that club delivered to the accused three checks totalling $1200.00 for the purpose of purchasing supplies for the club (R 7). The accused, in turn, delivered the checks to First Lieutenant William F. Grace, Jr., who was to make the actual purchase at St. Thomas (R 11). On 5 October Lieutenant Grace returned from St. Thomas with the supplies and $288 change (R 11), which sum he gave to the accused on the following day (R 12). Lieutenant Grace also told Sergenat Rose that he had given the money to the accused (R 12). Sergeant Rose requested the money from accused on two occasions but the latter failed to turn the money over to the club treasurer. On or about 20 October Sergeant Rose reported to Lieutenant Grace, the Base Adjutant, that he had not received the money from accused (R 7). Lieutenant Grace, acting on behalf of the Base

Commander, directed the accused to adjust his financial obligation due the Non-Commissioned Officers Club by letter dated 22 October 1946 (R 12). On the same day the accused made and gave to the club steward a check in the sum of $288.00 drawn on the National Bank of Ann Arbor, Michigan, payable to the Non-Commissioned Officers Club, Atkinson Field, British Guiana (Pros Ex 1; R 7-8, 16). At that time, or shortly thereafter, the accused asked Sergeant Rose to hold the check until pay day when he would reimburse him, but also told him that, if Sergeant Rose so desired, he could deposit the check. The accused stated, however, that he preferred that the check be held (R 7-9). After giving the check to the steward, and discussing the matter with Sergeant Rose, the accused, by signed first indorsement, addressed and forwarded to Headquarters Atkinson Field, stated: "Delinquent account has been adjusted" (Pros Ex 2, R 17).

On or about 5 November 1946 Sergeant Rose asked the accused to redeem the check, but the latter did not do so. Thereafter (R 12) Sergeant Rose turned the check over to Lieutenant Grace, who was then officer in charge of the club (R 7, 10, 12). When asked if he had any reason to believe that the check was worthless, Sergeant Rose replied, "No, but I had reason to believe, strictly from a personal point of view, that it was not quite good. I knew that Lt. Thomas was, at that time, more or less in financial straits" (R 11).

Thereafter a Board of Officers was appointed to investigate a shortage in the hospital funds. At a meeting of the board, after his rights under Article of War 24 were explained to him, the accused stated that the check was not good but that up to 1 October 1946, his wife had a "general bank account" in the drawee bank (R 13).

It was stipulated that when the check in question was made the accused had no account in any bank in Ann Arbor, Michigan, and that there was no such bank as "The National Bank of Ann Arbor, Michigan" (R 8).

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

Lieutenant Grace testified that the accused made restitution of the $288.00 on or about 1 January 1947.

After his rights as a witness had been explained to him, the accused initially elected to remain silent (R 17), but subsequently reconsidered his decision and made an unsworn statement (R 18). He stated that, acting as Officer in Charge of the Non-Commissioned Officers Club, he gave Lieutenant Grace, checks in the total sum of $1200 with which to purchase supplies for the club and later received $288 as change from Lieutenant Grace. The following day he went to San Juan, Puerto Rico, to meet his wife who had arrived from the United States and found her penniless. He spent part of this money, intending to return it, but found that he could not make restitution because of the expense of this trip, and expenses incurred because

of the illness of one of his children. Thereafter he received an official letter signed by Lieutenant Grace directing that he settle his financial obligations to the club, and that as a result thereof he made the check in question and gave it to Sergeant Rose. He knew that the check was without value although he thought that his wife had a small balance in the bank. He stated that he told Sergeant Rose that the check was not good and asked him to hold it until he could redeem it. He also told Rose that if the latter got into trouble about it, he (the accused) "would have to do something about it" (R 19). On 6 December 1946 he was called to Base Headquarters and confronted with the check. On the following day he made full restitution (R 20).

5. Under the Specification of Charge I the accused stands convicted of the embezzlement of $288.00, the property of the Non-Commissioned Officers Club, Atkinson Field, British Guiana, entrusted to him for the club by First Lieutenant Grace, in violation of Article of War 93.

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (MCM 1928, par 149h, p 179).

The evidence shows that early in October 1947, Lieutenant Grace turned over to the accused, as Officer in Charge of the Non-Commissioned Officers Club, the sum of $288 which was due the club as change for funds advanced for the purchase of supplies. By his own admission the accused converted the money to his own use instead of turning it over to the lawful custodian. The accused stated on numerous occasions that he fully intended to reimburse the fund but did not do so until December or January.

The mere taking of the money temporarily for accused's personal use establishes the offense of embezzlement.

> "The act of a custodian of company funds in borrowing them for even temporary personal use constituted 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); CM 320600, Hutcheson).

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

6. Specification 1, Charge II alleges that the accused, did, with intent to deceive, wrongfully and unlawfully make and utter a check in the amount of $288, payable to the Non-Commissioned Officers Club, Atkinson Field, British Guiana, drawn on the National Bank of Ann Arbor, Michigan,

well knowing that he did not have, and not intending that he should have, any account in the alleged drawee bank, for payment of said check, in violation of Article of War 95.

It is noted that the specification under consideration fails to allege to whom the check in question was uttered. In our opinion this omission is not a fatal defect for it may reasonably be inferred from the specification that the check was uttered to the named payee of the described check, The Non-Commissioned Officers Club, Atkinson Field, British Guiana. It does not appear, from the record as a whole that the accused was in any way misled by the mentioned omission or that his substantial rights were injuriously affected thereby.

The elements of proof of the offense charged are:

a. The making and uttering of a check;

b. With intent to deceive thereby;

c. Having insufficient funds on deposit to pay it when presented in due course to the drawee bank; and

d. Knowing that there are not, and not intending that there be, sufficient funds on deposit in the drawee bank to pay it when presented in due course.

The evidence fully establishes that the accused made and uttered the check in question, that he had no account in the bank in question, and that he knew those facts. It was also stipulated that he had no account in any bank in Ann Arbor, Michigan, and that there was no such bank as "The National Bank of Ann Arbor, Michigan."

The only substantial question presented by the record with respect to this specification is whether the evidence establishes sufficiently that the check was uttered with intent to deceive as alleged.

Sergeant Rose stated that when the accused gave him the check in question he asked him to hold it until pay day. The witness also stated that the accused told him that if he so desired, he could deposit the check, but that the accused preferred that he hold it. The witness admitted that he "had reason to believe, strictly from a personal point of view, that it was not quite good." In his unsworn statement, the accused stated that he told Sergeant Rose that the check was not good.

There is a serious doubt whether Sergeant Rose, the Club Treasurer, was in fact deceived by the uttering of the check, or whether the accused attempted to deceive him. Nevertheless it is clear that the check was

uttered for the purpose of concealing the accused's defalcation of the club's funds from the members of the club in general, and from any person who might conduct an audit or an official investigation of the club's funds. The issuing of the check under the circumstances shown by the record was also a deceitful ruse calculated to gain temporary respite from official pressure upon the accused to settle his obligations to the club. His intent to deceive the base commander by uttering the check may be inferred from his indorsement wherein he stated that the "Delinquent account has been adjusted" (See CM 267881, Lane, 44 BR 169, 176 and cases cited therein).

In our opinion the making and uttering of the check in question under the circumstances alleged and proved in the instant case constitutes a military offense and is conduct unbecoming an officer and a gentleman (CM 202601, Sperti, 6 BR 171; CM 249006, Vergara, 32 BR 5, 12-14 and cases cited therein; CM 320600, Hutcheson).

Accordingly we are of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge II.

7. The accused is 31 years of age, married, and the father of two small children. War Department records show that he attended the University of Minnesota for three years, taking pre-medical courses. His civilian occupation was that of a personnel clerk and first-aid attendant at the Revere Copper and Brass Company, Rome, New York. He enlisted in the Army on 25 January 1943 and was commissioned as a second lieutenant, Medical Administrative Corps, Army of the United States, on 15 November 1944. His efficiency ratings of record show that he was rated "Excellent" from 15 November 1944 to 30 June 1946, and "Unsatisfactory" for the period from 1 July 1946 to 31 December 1946. In March 1946 a forfeiture of $75 of his pay was imposed upon him under the provisions of Article of War 104 for overstaying a leave three days.

8. Attached to the record of trial is a recommendation for clemency signed by the law member wherein he recommended that the sentence to confinement be reduced to one year for the reason that the accused is the head of a family with two minor children, 6 years and 20 months of age, respectively, and also because of the officer's prior good record and efficiency in the administration of the Non-Commissioned Officers Club. There is also attached to the record a letter from Mr. Ralph O. Marron, dated 23 April 1947, wherein he urges clemency on behalf of the accused.

In addition to the foregoing, consideration has been given to a letter from the accused dated 19 April 1947, addressed to the Staff Judge Advocate, wherein he alleged various irregularities in connection with the trial.

9. 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 as modified by the reviewing authority and to warrant confirmation thereof. A sentence to dismissal, total forfeitures, and confinement at hard labor for two years is authorized upon a conviction of violations of Articles of War 93 and 95.

D. Hottenstein, Judge Advocate

R. McDonald Gray, Judge Advocate

Waldemar A. Solf, Judge Advocate

JAGH - CM 322695 1st Ind

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

TO: The Secretary of the Army

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 Pattison E. Thomas (0-2050675), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement of $288, the property of the Non-Commissioned Officers Club, Atkinson Field, British Guiana, in violation of Article of War 93 (Spec, Chg I) and of making and uttering with intent to deceive a check in the amount of $288, payable to the Non-Commissioned Officers Club, Atkinson Field, British Guiana, drawn on a bank in which he had no account, in violation of Article of War 95 (Spec 1, Chg II). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for two years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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 of the sentence. I concur in that opinion.

The accused was the Officer-In-Charge of the Non-Commissioned Officers Club, Atkinson Field, British Guiana. On 6 October 1946, he received in trust for such club, $288.00 in cash, which was the property of the Non-Commissioned Officers Club. He failed to return this money to the Club Treasurer and used it for his own purpose. On 20 October 1946 the failure to return the money was reported to the Base Adjutant who, acting in behalf of the Base Commander, directed the accused to adjust his delinquent financial obligations due the Non-Commissioned Officers Club. On 22 October the accused signed and gave to the Club Treasurer, suggesting that it be held but stating that it might be deposited, a check drawn upon the National Bank of Ann Arbor, Michigan, payable to the Non-Commissioned Officers Club, Atkinson Field, British Guiana, in the sum of $288.00 Thereafter the accused by signed indorsement addressed and forwarded to Headquarters Atkinson Field stated "delinquent account has been adjusted." The accused requested the Club Treasurer to hold the check above described until pay day. The evidence showed that the check was held until December 1946, at which time, not having been redeemed, it was turned over to the Base Adjutant. By stipulation it is shown that Lieutenant Thomas had no account in the bank on which this check was drawn and that in fact no such bank existed.

In December 1946 or early January 1947 the accused made restitution in full.

4. Attached to the record of trial is a recommendation for clemency signed by the law member wherein he recommended that the sentence to confinement be reduced to one year for the reason that the accused is the head of a family with two minor children, 6 years and 20 months of age, respectively, and also because of the officer's prior good record and efficiency in the administration of the Non-Commissioned Officers Club. There is also attached to the record a letter from Mr. Ralph O. Marron, dated 23 April 1947, wherein he urges clemency on behalf of the accused.

In addition to the foregoing, consideration has been given to a letter from accused, dated 19 April 1947, to the Staff Judge Advocate wherein he alleged that the law member and the trial judge advocate had discussed the case on its merits prior to trial and that he was arbitrarily denied counsel of his choice. By direction of the reviewing authority these allegations were investigated by an air inspector. The report of this investigation shows that a certain witness, mentioned by accused, with respect to the alleged conversation between the law member and the trial judge advocate, did not substantiate the accused's allegation. Both officers denied that they had discussed the case prior to trial. The commanding officer of the individual defense counsel, initially requested by accused, refused to make him available due to the nature of his other duties. Thereafter accused requested other individual counsel who was made available to him and who defended him ably at the trial.

5. In view of all the circumstances in the case including the recommendations for clemency on the part of the law member, I recommend that the sentence, as modified by the reviewing authority, be confirmed, but that the period of confinement be reduced to six months, that as thus modified the sentence be carried into execution and that an appropriate 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(G.C.M.O. 12, 16 October 1947).

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

JAGK - CM 322716

25 JUL 1947

UNITED STATES v. Private WILLIAM L. RHODES (RA 34104412), 3693rd TC Truck Company, and Private SAMUEL W. HENDERSON (RA 42250627), 3526th TC Truck Company	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters PHILCOM, PHILRYCOM, APO 358, 16 and 17 January 1947. EACH: To be hanged by the neck until dead.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class William L Rhodes, 3693rd TC Truck Company and Private Samuel W Henderson, 3526th TC Truck Company, acting jointly and in pursuance of a common intent, did in conjunction with Private Carl J Kemp, 624th Port Company, at Manila, Philippine Islands (APO 75) on or about 27 October 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class John P Butler, a human being, by shooting him with a rifle.

Each accused pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction by summary court-martial was introduced as to the accused Henderson. All the members present at the time the vote was taken concurring therein, each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

The prosecution and defense stipulated that the report of a neuropsychiatric examination of the accused, then in the process of being completed would show that accused were able to participate in their defense, and that the report

would be made a part of the record when completed. The law member rejected the stipulation and it was withdrawn (R. 6).

Private Carl J. Kemp, 624th TC Port Company, APO 75, testified that at about 2115 hours on the evening of 27 October 1946 as he was walking down the street near the enlisted men's club a jeep came alongside and someone said, "Kemp get in." The witness observed that Sergeant Vincent Milton was the driver of the jeep and Sergeant John Nelson was riding in the rear seat. He complied with their request and got in the jeep which was driven "down to the corner directly in front of the 3526th Motor Pool." The three men dismounted and were met by the accused (Privates Henderson and Rhodes), Private Alvin J. Martin and Private John P. Butler. Sergeant Nelson and the accused proceeded to search Butler. Nelson stated that Butler and a person referred to only as "Spencer" "were supposed to have a fist fight," but that he was not going to let them fight around the club, as it might cause the club to be closed and that Sergeant Milton was going to take them to a place where they could fight. The witness asserted that "they" told him he could go along "if I like to see that they did not draw any weapons" (R. 14,20). The parties, including Spencer, then loaded in the jeep and drove "down the road" (apparently Espana Extension) and Kemp stated that the following occurred:

> "A. We went down about a quarter of a mile and stopped everyone got out of the jeep except Sergeant Milton - after everyone got out, Sergeant Milton turned around and went back to the company. Then, Private Henderson hit Butler - knocked him down - Butler stood up - Henderson hit him again - knocked him down. When he was down, Private Rhodes took a carbine and hit him and then he stood up again - they pulled him over in the weeds, on the side of the street. Then, Spencer hit him with his fists - knocked him down. When he got up that time, Henderson asked him what did he have to say - Butler said, 'You got me wrong.' Then Henderson shot - Butler fell - we all started to walk away - Rhodes said, 'Wait a minute.' We stopped - Rhodes went back, trained the gun on Butler and fired another shot. We all returned back to the club.
>
> "Q. Did you see Henderson fire a shot?
> "A. Yes, sir.
> "Q. With what?
> "A. Carbine, sir.
> "Q. Carbine?
> "A. Yes, sir.
> "Q. Did you see Private Rhodes fire a shot?
> "A. Yes, sir.
> "Q. With what?
> "A. A carbine, sir.
> "Q. How do you know they were fired?
> "A. Because I heard the shot, sir - I was looking right at them." (R. 14-15)

Private Kemp stated further that as they were riding in the jeep "Spencer told Butler that he had got this boy picked up and sent to the Stockade and was telling that he [Butler] was a CID snitcher" (R. 16). On cross-examination Kemp stated that he did not attempt to stop the fight, that he was afraid, but that no one "had anything against him." He reiterated that Spencer, Privates Henderson and Rhodes had guns, and that Spencer had the "Sub-Thompson." After the shooting the men returned to the club, however Rhodes, Henderson and Spencer went to Sergeant Nelson's quarters and left the weapons on his (Nelson's) bed (R. 19).

Private Alvin J. Martin, 3448 TC Truck Company, a witness for the prosecution, stated that he did not know the accused by name but did know them by face and remembered that "these two men shot a friend of mine and I happened to be there at the time." He identified a photograph, Prosecution Exhibit A(3), stating, "That's Butler." On the evening Butler was shot he (Martin) lent him five pesos to get some whiskey. Later in the evening, at the enlisted men's club, Butler "stepped on some fellow's feet" and an argument ensued. Martin took Butler away toward the PX. As they walked along the street a jeep drove up and "the fellow" dismounted and ordered them to get into the jeep. "One boy" had a Thompson sub-machine gun pointed toward Martin. The jeep was driven some distance and stopped near the 3526th motor pool. Martin stated that he and Butler were ordered out of the jeep and "this fellow they called Robin Hood" accused Butler of being the person who had slapped his face. Robin Hood thereupon slapped Butler and told the driver to take them out "by the old trucking outfit - we are going to let him go." When the driver reached his destination the men dismounted and the driver left the area in the jeep. Butler was "standing up on the grasses" and the accused Rhodes beat him with a carbine. Accused Henderson walked up with a carbine in his hands and said, "Give it to him on the left hand side." Henderson then shot Butler, who fell to the ground, and turned to Martin and said, "You with him [Butler] all the time?" to which Martin replied, "No." Someone said, "Let's go," and the men started walking "up the road" leaving Butler lying in the grass. As they were walking away Rhodes said, "I better go back and shoot him again to make sure he's dead, *** so he went back and shot him again - so, we crossed over to the left hand side of the road and went back to those companies." The witness was positive that each of the accused had a carbine and that each fired at Butler. It was dark but he heard the report and saw the flash from the barrel (R. 24-30).

On cross-examination Martin stated that near the PX, before their departure, he and Butler were surrounded by the men with the weapons and ordered to get into the jeep for the trip to the "old trucking outfit." When Butler was shot he (Martin) was standing within a few feet of the accused and could have "grabbed him, but it didn't make sense - there was a man there with a sub-Thompson, sir - there is no use me risking my life for him." The witness stated that he went to bed "thinking about what must I do" and after the body was found on the following morning he decided to go to his company commander, Lieutenant Hess, and tell him who killed Butler if

the officer would promise to protect him "from these fellows." The officer promised protection and he related what had happened (R. 33). Martin was asked by defense counsel to describe the uniform worn by Private Henderson on the night of the homicide. The witness replied, "I don't worry about no uniform if a man is going to kill him." He stated that the nearest light from the place where Butler was shot was about two blocks away and that it was dark that night but "the moon was bright enough and he [Henderson] was standing right next to me - I seen him" (R. 34). In response to questions by the court Martin reaffirmed that "it was moonlight when the firing took place" and that the time was around midnight (R. 35).

The prosecution offered in evidence, subject to objection by the defense, Prosecution Exhibits B and C (purporting to be statements made by each accused). The defense announced that it had no objection to the introduction of these exhibits. The law member observed that the party taking the statements was not before the court and questioned the propriety of receiving the tendered documents in evidence without further proof. The court was closed and upon being opened the law member announced that the documents marked Prosecution Exhibits B and C which had been tentatively admitted in evidence would not be received (R. 38).

First Lieutenant Feliz A. Siegman, MC, 3rd Medical Laboratory, Mandaluyon, Rizal, identified and there was received in evidence as Prosecution Exhibit D a preliminary report of death of "BUTLER, JOHN, ASN RA 32 532 280," certifying that on 28 October 1946 at 1000 hours a post-mortem examination was performed on Butler's body at the 19th Medical General Laboratory, APO 75. This certificate bears the signature of Lieutenant Siegman and states that

> "*** death was determined to be due to a gunshot wound of the thorax with hemorrhage in the right pleural cavity and transection of the cord; another gunshot wound into the abdominal cavity with multiple perforations and severance of the small intestine and hemorrhage into the paritoneal cavity."

There was also received in evidence an "Autopsy Protocol," marked Prosecution Exhibit E, dated 28 October 1946 and signed by Lieutenant Siegman, showing the cause of death as stated in the preliminary report of death. Lieutenant Siegman testified that he performed the autopsy on the body of Butler and witnessed the taking of photographs of said body. The described photographs were received in evidence without objection as Prosecution Exhibit A (A1 to A5, inclusive) (R. 9-10).

4. For the Defense

The law member explained in detail the testimonial rights of the accused and each elected to be sworn as a witness (R. 38). The accused Rhodes stated that on the evening of 27 October 1946 he and his girl friend left the club

at about "9:30" to go home and when they reached the 3526th Motor Pool area a fellow named Spencer drove up in a jeep and said, "Rhodes, come on with me *** we are going down Espana (Avenua) because some Filipinos are starting trouble." Rhodes told his girl friend to go back to the club and wait for him and he got in the jeep. He "seen five (5) people in the jeep - it was the fellows by the name of Butler, Martin, Spencer and Kemp." When they reached the Battalion PX, Henderson was crossing the street and Spencer told the driver Milton, "Stop the jeep here comes Henderson." Spencer got out of the jeep, took Henderson aside, and talked to him privately; then Henderson and Spencer got into the jeep. The parties drove about one quarter mile down Espana Avenue, and Spencer said to Milton, "This is far enough - turn the jeep around." Milton turned the vehicle around and cut off the lights. Spencer said, "Everyone get out of the jeep." The parties dismounted, Milton left with the vehicle, and Rhodes stated that the following occurred:

> "*** Spencer started to question Butler about something that had happened the night before at the Enlisted Men's Club. I heard Spencer ask Butler, 'Why did you pull the forty-five on me last night and slapped me?' Butler replied, 'You have the wrong guy and I did not slap you last night.' Spencer said, 'You are a liar, you did slap me last night. I have a witness here by the name of Kemp' - Kemp also said, 'Yes.' At that time, Spencer hit Butler and knocked him down, so I replied to Spencer, 'What is this all about?' I said, 'You told me that Filipinos were starting trouble. I don't see any Filipinos here.' So, Spencer said to me, 'I wanted you to come along because Butler is supposed to have a gang.' So I says that I don't have anything to do with that - I don't know anything about this trouble.' At that time, I asked Martin a question - I asked Martin was he in the Fifth Replacement in the month of March. Martin said, 'No.' He said, 'Why?' I just wanted to know because I went through the Fifth Replacement in the month of March - I thought I'd seen him over there. He says, 'I have only been overseas a month - month and a half.' So, I says, 'I guess you are not the one.' So, I asked Martin, 'Why is he beating him up like that?' He said, 'I don't know, I only got out with Butler, tonight.' I and Martin was talking in normal conversation when the first shot was fired, so I turned around and I looked - Butler was on the ground, so Martin replied, 'Let's get away from here.' At that time, another shot was fired - so, Martin said, 'Shall we run?' I said, 'It is up to you.' By that time I had gotten into the road - I looked back across the street - Spencer was removing a blue or black jacket that Butler had on. Kemp replied, 'What shall we do with this jacket?' Spencer said, 'I will take care of that.' After he pulled the jacket off Butler, we all got back to the street and back to the Enlisted Men's Club. Someone asked the question, 'What shall we do with the rifles?' Spencer said, 'Leave that up to me. I will take care of that, too.' So, I went inside the Enlisted Men's Club. I stayed there approximately ten (10) minutes - long enough to drink one beer - then, I and my girl friend left and went home. That's the end of what I have to say." (R. 40)

On cross-examination Rhodes stated that when he got in the jeep he noticed three weapons and when they reached the scene of the shooting, "Henderson on my left had a Sub-Thompson. This boy, Spencer, had a carbine and the third carbine, I had slung on my left shoulder" (R. 44). "Someone struck Butler, the first time it was by Spencer and he was knocked down." Kemp had the magazine which belonged to the Sub-Thompson and "he hit him with the magazine clip - Butler fell again." Rhodes asserted that Martin did not have a gun and the reason he (Rhodes) had the carbine was because he happened to be standing by the jeep when the guns were distributed and Spencer passed one to him. Martin asked him, "'Why don't you stop him?' I said, 'I don't have any right to stop him because they lied to me already. They said it was Filipinos starting trouble and they told me they are coming up here to settle the argument, themselves.'" The witness heard two shots but could not state the relative position of himself with the person or persons firing the weapons (R. 45). At the time of the shooting Rhodes stated that he did not attempt to ascertain who fired the shots and that he did not see the person firing, however, the report of the guns came from his right where Kemp, Spencer, Henderson and Butler were standing. Henderson had the Sub-Thompson in a drawn position and Spencer had the other carbine. About three minutes elapsed between the first and second shot and someone said, "Let's get away from here" (R. 48-49).

On redirect examination Rhodes stated that Spencer "had more to do with the whole thing than anyone because Butler was the one - they were the ones arguing." He then asserted that it was Kemp who had the sub-machine gun (R. 50).

The accused Henderson testified that on the night of 27 October 1946 the following occurred:

> "*** On the night of October 27th, 1946, in the Enlisted Men's Club, I was in there standing at the bar drinking beer. I was there a while drinking beer and an uproar started - an argument. From what I saw, this argument was between this fellow Butler and some other fellow - the other fellow I do not recall. After this argument was over the fellow went at the back and sat at a table. While I was standing at the bar, Kemp - he was behind the bar - he was working at the bar, - so he told me that he wanted to get even with this fellow - I said, 'What fellow?' So, he told me the one with the blue jacket on, which was Butler. I asked him, 'Why?' For some reason he never gave me a definite answer. That passed on for a while, then he asked me to let him know when Butler would leave out of the club - so, I told him O.K. Then I walks out on the porch of the club and to my left, from the porch of the club is a little room - screened in, and someone called me. So, I goes down of the porch and goes to my left, toward the room. It was Private Kemp in the room, with the sub-Thompson - or there was a little table in the room - he had the Thompson on the table,

facing to the screen, facing towards the outside. So, he asked me had Butler came out as yet. I told him I did not know - I hadn't seen him since I was in the club. Then, I was standing on the outside - I stood there for a while and Kemp - he came out of that door, out of the little room with a poncho on, bulging out and goes down the street. He goes down the street - where to, I don't know because I did not go. Here I hunt around for a while and then I decided I am going to go to my girl friend's house. I goes out through the yard of the officers club, part of which is directly in front of the Enlisted Men's Club - and as I go through there - when I got through there, to the street, which is almost in front of the PX, a jeep was standing on the front of the PX. I was called then - someone got out of the jeep, which turned out to be Spencer. He asked me, 'Come on and go with us.' They was having trouble with some Filipinos. Well, I goes up to the jeep - Spencer and I and as I got in, I saw the following soldiers in it, which were Private Butler, Private Martin, T/4 Vincent - I don't recall his last name - Nelson, Kemp, Rhodes - then Spencer and myself got in. So, then I asked them - the men, 'what are you doing with all these fellows in here?' He said, 'Don't worry about it.' Those were his exact words - we leave there and go down to 3526th Motor Pool. Then, Spencer said, 'We will get out here.' Well, he gets out - we gets out, Martin and Butler were frisked by Spencer and Kemp. At the time they were being frisked, Nelson was talking to them about something. Then, Nelson leaves - after that, Spencer asked all of us to get back in. Then, we turned around, goes up by 3448th Quartermaster Truck Company - turned left to Espana Avenua - turned right, right down Espana Avenue which is about I would say about a quarter of a mile. Spencer said, 'This is far enough. We'll get out here.' Then everyone gets out - Spencer taken a carbine - giving Private Rhodes one. Then, Kemp was with the Thompson-sub. After we got out, T/4 Vincent Milton, the driver - he went on away - he went away. Then, they walked away from the road and I heard Spencer talking to Private Butler - it was about something had happened between him and Butler. A while past during that time, Private Kemp gave me the sub-Thompson and told me to let him know if anything worse come, he said he had the clip. Well, during that time, when we were told that some fighting went on back there between Kemp - at least Kemp and Spencer attacked Butler - then, all of a sudden I heard was a shot and looked like before I turned around, then, I heard another shot. Well, when I heard this shot, after I turned around, Spencer said, 'Let's go.' I asked him - I said, 'Who fired the shot?' He said, 'Don't worry about it.' Then, we left there - the area back to the club and I went to my company." (R. 51-52)

Henderson stated further that Kemp had the "Thompson," removed the clip, and handed the gun to him requesting that he stay close to the road to let

them know if a car approached. He did not see the shooting inasmuch as he was facing in the opposite direction, and the sounds produced by firing carbines and machine guns appear similar to him (R. 52).

On cross-examination the witness admitted that he was not forced to get into the jeep, he was merely asked to go along. Butler was not a volunteer but was ordered by Spencer to get into the vehicle (R. 56).

The defense requested the court to take judicial notice of the weather "that night," asserting that "we called the Fleet Weather Central this evening and they maintain a record at this Naval Installation and this record will show that the moon rose at 0730 hours on the morning of 27 October 1946 local time and set at 1910 hours, in the evening of October 26, local time, and the record further shows that there is no moon at the time that this incident is alleged to have occurred." The prosecution objected and the court refused to accept the statement without further proof. The defense did not pursue the matter further and rested (R. 57-58).

5. The court's refusal to admit in evidence the tendered stipulation concerning the mental responsibility of accused was not error. Had there been any doubt as to the sanity of accused and had their mental responsibility been brought in issue, then the court could properly have determined that issue, however, the stipulation was, at most, premature and the presumption of sanity furnished sufficient basis for the court to proceed to hear the evidence (MCM, 1928, par. 35c, p. 26 and par. 63, p. 49). Neither was it error for the court to refuse to take judicial notice of the moon's phases on the night in question, upon the statement of counsel that he had called the weather observers. Although judicial notice extends to matters of common knowledge, which need not be proved, for neither justice nor the law requires a court to profess to be more ignorant than the rest of mankind, yet to expect the court, without some evidence, to conclude that the moon set at 1910 hours on a date about two and one-half months prior to the date of the trial would appear to go beyond the limits of judicial knowledge. (See Wharton's Criminal Evidence, 11th Ed., Vol. 1, sec. 16-19; MCM, 1928, par. 125, p. 134-135.)

Consideration of the entire record reveals that the following facts are undisputed:

That a soldier named John P. Butler had an argument or disagreement with a person named Spencer at the enlisted men's club on the evening of 27 October 1947. Butler was accused of being a Criminal Investigation Division informer. Later the same evening Sergeants Nelson and Milton secured a jeep and then assembled together, Spencer, Kemp, the accused Rhodes and Henderson, Martin and Butler (the deceased). The jeep contained a Thompson sub-machine gun and two carbines. Butler and Martin appear to have been forced to enter the jeep. The others appear to have been volunteers. Milton then drove them

some distance, guessed to be a quarter of a mile, out a dark road where Spencer, apparently in command, directed that the men dismount. Spencer, Rhodes and Henderson each took one of the weapons. Butler was beaten and then two bullets were fired into his body, from which he died. He was unarmed and pleaded with his assailants, saying, "You have me wrong."

The accused deny firing either of the shots that killed Butler. They contend that they were not looking in the direction of the victim when the shots were fired and do not know who did the shooting. They had gone along upon representations having been made to them that Filipinos were causing trouble and that the mission was to subdue the Filipinos. Martin stated positively that he saw Henderson fire the first shot and that after they had started to leave the scene Rhodes went back and fired the second shot into Butler's prone body to make sure he was dead. The witness Kemp likewise stated that each accused shot Butler. Kemp appears to have been an accomplice, and although the uncorroborated testimony of an accomplice is to be considered with great caution (MCM, 1928, par. 124a, p. 132), the testimony of Martin, obviously not an accomplice in the homicide, together with the other facts and circumstances, not only supply adequate corroboration of Kemp's testimony but furnish adequate basis for a conviction irrespective thereof.

The evidence shows beyond doubt that Nelson and Spencer planned to lure or force Private Butler to go to a remote area under pretense of engaging in a fist fight with Spencer, and there to kill him for the declared reason that he was a C.I.D. informer. To effect the evil purpose they recruited, among others, the accused (Rhodes and Henderson), and Spencer handed each of them a weapon when they dismounted from the jeep at the appointed place. Butler was beaten and shot twice. The eyewitnesses Martin and Kemp each state that Henderson fired the first shot and Rhodes the second. The medical testimony shows that Butler died as a result of these bullet wounds. The offenses of each is therefore murder, defined as the unlawful killing of a human being with malice aforethought. Malice aforethought may exist when the act is unpremeditated, and if it be conceded that accused departed from the motor pool area in an honest belief that the mission was to subdue Filipinos (which statements find no corroboration in the record), it would yet be murder if, when they shot Butler they intended to cause his death or grievous bodily harm (except when death is inflicted in the heat of sudden passion, caused by adequate provocation) (MCM, 1928, par. 148a, pp. 162-163). Butler was shown to have been unarmed and did no more than to plead for mercy. The killing was therefore without adequate provocation, or any provocation recognizable in law. Finally, the evidence shows that Butler died as a result of two separate bullet wounds, one of which was inflicted by each accused. The contributions of each toward the death of the victim are therefore attributable to both, each having set about to kill Butler, and it was unnecessary for the court to determine whether either bullet wound, independent of the other, was in itself sufficient to produce death (CM 248793, Beyer, 50 BR 21; CM 314404, O'Neal).

6. The charge sheet shows that accused Rhodes is 24 years of age and that he was inducted into the Army on 29 March 1941. He was discharged on 27 November 1945 and reenlisted on 28 November 1945 for a period of three years. Accused Henderson is 22 years of age and entered the service on 23 July 1945.

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 sentences and to warrant confirmation of the sentences. Death or imprisonment for life is mandatory upon a conviction for murder in violation of Article of War 92.

Christy D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK CM 322716 1st Ind

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

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private William L. Rhodes (RA 34104412), 3693rd TC Truck Company, and Private Samuel W. Henderson (RA 42250627), 3526th TC Truck Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused and to warrant confirmation thereof. Under all the circumstances of the case, I am of the opinion that the death penalty is not required. I therefore 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 a U. S. penitentiary be designated as the place of confinement.

3. On 19 June 1947 Mr. Daniel J. Pinsky, Attorney of New York City, appeared before the Board of Review, made oral argument, and filed brief in behalf of the accused Henderson. Consideration has been given to a letter dated 6 June 1947 from Honorable P. H. Drewry, Member of Congress, inclosing a certificate from the clerk of the Hustings and Circuit Court of Petersburg, Virginia, showing that Henderson has no previous criminal record. Consideration has also been given to communications from the parents of Henderson inclosing a petition for clemency signed by numerous citizens of Petersburg, Virginia.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

6 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex. action
4. Brief of counsel for accused
5. Ltr fr Hon P. H. Drewry, w/incl
6. Ltrs dtd 23 June 47 w/incls fr parents of Henderson

GCMO 307, 28 Aug. 1947).

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

JAGV CM 322741

26 JUNE 1947

UNITED STATES v. Private JAMES H. McDONALD (38143074), Squadron F (Aviation), 2532d Army Air Forces Base Unit, Randolph Field, Texas.	HEADQUARTERS, FLYING DIVISION AIR TRAINING COMMAND Trial by G.C.M., convened at Randolph Field, Texas, 1 May 1947. Dishonorable discharge and confinement for six (6) months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 James H. McDonald, Squadron F (Aviation), 2532nd Army Air Forces Base Unit, did, at or near Fort Sam Houston, Texas, on or about 18 January 1946, desert the service of the United States and did remain absent in desertion until he surrendered himself at Randolph Field, Texas, on or about 20 February 1947.

Accused pleaded not guilty to the offense of desertion and to a violation of Article of War 58, but guilty of the lesser included offense of absence without leave, for the period charged, in violation of Article of War 61. He was found not guilty of desertion, but guilty of absence without leave "from his station at Fort Sam Houston, Texas, from about 18 January 1946 to about 20 February 1947", in violation of the 61st Article of War. 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 six (6) months. The reviewing authority approved the sentence, designated the Post Guardhouse, Randolph Field, Texas, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial shows that Major John M. Crosby, Air Corps, who signed and swore to the Charge and Specification, was the accuser (par 60, MCM 1928), and participated in the trial as a member of the court. Article of War 8 provides in part that ". . . . no officer shall be eligible to sit as a member of such court when he is the accuser . . . . ." Accordingly, the trial court was not legally constituted and the proceedings are null and void ab initio (Sec. 365(7), Dig. Ops. JAG 1912-1940; CM 216028, Nix; CM 220693, Dye; CM 232797, Coombs, 19 BR 211; CM 265840, Brown, 43 BR 97).

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

Wilmot T. Baughn, Judge Advocate.

On leave, Judge Advocate.

George E. Springstead, Judge Advocate.

JAGV CM 322741 1st Ind

JUL 8 1947

WD, JAGO, Washington 25, D. C.

TO: The Commanding General, Flying Division, Air Training Command, Randolph Field, Texas.

1. In the case of Private James H. McDonald (38143074), Squadron F (Aviation), 2532d Army Air Forces Base Unit, Randolph Field, Texas, 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 322741)

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General.

1 Incl

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

(335)

10 JUL 1947

JAGV CM 322753

UNITED STATES v. Private First Class LAWRENCE E. SAMMS (39327464), Headquarters Company, 1st United States Infantry Division, APO 1.	1ST UNITED STATES INFANTRY DIVISION Trial by G.C.M., convened at Bad Tolz, Germany, 27 March 1947. Dishonorable discharge and confinement for three (3) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 61st Article of War.

Specification 1: In that Private First Class Lawrence E. Samms, Headquarters Company, 1st U.S. Infantry Division, did, without proper leave, absent himself from his organization at Bad Tolz, Germany, from about 9 November 1946 to about 27 November 1946.

Specification 2: In that Private First Class Lawrence E. Samms, Headquarters Company, 1st U.S. Infantry Division, did, without proper leave, absent himself from his organization at Bad Tolz, Germany, from about 12 December 1946 to about 19 January 1947.

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

Specification: In that Private First Class Lawrence E. Samms, Headquarters Company, 1st U.S. Infantry Division, having been duly placed in confinement in Bad Tolz Military Community Stockade on or about 7 February 1947, did, at Bad Tolz, Germany, on or about 12 February 1947, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private First Class Lawrence E. Samms, Headquarters Company, 1st U.S. Infantry Division, did, in conjunction with Private Leonard K. Miner of the same organization, at Regensburg, Germany, on or about 9 January 1947, unlawfully, willfully, wrongfully and knowingly convert to his own use a one-quarter ton 4x4 truck, WD No. 20611588, of the value of more than $50.00, property of the United States, furnished for the use of the American Red Cross.

Specification 2: (Disapproved by Reviewing Authority).

He pleaded not guilty to the Charges and all Specifications thereunder. He was found guilty of Specification 1 of Charge I except the words "Bad Tolz", substituting therefor the word "Regensburg", and guilty of all other 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 may direct, for three years. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge III, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration in the present case concerns the legality of designating a Federal Reformatory as the place of confinement.

4. It is well established that a Federal correctional institution or reformatory may not be designated as the place of confinement except in cases where confinement in a penitentiary is authorized by law. (CM 220093, Unckel; CM 222173, Costa; CM 226611, Smith).

5. 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 United States, of general application within the continental United States, excepting Section 289, Penal Code of the United States, 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 Federal reformatory as a place of confinement in the instant case was based upon the finding of guilty of Specification 1 of Charge III, interpreted

in the light of Section 22-2204 of the District of Columbia Code. In order for an otherwise applicable code provision be used as a basis for penitentiary confinement, or confinement in a Federal reformatory or correctional institution, it must affirmatively appear that the offense alleged in the Specification of which the accused is found guilty is in all essential respects the same offense as that made punishable by penitentiary confinement by the Code.

Section 22-2204 [6:62] of the District of Columbia Code, 1940 Edition, entitled "Unauthorized use of vehicles" provides 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. (Feb. 3, 1913, 37 Stat. 656, ch. 23, § 826b.)"

From the statute above set forth, it will be noted that there are three essential elements to the offense denounced, viz: (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." (CM 321542, McCullough)

Specification 1, Charge III, above quoted, fails to allege the first and second elements set forth in the preceding paragraph and found in Section 22-2204 of the District of Columbia Code, and for that reason the finding of guilty of that Specification cannot be used as a basis for confinement in a Federal reformatory in this case. None of the remaining Specifications of which the accused has been found guilty disclose any basis for such confinement.

6. 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 three years at a place other than a penitentiary, Federal reformatory or correctional institution.

Wilmot T. Baughn, Judge Advocate.

John G. O'Brien, Judge Advocate.

Morgan B. Springston, Judge Advocate.

AUG 5 1947

JAGV CM 322753 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, 1st United States Infantry Division, APO 1, c/o Postmaster, New York, New York.

1. In the case of Private First Class Lawrence E. Samms (39327464), Headquarters Company, 1st United States Infantry Division, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon the 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 322753).

1 Incl
Record of trial

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

HQS. 1st DIVISION
RECEIVED
AUG 7
NEW YORK
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JUDGE ADVOCATE

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

JAGH - CM 322931

UNITED STATES v. Private MAT WOLSEY (38753343), Transient Debarkee, Oakland Army Base, Oakland, California.	)	SAN FRANCISCO PORT OF EMBARKATION Trial by G.C.M., convened at Camp Stoneman, California, 7 May 1947. Dishonorable discharge (suspended) and confinement for two years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, GRAY and LYNCH, 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 Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.
(Finding of Not Guilty on motion of defense).
Specification: (Finding of Not Guilty on motion of defense).

CHARGE II: Violation of the 89th Article of War.

Specification: In that Private Mat Wolsey, Transient Debarkee, Oakland Army Base, Oakland 14, California, being aboard the United States Army Transport General Brewster at sea, did, at sea, on or about 8 January 1947, commit a depredation upon the #2 hold of said United States Army Transport General Brewster belonging to and operated by the United States Army Transportation Corps, and situated at sea, by unlawfully entering the same and removing articles of baggage from said #2 hold of the General Brewster.

He pleaded not guilty to Charges I and II and to the Specification under each, and was found not guilty of Charge I and its Specification, on motion of defense, and guilty of Charge II and the Specification thereunder. 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 for two years. The reviewing authority approved the sentence, ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release

from confinement and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The results of trial were published in General Court-Martial Orders No. 21, Headquarters San Francisco Port of Embarkation, Fort Mason, California, dated 29 May 1947.

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

Staff Sergeant Howard D. Rader, CID agent, Oakland Army Base, testified that on 21 January 1947 he was the first to board the General Brewster after the gangplanks were put down. After ascertaining that another CID agent was on board he went ashore and got a photographer, returned to the ship and thereupon directed the taking of certain pictures of the lower hold, Hatch No. 2. The pictures were identified and admitted in evidence (R. 12, 13; Pros Exs A1-A11).

First Lieutenant Allen E. Wilmore, Intelligence and Security Division, Oakland Branch, San Francisco Port of Embarkation, secured a sworn statement from accused wherein he admitted that he went into Hold No. 2 with two persons named Tarlton and Barnes. Accused stated that he entered the hold to see if he could "find himself a watch." Accused admitted to Lieutenant Wilmore that he took some candy and pictures and stated, "The candy and pictures were on a box and looked like somebody else was getting ready to steal them so I picked them up." When he first saw the cargo in the hold it "was all torn up and scattered about." Tarlton and Barnes cut open a bag and Barnes broke into a footlocker (R. 19-21; Pros Ex B).

Private James Tarlton, Section B, Camp Stoneman Stockade, Camp Stoneman, California, testified that he, Barnes and accused went into No. 2 Hold of the ship, General Brewster. He saw accused take a box of candy from the floor of the hold. Tarlton further testified that "Lots of stuff laying down there and silks, cigarettes and stuff" (R. 25).

Private William G. Barnes, Section B, Camp Stoneman Stockade, Camp Stoneman, California, testified that he went into the No. 2 Hold with accused and that he saw him take a box of candy from the hold. Witness and accused went down into the hold through an escape hatch and entered through an unlocked door (R. 26-29).

4. No evidence was offered by the defense and accused, after being advised of his rights as a witness, elected to remain silent (R. 32, 33).

5. Accused was found guilty of committing a depredation upon Hold No. 2 of the General Brewster by "unlawfully entering the same and removing articles of baggage" therefrom. The evidence shows that accused entered Hold No. 2 and removed a box of candy and pictures therefrom. He is charged with unlawfully entering and removing property, not with damaging or injuring the property involved. The former does not constitute a depredation within the meaning and intent of Article of War 89 and the deficiency in the allegation cannot be remedied by resort to the proof. (Dig Ops JAG, 1912-40 Sec 452 (20)). The Board of Review has recently

considered this question in a companion case, CM 322500, Barnes. In that case the Board stated:

"It appears then that the specification of Charge II contains first a bold legal conclusion that an offense of 'depredation' was committed, followed by an allegation of acts which purport to, but on their face do not, constitute such an offense. Since the word 'depredation' as used here, is by its nature descriptive we are of the opinion that in determining what, if any offense is alleged by the Specification, the words 'depredation' must be considered as surplusage. Thus clarified of its ambiguity we find that the Specification does allege an offense of unlawful entry in violation of Article of War 96.

"Although unlawful entry is not a lesser included offense of depredation i.e., the element of unlawful entry is not necessarily one of the essential elements included in all offenses constituting a depredation or in other offenses properly chargeable under Article of War 89, nevertheless, as in this case, the allegation '* * * * unlawfully entering the same and removing articles of baggage and mail from No. 2 Hold of the General Brewster,' constitutes the gravamen of the offense charged, and being as it is an act denounced and made punishable under Article of War 96, conviction upon proof thereof is authorized. (AW 37; par. 87b MCM, 1928, page 74). Since the Specification, as drawn, so patently discloses the particular act charged, the fact that it failed to constitute an offense of depredation under Article of War 89 as intended, does not preclude trial and findings of guilty thereunder nor would such findings prejudice accused's substantial rights, since the Specification was sufficient to apprise him of the particular act complained of and which he was being called upon to defend (Par 78c (Exceptions and Substitutions), MCM, 1928, pages 64 - 65, CM 118078, CM 147387, Dig Ops JAG, 1912-40, Sec 394 (2); CM 154185, Dig Ops JAG 1912-40, Sec 428 (7); CM 155621, Dig Ops JAG 1912-40, Sec 451 (16)).

"The question remains whether the evidence is legally sufficient to support the offense of unlawful entry in violation of Article of War 96. To support this offense, the evidence must show that the alleged unlawful entry into hold No. 2 of the ship General Brewster was unauthorized or that it was prohibited by official orders or regulations."

Although the evidence clearly shows that accused wrongfully took a box of candy and pictures from the hold of the ship there is no evidence which shows that his initial entry into the hold of the ship was unlawful, unauthorized or even prohibited. The accused admitted, and other competent evidence shows, that he entered the hold for the purpose of pilfering the cargo contained therein, particularly with a view to finding a watch, but he is not charged with unlawfully entering the hold with the specific intent of committing a felony or criminal offense. As was said in the Barnes case, cited supra,

"and consequently, evidence of such intent will not support the inference that such entry was unlawful, unauthorized or prohibited in the first instance. Under these circumstances, it is just as probable that accused's presence in the hold was authorized. Where the only competent evidence is circumstantial, it must, in order to be sufficient to support a conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt (CM 153330, CM 169811, Dig Ops JAG 1912-40, Sec 395 (9))."

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

A. Hattenstein, Judge Advocate

R. McDonald Gray, Judge Advocate

J. T. Lynch, Judge Advocate

JAGH-CM 322931 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C. OCT 15 1947
TO: Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and Executive Order No. 9556, dated 26 May 1945, is the record of trial in the case of Private Mat Wolsey (38753343), Transient Debarkee, Oakland Army Base, Oakland, 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 recommend that the findings and the sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges and property of which the accused has been deprived by virtue of said sentence 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

Dept of the Army, GCMO 32, 23 Oct. 1947).

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

17 JUL 1947

JAGV CM 322954

UNITED STATES v. Private WILLIAM K. SWAIN (30122690), Attached Unassigned Personnel Center, Army Ground Forces, Pacific, APO 957.	HEADQUARTERS ARMY GROUND FORCES, PACIFIC Trial by G.C.M., convened at APO 958, 6 May 1947. Dishonorable discharge and confinement for one (1) year and six (6) months. Oahu Prison, Honolulu, Territory of Hawaii.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 61st Article of War.

Specification: In that Private William K. Swain, attached unassigned Personnel Center, Army Ground Forces, Pacific, APO 957, did, without proper leave, absent himself from his organization at Casual Company "C", Personnel Center, Army Ground Forces, Pacific, APO 957, from about 0615, 3 April 1947 to about 0424, 5 April 1947.

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

Specification: In that Private William K. Swain, attached unassigned Personnel Center, Army Ground Forces, Pacific, APO 957, did, at Honolulu, Oahu, T.H., on or about 5 April 1947, wrongfully take and use without consent of the owner, a certain vehicle, to wit, a 1940 Dodge Weapons Carrier, property of Mr. Philip Chang, of a value of more than fifty dollars ($50.00).

He pleaded not guilty to the Charges and Specifications and was found guilty of Specification of Charge I except the figures "0424" substituting therefor the figures "0530", guilty of Charge I and guilty of Charge II 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

may direct, for two years and six months. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I as involves the finding of guilty of absence without official leave from about 0615 hours on 3 April 1947 to about 0424 hours on 5 April 1947, approved all other findings, approved the sentence but reduced the period of confinement to one and one-half years, designated Oahu Prison, Honolulu, Territory of Hawaii, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration in the present case concerns the legality of designating Oahu Prison as the place of confinement. The last mentioned institution is, and for many years has been, recognized as having the same status as a penitentiary, Federal reformatory or correctional institution. (Par 12, Sec II, General Orders No. 21, War Department, April 13, 1915; Par 3d, War Department Circular No. 44, 18 February 1947).

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 United States, of general application within the continental United States, excepting Section 289, Penal Code of the United States, 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 Oahu Prison, as the place of confinement in the instant case was based on the finding of guilty of Specification of Charge II, 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 a basis for penitentiary confinement (or confinement in a Federal reformatory, correctional institution, territorial prison or penitentiary), it must affirmatively appear that the offense alleged in the Specification of which the accused is found guilty is in all essential respects the same offense as that made punishable by penitentiary confinement by the Code.

Section 22-2204 [6:62] of the District of Columbia Code, 1940 Edition, entitled "Unauthorized use of vehicles" provides 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. (Feb. 3, 1913, 37 Stat. 656, ch. 23, § 826b.)"

From the statute above set forth, it will be noted that there are three essential elements to the offense denounced, viz: (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." (CM 321542, McCullough; CM 322753, Samms)

Specification of Charge II, above quoted, fails to allege the third element set forth in the preceding paragraph and found in Section 22-2204 of the District of Columbia Code, and for that reason the Specification cannot be used as the basis for confinement in a penitentiary in this case. The other Specification of which the accused has been found guilty does not disclose any basis for such confinement.

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 one and one-half years in a place other than a penitentiary, Federal reformatory, Federal correctional institution, territorial prison or penitentiary.

Wilmot T. Baughn, Judge Advocate.

John F. O'Brien, Judge Advocate.

Margaret Springstow, Judge Advocate.

JAGV CM 322954 1st Ind

WD, JAGO, Washington 25, D.C.

TO: The Commanding General, Army Ground Forces, Pacific, APO 958, c/o Postmaster, San Francisco, California.

1. In the case of Private William K. Swain (30122690), Attached Unassigned Personnel Center, Army Ground Forces, Pacific, APO 957, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon the designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, or Oahu Prison, 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 322954).

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

1 Incl
Record of trial

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

JAGN-CM 322967

UNITED STATES v. Technicians Fifth Grade NORMAN E. HUFFMAN (38716889), and MICHAEL H. BOBOVNYK (15404057), both of 484th Transportation Corps Traffic Regulation Company.	)	24TH INFANTRY DIVISION Trial by G.C.M., convened at Kokura, Kyushu, Japan, 16 January 1947. Huffman: Dishonorable discharge and confinement for five (5) years. Bobovnyk: 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 record of trial in the case of the soldiers named above has been examined by the Board of Review.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty).

Specification 2: (Nolle prosequi).

Specification 3: In that Technician Fifth Grade Michael H. Bobovnyk, and Technician Fifth Grade Norman E. Huffman, both members of 484th TC Traffic Regulation Company, acting jointly and in pursuance of a common intent, did, at Fukuoka, Kyushu, Japan, on or about 20 October 1946, feloniously take, steal, and carry away, one (1) double barrelled shotgun, the property of Tadashi Watanabe, value about sixty dollars (60.00). (Finding of not guilty as to accused Bobovnyk).

Specification 4: In that Technician Fifth Grade Michael H. Bobovnyk, and Technician Fifth Grade Norman E. Huffman, both members of 484th TC Traffic Regulation Company, acting jointly and in pursuance of a common intent, did, at Fukuoka, Kyushu, Japan, on or about 30 October 1946, by force and violence, and by putting him in fear feloniously take, steal, and carry away from the person of Tsukasa Kuzuya, one (1) watch, the property of Tsukasa Kuzuya, value about fifty dollars (50.00).

Each accused pleaded not guilty to the Charge and all Specifications. Accused Huffman was found not guilty of Specification 1 of the Charge but guilty of all other Specifications 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 for seven and one-half years. Accused Bobovnyk was found not guilty of Specifications 1 and 3 of the Charge but guilty of Specification 4 of the Charge 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 for five years. In the case of accused Huffman the reviewing authority disapproved so much of the finding of guilty of Specification 3 of the Charge "as refers to "Bobovnyk or common intent with or acting jointly with Bobovnyk," approved the sentence but reduced the period of confinement to five years. In the case of accused Bobovnyk the reviewing authority approved the sentence but reduced the period of confinement to three years. In the case of each accused the United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement, and the record of trial was forwarded pursuant to Article of War 50½.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Specification 3, as modified by the reviewing authority, except as to the value of the stolen property. The consideration of the evidence, as it pertains to Specification 3, will therefore be limited to that portion thereof bearing upon the value of the property involved.

4. <u>Evidence for the prosecution</u>:

The property stolen was a "SHOT GUN, DOUBLE-BARRELED, OPEN AND CHOKE BORE, SERIAL NO. 3332" (Pros. Ex. C). Toshizo Nagasawa, a firearms repairman, testified as follows:

"Q. I take Exhibit B and ask you, what it is?
A. This is a 12 gauge shot gun.

Q. What is its value?

A. I believe that current exchange price for shot gun is about fifteen hundred yen" (R. 19, 20).

The owner testified that the current valuation of the firearm was about 12,000 yen (R. 16).

As to Specification 4, the victim, Tsukasa Kuzuya, testified that in October or November on a dark street of Hakata station a person who appeared to be a soldier chased him, and tried to take some of his things (R. 13). As to who his pursuer was he testified "I cannot definitely point out the person," but stated he was a "red-haired American whose height was about six feet" (R. 13-14). He further stated that if he saw his assailant again he could not recognize him (R. 15). During his struggle with his assailant a jeep drove up and his assailant talked with the occupant of the jeep, returned, and took his watch. The assailant then got in the jeep with the occupant thereof and "ran away" (R. 14). The trial judge advocate stated in open court that neither accused had red hair (R. 15).

Fifteen watches and a wallet were offered and accepted for identification purposes only (R. 8). Kinoshita Sakae, a cook on a GI train, testified that an interpreter by the name of Roy gave him a wallet and told him to hide it behind the stove (R. 9). The interpreter, Roy Teizo Horiye, testified that accused Bobovnyk, on or about the second of November, told him to tell the cook to hide the bundle (R. 10). Giichi Morimoto, GI train porter, testified that on 2 November 1946 he saw Roy, the interpreter, give the cook a wallet and he saw the cook hide it under the stove. After Bobovnyk was taken in by the Military Police, witness told Roy, the interpreter, the package should be taken to the Military Police. Roy opened the package and inside it Morimoto saw watches and money. He could not identify the watches (R. 11).

It was stipulated that if Captain William B. Towsend were present he would testify as follows:

"After the arrest of Pvt. Michael H. Bobovnyk, RA 15404059 of the 3D M.R.S. as a suspect in certain robbery cases, I learn from informal investigation, the alleged stolen property had not been recovered and suspecting the property might be hidden on the Diner Elmhurst, on which Pvt. Bobovnyk was steward, I made an inspection of the car and found eight (8) wrist watches, of various manufacture, hidden in a closet. The watches were turned over to Capt. Evans, Provost Marshal, 24th Division Artillery on 3 November 1946 (the same day of the inspection) as alleged stolen property" (R. 7, 8; Pros. Ex. A).

Kama Hatsuyoshi, a GI train porter, testified that on or about 30 October, in front of the black market, he saw a jeep go

toward the depot. A group of people gathered around the jeep. He saw two GI's whom he recognized as the accused take off in the jeep (R. 12).

A sworn pre-trial statement of accused Huffman was introduced in evidence and states in part:

> "Around the 22nd of October 1946, Mike and I went out in a jeep around 9:30 or 10:00 p.m. and as we were driving down the road, two Japanese flagged us down and we stopped and wanted a ride after we found out they were drunk we said no but they wanted to go anyway so I got out of the jeep and hit one of them and kicked the other in the seat of the pants and told them to get going but they did not understand so we took some of their money and went.
>
> "Two or three nights later we went out and took a watch away from a Jap and went on and that went on for 5 or 6 times then we decided to quit and then one night something happened and we were the suspects. Then we were brought to the brig" (Pros. Ex. F).

A sworn pre-trial statement of accused Bobovnyk was introduced in evidence and states in part:

> "On the night of 30 October I checked out a jeep for the purpose of taking the steward of one of our ships and his interpreter to the ship. My buddie went along with us and on the way back we stopped by a Jap and took his watch away from him, in doing this there was a struggle in which the Jap was hit a few times. I was sitting in the jeep watching the struggle when a crowd began to form, I got out and chased the people away and told Tex (my buddie) to come on and then we left.
>
> "We then went back to the R.T.O. and checked the jeep in. Then we learned that the Japs who worked in our Motor Pool had seen us doing this. As this was by the Black Market Area and right around the corner from the R.T.O.
>
> "The two mechanics said they had seen us doing this and reported to an interpreter who told one of our officers, which I don't know much about" (Pros. Ex. E).

Each accused, having been advised of his rights as a witness, elected to remain silent. No evidence was introduced by the defense.

5. As to Specification 3, there is no competent evidence in the record of trial to establish the market value, at the time of the offense, of the gun stolen. The fact that the witness Nagasawa was a firearms repairman is insufficient to establish his competency to testify as an expert. There was no showing of his having special qualifications, experience, or familiarity with the type of firearms here involved as is required before expert testimony of value such as he gave in this case is admissible. Further he testified only as to the "current exchange" price of the gun, not as to its value as of the time of the offense. Nearly three months had elapsed from the time of the commission of the offense and the time the case was brought on for trial. For the foregoing reasons the testimony of the purported "expert" must necessarily be disregarded. Nor is the valuation placed on the gun by the owner of any legal significance in the absence of a showing that he was an expert or had special knowledge on the subject (CM 268007, McKinney, 44 BR 205). While it is true that the gun was offered in evidence and was before the court for inspection, to permit the court from inspection alone to find definite market values of articles before it "would be to attribute to the members of the court technical and expert trade knowledge which it cannot be legally assumed they possessed" (CM 208481, Ragsdale; CM 209131, Jacobs; CM 208002, Gilbert). It follows that the finding of the value of the gun by the court cannot be sustained by the evidence. The evidence permits a finding only that the gun had some substantial value which will support only a sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement not in excess of six months, according to the Table of Maximum Punishments (par. 104c, MCM, 1928).

With respect to Specification 4, the record of trial fails to disclose any direct evidence connecting either of the accused with the offense. They were not identified by the victim, and there were no surrounding circumstances reflected in the record of trial from which a reasonable inference could be drawn to establish their participation in this offense. The evidence is insufficient to establish that the property before the court had been taken by accused or was ever in the possession of accused. The pre-trial statements of accused are too uncertain, indefinite and vague to be considered as a confession or admission of the commission of the particular offense charged. The record of trial raises no more than a suspicion that either of the accused was involved in the offense. It has been repeatedly held, and is well established, that mere suspicion or conjecture does not warrant a conviction (16 C J 779, and cited cases). The following has been frequently quoted, with approval, by the Board of Review (CM 197408, McCrimon; CM 216522, Young; CM 207591, Nash et al).

"'While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless

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

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 Specification 3 as approved by the reviewing authority as involves a finding that accused Huffman did, at the time and place alleged, feloniously take, steal and carry away one double-barreled shot gun, the property of Tadashi Watanabe, of some substantial value not in excess of $20.00; legally insufficient to support the finding of guilty of Specification 4 as to each accused; legally insufficient to support the sentence of accused Bobovnyk; and legally sufficient to support only so much of the sentence of accused Huffman as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Edward J. Johnson, Judge Advocate.

Joseph P. Brack, Judge Advocate.

Francis D. Fowler, Judge Advocate.

(355)

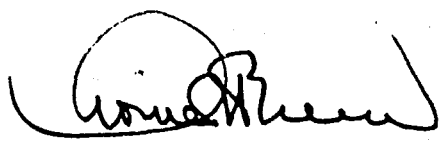
JUL 20 1950

JAGN-CM 322967 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, 24th Infantry Division, APO 24, c/o Postmaster, San Francisco, California.

1. In the case of Technicians Fifth Grade Norman E. Huffman (38716889), and Michael H. Bobovnyk (15404057), both of 484th Transportation Corps Traffic Regulation Company, I concur in the holding of the Board of Review and for the reasons stated therein recommend that in the case of accused Bobovnyk the findings and sentence be vacated; and that in the case of accused Huffman only so much of the finding of guilty of Specification 3 of the Charge be approved as involves a finding that accused Huffman did, at the time and place alleged, feloniously take, steal and carry away one double-barreled shot gun, the property of Tadashi Watanabe, of some substantial value not in excess of $20.00, the finding of guilty of Specification 4 of the Charge be disapproved and 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 six months. Upon taking such action you will have authority to order the execution of the sentence as to accused Huffman.

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 322967).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

JUL 28 1947

JAGQ - CM 322979

UNITED STATES	)	AIR DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at Mitchel Field, New York, 17-18 February, 21, 24, 25, 26, 28, 31 March, and 3, 7, 8, 10, 11 and 14 April 1947. Dismissal and confinement for three (3) years.
Captain THOMAS F. LEONARD (O-1112278), Corps of Engineers.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, GRAY 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 61st Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

Specification 3: In that Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, then of 463rd AAF Base Unit, Geiger Field, Washington, did, without proper leave, absent himself from his station at Mitchel Field, New York, from about 27 May 1946 to about 15 June 1946.

Specification 4: In that Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, without proper leave, absent himself from his station at Mitchel Field, New York, from about 2 December 1946 to about 4 December 1946.

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

Specification: In that Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at BOQ Number 253, Santini Area, Mitchel Field, New York, on or about 1 December 1946, feloniously take, steal and carry away $490.00, United States currency, the property of First Lieutenant Lucien L. Marcel.

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

Specification 1: (Nolle Prosequi).

Specification 2: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at or near Cleveland, Ohio, on or about 20 April 1946, wrongfully and unlawfully marry, take and have for his wife, one Violet Chapman, he, the said Thomas F. Leonard Jr., then having a living wife, to-wit: Lois Mauney Leonard.

Specification 3: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, having been restricted to the limits of Mitchel Field, New York, did, at Mitchel Field, New York, on or about 23 November 1946, break said restriction by going to New York City, New York.

Specification 4: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, having been restricted to the limits of Mitchel Field, New York, did, at Mitchel Field, New York, on or about 2 December 1946, break said restriction by going to New York City, New York.

Specification 5: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at Mitchel Field, New York, on or about 1 November 1946, with intent to deceive, unlawfully and wrongfully, forge the name of J. E. Warren, 1st Lieutenant, Air Corps, on a certain document, in words and figures, as follows:

Type of loan (Check)	AMERICAN RED CROSS	Form 899
___Emergency furlough	Loan Form	Rev. May 1945
___Family assistance		
___Convalescent or therapeutic furlough	Loan No. 9422	
___Personal needs or comfort	Amount of Loan $15.00	
___Morale	Date 11-1-46	
___All other	Red Cross Case No. 5258	

Name in full Thomas F. Leonard Serial No. 0-1112278

Organization Sqd G 104 AAF Base Unit Rank or Grade Capt.

Home address 1 North Main St., Kembridge, Va.

Amount of pay $441.00 Amount deductions Ins. $6.80 Date of last pay 31 Mar 46 Amount $434.20

Purpose of loan To go home to visit ill father - heart condition on emergency leave.

Arrangements for repayment Nov 15, 1946 - next pay in full

Name of chapter consulted not necessary

Address - -

Approved by /s/ J.E.Warren, 1st Lt., AC Made by /s/ Lucile M. Backus
Military or naval authority worker /i/ A.F.D.

Rank and organization /s/ Asst Adjutant Approved by
Field Director

(Repayments recorded on reverse side)

- -

ACKNOWLEDGEMENT

Loan no. 9422

Date Nov 1, 1946

Received from American Red Cross $15.00/100 as a loan which I agree to repay without interest or security as follows in full Nov 15, 1946

/s/ Thomas F. Leonard Jr.
Signature of serviceman

Old Cantonment Hospital
Red Cross Station or Office
Mitchel Field

/s/ Capt CE

ORIGINAL

(To be retained by American Red Cross until loan is paid).

a writing of a private nature, which might operate to the prejudice of another, and by means thereof, did fraudulently obtain from the American Red Cross the sum of $15.00.

Specification 6: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at Mitchel Field, New York, on or about 1 November 1946, with intent to deceive, wilfully, unlawfully and fraudulently, utter as true and genuine to the American Red Cross, a document in words and figures as follows:

Type of loan (check)
___Emergency furlough
___Family assistance
___Convalescent or therapeutic furlough
___Personal needs or comfort
___Morale
___All other

AMERICAN RED CROSS
Loan Form

Form 899
Rev. May 1945

Loan No. 9422
Amount of loan $15.00
Date 11-1-46
Red Cross Case No. 5258

Name in full Thomas F. Leonard Serial No. O-1112278

Organization Sqd G 104, AAF Base Unit Rank or Grade Capt.

Home address 1 North Main St. Kembridge Va.

Amount of pay $441.00 Amount deductions $6.80 Ins Date of last pay 31 Mar 46 Amount 434.20

Purpose of loan to go home to visit ill father - heart condition on emergency leave

Arrangements for repayment Nov 15, 1946 - next pay in full

Name of chapter consulted not necessary

Address - -

Approved by /s/ J.E.Warren,1st Lt., AC Made by /s/ Lucile M. Backus
Military or naval authority Worker /i/ A.F.D.

Rank and organization /s/ Asst Adjutant Approved by _____
Field Director

(Repayments recorded on reverse side)

ACKNOWLEDGMENT

Loan No 9422

Date Nov 1, 1946

Received from American Red Cross $15.00/100 as a loan which I agree to repay without interest or security as follows in full Nov 15, 1946.

/s/ Thomas F. Leonard Jr.
Signature of serviceman
/s/ Capt CE

Old Cantonment Hospital
Red Cross Station or Office
Mitchel Field

ORIGINAL
(To be retained by American Red Cross until loan is paid)

a private writing, which might operate to the prejudice of another, he, the said Captain Thomas F. Leonard Jr., then well knowing that the signature of J. E. Warren, 1st Lt., AC, thereon was falsely made and forged.

Specification 7: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, being indebted to Master Sergeant Frederick H. Post, Squadron H, 104th AAF Base Unit, Mitchel Field, New York, in the sum of $10.00 which amount became due and payable on or about 15 November 1946, did, at Mitchel Field, New York, from on or about 25 November 1946 to on or about 11 December 1946, dishonorably fail and neglect to pay such debt.

Specification 8: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at Cleveland, Ohio, on or about 30 March 1945, with intent to defraud, feloniously, wilfully, wrongfully, and unlawfully make, utter and deliver to Mrs. George M. Cross a certain check in words and figures as follows, to wit:

30 March 1945

PAY TO THE ORDER OF Mrs. George M. Cross $ 900.00/100

Nine hundred dollars & 00/100 Dollars
With Exchange

To The Nat'l City Bank & Trust Co
Name of Bank or Trust Co.

1 Wall Street, N.Y.C.
City or Town and State

(I hereby represent that the
(amount drawn for in this check
(is on deposit to my credit, free
(of any claims, and acknowledge
(that this amount has been paid
(to me.
(/s/
(Thomas F. Leonard Jr.
(
(Address Capt. C.E. O-1112278

he, the said Captain Thomas F. Leonard Jr., well knowing that he did not have and not intending that he should have any account in The Nat'l. City Bank & Trust Co., 1 Wall Street, New York City, for the payment of said check.

Specification 9: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at Fort Hamilton, New York, on or about 13 June 1946, with intent to defraud, feloniously, wilfully, wrongfully, and unlawfully make, utter and deliver to the Fort Hamilton Exchange a certain check in words and figures as follows, to wit:

June 13 1946 No. - -

BANK OF THE MANHATTAN COMPANY
QUEENS VILLAGE N.Y.

Pay to the
order of Fort Hamilton Exchange $ 50.00/100

Fifty dollars & 00/100 Dollars

Hq. Airborne Command
Fort Bragg, N.C.

/s/ Thomas F Leonard Jr. Major U.S.A.
O-1112278.

and by means thereof did fraudulently obtain from the Fort Hamilton Exchange $50.00 in good and lawful money of the United States, he, the said Captain Thomas F. Leonard Jr., then well knowing that he did not have and not intending that he should have any account in the bank of the Manhattan Company, Queens Village, New York, for the payment of such check.

Specifications 10, 11, 12 and 13: Same as Specification 9 with pertinent details as follows:

Spec. No.	Amount	Place	Date	Payee	Bank
10	$10.00	Ft Hamilton, NY	12 Jun 46	Cash	Bank of the Manhattan Co.
11	25.00	Mitchel Field, NY	25 May 46	Mitchel Field Exchange	Security National Bank, Greensboro, North Carolina

Spec. No.	Amount	Place	Date	Payee	Bank
12	$20.00	Wash. D.C.	8 May 46	New Colonial Hotel	Bank of the Manhattan Co.
13	25.00	" "	9 May 46	Cash	Security National Bank Greensboro, North Carolina

Specification 14: (Finding of Not Guilty).

Specification 15: In that, Captain Thomas F. Leonard Jr., C.E., Squadron H, 104th AAF Base Unit, Mitchel Field, New York, did, at Mitchel Field, New York, on or about the 4th day of November 1946 with intent to deceive Captain Finton J. Phelan, Jr., Assistant Base Legal Officer, Mitchel Field, New York, officially state to the said Captain Finton J. Phelan, Jr., Air Corps, that he had, on the previous Friday night, mailed a United States Postal Money Order in the sum of $60.00 to Major Harry Holt account at the Crawford County Trust Company, Meadville, Pennsylvania, which statement was known by the said Captain Thomas F. Leonard Jr., to be untrue, in that the said Captain Thomas F. Leonard Jr., had not mailed such Postal Money Order to the said Crawford County Trust Company.

Accused refused to plead to any Charge or Specification and was found not guilty of Specifications 1 and 2 of Charge I and Specification 14 of Charge III and guilty of all Charges and the remaining 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, at such place as the reviewing authority may direct for 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.

Specifications 3 and 4, Charge I. On 27 May 1946, while accused was a member of the detachment of patients, Station Hospital, Mitchel Field, New York, he absented himself without leave from his station (Pros. Ex. 5; R. 273) and remained in that status until he surrendered himself to the military police in New York City on 15 June 1946 (Pros. Ex. 6; R. 275, 276). At the time of accused's surrender to military control he stated that he "had been AWOL" since the 27th of May 1946. Thereafter on 2 December 1946, accused absented himself without proper authority from his station at Mitchel Field, New York and remained absent until he was apprehended by the military authorities in New York City on 4 December 1946 (Pros. Ex. 7; R. 280, 482).

Specification, Charge II.

On Saturday, 30 November 1946, accused requested Lieutenant Marcel, who lived in the same barracks, if he (accused) could listen to the radio in Marcel's room while the latter was away for the week-end. Marcel consented and departed from the Field. On Monday, 2 December 1946, Marcel discovered that $490.00 in United States currency which he had left in his room in a "zipper case" was missing. He reported the loss to the Provost Marshal and on 6 December he was called to the Provost office where he found accused and the Provost Marshal and was given $125.00 by the latter. Accused requested to speak to Marcel and said:

> "Q. What was the substance of the conversation?
> A. The substance was, he was very sorry that it happened and, if I may read it, I believe I can say it more correctly, it was the 6th of December (reads from one of his own papers) This is to certify that I, Thomas F. Leonard, Junior, per my father, Thomas F. Leonard, Senior, who resides at 239 New York Avenue, Brooklyn, will on or before Thursday, 12 December 1946, refund in full the difference of $365.00 owing to Lucien L. Marcel. (ends reading). It was signed Thomas F. Leonard and Roy Ingalls." (R. 448).

Thereafter Marcel received the balance of the $490.00 (R. 444-453). Accused on 4 December 1946, after being warned of his rights under the 24th Article of War made the following written statement relative to the taking of the money.

> "On Saturday, 30 November 1946, at approximately 1300 hours, I requested permission from Lieutenant Luki Marcel to use his radio in his room, in Barracks T 253 in Santini. Lieutenant Marcel gave me permission to listen to his radio and pointed out several photo albums on the desk, saying that he thought the photos would interest me. Shortly thereafter, Lieutenant Marcel left for the weekend to go to New York.
>
> "On Sunday, 1 December 1946, while in Lieutenant Marcel's room, I was listening to a football game on his radio, during which time I reached under the table and took Lieutenant Marcel's leather, zipper case and started looking through it. While so doing I noticed a brown envelope which I opened, and saw another white envelope on the inside. I opened the white envelope and in it, I saw a number of bills. I took them out and counted

them, and found that there were two $100.00 bills, five $50.00 bills and two $20.00 bills, totaling $490.00. I put the bills back into the envelope and returned the brief case under the table, where I had gotten it, after which I returned to my room. About three hours later, I decided that I wanted to go to Town, so I returned to Lieutenant Marcel's room and took the $490.00 out of his brief case, and put the money into my wallet. I did not take either the brown or white envelopes in which the money was contained; I left these envelopes in the brief case.

"Shortly thereafter, I left the Base, taking the money with me. I did not borrow the $490.00 from Lieutenant Marcel, nor did he give me permission to remove it from his brief case. I knew I was doing wrong by stealing the $490.00 from Lieutenant Marcel's room, and I hope to return it to him as soon as possible.

"When I left my barracks at Santini to go to Town, I realized that I was breaking my restriction to quarters. Knowing this, I still left my quarters and went into Town.

"On 4 December 1946, at approximately 1600 hours, I was apprehended by Captain Ingalls, Assistant Provost Marshal, Mitchel Field, at the Beverly Hotel, on Lexington Avenue, at 50th Street, New York City. I had in my possession, at this time, $177.56, which was the remainder of the money which I had stolen from Lieutenant Marcel's brief case. This $177.56, I want to surrender to Lieutenant Marcel." (R. 481-482).

Specification 2, Charge III. Accused married Lois Pauline Mauney on 29 October 1939 and she is still his wife, the marriage never having been annulled or dissolved by decree of divorce (R. 368-370). On 20 April 1946, accused married Violet E. Chapman in the State of Ohio (Pros. Ex. 22; R. 577, 401-407). In a statement given to an agent of the Federal Bureau of Investigation and Captain Ingalls, Assistant Provost Marshal, Mitchel Field, dated 17 June 1946, accused related his association with Miss Chapman as follows:

"I left Chicago some time between April 21st and May 1st, 1946. Between those dates I met Violet Chapman at the Bar of the Hollanden Hotel, Cleveland, Ohio. I paid her way to Ashville, North Carolina, by train and we registered as man and wife, at a tourist home, a motel, and lived there about a week,

I then paid her way to Washington, D. C., by train and we registered as man and wife, and lived and slept together at the Colonial Hotel.

* * *

"While in Washington, D. C., Violet Chapman and I also lived together at Hotel 1703. She told me that she used to sing at the Cadillac Hotel in Detroit. We stayed together in Washington, D.C. for about several weeks. We then left for New York City by train and I paid her fare.

"In New York City, we registered at the Governor Clinton Hotel as man and wife. Violet said she was returning to California where she knew someone who could get her a job. She is about 29 years of age." (R. 557).

At the time of the alleged marriage accused was sober (R. 412, 418, 454, 458 and 569).

Specifications 3 and 4, Charge III. On 13 September 1946 accused was restricted by the Commanding Officer, Mitchel Field, New York, to the base and Santini area thereof. The terms of the restriction were definite, were set forth in a letter to accused and later on 15 September were orally explained to him (R. 298; Pros. Ex. 9; R. 301). During November 1946, while the restriction was still in force, accused went to New York City where he met Violet Chapman at a "bar on 46th Street" (R. 402). Accused admitted this breach of restriction on 23 November 1946 to the investigating officer (R. 440). Thereafter on 29 November 1946 the Commanding Officer, Mitchel Field, New York, changed the terms of accused's restriction "from restriction to the Post to restriction in quarters" (R. 304) and advised him of this fact. While this latter restriction was still in force (R. 305) accused went to New York City on 1 December 1946 and remained there until he was apprehended by the military police on 4 December 1946 (R. 255, 490). Accused also admitted this breach of restriction (R. 482).

Specifications 5 and 6, Charge III. On or about 1 November 1946 accused requested a loan of $15.00 from the American Red Cross representative at Mitchel Field. The required form was prepared by the representative and delivered to accused with instructions to obtain the signature of his commanding officer thereon (R. 284, 285). Accused returned the form to the Red Cross with the name "J. E. Warren, 1st Lt., A.C., Asst. Adjutant" written thereon, signed the receipt and received the $15.00 (Pros. Ex. 8; R. 286, 287). The purported signature of "J.E. Warren" was

a forgery and he had not authorized any one to sign his name on such a form (R. 295-297). The loan was repaid to the Red Cross in the latter part of January or first of February 1947. Accused stated to the investigating officer that:

> "Q. Would you state to the court your questions and his answers?
> A. Captain Leonard was asked, sir, after the specification was read, Captain Leonard was asked if did sign the name of 1st Lt. J. E. Warren, and he said, yes, that he had, that he hadn't been paid for some time and that he was short of funds.
>
> "Q. He admitted to you that he had signed the name of J.E. Warren?
> A. Yes sir." (R. 563).

Specification 7, Charge III. In November 1946 accused borrowed $10.00 from Master Sergeant Post for which he agreed to "pay back" $15.00 in two days. When Sergeant Post learned that accused was under restriction he "put in a claim" to Major Bonham, the acting Base Inspector General on 16 December 1946. The loan was repaid between 15 and 20 February 1947 (R. 310-317).

Specification 8, Charge III. On 30 March 1945 accused drew a check in the amount of $900.00 on the National City Bank and Trust Company, 1 Wall Street, New York City, payable to Mrs. George M. Cross and delivered it to Evelyn Mae Cross who delivered it to the payee. The check was in payment for a car which Mrs. Cross had purchased for her daughter Evelyn and accused had assumed the obligation to pay for the car (Pros. Ex. 20; R. 604, 581-585). After the check was delivered by accused to Evelyn, he called her and requested that she "hold" the check until the "end of the week" when they would both deliver it to her mother. The check had already been delivered to the payee but it was not cashed for three weeks because of accused's request. The "National City Bank and Trust Company" is non-existant in New York City. The check was forwarded to the National City Bank of New York which returned same as accused had no account in said bank or any of its 66 branches (R. 608-609).

Specifications 9, 10, 11, 12, and 13, Charge III. During the period from 8 May to 13 June 1946 accused cashed the five checks described in these specifications in amounts varying from $10.00 to $50.00, aggregating $130.00 for which he received cash or its equivalent. Accused did not maintain an account in any of the banks on which the checks were

drawn (R. 373, 381, 519, 558). Reimbursement was made on all of these checks subsequent to the filing of charges in this case. In the statement accused made to the agent of the Federal Bureau of Investigation he made reference to these checks as follows:

"I got as far as St. Paul, Minnesota. I returned to Chicago about April 10, 1946, and lived at the Morrison Hotel. I cashed a $25.00 bad check at the New Colonial Hotel, Washington, D. C., which I had drawn on the Bank of Manhattan, Queens Village Branch.

* * *

"While in Washington, D. C., I recall passing two bad checks; one of these was the $25.00 check aforementioned. I cashed the $20.00 check also, at the Colonial Hotel, drawn on the Bank of Manhattan, Queens Village Branch. At the time I passed and cashed these two checks I knew that I had no accounts at any of the banks I have named.

* * *

"Before leaving the Base at Mitchel Field, I stopped at the Post Exchange and cashed a $25.00 bad check which I had drawn on the Security National Bank, Greensboro, North Carolina. I then went to live at the home of Elsie Donohue at Bayville, New York. On Monday, June 10th, 1946, I left Bayville, New York.

"I then went to Fort Hamilton, New York, planning to give myself up as an AWOL, and slept in Building No. 77, an empty barracks for several days unknown to that Base. On Thursday, June 13, 1946, I went to the Officers Club at Fort Hamilton and cashed a bad check of $10.00, drawn on a Greensboro, North Carolina, Bank, and on Friday, June 14, 1946, I cashed a $50.00 bad check on the Greensboro, North Carolina Bank at the Post Exchange, Fort Hamilton, New York.

"That same day, I went to New York City, where I met a girl I had previously known and stayed with her overnight, and then surrendered myself to the Provost Marshal's Office, the next day at 39 Whitehall Street, New York City. At the time I made out the checks, and cashed them, I also knew that I had no account in any of the banks on which they were drawn and I also knew I was doing wrong." (R. 557-558).

Specification 15, Charge III. On or about 4 November 1946, Captain Phelan, Assistant Base Legal Officer and Legal Assistance Officer, asked

the accused concerning repayment of a loan from Major Holt. The accused "said he knew about it, and that the preceding Friday - - - he said he had sent a Postal Money Order to the Major's account in the Major's home town", the Meadville Trust Company, Meadville, Pennsylvania (R. 335). The records of the bank did not disclose receipt of such a money order or a deposit of $60 to Major Holt's account from 24 October 1946 to the time of trial (R. 398-399). (The $60 was actually repaid to Major Holt about 12 February 1947 - R. 387).

4. Evidence for the Defense:

The accused attended the preparatory semester at Cathedral College, Brooklyn, New York, in 1930 and was in school the next three years during which time he was interested in active sports. During the school term they were not allowed out at night so there was little opportunity of doing wrong. The students attended a fraternity meeting once a week, then went to the St. George Hotel for a swim and to have other social contacts (R. 649-652, 666). A witness who had daily contact with the accused from 1930 to 1943 did not know that accused even drank during that period (R. 653). If he did, it was moderate (R. 652). In 1943, accused was proud of himself in his officer's uniform and had a "snappy appearance" (R. 651). A year or so later, accused went to a bar with this friend and was drinking scotch "a little too fast for me", argued with some Navy men concerning the number of feet required "to set down an 87", later excused himself and walked out of the bar without explanation to his friend (R. 654-655). At this time accused was in a highly nervous state. "I mean he just wanted to keep on going". He would say, "Let's go, get out of here - take off; * * * he meant really take off, and he did it." (R. 656). Something had definitely changed him (R. 657). Almost a year later, accused attended a reunion of a few classmates during which they had a few drinks and were reminiscing when "out the door Captain Leonard went — out the door, and he was in a local 'pub' and we were giving them free" (R. 655). This friend, a Deputy United States Marshal who takes charge of federal prisoners after arraignment, next saw accused when he was in jail in Brooklyn. Accused's hair was unkempt and he had every indication of continuous drinking. "I believe that is what an alcoholic is, a man who keeps drinking" (R. 659). Accused had holes in his shoes, his uniform was soiled and untidy (R. 659). Accused could not explain his actions, but agreed with the suggestion that he go to the Kings County Hospital for a ten days' psychiatric observation (R. 660). Later, this friend visited accused at the Officers' Club, Mitchel Field, during the football season in 1946, when accused said he had to get a beer and when asked what was his hurry, replied "I've got to get a beer" and they "got a line-up of beers". The accused "hadn't gotten back on his feet. He still looked a little off" (R. 661).

Accused's brother, 1st Lieutenant Robert T. Leonard, Prep School Detachment, 1802nd Regiment, Stewart Field, Newburgh, New York, testified that until accused entered the military service, he was an average American boy, and never caused any trouble to his father or mother. When accused returned from overseas in December 1945, he "was extremely nervous and looked like heck. He had a sallow complexion, he looked yellow. I took it he had a case of malaria. I wasn't sure." The six or seven times witness has seen accused since he has been home, accused has never had occasion to lose his temper, or anything, but he has been "extremely nervous, jumpy, walking around, moving all the time; he seemed to have something on his mind - his complexion, his features, I mean, he was much thinner, he looked worse than I ever remember him". (R. 674-675). There have never been any mental disorders in accused's family (R. 678).

Accused was assigned to the 871st Engineers in March 1943 directly from Officer Candidate School, Fort Belvoir, Virginia and was Company Administrator. On 1 May 1943 he left the United States with his organization for Brisbane, Australia and arrived in Port Moresby, New Guinea on 1 June 1943. The first mission was the construction of the advanced fighter base in Tsili Tsili about 20 minutes from the nearest Japanese installation. They arrived about the middle of July and remained three weeks before the enemy found them, after which they were attacked "several times - every night." On the 17th of August the Japanese base was annihilated. The accused commanded one platoon that was responsible for the defense of the area on the southern part of the base. Thereafter, the organization constructed the advance fighter fields and troop carrier fields at Nadzab where accused was Airborne Control Officer. Later he served as Battalion Adjutant for about a month when he became sick with malaria and was evacuated to Port Moresby during the latter part of October 1943. He was later returned to Nadzab and was placed in the psychiatric ward of the station hospital. "He had been in an aircraft accident and had become allergic to flying in airplanes and something happened to him when he went to go in an airplane." He was assigned to a non-flying outfit early in March 1944. "He was odd, certainly. A change had taken place in him, I can say that." During his service as Battalion Adjutant, he was given a rating of Superior. According to this witness, his commanding officer, he was the outstanding Administrative Officer of the Battalion (R. 631-645).

While accused was in the hospital at Mitchel Field he made the acquaintance of a Red Cross "visiting lady" who described him as, "I will never forget the stare in his eyes; he had a stare in his eyes — shall we say a haunted far-away look. He didn't look like you or I would look; he seemed physically disturbed some way. After, later on, he came back from the Federal authorities, I believe that is where he was, he was nervous, terribly nervous and, I suppose the effects of the

whole business was telling on him." She observed him drinking in the hospital and on 1 December 1946 she and her mother brought a "shaker" of manhattan cocktails to him when he was restricted to the Santini area. After accused had six cocktails, "pretty stiff ones", the effects began to show on him and he "indicated a gaiety". On 3 or 4 December 1946 she met accused in New York in a bar and "His hands shook, his eyes were badly blood-shot, and well, I shouldn't say, in a stupor — that isn't it — shall we say a fog." He was polite and talked coherently but "he had definitely been on a bender. You could tell that." She has given indications that she was in love with accused and they have discussed marriage "as a thing projected, applying to the future" (R. 681-696).

Captain Lepine lived in the same barracks with accused during the months of October, November and December 1946 and they drank together frequently. When accused drank he was not "jumpy" but talkative and "quick would be the way I would put it." Their conversation would follow normal lines and he had heard accused say that he would like to go to town and "throw a bender" (R. 697-710).

The accused, after being duly advised of his rights as a witness elected to remain silent (R. 716-717).

5. Evidence as to the Mental Capacity of Accused.

Captain Landau, officer in charge of the psychiatric section, Station Hospital, Mitchel Field, testified that he examined accused on 5 December 1946 and made the following neuro-psychiatric evaluation of accused:

"a. There is no evidence of the presence of nervous or mental illness.

"b. He may be classified as a type of character and behavior disorder, specifically, pathological personality type, inadequate personality. Such individuals are characterized by inadequate responses to intellectual, emotional, social, and physical demands. They are neither physically nor mentally grossly deficient on examination, but they do show inadaptability, ineptness, and social incompatibility.

"c. He is capable of distinguishing right from wrong, and of adhering to the right.

"d. He is able with the aid of counsel, to participate in his own defense in any military or legal action in which he may be involved." (R. 63-64).

Witness disagreed with one statement made by Lieutenant Steiner, his predecessor as psychiatrist at the Station Hospital, to the effect that while accused could distinguish right from wrong "he has demonstrated an inability to adhere to the right" (R. 65). Witness found accused to be "of average intelligence" (R. 66).

The court granted a defense motion for an inquiry as to accused's sanity pursuant to paragraph 63, Manual for Courts-Martial, 1928. Accordingly, accused was transferred to Tilton General Hospital for observation and report pursuant to AR 600-500 and each of the three members of the board and a special consultant who worked with the board testified that they all agreed with the conclusions of the board that accused was sane, able to distinguish right from wrong, adhere to the right, cooperate intelligently in his defense, and was sane at the time of his two confessions. One member testified that the Board found:

> "The conclusions were, at the time of the examination, that the accused did not suffer from any psychosis. At the time of each of the alleged offenses he was so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong. The accused was at the time of each of the alleged offenses so far free from mental defect, disease or derangement as to be able concerning the particular act charged, to adhere to the right. That the accused, at the time of trial and at the time of the examination, has the mental capacity to understand the nature of the court-martial proceedings and intelligence to conduct or cooperate in his defense. And, at the time of the alleged confessions on the 17th of June 1946 and the 4th of December 1946, he had sufficient mental capacity to understand the nature of his confessions.
>
> "Q. You agreed with the other members of the Board as to those conclusions?
> "A. I did." (R. 133).

Another member of the Board testified:

> "A. I believe that this officer is not psychiatric, that he does have a personality disorder in that his pathological personality is of inadequate type; that means that he has a character difficulty, so that he is immature, inapt type of individual, who, however, knows quite well what he is doing. He is able to adhere to the right if he so desires.
>
> "Q. Did you have knowledge of the charges that were being pressed against the accused?

A. I did have knowledge of those charges and I reviewed those offenses with the other Members of the Board.

"Q. With regard to those charges, what were your statements insofar as the ability of the accused was concerned to distinguish between right and wrong?

"Major Gerson: He was able to distinguish between right and wrong.

"Trial Judge Advocate: Concerning all the charges against the accused, what statements or what conclusions did you arrive at concerning his ability to adhere to the right?

"A. He was able to adhere to the right in regard to each of the alleged offenses.

"Q. In your opinion, was the accused able, with the aid of counsel, to properly handle his defense?
A. Yes. He is capable of handling his own defense with the aid of counsel." (R. 160-161).

Two psychiatrists stated that accused did have "more difficulty" adhering to the right than the average person.

The Board made a "special" finding with reference to the ability of accused to adhere to the right at the time of the alleged bigamous marriage as follows:

"We did have a corollary finding, however, which was worded as follows by the Board, with special reference to the bigamous marriage to Violet Chapman: (Witness reads from record): The Board believes that if it can be established that the accused was under the influence of liquor at the time of his marriage, that there was a limitation of his judgment with respect to this particular action. This cannot, however, be construed to indicate that he was unable to adhere to the right." (R.108).

Gladys McDermaid, senior psychiatrist, Kings County Hospital, Brooklyn, New York, testified that she observed and examined accused from 23 July to 6 August 1946, found him sane, of superior intelligence and physical examination showed no symptoms of malaria (R.143-144).

Doctor Jacques, a civilian psychiatrist, testified for the defense that he examined accused on 25 February 1947 and when he advised

accused of the seriousness of the charges against him, the following conversation ensued:

> "* * * I was given a list of the acts that he had done which were irrational and which were against the law. I asked him if he realized he had done these things and he said, yes, he knew he had done them, and he realized they were wrong. He answered my questions vividly and freely, he didn't hold back, except that he didn't volunteer to me the fact that he had been forging checks, and, I think there were six altogether—the list was given to me of the number he had forged. Also, I questioned him as to his habits with respect to alcohol, and he said he had been a heavy drinker, but since last December 1946, he had stopped drinking and since that time he had not been drinking. In fact, I asked him just now, when I saw him outside, if he had been drinking and he said, no, not since last December. I asked him if he realized the enormity of his offenses and he said, yes, and also these were his words, he said, I realize I have done all these things, and, he said, I am willing to take my medicine, turn over a new leaf and start over again. ***" (R. 201).

He further testified that while accused was sane at this time and knew right from wrong, if he had relapses of malaria and drank during these attacks his ability to adhere to the right would be definitely impaired.

Accused is not suffering from cerebral malaria or recurrent malaria of the Vivax type (R. 166, 185). While quartered in the Santini area from October to December 1946, accused appeared to be a rational individual (R. 194-196).

6. When accused refused to plead to the general issue, the court "entered" pleas on his behalf of not guilty to all Charges and Specifications. While the Manual for Courts-Martial provides that in such cases the trial will proceed as if accused had pleaded not guilty to all Charges and Specifications the mere fact that such a plea was "entered" for accused by the court is of no consequence. The trial proceeded and the Board of Review will consider the case as if accused had pleaded not guilty.

The court properly overruled the motion to strike Specification 4 of Charge I, and Specifications 6 and 15 of Charge III (R. 42). The case cited in support of the motion (5 Bull JAG 202-203) decided only the question of assessment of punishment. A reading of paragraph 27, Manual for Courts-Martial, discloses the fallacy of the motion, even if it were a proper motion. Such motion on such grounds is not authorized by paragraph 71c, Manual for Courts-Martial. The motion to strike

Specification 7 of Charge III was made on proper grounds (failure to state an offense) (R. 35), and was properly overruled by the court (R. 40, 42). Specification 7 alleges dishonorable failure and neglect of less than a month to pay an indebtedness of $10. The court could pass on the question of whether the neglect to pay the debt was dishonorable, only after hearing the evidence.

After ruling on the above motions the court heard 227 pages of testimony with reference to the sanity of accused. It granted the motion of special defense counsel for an inquiry into accused's sanity and he was examined by a board of medical officers pursuant to AR 600-500 and each member was present in court and testified to his agreement with the conclusions of the Board, his individual opinion as to the mental capacity of accused and explained the methods and procedures employed in reaching those conclusions. The court ruled after hearing all the medical testimony that accused was sane and responsible for his acts. The Board of Review is of the opinion that such finding was substantiated by the evidence beyond a reasonable doubt and in fact that the testimony can hardly be said to be conflicting on this point. Even the civilian psychiatrist produced by the defense testified as follows:

> "Trial Judge Advocate: Then your conclusion is that he merely had a lower resistance than the average man?
>
> "Dr. Jacques: Definitely, at the time he was in the throes of what he was doing, of these irrational acts, yes, resistance to the right.
>
> "Q. Does * * * that does not mean that he was unable to adhere to the right?
> "A. He could have if he had wanted to, but he didn't.
>
> "Q. What was that?
> A. I say, he could have if he had wanted to, but he didn't." (R. 211).

Neither medical examinations, psychiatric examinations, or testimony with reference thereto in any way established that accused was afflicted with compulsive neurosis or psychosis. In CM 283726, Bowles, 55 BR 125 (128) the defense attempted to show that accused was unable to adhere to the right because of an anxiety state, tension and nervous condition. The Board of Review stated:

> "*** He was intelligent, had full possession of his faculties, and, according to Major Ruffin's unqualified assertion,

was able to distinguish right from wrong. It is clear that Major Ruffin found it difficult, and even objectionable, to describe the accused's psychiatric disorder in terms of an ability to adhere to the right. A careful analysis of his testimony, however, with its constant emphasis on the repetitive character of the behavior and the refusal to learn from experience, warrants the conclusion that the accused acted with an unwise disregard for consequences, but does not establish that he was deprived of his volition. He doubtless suffered from anxiety, with its consequent tension and restlessness, and the resulting nervous condition may well have clouded his judgment and caused him to act indiscreetly without proper concern for what would follow. The testimony of Major Ruffin does not go further. Certainly it does not establish the existence of an impulse so strong and irresistible that the accused was powerless to control his conduct."

Even the psychiatrist produced by the defense could only state that accused would have difficulty in adhering to the right if he were under an attack of recurrent malaria, and there is no evidence that he was at any time when these offenses were alleged to have occurred.

In CM 296061, Keech, 58 BR 51 (56), the Board of Review disposed of a similar contention in the following language:

"The defense sought to establish that accused was suffering from toxic or psychotic reactions as a result of potions of sulfadiazine that had been administered to him by medical authorities for about five days immediately preceding the day of this fatal flight. There is medical testimony in the record to establish the possibility of such reactions. However, there is no substantial evidence to induce the belief that accused in fact suffered any such reaction. He was able to operate the aircraft, to converse intelligently with his co-pilot, to point out locale with which he was familiar and, most important of all, to intend to make low runs or passes over his father-in-law's house and to execute that intention. In view of such evidence, it cannot be said the court was unwarranted in concluding that accused was mentally responsible for his acts."

The request of special defense counsel to appear before the Board of Medical Officers who examined accused under AR 600-500 was properly denied by the Board. Paragraph 6, TB MED 201, 1 October 1945, provides:

"It is unwise to perform the psychiatric examination in the presence of other interested parties, particularly those who are to serve as counsel. In the presence of others it is difficult to establish good rapport with the patient."

The evidence is clear, uncontradicted and proves beyond any reasonable doubt every element of all the offenses charged. The two charges of absence without leave (Specifications 3 and 4 of Charge I) were proved by the duly authenticated copies of the morning report of accused's organization, the admissions of accused and the testimony of the military authorities who apprehended him in one instance and to whom he surrendered in the other. The larceny of the $490.00 (Spec., Charge II) was established by the testimony of the victim and admitted by accused in his statement to the officers who apprehended him on 4 December 1946. The contention of defense counsel that accused was "drunk" when he made the statement is not supported by the evidence. He was adequately warned of his rights under the 24th Article of War and recounted in detail his actions in taking the money. The bigamous marriage to Violet Chapman (Spec. 2, Charge III) was proved by competent evidence and uncontradicted by the defense. Both Miss Chapman and her father testified that accused was "sober" at the time of the ceremony and the defense introduced no evidence to the contrary, except Miss Chapman's testimony on cross-examination that she and accused had spent $900.00 of her money "having a good time" in a two-week period preceding the marriage. The two offenses of breach of restriction (Specs. 3 and 4, Charge III) were established beyond any doubt by the uncontradicted testimony of accused's commanding officer, the military police who apprehended him, and were in fact admitted by accused in his statements to the investigating officer and the Base S-2 Officer, Mitchel Field, respectively. As the breach of restriction on 1 December (Spec. 4, Charge III) and the absence without leave (Spec. 4, Charge I) arose from the same act of accused only punishment for the more serious offense of absence without leave should be imposed (CM 313544, Carson; 5 Bull. JAG 202 and cases there cited).

The offenses of forgery and uttering the forged instrument (Specs. 5 and 6, Charge III) were clearly proved by competent evidence. The officer whose name was forged testified that the signature in question was a forgery and that he had never given anyone permission to sign his name. When accused received the form the signature was not present thereon and when he returned it to the Red Cross the same day and received the loan of $15.00 the purported signature appeared on the form. The evidence is uncontradicted that accused uttered the forged instrument when he delivered it to the Red Cross, and the forgery was admitted by him in his statement to the investigating officer. In any event it

may be inferred from his possession of the instrument under these circumstances. In CM 269449, Campbell, 45 BR 33 (43) the Board of Review stated:

> "* * * In defense the accused claimed that if any alteration or amendment was made in AFO Form 542 or if the name of John C. Hird was forged on WDSO #127 it was done by some other person and that he was not aware of it when he mailed the papers to the Finance Officer. The accused admitted that he had in his possession, for at least 24 hours before mailing, all of the papers that he mailed to the Finance Officer. The Finance Officer stated that among the papers received by him from the accused were the forged signature of John C. Hird on the purported copy of WDSO #127 and the altered or amended AFO Form 542. While there was no direct proof that the accused forged John C. Hird's name or that he altered the AFO Form 542, yet these acts may properly and legally be presumed from these circumstances.
>
> 'A person who is recently in possession of, and attempts to sell or obtain money on, a forged note is presumed to have forged it, and unless such possession or forgery is satisfactorily explained the presumption becomes conclusive' (12 Ruling Case Law par. 26).
>
> 'Possession of a forged paper by accused, with a claim of title thereunder, if unexplained, raises a presumption that he forged it, or procured it to be forged. In any event, such evidence warrants an inference, sufficient to support a conviction, that accused made or participated in the forgery' (37 C.J.S. sec. 80b, page 91)."

Specification 7, Charge III alleges accused dishonorably failed to pay a debt of $10.00 to an enlisted man. The money was borrowed in November and repaid in February, some two months after the enlisted man had reported the matter to The Inspector General and the charges had been preferred in this case. In view of all the evidence that accused possessed money to spend on liquor and entertainment subsequent to the time the loan was due (two days after it was made) the Board of Review is of the opinion that the neglect to repay it was dishonorable and constituted a discredit to the military service.

The evidence pertaining to the issuance of the six worthless checks (Specifications 8, 9, 10, 11, 12 and 13, Charge III) is clear, convincing and uncontradicted that accused issued the checks in question,

drawn on banks in which he kept no accounts, that he received value for them, and that they were dishonored by the drawee banks. Cash was received for each check except the one for $900.00 (Spec. 8). The fact that accused requested this check to be "held up for a week" was no defense, as it had been delivered to the payee before the request was made and accused gave no indication at the time he signed the check that it was not to be cashed immediately. The Board of Review is of the opinion that the delivery of this check was not a conditional delivery such as to constitute a defense. The intent to defraud could be clearly inferred from the evidence establishing the drawing of each check on non existant accounts where timely reimbursement is not made (CM 249006, Vergara, 32 BR 5 (14)). The making and uttering of five checks against non existent accounts is conduct to the prejudice of good order and military discipline.

The offense of making a false official statement (Spec. 15, Charge III) was established beyond any doubt by the testimony of the Base Legal Officer. After Major Holt advised him of accused's indebtedness, witness, in his official capacity as Base Legal Officer and Legal Assistance Officer, called accused to his office to discuss the matter and was informed by accused that a money order had already been mailed to Major Holt to liquidate the debt. This statement was shown to be false and accused knew at the time it was made that such was the fact. The contention of special defense counsel that this statement was made by accused to the witness in the capacity of attorney and client and therefore privileged is not substantiated by the evidence. In fact the Base Legal Officer had called accused to his office in an attempt to collect the debt for Major Holt who had contacted him previously and if he was acting in the capacity as attorney for anyone it was for Major Holt and not for accused.

Mr. John J. Barry, attorney, appeared before the Board of Review on 24 July 1947, and presented oral argument on behalf of accused. Consideration has been given to the points raised by Mr. Barry.

7. War Department records show that accused is 31 years of age and married. He graduated from Venard Preparatory School, Clarks Summit, Pennsylvania, in 1934 and attended Venard College for three years. He was employed in clerical positions with Republic Aviation Corporation and E. I. Du Pont de Nemours and Co. until he enlisted in the Army in February 1942. He attended Officers Candidate School and was commissioned a Second Lieutenant, C. E., 31 March 1943. He was promoted to First Lieutenant, 31 January 1944, and to Captain, 13 February 1945. While there is no record of previous convictions by court-martial it appears that accused has on two previous occasions received punishment under the 104th Article of War, once for failing to make proper

deductions on his pay vouchers for three partial payments and once for absence without leave for seven days. His efficiency reports disclose numerical ratings of "4.0 and 5.2" with the notation that he is lax in the management of his personal affairs.

8. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61, 93 and 96.

W. H. Johnson Jr, Judge Advocate

R. McDonald Gray, Judge Advocate

C. E. Johnson, Judge Advocate

JAGQ - CM 322979 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 herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Thomas F. Leonard (O-1112278), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of two offenses of absence without leave from 27 May to 15 June 1946 and from 2 December to 4 December 1946, respectively, in violation of Article of War 61; of the larceny of $490.00 in United States currency in violation of Article of War 93; of a bigamous marriage, two breaches of restriction, forgery, uttering a forged instrument, dishonorable neglect to pay a debt to an enlisted man, making and uttering, with intent to defraud, six checks, aggregating $1030.00 on banks in which he had no account, and of making a false official statement, all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 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. 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 accused absented himself without leave from his station at Mitchel Field, New York, from 27 May to 15 June 1946 and from 2 December to 4 December 1946 respectively. The former absence was terminated by surrender and the latter by apprehension.

On Saturday, 30 November 1946, accused, with the consent of Lieutenant Marcel who lived in the same barracks, was in the latter's room listening to the radio. Marcel departed for the weekend and accused on the following day searched a "zipper bag" which he found in the room and discovered $490.00 in United States currency inclosed in an envelope. He took the money and went to New York where he was apprehended in a bar on 4 December 1946 by the military police. He admitted the theft, returned $125.00 of the money on 6 December and the balance sometime later.

Accused met one Violet Chapman in Cleveland, Ohio in April 1946 and married her on 20 April 1946. At the time of this ceremony accused was legally married to Lois Pauline Leonard who is living. Their marriage had never been annulled or disolved by decree of divorce.

Accused was duly restricted to the limits of Mitchel Field, New York, by his Commanding Officer on 13 September 1946. While the restriction was still in effect he went to New York City without permission on 23 November and 1 December 1946 respectively.

On 1 November 1946 accused requested a loan of $15.00 from the American Red Cross and was given a form to complete which required the signature of his Commanding Officer. He forged the name of "J. E. Warren, 1st Lt. A.C." thereon, returned the document to the Red Cross and received the loan.

Accused borrowed $10.00 from an enlisted man in November 1946 and agreed to repay the loan in two days. On 16 December 1946 the enlisted man complained to the Inspector General that the loan was still unpaid. Accused did not repay the money until 15 or 20 February after the charges in this case had been filed.

On 30 March 1945 accused drew a check for $900.00 on the National City Bank and Trust Company, payable to Mrs. George M. Cross and gave it to Evelyn Mae Cross who delivered it to the payee. The check was returned from the bank as accused had no account in the National City Bank or any of its 66 branches.

During the period from 8 May to 13 June 1946, accused cashed five checks, aggregating $130.00 in amounts varying from $10.00 to $50.00 for which he received cash. Accused had no account in any of the banks on which these checks were drawn. Reimbursement has been made on all of these checks except the one given to Mrs. Cross in the amount of $900.00.

Accused was called to the office of the Base Legal officer on 4 November 1946 and was asked about the repayment of a loan he had received from Major Holt. Accused falsely stated that he had previously mailed a money order in repayment of the loan, which statement he knew was false.

Two witnesses testified for the defense to the effect that accused had been an "average person" until his return from overseas, at which time they noticed that he had "definitely changed." He was "jumpy and wanted to keep on going", drank excessively and was nervous. The Commanding Officer of his unit while he was overseas testified that after an air accident "he was odd certainly. A change had taken place in him."

The issue of accused's mental capacity was raised at the trial and he was transferred to Tilton General Hospital for observation and neuro-psychiatric examination pursuant to AR 600-500. Each member of the board, two other Army psychiatrists and one civilian psychiatrist testified that from their examination of accused, they believed that he was sane, could distinguish right from wrong, adhere to the right and cooperate intelligently in his defense. One civilian psychiatrist testified for the defense that accused was sane but his ability to adhere to the right would be impaired if he was in the throes of a malaria attack or under the influence of intoxicants.

The regularly appointed defense counsel and three members of the court recommended clemency for accused in the reduction of the period of confinement imposed.

5. War Department records show that accused is 31 years of age and married. He graduated from Venard Preparatory School, Clarks Summit, Pennsylvania in 1934 and attended Venard College for three years. He was employed in clerical positions with Republic Aviation Corporation and E. I. Du Pont de Nemours and Co. until he enlisted in the Army in February 1942. He attended Officers Candidate School and was commissioned a Second Lieutenant, CE, 31 March 1943. He was promoted to First Lieutenant, 31 January 1944 and to Captain, 13 February 1945. Accused has on two previous occasions received punishment under the 104th Article of War, once for failing to make proper deductions on his pay vouchers for three partial payments and once for absence without leave for seven days. His efficiency reports disclose numerical ratings of "4.0 and 5.2" with the notation that he is lax in the management of his personal affairs.

On 14 September 1946 accused submitted his resignation for the good of the service in lieu of trial by court-martial, but the resignation was not accepted by the Secretary of War and this trial ensued.

Mr. John J. Barry, attorney, appeared before the Board of Review on 24 July 1947, and presented oral argument on behalf of accused.

6. By a continued course of conduct, culminating in the present trial by general court-martial, accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 287, 25 Aug 1947).

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

JAGN-CM 316223

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 31 July 1946. Dishonorable discharge and confinement for five (5) years. Federal Reformatory.
Private First Class FLOYD S. EVANS (46030993), Attached Unassigned, 1612 Service Command Unit, Reception Center, Detachment B, Fort Sheridan, Illinois.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Floyd S. Evans, attached unassigned 1612 Service Command Unit, Reception Center, Detachment B, did, at Highwood, Illinois, on or about 23 June 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Richard Fiocchi, the amount of about sixty ($60.00) dollars in United States Currency, the property of Richard Fiocchi.

Accused pleaded not guilty to the Charge and Specification, was found guilty of the Charge and Specification, 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 five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe,

Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution.

Richard Fiocchi, a 71 year old man, testified in substance that at about 2200 hours, 23 June 1946, while crossing a gully enroute from the "Haven" tavern to his home he was set upon by two soldiers who struck him with an unknown object, threw him to the ground, and took his pocketbook and some sixty odd dollars in currency including at least one, possibly two twenty dollar bills, at least one ten dollar bill, and possibly some five dollar bills. He could not identify his assailants (R. 10-18).

At about 2045 hours 23 June 1946 accused was seen in company with Private Gregg at the "Frolic Club," a tavern about one block from the "Haven," at which time "one of them" stated they only had about $1.50. Accused then asked the tavern owner for the loan of $10.00 and, when refused, stated: "Well, that is ok. I just thought I would ask you. We are flat tonight" (R. 21-22). The pair then left the tavern at about 2130 hours. They returned about 2300 hours and began buying drinks for themselves and other people at the bar, and making calls on the pay telephone, spending a total of about $25.00 and showing, in the process at least two ten dollar bills and one twenty. When asked where they got the money "one of them said, 'we went to our First Sergeant and got it'" (R. 24). Accused at about 0115 left with a girl and sat on the steps of a house next door to the tavern (R. 23-25) until he was arrested by a police officer at about 0145 and taken to jail (R. 28, 47). When arrested accused possessed in currency one twenty dollar bill, one ten dollar bill, one five dollar bill, and three one dollar bills (R. 51) which he stated represented "some back pay from the Army, and also that his mother sent him some money" (R. 48).

At about 1000 24 June at the courtroom of the Highwood City Hall, accused was questioned by the Chief of Police, in the presence of two other police officers, Captain Eugene Knifong, Provost Marshal, Fort Sheridan, Illinois, and Sergeant Swanson of the same office (R. 54, 56). All questioning was done by the Chief of Police who prefixed his inquisition:

> "I told him that if he told me the truth I would think he would get a better break out of it. * * * it would be much easier for him if he told the truth" (R. 67, 75).

Accused was not advised of his rights by anyone (R. 79). Accused then orally confessed to the robbery (R. 54-55, 75-76), and was returned to a jail cell. The Chief of Police reduced the confession to writing and accused signed the same in the jail in the presence of the Chief

and a civilian stenographer (R. 57-58). The afternoon of the same day after the confession was signed and prior to 1500, the Chief of Police and Mr. Fiocchi (victim of the robbery) confronted accused at the jail door. The Chief asked accused "if he slugged Mr. Fiocchi," and accused said to Mr. Fiocchi "No, I didn't, old timer, I did take your money but I did not slug you" (R. 64). The written confession (Pros. Ex. 1) was admitted over objections by the defense counsel (R. 72).

4. Evidence for the defense.

The accused, after having been advised as to his testimonial rights, elected to be sworn as a witness, and testified in substance as follows:

> "I got in from Chicago at 9:00 o'clock and went over at the Frolic Club at 9:00 o'clock, after I got off the train. I sat there and had a few drinks and then went over to my barracks to get cleaned up. And I was there until almost 11:00 o'clock. I went in and had a few drinks and made a telephone call and went over to my barracks. Had a few drinks— I mean, got cleaned up and went back at 11:00 o'clock and stayed there until 2:00 o'clock when they closed. And when he closed up I went outside. They picked me up out there" (R. 83-84).

He had "a little over $50.00" when he first went to the Frolic Club, $50.00 of which he received 22 June by letter from Marvin Schoonover to whom he had previously loaned money. He did not disclose this source of money to the police because Schoonover "was AWOL" (R. 85-86). He asked the proprietor of the Frolic Club for a $10.00 loan because "I seen him loan quite a few other guys money and I just wanted to see if he would loan me money after being in there all the time" (R. 98). He did not rob Richard Fiocchi (R. 108). He made the oral confession and signed the written one only because:

> "He (the Chief of Police) said, 'If you confess you will be turned loose and you will walk out of this jail-house free'" (R. 95);

and:

> "Just to keep my mother from thinking that I was in any kind of trouble at all" (R. 95).

The defense introduced no evidence other than the testimony of accused.

5. A robbery is clearly proven by the uncontradicted testimony

of the victim. The question then arises as to whether or not the conviction of accused as its perpetrator may be legally sustained.

The court erred in admitting in evidence and considering the oral and written confessions of accused since the evidence clearly discloses they were induced by a promise of material benefit to accused. MCM, 1928, par. 114, page 116 (CM 230388, Wilson, 17 BR 365, 366, and cases therein cited). The taint of such inducement is equally present regarding the accused's admission to Mr. Fiocchi "No, I didn't, old timer, I did take your money but I did not slug you" (R. 64), and such statement was equally inadmissible for the same reason (Wharton's Criminal Evidence, Vol. 2, Sec. 601).

Excluding these confessions from the record there remains some evidence to link accused with the crime such as the financial status of accused shortly before and after the crime was committed, his proximity to the scene of the crime at or about the time of its commission, his dress, within the exceedingly broad terms with which the victim described his assailants, and the general aspects of his own testimony, although such testimony remains uncontradicted.

It is well settled that "error of receiving in evidence an extra judicial confession not voluntarily made is not fatal if the evidence of the accused's guilt, outside of the confession, is compelling; but where it may not be said with reasonable certainty that conviction would have resulted had such confession been excluded, the error must be held to have injuriously affected the substantial rights of accused" (Dig. Ops. JAG, 1912-40, page. 206, and cases cited).

> "In reviewing records of trial, the Board of Review in the ordinary case is limited to ascertaining whether the record contains substantial evidence as to the existence of each element of the offense charged, and in determining the substantiality of the evidence we do not judge of the credibility of witnesses or evaluate the weight to be accorded their testimony. * * * If, however, the court erroneously admits or excludes evidence of a vital character, or commits other vital error, not sufficient to require the proceedings to be set aside, then we require its findings of guilty to be supported by compelling evidence. * * * We conclude * * * that in the absence of compelling evidence of guilt, accused's substantial rights were prejudiced * * *." (CM ETO 16516, Shaffer, et al).

It appears obvious that, once all confessions are removed from consideration, the remaining evidence cannot be said to be of the

compelling nature which would dispell the prejudicial effect of their erroneous admission. Such being the case it cannot be said that the accused had the fair and impartial trial to which he was entitled or that the record will support the findings and sentence by the court.

6. For the reasons stated the Board holds that the record of trial is legally insufficient to support the findings and the sentence.

Thomas J. White, Judge Advocate.

Robert E. McMullen, Judge Advocate.

[illegible], Judge Advocate.

JAGN-CM 316223 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Headquarters Fifth Army, Chicago 6, Illinois.

1. In the foregoing case of Private First Class Floyd S. Evans (46030993), Attached Unassigned, 1612 Service Command Unit, Reception Center, Detachment B, Fort Sheridan, Illinois, I concur in the holding of the Board of Review and for the reasons therein stated 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:

(CM 316223).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

OCT 23 1947

JAGQ - CM 318507

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Camp Kilmer, New Jersey, 10-11 September 1947. Dismissal and confinement for two years. United States Disciplinary Barracks.
	)	
First Lieutenant DONALD E. HAYES (0-1003750), Air Corps.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, 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 1: In that First Lieutenant Donald E. Hayes, AC, Shipment Number AY-2119-ER-B(a), did, without proper leave, absent himself from his station at Camp Kilmer, New Jersey, from about 9 April 1946 to about 18 April 1946.

Specification 2: (Nolle Prosequi).

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

Specification: In that First Lieutenant Donald E. Hayes, AC, 9223 TSU-TC Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 26 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Boston, Massachusetts, on or about 17 August 1946.

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

Specification 1: In that First Lieutenant Donald E. Hayes, AC, 9223 TSU-TC Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Westover Field, Massachusetts, on or about 13 August 1946 present for approval and payment a claim against the United States by presenting to R. Martinez, Captain, AC, Westover Field, Massachusetts, an officer of the United States, duly authorized to pay such claims, in the amount of four hundred and twenty-six dollars and seventy cents ($426.70) in payment for pay and allowances claimed by First Lieutenant Donald E. Hayes, to be due him for the period 1 July 1946 to 31 July 1946, which claim was false and fraudulent in that said First Lieutenant Donald E. Hayes was not entitled to such pay and allowances for such period and the claim presented on 13 August 1946 was then known by the said First Lieutenant Donald E. Hayes to be false and fraudulent.

Specification 2: In that First Lieutenant Donald E. Hayes, AC, 9223 Technical Service Unit-Transportation Corps Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Cleveland, Ohio, on or about 12 July 1946, present for approval and payment a claim against the United States by presenting to G. F. Brewton, Commander SC, USNR, Field Branch, Bureau of S & A, Cleveland, Ohio, an officer of the United States, duly authorized to pay such claims, in the amount of five hundred ninety-seven dollars ($597.00) in payment for pay and allowances claimed by First Lieutenant Donald E. Hayes, to be due him for the period of 1 May 1946 to 30 June 1946, which claim was false and that the said First Lieutenant Donald E. Hayes, was not entitled to such pay and allowances for such period and the claim presented on 12 July 1946 was then known by the said First Lieutenant Donald E. Hayes to be false and fraudulent.

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

Specification: In that First Lieutenant Donald E. Hayes, Air Corps, 9232 Technical Service Unit-Transportation Corps, Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Washington, District of Columbia, on or about 1 July 1946, present for approval and payment a claim against the United States

by presenting to Carl Witcher, Colonel, Finance Department, at Washington, District of Columbia, an officer of the United States, duly authorized to pay such claims, in the amount of five hundred and seventy seven dollars and forty cents ($577.40) in payment for allowances claimed by First Lieutenant Donald E. Hayes, to be due him for the period 1 December 1945 to 31 May 1946, which claim was false, in that the said First Lieutenant Donald E. Hayes was not entitled to such allowances for such period and the claim presented on 1 July 1946 was then known by the said First Lieutenant Donald E. Hayes to be false and fraudulent.

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

Specification: In that First Lieutenant Donald E. Hayes, AC, attached unassigned 9232 Technical Service Unit-Transportation Corps, Embarkee Transient Detachment 1-A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 15 October 1946, desert the service of the United States and did remain absent in desertion until he surrendered himself at Camp Kilmer, New Jersey, on or about 20 March 1947.

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

Specification: In that First Lieutenant Donald E. Hayes, AC, attached unassigned 9232 Technical Service Unit-Transportation Corps, Embarkee Transient Detachment 1-A, New York Port of Embarkation, Camp Kilmer, New Jersey, having been duly placed in confinement, Prison Ward, Station Hospital, Camp Kilmer, New Jersey on or about 18 August 1946, did, at Camp Kilmer, New Jersey, on or about 15 October 1946, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings of guilty of the Additional Charge I and the Specification thereof as involves a finding of guilty of absence without leave from 15 October 1946 to 20 March 1947, in violation of Article of War 61, approved

the sentence but reduced the period of confinement to two years, designated Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 48.

3. This is a trial upon rehearing. At the original hearing, accused was not brought to trial on Additional Charges I and II and Specifications thereunder but was brought to trial on all other Charges and Specifications. Prior to arraignment accused absented himself and was tried in absentia. He was found guilty of all Specifications and Charges on which he was tried and 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 fifteen years. The reviewing authority approved the sentence but reduced the period of confinement to eight years and forwarded the record of trial for action under Article of War 48. The Board of Review held that the record of trial was not legally sufficient to support the findings and the sentence. The Judge Advocate General concurred in this opinion, and the reviewing authority then disapproved the sentence and ordered a rehearing.

4. Evidence for the Prosecution.

While stationed at Camp Kilmer, New Jersey, accused absented himself without leave from 9 April to 18 April 1946 (R. 13; Pros. Ex. 1).

Accused again absented himself without leave on 26 June 1946 (R. 14; Pros. Ex. 2). While so absent, on 1 July 1946 at Washington, D. C., he presented a voucher claiming subsistence and rental allowances for a dependent wife for the period from 1 December 1945 to 31 May 1946. This voucher gives his wife's name and address as Ruth H. Hayes, 1209 Adelia, El Monte, California, and contains a notation that accused had been paid during that period as a single officer and that he had not made a claim for dependent's subsistence and rental allowances because he thought his wife was going to get an annulment. Accused was given $577.00 cash in payment of this voucher (Pros. Exs. 20, 21, 22, and 24).

At Cleveland, Ohio, on 12 July 1946, accused presented a voucher for pay, flying pay and allowances for the period from 1 May to 30 June 1946. This voucher gives his wife's name and address as in the previous voucher and includes rental and subsistence allowances based thereon. Accused received a check for $597.00 in payment of this voucher (Pros. Exs. 15 and 18).

On 13 August 1946, accused presented at Westover Field, Springfield, Massachusetts, a voucher for pay, flying pay and allowances for the period from 1 July to 31 July 1946. This voucher was similar to the

one described in the previous paragraph and accused received $426.70 cash as payment thereof (Pros. Exs. 29, 8, 9, 10, 11, 12, and 13).

On 17 August 1946, accused was apprehended in civilian clothes at the Bellevue Hotel, Boston, Massachusetts (Pros. Ex. 3). He was returned to Camp Kilmer, New Jersey (Pros. Ex. 3) and confined in Ward B-32, Station Hospital, on 20 August 1946 (R. 49). About 0630, 14 October 1946, accused was missing from his room and could not be located throughout Ward B-32 (R. 52-53). Pillows had been placed under the bedcovers to give the appearance of someone lying prone on the bed. The grating on the window was unlocked and open (R. 52-55).

On 20 March 1947 accused surrendered at the Office of the Provost Marshal, Camp Kilmer, New Jersey (R. 58-59). He stated that he had absented himself "for the purpose of trying to make enough money to make restitution to the Government for the money he owed it" (R. 62).

It was stipulated (Pros. Ex. 26) that the Chief of Police at Elmonte, California, endeavored to locate Mrs. Ruth H. Hayes in and about the vicinity of Elmonte without success, and that there is no street or avenue bearing the name "Adelia" or such an address as "1209 Adelia" in said town.

When accused was returned to Camp Kilmer on 18 August 1946, he was interviewed by agents of the Criminal Investigation Division regarding his absence without leave. At that time, he made a sworn statement which was received in evidence without objection (R. 39-43). In addition to outlining his travels during his absence, accused disclosed in his statement that he had presented the three vouchers involved in current charges (the presentation of these vouchers was not known by the investigators at that time), that he had prepared and used false leave orders in connection with each of these vouchers, and that he bought a suit of civilian clothes at Washington, left his Army uniform at Chicago, and borrowed a uniform for use in presenting his voucher at Westover Field (Pros. Ex. 29).

5. Evidence for the Defense.

It was stipulated that Colonel Carl Witcher, Finance Department, would testify that on 19 March 1947, he received $1601.10 "on account of overpayments" in connection with the three vouchers heretofore referred to in this opinion (R. 76; Def. Ex. 2).

The Administrative Officer, Prison Branch, Camp Kilmer, testified that during accused's confinement, he volunteered for work, setting up the Honor and Rehabilitation Company, initiating case histories and correspondence. He always did whatever was asked of him and was courteous and cooperative (R. 79-80).

The accused elected to be sworn as a witness and testified as follows: He entered the service as an enlisted man on 8 July 1941, and was commissioned a Second Lieutenant in the Air Corps on 11 August 1943. When he was returned from Boston to Camp Kilmer, he made a full, voluntary statement because he realized he "had done something wrong and wanted to correct it". He went absent from the Station Hospital in order to make some money to return "what didn't belong to me" (R. 81-83). On cross-examination, he testified that he was not married and never had been; that he last participated in flying in military aircraft in October or November, 1945; that his return to military control on 20 March 1947 was the termination of an absence without leave initiated by his unauthorized departure from the Camp Kilmer Station Hospital (R. 84-85).

6. Mental Condition of Accused.

At the time of accused's surrender at Camp Kilmer on 20 March 1947, his sister wrote to The Judge Advocate General requesting that a Board of Medical Officers be appointed to examine into accused's mental condition. He was accordingly committed to the Tilton General Hospital where a Board found (12 May 1946) that he was mentally responsible but that "in view of this man's inadequacy and regressive type of personality disorder, manifested by his poor judgment and aggressive behavior in response to frustrating circumstances, he should be considered for retirement from the Army". The Board also found that accused would be unable to adhere to the right when inebriated and although he told these medical officers that he was drinking most of the time when he presented the vouchers involved herein, there is no evidence of inebriation in the record of trial.

7. The first unauthorized absence (from 9 to 18 April 46, Spec. 1, Charge I) was clearly established by the duly authenticated extract copy of the morning report of accused's organization.

The offense of desertion, terminated by apprehension (26 June to 17 Aug. 1946, Spec., Charge II) was established by the extract copy of morning report, stipulated testimony of the military police who apprehended accused in civilian clothes, and by accused's admissions in his written statement. The intent to desert may be inferred from the length of the absence, discarding of the uniform, and apprehension.

The escape from confinement from the Station Hospital, Camp Kilmer, and the ensuing five months' absence without leave were established by the testimony of the nurse who supervised the ward where accused was confined, by the testimony of the Provost Marshal regarding accused's surrender and by accused's own testimony in the courtroom. This escape and

the ensuing absence are, in effect, a single offense and should be punished as such and not as separate offenses (CM 313544, Carson, 5 Bull. JAG 202).

The remaining offenses involve presentation of three false and fraudulent claims against the Government (Specs. 1 and 2, Charge III, and Spec., Add. Charge).

Although these Specifications allege that the accused knew the claims were false and fraudulent, they do not specify in what regard the vouchers were false, except that accused "was not entitled to such pay and allowances" (Par. 150a, b, MCM). The cooperative attitude of the accused and the defense counsel as reflected in the numerous stipulations indicates that accused was not in fact misled by the defect nor were his substantial rights injuriously affected thereby. Accordingly, the defect is not fatal (Par. 87b, MCM) (CM 247496, Egalnick, 30 BR 370).

In presenting each of the three vouchers, accused tendered false leave orders to the paying offices as an explanation of his absence from his post of duty.

One of these vouchers (Spec. 1, Charge III) covers pay and allowances for the month of July 1946. Accused was absent without leave during this entire month and was still in that status when he presented this voucher. Army Regulations (par. 3a, AR 35-1420, 15 Dec. 1939, and par. 9a(1), AR 605-300, 14 Sept. 1944) provide that pay and allowances do not accrue during such unauthorized absences "unless excused or unavoidable" but even aside from such regulations, it is fundamental that a man is not entitled to compensation for the period while he is voluntarily absent without leave from his work and performs no services for his employer. A voucher claiming pay and allowances under such conditions is a false and fraudulent claim against the United States (CM 246591, Graham, 30 BR 95).

In the other two vouchers (Spec. 2, Charge III, and Spec., Add. Charge) accused claimed rental and subsistence allowances as a married man and in the second of these vouchers, he included a claim for flying pay.

While on the witness stand, accused admitted under cross-examination that he was not married and never had been, and that he had not participated in flying in military aircraft since October or November 1945. This evidence, if admissible, would clearly establish the falsity

of the two vouchers covered in Specification 2, Charge III, and the Specification of the Additional Charge. It must be noted, however, that although accused did not specifically limit or restrict his own testimony on direct examination, a reading thereof (R. 84-85) shows that he did not offer any testimony as to the fraudulent voucher charges. Paragraph 121b, Manual for Courts-Martial, page 127 provides:

> "When an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified."

In view of the above, the cross-examination in question was improper and the information thus elicited cannot be considered as evidence in connection with the falsity of these vouchers.

There is no other evidence in the record as to whether accused was entitled to draw flying pay. As to his marital status, prosecution introduced three vouchers which accused had previously presented at Camp Kilmer, in each of which he indicated that he did not have a wife. In the allegedly fraudulent vouchers, accused listed his wife as Mrs. Helen Ruth Hayes, 1209 Adelia, El Monte, California. The stipulated testimony of the Chief of Police at El Monte was to the effect that there was no such address in that town and that Mrs. Hayes was unknown to him.

Although these factors create a doubt as to accused's marital status, they are not sufficient in law to establish beyond a reasonable doubt that accused was not married or that his claims based thereon were false and fraudulent. The evidence is therefore insufficient to establish the falsity of the vouchers described in Specification 2, Charge III, and the Specification of the Additional Charge.

8. War Department records show that accused is 29 years of age and single. He completed four years of high school and was employed as a clerk in the General Accounting Office when inducted into the Army on 11 July 1941. He was promoted rapidly through the enlisted grades and was made Regimental Sergeant Major on 9 August 1942. Upon graduation from The Adjutant General's Officer Candidate School, he was commissioned a Second Lieutenant, 11 August 1943. On 27 March 1945, he was promoted to First Lieutenant. His efficiency ratings have all been excellent and superior. On 26 November 1945, he was recommended for a Soldier's Medal for heroism in connection with rescuing persons who were in a truck which had plunged into a swollen stream. This recommendation is now pending before the AAF Board on Military Awards.

On 17 June 1947 accused submitted his resignation for the good of the service in lieu of trial by court-martial. The Commanding Officer of Camp Kilmer and the Commanding General of the New York Port of Embarkation recommended that this resignation be accepted on the basis that he had made full restitution, that a Board of Medical Officers had recommended he be considered for retirement because of his mental condition, that he had been in confinement for 140 days, and that a trial would probably result in a dismissal without forfeitures and confinement. The Commanding General, Army Air Forces, recommended against its acceptance and the Secretary of War's Personnel Board directed that it be not accepted.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specification 2, Charge III, the Specification of the Additional Charge, and the Additional Charge, legally sufficient to support the findings of guilty of all other Specifications and Charges, and the sentence, and to warrant confirmation thereof. Dismissal is authorized for conviction of a violation of Articles of War 58, 61, 69, and 94.

W H Johnson Jr, Judge Advocate

C H Schenken, Judge Advocate

A. J. Kane, Judge Advocate

JAGQ - CM 318507 1st Ind NOV 4 1947

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

TO: The Secretary of the Army

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 Donald E. Hayes (O-1003750), Air Corps.

2. Upon trial (rehearing) by general court-martial, this officer was found guilty of two offenses of absence without leave (Spec. 1, Charge I; Spec., Add'l Charge I), in violation of Article of War 61; of desertion (Spec., Charge II), in violation of Article of War 58; of escape from confinement (Spec., Add'l Charge II), in violation of Article of War 69; and of presenting three false and fraudulent claims against the United States (Specs. 1 and 2, Charge III, and Spec., Add'l Charge), in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to two years, designated Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, 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. The Board is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specification 2, Charge III (false claim); Specification, Additional Charge; and Additional Charge (false claim); legally sufficient to support the findings of guilty as to all other Specifications and Charges, and the sentence, as modified by the reviewing authority, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that accused was absent without leave from Camp Kilmer, New Jersey, from 9 to 18 April 1946. He again absented himself without leave on 26 June 1946 and remained absent until apprehended at Boston, Massachusetts, in civilian clothes on 18 August 1946. During this absence, accused presented three false vouchers hereinafter mentioned and discarded his uniform. On the basis of these factors, the court found accused guilty of desertion in connection with

this absence. The three false vouchers amounted to $1601.10 covering claims for a dependent wife when he was in fact not married and also claiming pay and allowances for periods when he was absent without leave. There is insufficient evidence to establish the falsity of the first two vouchers but the third voucher, amounting to $426.70, was false and fraudulent in that it covered, in its entirety, a period during which accused was absent without leave. While in confinement awaiting trial for these several offenses, accused escaped (15 Oct. 1946). On 19 March 1947, he reimbursed the United States for the full amount of his false vouchers and surrendered at Camp Kilmer on the following day. He claimed that his escape and absence were for the purpose of securing enough money to make the aforementioned restitution. Restitution, of course, is not a defense to the charge but is a mitigating factor for consideration.

5. Department of the Army records show that accused is 29 years of age and single. He completed four years of high school and was employed as a clerk in the General Accounting Office when inducted into the Army on 11 July 1941. He was promoted through the enlisted grades and was made Regimental Sergeant Major on 9 August 1942. Upon graduation from The Adjutant General's Officer Candidate School, he was commissioned a Second Lieutenant, 11 August 1943. On 27 March 1945, he was promoted to First Lieutenant. His efficiency ratings have all been excellent and superior. On 26 November 1945, he was recommended for a Soldier's Medal for heroism in connection with rescuing persons who were in a truck which had plunged into a swollen stream. This recommendation is now pending before the AAF Board on Military Awards.

On 17 June 1947 accused submitted his resignation for the good of the service in lieu of trial by court-martial. The Commanding Officer of Camp Kilmer and the Commanding General of the New York Port of Embarkation recommended that this resignation be accepted on the basis that he had made full restitution, that a Board of Medical Officers had recommended he be considered for retirement because of his mental condition, that he had been in confinement for 140 days, and that a trial would probably result in a dismissal without forfeitures and confinement. The Commanding General, Army Air Forces, recommended against its acceptance and the Secretary of War's Personnel Board directed that it be not accepted.

6. Consideration has been given to a plea for clemency filed by accused's civilian defense counsel.

Subsequent to accused's surrender (20 March 1947), a Board of Medical Officers was convened at Tilton General Hospital to report upon accused's mental condition. The Board reported that accused was sane and responsible at the time of his offenses and at the time of trial, but recommended his "retirement" in view of his "inadequacy and regressive type of personality disorder, manifested by his poor judgment and aggressive behavior in response to frustrating circumstances."

7. I recommend that the sentence be confirmed but in view of accused's restitution, the eight months he has been in confinement on these charges, his previous Army record, his cooperative attitude, and the report of the Board of Medical Officers, recommend that the period of confinement be reduced to one year, that a United States Disciplinary Barracks be designated as the place of confinement, 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

3 Incls
1. Record of Trial
2. Form of Action
3. Brief

Dept of the Army, GCMO 64, 24 Nov 1947).

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

(403)

JAGK - CM 318548

6 FEB 1947

UNITED STATES v. Private First Class RAYMOND HERNANDEZ (39594481), Battery A, 753d AAA Gun Battalion, APO 503.	EIGHTH ARMY Trial by G.C.M., convened at Headquarters Eighth Army, APO 343, 23 and 24 August 1946. Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Raymond Hernandez did, in conjunction with Private First Class James L. DeSantis at Isogo, Honshu, Japan on or about 13 June 1946 forcibly and feloniously, against her will, have carnal knowledge of Yoshiko Takei.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction was introduced. All of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The prosecution offered proof tending to establish the rape of Yoshiko Takei, a Japanese national. Yoshiko Takei testified concerning the rape and identified the accused as her assailant. She also stated that at the time the offense was committed upon her, she was a maid employed at the Sakura Hotel and that the rape occurred at that establishment (R. 28,31).

In defending against this accusation the defense produced as a witness Private Bert J. Javor, who testified that he knew the accused and knew of the existence of the Sakura Hotel. The defense then proceeded to question the

witness concerning the reputation of the hotel and, the prosecution having objected thereto, the following occurred:

"Q. Had you had occasion to frequent that hotel yourself?
"A. Yes, sir, many times.

"Q. What was the purpose of this visit and ...

"PROS: I object to that question as being immaterial and irrelevant, unless the defense counsel can show that it has something to do with the incident that occurred on the 13th of June.

"DEF: It is the intention of the defense to show by the testimony of several score of witnesses that the Sakura Hotel was in fact a hotel frequented by American soldiers for sexual purposes.

"PROS: Paragraph 90 in the Chapter on Rape in American Jurisprudence discusses the 'Unchastity in Prosecution for Rape', the evidence that may be admitted in a case of rape. 'Evidence of the reputation of the house in which the prosecutrix lived is not admissible.' On those grounds I object to any evidence of the character of the Sakura Hotel.

"DEF: May the defense counsel ask for an opinion of the court on the house, notwithstanding the fact that the alleged victim was of questionable character herself.

"PROS: Will the court first rule on the objection of the prosecution.

"LM: The objection as to evidence indicating the nature of the premises is sustained.

"DEF: The defense wishes to repeat then his request for a statement of opinion by the court as to whether the character of the alleged victim can be demonstrated.

"PROS: I believe the defense should first be required to give the basis of the defense and in that connection I call the attention of the court to the same paragraph, paragraph 90 in the Chapter on Rape in American Jurisprudence.

"DEF: The purpose of the defense is merely to show that the victim was of poor morals.

"PROS: I object. If the purpose of the defense is to show that the accused had intercourse with the victim and that the victim, Mrs. Takei, did in fact consent, I will withdraw my objection.

"DEF: May it please the court, the defense is of the opinion that it has not been established that the accused did or did not have sexual intercourse with the alleged victim.

"PROS: Evidence pertaining to the morals of the alleged victim is applicable only if there is a question as to the denial of the victim since she has never stated that she has engaged in intercourse with other American soldiers.

"DEF: It is the opinion of the defense counsel in reading accounts of similar cases of rape in the United States, that if it can be proved

that the girl in question is engaged in the business of prostitution, that that in itself is a mitigating or extenuating circumstance in the crime of rape.

"PROS: That opinion is incorrect because in all parts of the United States the unchastity of the victim is no defense in the case of rape.

"DEF: If what the trial judge advocate says is true it appears that the defense counsel is enjoined from making any substantial defense to the charge.

"LM: It is the opinion of the court that any defense that the defense counsel may make must be in connection with the witnesses who are presented or who may be presented to testify as to the actions of the accused at the time and at the place where the alleged offense was committed. It is stated in Davis's Commentary that rape may be had against the person of a prostitute, and accordingly the morals of the woman in the case have no bearing on a question of whether or not rape was committed. It is stated in the Manual For Courts-Martial, on page 165, paragraph 148(b) on Rape, under Proof, that the accused had carnal knowledge of a certain female, as alleged, and that the act was done by force and without her consent. The question as to whether or not there has been sufficient evidence to support that case is to be determined by the court. Accordingly the court will sustain objection of the TJA to any evidence which may reflect on the character of the woman, Yoshiko Takei, or against the character of the premises in question, the Sakura Hotel." (R. 38-39) (Underscoring supplied.)

"DEF: May it please the court, the defense having learned of the limitations of the law, desires to excuse the present witness and have the law member explain to the accused their rights as to remaining silent, making an unsworn statement or a sworn statement by taking the stand, after which time, if the accused do not intend or wish to take the stand or make an unsworn statement, the defense will rest." (R. 40)

In prosecutions for common law rape, or for assault with intent to rape, evidence tending to show the unchaste character of the prosecuting witness is competent both to show the probability of consent to the act of sexual intercourse and by way of impeachment of her testimony (52 C.J. 1079; Chamberlayne Trial Evidence (Tompkins) 598,599; 44 American Jurisprudence, p. 958). Although evidence of the general reputation of the prosecutrix as a woman of unchaste character has been generally held to be admissible for this purpose, there

is a sharp division of authority as to whether such character may be proved by evidence of specific unchaste acts with accused or with others. The majority view seems to be that such evidence is not admissible or, if admissible, that such evidence should be restricted to prior unchaste acts with accused (L.R.A. 1916B,965). There is, however, respectable authority holding that evidence of specific unchaste acts of the prosecutrix with accused or others, occurring prior to the commission of the offense charged and within such a period of time as to be logically relevant to the issues at trial, is admissible both as tending to show the probability of consent and as tending to impeach her credibility. In a well considered opinion adopting the minority rule the Tennessee Supreme Court said:

> "After all, where opinions are in conflict, it is not so much the duty of a court to follow the greater number of decisions as it is to adopt the sounder reasoning. The opposite view has been sustained by some because it had the larger number of adherents. The best, and in fact the only valid, reason for this adherence is expressed by the Oregon court in the case of State v. Ogden, 39 Or. 195,65 Pac. 499, as follows: 'While a prosecutrix, as a witness in an action of rape alleged to have been committed upon her, is expected to defend her general reputation for chastity, she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify.'
>
> "We admit that this affords some reason for that view. But does it outweigh the other reason in favor of such proof, that a defendant charged with this capital crime should have the benefit of all facts which may show the probability of consent on the part of the woman?***
>
> "Acts of sexual intercourse may always be proven between the prosecutrix and the defendant upon a trial for common-law rape prior to the alleged offense, for the purpose of raising an implication of consent. This has been held quite generally. *** It is here where the authorities divide. The sharp conflict in the decisions is over the competency of acts of intercourse between the prosecutrix and other men than the accused. There is greater reason for its introduction where the proof is of acts between the direct parties, but all acts, conversations, and admissions of the woman tending to show that she is a prostitute, or of easy virtue, should be admitted for the twofold purpose of showing her character as affecting her testimony, and also to raise an implication of her consent." (Underscoring supplied.) (Lee v. State, 132 Tenn. 655, 179 S.W.145.)

This so-called minority view appears to have been followed in military law (CM 300091, King, 26 BR (ETO) 133,147; CM 295675, Anderson, 30 BR (ETO) 145,150) and we are thoroughly in accord therewith. Indeed, following what we conceive to be a logical trend, we are prepared to go further and admit such evidence even though it refers to a point of time after as well as prior

to the alleged offense. It is difficult to discover any sound reason for the rejection of the former and it might well be said that a woman shown to have engaged in prostitution or other lewd and lascivious ways of life after the alleged offense would have been as likely to have consented to the act of intercourse in question as a woman similarly tainted prior to such act.

Having in mind the maxim that an accusation of rape is "easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent" (MCM, 1928, sec. 148b), the Board of Review is of the opinion that the rule of law to be applied in the instant case may be stated in the following manner. In a prosecution for common law rape, or assault with intent to rape, any evidence, otherwise competent, tending to show the unchaste character of the prosecutrix is admissible on the issue of the probability of her having consented to the act charged and on the question of her credibility and for this purpose her lewd habits, ways of life or associations and her specific acts of illicit sexual intercourse or other lascivious acts with accused or others are all relevant. Such evidence is generally admissible though it refers to a point of time prior to or after the commission of the alleged offense, but the court, in the exercise of a sound discretion, may reject such evidence if it is so remote in point of time as to be clearly and logically irrelevant. Accordingly, it is obvious that accused should have been allowed to adduce evidence tending to support his contention that the prosecutrix, at or about the time of the alleged rape, was engaged in the business of prostitution and that the hotel in which she worked as a maid was in fact a house of ill fame. The ruling of the law member excluding such proffered testimony was, therefore, prejudicial to the substantial rights of accused.

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

Christy E. Silvers, Judge Advocate

Carlos E. McCafferty, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

(408)

FEB 27 1947

JAGK - CM 318548 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Eighth Army, APO 343, c/o Postmaster, New York, N. Y.

1. In the case of Private First Class Raymond Hernandez (39594481), Battery A, 753d AAA Gun Battalion, 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 318548).

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 319499

6 FEB 1947

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Leghorn, Italy, 13 November
Private HARRY C. SMITH	)	1946. Dishonorable discharge
(39074025), Headquarters	)	and confinement for five (5)
and Headquarters Company,	)	years. United States Peni-
10th Port of Embarkation	)	tentiary

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

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

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

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

Specification: In that Private Harry C. Smith, Headquarters and Headquarters Company, 10th Port of Embarkation, did, without proper leave, absent himself from his station at Leghorn, Italy, from about 25 August 1946 to about 14 September 1946.

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

Specification 1: In that Private Harry C. Smith, Headquarters and Headquarters Company, 10th Port of Embarkation, did, at or near Leghorn, Italy, on or about 6 September 1946, wrongfully knowingly and willfully misappropriate one motor vehicle of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In the Private Harry C. Smith, Headquarters and Headquarters Company, 10th Port of Embarkation, did, at or near Leghorn, Italy, on or about 25 August 1946, wrongfully knowingly and willfully misappropriate one motor vehicle of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Private Harry C. Smith, Headquarters Company, 10th Port of Embarkation, attached 6677th Disciplinary Training Company (Overhead), did without proper leave, absent himself from his station at the MTOUSA Disciplinary Training Center, near Pisa, Italy from about 1 October 1946, to about 7 October 1946.

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

Specification 1: In that Private Harry C. Smith, Headquarters Company, 10th Port of Embarkation, attached 6677th Disciplinary Training Company (Overhead), did, at Leghorn, Italy, on or about 7 October 1946, wrongfully appear in Leghorn, Italy without a field jacket, wool o.d. (Eisenhower).

Specification 2: In that Private Harry C. Smith, Headquarters Company, 10th Port of Embarkation, attached 6677th Disciplinary Training Company (Overhead), did, at Leghorn, Italy, on or about 7 October 1946, wrongfully appear in an Off Limits bar.

Specification 3: In that Private Harry C. Smith, Headquarters Company, 10th Port of Embarkation, attached 6677th Disciplinary Training Company (Overhead), did, at the MTOUSA Disciplinary Training Center near Pisa, Italy, on or about 1 October 1946, wrongfully leave the Post without a proper liberty pass, in violation of standing orders.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of two 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 five years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The only question presented by the record is whether confinement in a penitentiary is authorized for the offenses of which the accused was convicted.

4. Article of War 42 provides in relevant part:

> "* * * no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is 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 United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910," (18 USC 468) "or by the law of the District of Columbia * * *."

5. It is obvious, without further discussion that the offenses alleged under Charge I, Additional Charge I, and Additional Charge II, are military offenses for which penitentiary confinement is not authorized by Article of War 42.

6. There remains for consideration whether the findings of guilty of misappropriation in violation of Article of War 94, alleged in Charge II and the Specifications thereof, warrant confinement in a penitentiary.

In relevant part Article of War 94 provides:

> "Any person subject to military law * * *
> "Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; * * *
> "Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. * * *."

The above quoted portions of Article of War 94 is comparable to Criminal Code Section 36, United States Criminal Code (18 USC 87) which provides:

> "Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property furnished or to be used for the military or naval service, shall be punished as prescribed in section 82 of this title." (As amended Nov 22, 1943, c. 302, 57 Stat 591) (18 USC 82 provides for a fine of not more than $10,000 or imprisonment for not more than ten years or both where the property in question is of a value of more than $50).

It is to be noted that although misappropriation is denounced by Article of War 94 it is not one of the offenses denounced by 18 USC 87 or any other section of the United States Criminal Code. Although the evidence shows that the accused was guilty of misapplication, which is denounced by 18 USC 87, he was not so charged, and he can not be punished as though he were convicted of misapplication.

Misappropriation, as such, is not denounced by the law of the District of Columbia.

Accordingly, the Board of Review is of the opinion that penitentiary confinement is not authorized by Article of War 42 for any offense of which accused was found guilty in this case (CM 223054, Langanki, 13 BR 347).

7. 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 five years in a place other than a penitentiary, Federal correctional institution or reformatory.

[signature], Judge Advocate

[signature], Judge Advocate

[signature], Judge Advocate

MAR 3 1947

JAGH - 319499 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Headquarters, Peninsular Base Section, APO 782, c/o Postmaster, New York, New York

1. In the case of Private Harry C. Smith (39074025), Headquarters and Headquarters Company, 10th Port of Embarkation, 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 319499).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 320478

1 DEC 1947

UNITED STATES	SPOKANE AIR MATERIEL AREA
v.	Trial by G.C.M., convened at Spokane Army Air Field, 24-26 January 1947. Dismissal and confinement for two (2) years. Disciplinary Barracks.
Second Lieutenant RICHARD VANCE (0-557620), Air Corps	

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

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

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

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

Specification: In that Second Lieutenant Richard Vance, assigned Squadron "E", 4102d AAF Base Unit, did, without proper leave, absent himself from his proper station at Santa Ana Army Air Base, Santa Ana, California, from about 29 October 1945 to about 4 March 1946.

CHARGE II: Violation of the 95th Article of War. (Nolle Prosequi)

Specifications 1 - 10: (Nolle Prosequi).

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

Specification 1: In that Second Lieutenant Richard Vance, ***, did, at Camp Joseph T. Robinson, Arkansas, on or about 23 October 1945, present for payment a claim against the United States, by presenting to B. J. Tullington, Colonel, Finance Department, Finance Officer at Finance Office, Camp Joseph T. Robinson, Arkansas, an officer of the United States duly authorized to pay such claims, for pay while a commissioned officer of the Army of the United States, in the amount of Two Hundred Dollars ($200.00) for partial pay, which claim was false and fraudulent in that Second Lieutenant Richard Vance had already been paid in full his pay due from the United States and was then known by the said Second Lieutenant Richard Vance to be false and fraudulent.

NOTE: Specifications 8, 10, 11, 12, 17, 19 and 20 vary materially from Specification 1 only as to date and place the alleged fraudulent voucher was presented, the finance officer to whom presented and the amounts claimed. All the foregoing vouchers being for partial pay in amounts varying from $135 to $600.

Specifications 2, 3, 4, 5, 6 and 16: (Nolle Prosequi).

Specification 7: In that Second Lieutenant Richard Vance, ***, did, at Fort Worth, Texas, on or about 29 October 1945, present for payment a claim against the United States by presenting to E. J. Kleckner, Colonel, Finance Department, Finance Officer at Finance Office, Fort Worth, Texas, an officer of the United States duly authorized to pay such claims, for pay and allowances while a commissioned officer in the Army of the United States, in the amount of Two Hundred Six Dollars and Fifty Cents ($206.50) for base and longevity pay from 1 September 1945 to 30 September 1945 and for subsistence and rental allowance from 1 September 1945 to 30 September 1945, less Class "N" National Service Life Insurance deduction for the month of September 1945 and less partial payment for September 1945, which claim was false and fraudulent in that Second Lieutenant Richard Vance had already been paid his pay in full by the United States for said period, and was then known by the said Second Lieutenant Richard Vance to be false and fraudulent.

NOTE: Specifications 9, 13, 14, 15, 18, 21, 22, 23, 24, 25, 26, 27 and 28 vary materially from Specification 7 only as to date and place of the offense, the finance officer to whom presented, the amounts claimed and the period for which pay and allowances was claimed. All the foregoing vouchers being for pay and allowances for specific periods from 1 September 1945 to 31 January 1946. Amounts vary from $206.50 to $545.80. Total amount claimed - $8,654.30.

He pleaded not guilty to and was found guilty of all charges and specifications upon which he was arraigned. 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 five years. The reviewing authority approved the sentence, remitted three years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

a. Charge I and its Specification

There was received in evidence as Prosecution Exhibit 1 a paper which will be discussed further in this opinion. By stipulation agreed and entered into by the parties the following extract copy of Paragraph 119, Special Orders 243, ASF Ninth Service Command, Headquarters WD Personnel Center, Fort Lewis, Washington, dated 10 September 1945, was received in evidence as a true copy of the original:

"119. Fol Off (W male) having ret US and rptd this Hq in compliance with auth appearing below names reld from atchd unasgd this sta and atchd unasgd to Redistribution Sta indicated for processing and reasgmt. TDY enroute and tvl time indicated atzd. Off will rpt new sta on or before date indicated (all dates 1945). ***

NAME	ASN	GRADE	BR	DAYS TDY	DAYS TVL	MOS	RPTG DATE	ADDRESS

***

AAF REDISTRIBUTION STAT #4 SANTA ANA CALIF

VANCE, RICHARD	0557620	2ND LT	AC	304	4	1051	14 Oct	738 S Washington St Spokane Wash

(Par 30. SO 213 Hq AAF Regional & Conv Hosp Ft George Wright Wash 7 Sept 45)

BY COMMAND OF BRIGADIER GENERAL BEEBE:

FRANK W. SHUTKO
Capt CE
Asst Adj

OFFICIAL:
/s/ Frank W. Shutko
FRANK W. SHUTKO
Capt CE
Asst Adj" (Pros. Ex. 3, R. 33).

There was also received in evidence a certified extract copy of the morning report of Squadron H, 1040 AAF BU (RS #4) AC, showing the following entry relative to the accused:

"4 Nov 45

Vance, Richard 0557620 2nd Lt
Enroute to jn (TDY) to AWOL
0001 29 Oct 45" (R 33, Pros Ex 2).

The authenticating certificate on foregoing extract copy of the morning report is signed by Captain Arthur J. Strand, AC, who certified that he was the commanding officer of the reporting unit and the official custodian of its morning reports and that the entry shown is a true and complete copy of that part of the morning report of said command submitted at Santa Ana Army Air Base, Santa Ana, California, for the dates indicated in said copy which relates to Richard Vance, 0557620, 2nd Lt, Squadron H, 1040th AAF BU (RS #4), AC, SAAAB, Santa Ana, California.

The defense objected to the admission in evidence of the foregoing document on the ground that the entry did not show the signature of the officer who made the original entry (R 32).

The prosecution offered in evidence as its Exhibit 4 a certified extract copy of the morning report of the Detachment of Patients, 3501st AAF BU, Boca Raton, Florida, for the date 4 March 1946 as follows:

> "4 Mar 1946
> Attached from other organizations
> Officers
> Vance, Richard, O-557620 2nd Lt.
> Adm to Hospital from AWOL Santa Ana AAB,
> Redistribution Station #4 Calif."

The defense objected to that part of the entry "Where it says 'Vance, Richard, O-557620, 2nd Lt. Adm to Hosp,' just that far," on the ground that such matter was hearsay (R 35). The law member ruled that the entry of 4 March would be received in evidence for the purpose of showing that on the date recited, 4 March 1946, the accused was under military control at the station indicated (R 36).

b. Charge III and its Specifications

Captain Louis C. Mulvaney, FD, AUS, testified that on and prior to 1 September 1945 he had been Finance Officer at Fort George Wright (Washington) and that he was acquainted with the accused. The witness read certain provisions of Army regulations relative to the procedure required in the presentation and honor of officers pay and allowance accounts, WD Form 336, and stated that if payment was made in cash, the creditor was required to sign the certificate of receipt in person. The court took judicial notice of the provisions of Army Regulations 35-1040, 13 May 1942 and 35-1360, 14 February 1946. The court also took judicial notice of the monthly pay and allowances of commissioned officers of the Army as is provided in Army Pay Tables, TM 14-509 (1945), and particularly the table at pages 64 and 65 thereof showing the authorized pay of a second lieutenant (over 5 years' service) as follows: Base pay $175.00, rental (with dependents) $75.00, subsistence (with dependents) $42.00 (R 47-51).

Captain Mulvaney stated that as Finance Officer at Fort George Wright he had made partial payments to accused on two occasions, knew his signature and identified what he described as photostatic copies of the original vouchers duly signed by the accused and including his receipt for payment thereon. These original copies of the vouchers had been forwarded to the General Accounting Office subsequent to payment. The court received in evidence as Prosecution Exhibits 6 and 7 photostatic copies of the foregoing vouchers. The defense objected to this evidence as being immaterial to the issues. The payments thereon are shown to have been made on 7 September 1945 and 17 September 1945 and are in the amount of $60.00 each (R 52-67). On or about 1 September 1945 the accused stated to Captain Mulvaney that he had discovered from checking his bank statements that he had been paid twice for the month of November 1944 and he thereupon paid to the finance officer about $317.75, the alleged amount of such overpayment. The court admitted this evidence as being material to the question of accused's pay status as of 1 September 1945 (R 73-76).

Miss Helen Dennis, 2203 North Perry Street, Spokane, Washington, testified that she was a clerk in the Finance Office, Fort George Wright, Washington, and that she had prepared pay vouchers for the accused which he had signed in her presence. She knew his signature. The witness was shown two documents purporting to be original pay vouchers with the signature "Richard Vance, 2nd Lt. AC (AUS)". She identified the signature as being that of the accused. The court examined these documents and the prosecution moved that the original documents be withdrawn and the photostatic copies substituted for the record. The defense challenged the competency of the witness and objected to the admission of the exhibits. The objection was overruled and the photostatic copies were received in evidence as Prosecution Exhibits 8 and 9 (R 83-94).

First Lieutenant Paul U. Vick, AC, Adjutant, Fort George Wright, identified a document which he testified was signed and presented to him by the accused on or about 27 November 1946 and which was shown to be a WD AGO Form 137 (Officers' Clearance Certificate). Without objection the certificate was received in evidence, withdrawn and a photostatic copy thereof received in evidence as Prosecution Exhibit 10 (R 95-97).

Mrs. Jane Hodge Greenough, Spokane, Washington, testified that she was the manager of Greenough's store, 613 South Washington, Spokane. She knew the accused. On 14 July 1945 he had applied for credit at her store and signed the usual application for credit card in her presence. She identified and there was received in evidence the described card fully executed and signed "Richard Vance, 2nd Lt AC 0-557620" (R 99, Pros Ex 11). Over objection by the defense, Mrs. Greenough was permitted to testify that at the time he executed the card his "manner was friendly and straightforward. There was no hesitation in his filling out the card. He had, seemingly, had charge accounts before. That is, he knew

how to go about it, and there was no hesitation in his manner. I felt that he was a very responsible person, otherwise I would not have opened a charge account for him" (R 103).

Miss Mary Milla, a civilian clerk in the Adjutant General's Office, Spokane Army Air Field, identified the permanent mail record card of accused, executed and signed by him in her presence on 28 September 1946, which was retained in the records at headquarters. Without objection the document was withdrawn and a photostatic copy thereof received in evidence as Prosecution Exhibit 12 (R 111).

Mr. Frank H. Stivers, Police Department, Spokane, Washington, was sworn as a witness for the prosecution and stated that he had been a police detective for 21 years, his principal duties being that of identification of handwriting. The defense conceded that Mr. Stivers was a handwriting expert. The witness testified that he had made comparison of the signatures appearing on Prosecution Exhibit 10 (Officers' Clearance Certificate), Prosecution Exhibit 11 (Application for Credit Card, "Greenough's") and an Army identification card signed "Richard Vance" with the signatures appearing on certain exhibits offered for identification by the prosecution, as follows:

CHARGE III Spec. No.	Prosecution Exhibit No.
1	26
7	18
8	25
9	28
10	32
11	33
12	31
13	16
14	30
15	13
17	19
18	29
19	27
20	17
21	21
22	14
23	24
24	34
25	22
26	15
27	20
28	23

These exhibits appear to be WD Form 336-Revised, Pay and Allowance Account of Commissioned Officers commonly referred to as pay vouchers.

The witness explained in detail the manner of his comparison of the characteristics of the handwriting appearing on all the exhibits. He stated that in his opinion the person who signed the name "Richard Vance" on Prosecution Exhibits 10 and 11 was one and the same person who signed the same name to the exhibits listed above (R 126,135). The prosecution offered the described exhibits in evidence and asked permission to withdraw the same and substitute photostatic copies thereof with similar numbers for the record. The defense objected to the receipt in evidence of the foregoing documents asserting that they had not been properly identified. The law member overruled the objection and admitted in evidence the exhibits heretofore listed and numbered with permission to substitute photostatic copies thereof in the record (R 127-131). On cross-examination of the witness it was shown that only two of the samples of accused's signature used by the witness as exemplars had been produced in court. The prosecution then presented to the witness a photostatic copy of WD Form No. 35 "War Dept. Signature Card" bearing the signature "Richard Vance" and which Mr. Stivers identified as also having been used by him in his handwriting tests. The signature card was received in evidence as Prosecution Exhibit 35 (R 139).

Captain Abraham L. Whipple, Jr., AC, Headquarters AAF, Washington, D.C., a witness for the prosecution, testified that he appeared before the court in response to orders directing him to "bring some original pay vouchers from the General Accounting Office in Washington, D.C." The defense objected to the answer and the court disregarded the word "original." The witness identified Prosecution Exhibits 13 to 34 inclusive (papers withdrawn and photostatic copies substituted therefor) as the documents he had procured from the Reconciliation and Clearance Division, GAO, Washington, D.C. The witness had checked these documents against a list contained in a letter from the Assistant Comptroller General of the United States to the Commanding General, Army Air Forces, Washington, D.C., authorizing the use of the documents and requiring certain procedure to be followed in the handling thereof. He stated that the list contained in the letter set forth the exhibits before the court, which exhibits he was under orders to return to the General Accounting Office. The prosecution offered in evidence a copy of the described letter. The defense objected thereto and the court ruled that the same would be admitted as Prosecution Exhibit 36 to show the instructions received by the witness (R 146-150, Pros Ex 36).

On cross-examination the witness testified that no markings whatever had been made on the documents listed in Prosecution Exhibit 36 and which were before the court, since he received them from the General Accounting Office and that "they have been in my physical possession ever since I got them" (R 153). The prosecution rested, the defense moved for findings of not guilty to all charges and specifications. The motion was overruled after extended argument by counsel.

4. For the defense

Mr. Samuel E. Vance, Boise, Idaho, testified that his son, the accused, was in excellent physical condition in 1942 and before he went overseas. Since his return from overseas the accused was restless and irritable, possessed scars from being burned about the head and had a "soft spot" on his forehead (R 167-172). Mrs. Samuel E. Vance related in detail the marked change in the physical and mental condition of her son which she asserted had occurred from 1942 to 1944. He exhibited lapses in memory, his conversation was disconnected and difficult to understand and he complained of pains in his head. Mrs. Vance had written about three letters to his various commanding officers expressing apprehension relative to his mental condition. During August 1945 she had concluded that he was not sane (R 176-205). The defense offered in evidence a carbon copy of a letter dated 20 October 1945 and alleged to have been written by Mr. and Mrs. Vance to the Commanding Officer, 4th Redistribution Station, Santa Ana Army Air Base. Upon objection by the prosecution the proposed exhibit was rejected as evidence but it was marked and attached to the record as Defense Exhibit A (R 196).

Mrs. Richard Vance, 517 South 13th Street, Boise, Idaho, testified that she and the accused were married in July 1942. At that time she considered him to be the average American pilot, mentally alert, courteous and happy in his chosen work. He had departed for overseas in December 1942 and returned in January 1944. On the latter date he was nervous, restless at night and "seemed to be re-living the flight." He had been "severely injured physically and mentally." She had been with him continuously since January 1944. Since being treated at Torney General Hospital, Palm Springs, California, the accused had habitually consumed considerable amounts of liquor and "it was nothing for a quart to disappear in twenty four hours, or a fifth" (R 207-221).

On cross-examination Mrs. Vance stated that from the period September 1945 to March 1946 she and her husband travelled about the country sightseeing and living in hotels. They had purchased a car in New Hampshire. The witness could not remember the exact dates but during the latter part of the year 1945 she and her husband had been in Los Angeles, California; Las Vegas, Nevada; Stuttgart, Arkansas; Memphis Tennessee; Fort Worth, Texas; Kansas City, Missouri; Lincoln, Nebraska; Salina and Topeka, Kansas; Chicago, Illinois; Indianapolis, Indiana; Dayton, Ohio; Louisville, Kentucky; Augusta, Georgia; New York, New York; Boston, Massachusetts; and Laconia, New Hampshire. The witness did not know what source of income her husband had during all these times (R 238-249).

Mr. John H. Kendall, Spokane, Washington, was a member of the Army Air Corps in 1945 and had daily contact with the accused at Fort George Wright for the period of June to August of said year. He believed the accused to be ill and "completely irresponsible at these times" (R 259).

On cross-examination, the witness stated that on about ten occasions he had observed the accused to be excessively intoxicated. The witness considered the accused as being unable to distinguish between right and wrong. Mr. Kendall was not experienced in psychiatry or medicine (R 266-269).

It was stipulated that if Mr. Martin G. Harvath, Cleveland, Ohio, were present in court he would testify that he had been an officer in the Air Corps and had become acquainted with the accused in May 1944; that at that time he observed the accused to be suffering from pains in the head, that he was nervous and unstable and that for the reasons stated he had grounded accused while they were stationed at Palm Springs, California (R 272, Def Ex B). It was also stipulated that if Mr. Charles E. Roberts were present in court he would testify that in September 1944 he became acquainted with accused and worked with him in the 72nd Squadron Operations Office; that both he and the accused were transferred to Santa Ana Regional Air Corps Hospital in November 1944 and later to Dibble General Hospital, Menlo Park, California, and thence to Brooke General Hospital, Fort Sam Houston, Texas. The witness had daily contact with the accused and found him to be worrying about his physical condition and flying status, restless, irresponsible to his family and the Army, and he was absent without leave on several occasions due either to memory failure or lack of realization that he was doing wrong (R 274, Def Ex C).

Dr. Robert H. Southcombe, Paulson Medical and Dental Building, Spokane, Washington, a qualified physician and neuropsychiatrist, testified that he had obtained a physical and neurological clinical history of the accused and had made a personal examination and observation of him. This examination extended over "parts of two days; one afternoon" (R 279). The witness had formed the opinion that the accused suffered from "intra-cranial injury with secondary manifestations, personality changes, fracture and secondary ostiomelitis of the skull, an anxiety state and multiple injuries." Dr. Southcombe stated that in his opinion "the mental condition of Lt. Vance was such that at times he could not judge between right and wrong, and that he was not capable of adhering to the right." The witness rephrased his answer so as to say, "It was my opinion at that time that Lt. Vance was not capable of judging between right and wrong or adhering to the right." On further examination by counsel he asserted that "the last opinion is my opinion" (R 282).

Dr. Harry C. Leavitt, Seattle, Washington, a qualified physician with experience in nervous and mental diseases testified that he had served as a neuropsychiatric officer in the Army for two years and that during this period of service, and while he was stationed at Madigan General Hospital, he had examined the accused. After studying his clinical history, Dr. Leavitt observed accused practically every day for ten days. The result of his examination was incorporated in a certificate which was

offered in evidence as Defense Exhibit D (R 296). The proffered exhibit was rejected by the court but was summarized by Dr. Leavitt as follows:

> "A. (Witness refers to paper) All right. The certificate contained information relative to my impression, that is, that up to the time of his head injury, during which time he was rendered unconscious for five days and semi-conscious for two weeks, afterwards, that he had made a satisfactory adjustment in all respects socially, economically and academically, and that following this head injury, the use of alcohol -- No, I don't know what the amount was, so I didn't stipulate -- seemed to have brought about very pathological defects in judgment which I attributed to an increased sensitivity of the brain resulting from head injury, and my diagnosis was encephalopathy, moderate, chronic, and I recommended that he be considered as being unable to differentiate between right and wrong when under the influence of liquor, and I also mentioned that I could gather no evidence from the patient or from the clinical records, relative to the fact that he had been cautioned against drinking alcohol, which is a well-known poison to the brain, and especially contra-indicated in any type of severe head injury." (R 289-290)

The witness stated that, according to his memory, a surgical operation had been performed on accused's head for the removal of plasti-glass therefrom (R 291). On cross-examination Dr. Leavitt asserted that the pathological defects in judgment which he attributed to the accused were present only when he (the accused) was under the influence of alcohol (R 293).

It was stipulated that if First Lieutenant Russell A. Quay, MC, were present he would testify that the accused was under his care as a patient at Madigan General Hospital, Fort Lewis, Washington, from about 2 July 1946 to about 10 August 1946 and that the witness made daily observations of accused's condition. It was the opinion of Lieutenant Quay, based on a study of the clinical records in his case and accused's admissions of resorting to alcoholic drinking to obtain relief from constant headaches, that his actions during the five months' period ending 4 March 1946 "were the result of an encephalopathy arising as a consequence of the airplane accident in September 1943, and aggravated by subsequent stringent surgical treatment and alcoholic excesses, and that Lieutenant Vance was during that time mentally ill and not responsible for his actions" (R 311).

Dr. Robert H. Southcombe was recalled by the defense and testified to matters he had learned from the accused and relating to his prior civilian and military history. He stated that the accused was involved in an airplane accident in England in September 1943 resulting in his being burned about the face and body, fracture of several ribs, loss

of fourteen front teeth and paralysis of the right axillary nerve. Subsequently the accused had been treated in various hospitals in England and the United States. The witness had made an electro-encephalographic test of the patient. This test had caused the witness to conclude that "the left frontal lobe, particularly the pre-frontal area, which is the most anterior or the most forward part of the left side of the brain of Lieutenant Vance, has been damaged the extent of which I do not know but it is my firm opinion that there has been damage there" (R 326). On cross-examination the witness stated that he based his opinion in part on information given to him by the accused (R 339). The defense rested.

5. Rebuttal evidence

Lieutenant Colonel Donald B. Peterson, MC, Chief of the Neuropsychiatric Service, Madigan General Hospital, testified that he had examined the accused on several occasions subsequent to the accused's admission to Madigan General Hospital on 29 June 1946, that he had examined all clinical records pertaining to accused from various other hospitals. The defense objected to the witness making reference to any clinical records not a part of his own reports. The objection was overruled. The witness related accused's medical history, including his (accused's) own account of the airplane crash in England. The witness stated in detail and in medical terminology his findings concerning accused's physical and mental condition and concluded that in his opinion the accused, during the period from September 1945 to March 1946 knew right from wrong and was able to adhere to the right. He was also of the opinion that at the time of the trial the accused was so far free from mental defect, abnormality or derangement as to be able intelligently to cooperate in his defense (R 389). The defense cross-examined Colonel Peterson at length concerning possible personality changes due to head injuries and the excessive use of alcohol. The witness asserted that in the examinations he had made of the accused he was concerned chiefly in determining whether the patient's brain had suffered physiological damage so as to impair the brain functions. He could not state positively that the accused had not suffered anatomical brain injury in some degree but he had formed a positive opinion of the functional extent of any such possible injury. He asserted that any possible anatomical injury was of a mild degree (R 402-409).

First Lieutenant George Ulitt, MC, Fort George Wright, Washington, testified that he was a graduate of Stanford University and the University of Oregon Medical School. He had received a Master of Science degree for research in the field of anatomy of the nervous system and a Ph. D. degree in the fields of neuro-anatomy and neurology. The witness stated further that he was a member of the Eastern Association of Electro-encephalographers and was a contributor to various medical journals. The accused was under Lieutenant Ulitt's observation at Fort George Wright Hospital from 12 November to 26 November 1946. On 6 December 1946, the witness was a member

of a Board of Medical Officers which also examined accused. An electro-encephalograph had been taken of accused in the course of the examination. The witness identified in court the electro-encephalogram taken at Madigan General Hospital on 9 August 1946 and also some X-Ray pictures which were made under his supervision. The witness found no evidence of skull fracture (R 418). His study of the electro-encephalogram revealed no abnormal condition with regard to the accused's brain (R 421). The defense objected to the witness' testimony regarding the electro-encephalogram on the ground that it was not taken personally by Lieutenant Ulitt. The prosecution thereupon recalled Colonel Peterson who also identified the electro-encephalogram and asserted that it was made under his personal direction at Madigan General Hospital (R 423). The court overruled the objection and the electro-encephalogram was received in evidence as Prosecution Exhibit 37. It was withdrawn by consent for retention in the permanent records at the aforementioned hospital (R 425).

Continuing his testimony, Lieutenant Ulitt asserted that during the course of the examination of accused, the patient stated that he had been suffering from amnesia. The diagnosis showed no amnesia and the witness was of the opinion that the accused was able to distinguish between right and wrong and that he was able to adhere to the right (R 426-427).

The prosecution offered in evidence as its Exhibit No. 41 the deposition of Mr. Kirby L. Vidrine, Phoenix, Arizona, and read into the record certain numbered interrogatories and the answers thereto. The defense objected on the ground that the evidence tended to show an offense for which the accused was not on trial. After argument of counsel the law member ruled that the deposition would not be considered by the court as an exhibit but merely appended to the record of trial as having been offerred in evidence (R 438-450).

6. Discussion

Mental Responsibility

At the opening of the trial the defense interposed a "special plea" of insanity. The law member apparently refused to treat the plea as an interlocutory question and inquired if the accused was ready to proceed or desired further time to prepare his defense. The accused and his counsel stated that they were ready for trial, nearly a year having transpired since the charges were preferred, and that the defense would present its medical testimony. Pleas of "not guilty" were thereupon entered.

Although issues relating to insanity may be properly treated as an interlocutory matter (CM 275648, Creighton, 48 BR 117,127; AW 31; MCM 1928, par 51, 75a), they may also be treated as constituting part of the general issue. The defense was afforded ample opportunity to and did present detailed evidence bearing upon the mental capacity of the accused.

As was stated in CM 305621, Curtis, 8 BR 207,221, "the time and order in which such evidence was submitted to and received by the court is immaterial and none of the substantial rights of accused was prejudiced by the court's error in judgment in refusing to follow the usual and what, in the opinion of the Board of Review, would have been the better procedure." See also CM 252628, Earle, 34 BR 111,117, citing authority for the proposition that failure to ballot separately on the issue of insanity is not substantial error.

As set forth in the statement of evidence the court heard numerous witnesses and a vast amount of evidence both medical and otherwise concerning the mental responsibility of the accused. He had been examined at various times prior to the trial by competent authorities in several military hospitals and by civilian neuropsychiatrists. The accused had suffered injuries to his head and body in a plane crash in England and although he had apparently undergone a noticeable change of personality there is no substantial proof that he had suffered what the experts termed "residual brain damage." The X-Rays showed no skull fracture and the electro-encephalograph revealed no abnormal condition. Accused's parents, his wife and civilian friends did observe anti-social behavior on his part which led them to believe that he was mentally deranged. Dr. Robert H. Southcombe was of the opinion that the accused, at times, or at the time of his examination, was incapable of judging between right and wrong and of adhering to the right. Dr. Harry C. Leavitt expressed the same opinion. However, it appears from the testimony of Dr. Leavitt that he limited his opinion to such conditions as were brought about by the excessive use of alcohol. On the other hand, Lieutenant Colonel Peterson and First Lieutenant Ulitt, who had conducted extensive observation and examinations of the accused were of the opinion that the accused was at the time of the offenses alleged and at the time of the trial so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong and to be able to adhere to the right. Upon such state of facts, the question as to the accused's mental responsibility for his acts was primarily one for the determination of the court. There was substantial, competent evidence upon which the court could conclude beyond a reasonable doubt that accused was legally sane at the time of the commission of the acts alleged and at the time of his trial. The court resolved this question of fact contrary to the contentions of the defense. We have given careful consideration to the expert and other testimony in this regard and find no reasonable basis for disturbing the court's findings in regard to accused's mental responsibility implicit in its general findings of guilty (CM 250223, Stafford, 32 BR 283, 287; CM 260378, Corcoran, 6 BR (ETO) 125-127).

Charge I and its Specification

There was received in evidence as Prosecution Exhibit 1, over objection of the defense, what purports to be an attested copy of a certified true copy of the morning reports of Reception Station #13 "Cas off WDPC 1907 SCU" for 10 September and 14 September 1945 relating to the accused. The officer signing the document as "A true copy" of the purported certified extract copy did not testify in court and the paper shows on its face that the attesting officer was not the custodian of the original morning report. We are therefore of the opinion that the document was inadmissible in evidence (CM 312008, Armstrong, 61 BR 319,323; CM 302139, Stubinski, 14 BR (ETO) 257,263). Upon examination of this document it is found that the matters recited therein are but cumulative to other competent and compelling evidence hereinafter discussed and the error in receiving the paper was not prejudicial to accused's substantial rights (AW 37; CM 232160, McCloudy, 18 BR 389, 394; CM 258073, Allen, 5 BR (ETO) 233, 239).

Prosecution Exhibit No. 3, which was received in evidence by stipulation shows that on 10 September 1945 the accused was stationed at War Department Personnel Center, Fort Lewis, Washington, and that he was, on said date, relieved from attachment unassigned and transferred to AAF Redistribution Station No. 4, Santa Ana, California. The order granted the accused thirty days temporary duty en route and four days travel time to the new station and directed that he report thereat on 14 October 1945. Prosecution Exhibit No. 2, the certified extract copy of the Morning Report of Squadron H, 1040th AAF BU (RS No. 4) AC SAAAB, Santa Ana, California, the reporting station, shows the accused absent without leave at 0001 hours 29 October 1945. This extract is certified to by Captain Arthur J. Strand, AC, as the commanding officer and official custodian of the morning reports of the reporting unit and is competent evidence to establish the unauthorized absence alleged. Defense counsel's objection to the introduction of this extract copy, on the ground that the signature of the officer making the original entry thereon had been omitted, was properly overruled, it being presumed, in the absence of a showing to the contrary, that the original, of which the extract was but a copy of a part, was regular and signed in another and proper place by the officer competent to sign it, and that he was cognizant of the facts therein contained (CM 287982, Hatfield, 25 BR (ETO) 291,293). The status of absent without leave having been established by competent evidence, such status is presumed to continue until the contrary is shown (MCM, 1928, par 112a, p. 110).

The morning report entry of the Detachment of Patients 3501st AAF BU Boca Raton, Florida, dated 4 March 1946 showing the accused "Adm to Hosp from AWOL Santa Ana AAF, Redistribution Station #4 Calif" (Prosecution Exhibit 4) is competent evidence showing accused's return to military control on the date thereof. Although as a general rule, the original of a writing must be introduced to prove its contents, morning reports

are "public records" coming within the exception to the general rule and the admissibility of duly certified extract copies thereof is well established in military law. (See par 116a, MCM, 1928; CM 226521, Thomas; CM 231469, Marcellino, 18 BR 217; CM 320957, Boone.) We are therefore of the opinion that the documentary evidence, uncontradicted in the record, is sufficient to establish absence without leave for the period as alleged in Charge I and its specification. It may also be noted that the testimony of accused's wife shows that during the period of absence alleged the accused traveled about the country sightseeing and engaging in activities having no direct relation to military duties.

Charge III and its Specifications

The Finance Officer at Fort George Wright, who had paid the accused on duly executed pay vouchers, identified tha accused's signature appearing on two of such vouchers. Miss Dennis, the clerk in the Finance Office, the Post Adjutant, the manager of a department store, and the civilian mail clerk all identified the accused's signature appearing on certain writings which they testified that they had seen him sign. These documents, Prosecution Exhibits 6 to 12, inclusive, together with Prosecution Exhibit 35, were therefore admissible in evidence as tending to establish by direct evidence known samples of the accused's signature. Mr. Frank H. Stivers, a duly qualified handwriting expert, had compared three of the proven signatures of the accused with the signatures appearing on Prosecution Exhibits 13 to 34, inclusive, and expressed the positive opinion that one and the same person signed all the documents. Prosecution Exhibits 13 to 34, inclusive, were identified by Captain Whipple as being documents he had personally procured at the General Accounting Office, Washington, D.C. At the outset, it must be observed that Captain Whipple was not shown to have been the custodian of these documents. Not being the custodian he could not, therefore, identify the documents as in fact being public records preserved on file in the General Accounting Office and the exhibits do not appear to have been admitted under seal of that office. (See par. 116a, MCM, 1928; 28 USC 661.) These exhibits therefore were not properly admissible in evidence as being originals or copies of records on file in the General Accounting Office (CM 324725, Blakeley). Prosecution Exhibit No. 36 (letter from the Asst. Comptroller General) was not competent evidence to authenticate the documents as being records on file in the General Accounting Office. The letter was admitted only for the limited purpose of showing the instructions given Captain Whipple with regard to safeguarding the papers. Although it be considered that the letter was inadmissible for any purpose, in view of other competent and compelling evidence hereinafter discussed, no prejudicial error resulted by the limited admission of the letter.

Having determined that Prosecution Exhibits 13 to 34, inclusive, were not admissible in evidence as being public records on file in the General Accounting Office we now consider if they were admissible on other grounds

supported by adequate proof. Paragraph 116b, Manual for Courts-Martial, 1928, provides in part:

> "If a writing is an offocial document such as a pay voucher, or an admissible photostat copy, it should be produced in court. The signature to the voucher (or as shown by the photostat copy thereof) should be proved to be genuine if that is not admitted.
>
> "Where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the court to prove or disprove such genuineness; but before admitting such specimens of handwriting, satisfactory evidence should be offered as to the genuineness of same."

The court had before it proven specimens of accused's handwriting and the uncontradicted testimony of an expert in handwriting matters that in his opinion the person who signed the samples also signed the name appearing on Prosecution Exhibits 13 to 34 inclusive. In addition to its consideration of the expert testimony mentioned the court was authorized to make its own comparison of the proven signatures appearing on Exhibits 6 to 12 inclusive with the signatures appearing on Exhibits 13 to 34 inclusive and conclude as fact that the accused signed each and all of the documents (28 USC 638; In Re Goldberg, 91 Fed 2d 996; CM 248919, Christ, 31 BR 377,385). On Prosecution Exhibits 14,15,16,17, 18,19,20,22,23,24,25,26,27,28,29,31,32,33 and 34 the signature "Richard Vance" appears on both lines 16 (certificate "that the foregoing statement and account is true and correct") and 18 thereof (receipt for cash payment shown). The only reasonable inference to be drawn from the foregoing is that the accused, by his signature, consented to and acknowledged the fact of the matters to which he subscribed, viz, that the claim was correct and due and that he had received payment therefor and in the amount shown in cash. Such payment would necessitate the presentation of these claims. With respect to Exhibits 13, 21 and 30 although line 18 contains no signature acknowledging payment of the accounts therein stated in cash, in view of the testimony that no signature was required on line 18 of a pay voucher if payment was made by check, and the testimony that these papers came from the General Accounting Office in Washington, D.C., it can reasonably be inferred that the accused must have presented these papers to persons charged with handling pay accounts of military personnel, thereby placing them in authorized financial channels through which they found their way to the General Accounting Office (CM 260165, Thompson, 39 BR 151,158; CM 324725, Blakeley, supra). Having established the identity of the vouchers by handwriting of the accused appearing thereon and the circumstances fully warranting the inference that they must have been presented, we now consider the allegation that such claims or vouchers were false and fraudulent.

Prosecution Exhibit No. 26 (relating to Specification 1) being a voucher for partial payment of $200 and presented on 23 October 1945 contains the notation, "Last paid to include 30 September 45 by Ft Lewis Wash." Captain Mulvaney testified that during September 1945 he made two partial payments to the accused on his September 1945 account and that the accused had made a refund to him for a prior overpayment. We conclude that the foregoing was sufficient evidence to show that on 23 October the accused had been paid in full all pay and allowances due him from the United States prior to 1 October 1945. All the vouchers described in the pleadings and shown by the exhibits appear to have been presented subsequent to such date. The record shows that the accused was absent without leave during the periods wherein he presented these vouchers, with the single exception of the voucher presented on 26 October (Pros Ex 29). Although the court took judicial notice of pertinent regulations providing that an officer in the status of absence without leave is not entitled to pay for such period, none of the specifications alleged that the claims presented were false and fraudulent in that the accused was absent without leave and not entitled to pay. With regard to Specifications 1,8,10,11,12,17,19 and 20 it is averred that the claims for partial pay were fraudulent in that the accused "had already been paid in full his pay due from the United States" or words to that effect. Specifications 7,9,13,14,15,18,21,22,23,24,25,26,27 and 28 allege that the claims therein described were false and fraudulent in that the accused "had already been paid his pay in full by the US for said period" (the period shown in the specification and on the corresponding exhibit voucher). We are of the opinion that, in view of the form of the pleading, the record must show prior payment in order for the accused to be convicted of fraudulently presenting the described vouchers. To assume that any of the vouchers were false and fraudulent on the ground that the accused was absent without leave (although such status was proven) and not entitled to pay would be injecting an element not denounced in the pleading.

It has been shown that on 23 October 1945 the accused had been paid to and including 30 September 1945. His total monthly pay and allowances, without any deduction, is shown by Army pay tables to be $292.00. On 14 October he claimed and received $135.00 partial pay (Spec. 17, Pros. Ex. 19). On 23 October 1945 he claimed and received $200 partial pay (Spec. 1, Pros. Ex. 26). The total of these two amounts more than offset his total pay for the month of October but since the payments are not shown to have been for any specific period, it can be fairly presumed that they could only be intended to apply on his October 1945 account. For the purposes herein we so apply these payments. On 25 October 1945 the accused presented a voucher for partial pay under AR 35-1360, paragraph 7a(2) and received $225.00 in cash (Spec. 19, Pros. Ex. 27). Assuming as we have that former payments covered his October account, this voucher is obviously fraudulent.

On 26 October 1945 accused presented a voucher for and was paid $271.50 for the period 1 September to 30 September 1945 (Spec. 18, Pros. Ex. 29). Inasmuch as he had already been paid for such period this claim was therefore fraudulent. On 29 October 1945 he also presented to another finance officer a voucher claiming partial pay in the amount of $250.00 (Spec. 20,

Pros. Ex. 17). As heretofore shown he had no partial pay due at such time. On the same date he presented to another finance officer a voucher claiming payment for the period 1 September 1945 to 30 September 1945 in the sum of $206.50 (Spec. 7, Pros. Ex. 18). This claim was likewise fraudulent since he had already been paid for such period.

On 15 November 1945 the record shows that the accused presented to a finance officer a voucher for $394.40 covering the period 1 September 1945 to 31 October 1945 (Spec. 9, Pros. Ex. 28). He had obviously been paid in full for such period. On 26 November 1945 accused presented a voucher for partial pay in the sum of $225 (Spec. 8, Pros. Ex. 25). The record does not show that he had been previously paid for the month of November 1945 and irrespective of the fact that he was absent without leave and not entitled to pay, for the purposes heretofore stated we apply the foregoing payment to accused's November 1945 account. On 30 November 1945 accused presented a voucher for $200.00 partial pay (Spec. 10, Pros. Ex. 32). Inasmuch as the total of the last two amounts shown is far in excess of his monthly pay the latter voucher must be fraudulent. On 30 November 1945 accused presented to a finance officer a voucher for pay and allowances for the period 1 October 1945 to 30 November 1945 in the sum of $544.40 (Spec. 13, Pros. Ex. 16). On 4 December 1945 he presented another voucher for the period 1 October 1945 to 30 November 1945 in the sum of $544.40 (Spec. 15, Pros. Ex. 13). Both of the foregoing vouchers are fraudulent because he had been previously paid to and including 30 November 1945.

On 12 December 1945 the accused presented a voucher for partial pay in the sum of $500 (Spec. 12, Pros. Ex. 31), and on 17 December 1945 he presented a voucher for partial pay in the sum of $600.00 (Spec. 11, Pros. Ex. 33). Both of these "partial payments" are patently so far in excess of any possible pay due him at the time of presentation that they could not reasonably have been represented as his monthly pay for the month of December 1945 and are therefore fraudulent. On 26 December 1945 accused presented a voucher claiming $271.50 due him for the period 1 November to 30 November 1945 (Spec. 14, Pros. Ex. 30). He had been previously paid for the period for which this payment was claimed. On 31 December 1945 he presented to a finance officer at Dayton, Ohio, a voucher for $544.40 claiming payment for the period 1 November to 31 December 1946 (Spec. 21, Pros. Ex. 21). Although there is no proof that accused had been paid for the month of December 1945, not only is this voucher fraudulent in that it includes a month (Nov 1945) for which he had been paid, but it is also sufficient to establish payment of any sums due him for the month of December 1945. On four subsequent dates as hereinafter shown he presented to various finance officers similar vouchers for the same periods and claiming the same amount, viz, 31 December 1945 (Spec. 22, Pros. Ex. 14), 9 January 1946 (Spec. 24, Pros. Ex. 34), 24 January 1946 (Spec. 25, Pros. Ex. 22), 1 February 1946 (Spec. 26, Pros. Ex. 15).

On 31 January 1946 accused claimed pay on a voucher for the period 1 January to 31 January 1946 in the sum of $272.90 (Spec. 27, Pros. Ex. 20). He had not been previously paid for the month of January 1946 and we therefore treat this voucher as payment for that period. On 11 February 1946 he claimed pay on a voucher for the period 1 December 1945 to 31 January 1946 (Spec. 28, Pros. Ex. 23). On 19 February 1946 the accused presented a voucher for and was paid $545.80 for the period 1 December 1945 to 31 January 1946 (Spec. 23, Pros. Ex. 24). These latter vouchers are patently fraudulent as being duplicitious of periods for which he was previously paid. We do not say that, considering accused's status, he was justly entitled to any payments heretofore set forth, but in view of the reason they are alleged to have been fraudulent in the specifications we construe it appropriate to disapprove the findings of guilty of such specifications as allege payment for any monthly period for which accused is not shown to have already been paid. From the foregoing it will appear that these specifications are Nos. 1,8,17 and 27. In arriving at our view of the state of accused's pay account as shown above we have given him the benefit of every reasonable doubt as measured by the pleadings. The proof shows that the total amount of "pay" claimed and collected by the accused for the period 1 September 1945 to 31 January 1946 amounts to approximately $8650.00. For the five months period involved, $1460.00 is the maximum amount he possibly could have lawfully received in pay and allowances. (Flight pay is not involved.).

7. At the close of the trial the president of the court announced that certain members of the court had expressed their intention to submit recommendations for clemency.

Attached to the record is a letter to the convening authority signed by the defense counsel and four of the eleven members of the court captioned, "Subject: Plea for Clemency re: Lt. Richard Vance." Paragraph 1 thereof recommended that "consideration for clemency be given in the case of Lt. Richard Vance, who was sentenced to a dismissal and five (5) years confinement for being absent without leave and uttering several fraudulent pay vouchers." Paragraph 2 set forth prior service of the accused and the fact that he was injured in the crash of a C47 transport plane, for which injuries he had spent much time in Army hospitals; that his present physical condition was such that "Dr. Southcomb is firmly convinced that Lt. Vance is not mentally sound at the present date as born out by the encephalogram he took showing abnormal condition of the brain." For the reasons set forth it was stated that confinement would be detrimental to the accused and of no useful purpose to society and that the accused should be treated as a mental patient. Paragraph 3 recommended that, due to accused's prior excellent service and the physical disfigurement he had suffered, the dismissal be suspended. Paragraph 4 stated that in view of the reasons set forth, "including the present doubtful mental condition of Lt. Vance it is recommended that the sentence be reduced substantially by the reviewing authority so that with proper medical treatment Lieutenant Vance may have the opportunity to make a normal readjustment with society."

On 28 February 1947 the law member of the court addressed a letter to the reviewing authority recommending clemency wherein he stated that "while the sentence imposed by the court reflects the view of the court that the sentence is appropriate for the offense, there may be considerations that make it inappropriate for the particular offender. If such considerations do exist in this case they lie in the view that although the accused was not psychotic at the time of the offenses and was mentally capable of distinguishing between right and wrong and of adhering to the right, he nevertheless was and is, in the opinion of the undersigned, psychopathic to a degree that confinement not only will be of no value either to him or society, but may have a positive deleterious effect upon him." The law member recommended that so much of the sentence as related to confinement be remitted. It may be fairly presumed that the reviewing authority gave due consideration to the recommendations for clemency for in his action he remitted three years of the confinement adjudged. The foregoing letters are not a part of the proceedings of the court and therefore are not a part of the record of trial. In the state and Federal courts it is generally held that, in the absence of a statute, the court will not receive the affidavits or testimony of jurors for the purpose of impeaching their verdict with respect to any matter essentially inherent in their verdict (Hendrix v. U.S., 219 U.S. 79; Mattox v. U.S., 146, U. S. 140; 23 Corpus Juris Secundum, pages 1310-1314). Paragraph 81, page 68, Manual for Courts-Martial, 1928, provides in part as follows:

> "One or more recommendations to clemency, each signed by the members joining therein, may be submitted to the trial judge advocate for forwarding with the record. Such recommendation may include a recommendation for the suspension of all or part of the sentence, including a sentence of dishonorable discharge. It should be specific as to amount and character of clemency recommended and as to the reasons for the recommendation."

An interesting and illuminating discussion of recommendations for clemency is found in Winthrop's Military Law and Precedents, Sections 677-678, pp 443-444, and the footnotes thereto.

The letter of the law member states that the accused was not considered psychotic but was capable of distinguishing right from wrong and of adhering to the right. The letter of 27 January 1947, however, signed by four members of the court concludes that the sentence should be reduced substantially "for the above reasons including the present doubtful mental condition of Lt. Vance."

Under the rule heretofore set forth in the Manual for Courts-Martial, that a recommendation for clemency "should be specific as to the amount and character of clemency recommended and as to reasons for the recommendation" we feel impelled to determine whether the "reasons" assigned in this letter

amount to an impeachment of the court's findings and sentence, for at least one of the four members who subscribed thereto must have concurred in the findings of guilty and sentence. The answer to this question must turn on what was meant by the phrase "present doubtful mental condition", considered in the light of its context. In CM 318085, Chance, 67 BR 125-127, six members of a nine member court addressed a letter to the reviewing authority stating that they believed the accused "not sane as the term is commonly understood", that they had reached findings of guilty and sentence under the impression that they were bound by certain psychiatric testimony and that they also believed a finding of guilty and sentence was required in order that the accused might be admitted to a government mental hospital. The Board of Review held that the members who signed the petition so abused their judicial powers at the trial as to constitute fatal prejudice to the substantial rights of the accused, thereby voiding the findings and sentence.

In the present case the members signing the "Plea for clemency" did not say that the accused was or is insane, or that by false conception of the facts or law, or by any other erroneous assumption they had found him sane and sentenced him. "Doubtful mental condition" does not necessarily mean that the members, at the time of the trial or the signing of the petition entertained a reasonable doubt that the accused was legally sane. There appear to be many forms of mental defect which do not amount to insanity in law and which therefore do not constitute a complete defense to crime. So it might be said of many legally sane people, that they are of "doubtful mental condition". This would probably include all so called psychopaths who are generally held to be legally responsible for their acts (CM 319168, Poe; War Department Technical Bulletion (TB MED 201) 1 October 1945). The reviewing authority construed the letter in question as being what it purported to be, a plea for clemency and obviously took the view that the language therein was not to be construed as being in derogation of the findings and sentence. We have reached the same conclusion, for unless as was shown in the Chance case supra, the subsequent statements by the court are absolutely repugnant to and inconsistent with matters inherent in the courts findings and sentence, such statements should not be construed as impeaching the judicial proceedings.

8. Department of the Army records show that the accused is 27 years of age and married. He attended the University of Idaho for one year and was employed by the Agricultural Adjustment Administration prior to enlisting in the Army in July 1940. He was appointed flight officer on 31 December 1942 and second lieutenant, AUS, on 26 July 1944.

9. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its

specification, legally sufficient to support the findings of guilty of Charge III and Specifications 7,9,10,11,12,13,14,15,18,19,20,21,22,23, 24,25,26 and 28 thereunder but legally insufficient to support the findings of guilty of Specifications 1,8,17 and 27 thereunder, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of Article of War 61 or 94.

Charles A. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Lloyd, Judge Advocate

JAGK - CM 320478 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. DEC 15 1947

TO: The Secretary of the Army

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 Richard Vance (O-557620), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for the period 29 October 1945 to 4 March 1946, in violation of Article of War 61; and of presenting for payment 22 false and fraudulent claims (pay vouchers) to various finance officers, in violation of Article of War 94. No evidence of previous convictions was introduced. He was sentenced on 26 January 1947 to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence but remitted three years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty of Specifications 1,8,17 and 27 of Charge III (false claims) but is legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence.

By paragraph 119, Special Orders No. 243, Headquarters, ASF Ninth Service Command, Headquarters WD Personnel Center, Fort Lewis, Washington, dated 10 September 1945 the accused was released from attached unassigned to that Headquarters and was attached unassigned to AAF Redistribution Station No. 4, Santa Ana, California. Thirty days temporary duty and four days travel time were authorized. The accused never reported to his new station as directed and was absent without authority from 29 October 1945 until 4 March 1946 when he was returned to military control at the 3501st AAF BU, Boca Raton, Louisiana. ?

At various times during the period between October 1945 and February 1946 the accused presented to finance officers located in different parts of the United States, and received the proceeds of, twenty-two claims (vouchers) for pay in amounts varying from $135 to $600, collecting a

total amount thereon in excess of $8500.00. All the claims were false and fraudulent because accused was absent without leave during the periods for which these claims were presented and he was therefore not entitled to any pay. Some of the specifications alleged that the claims were false and fraudulent in that the accused had already been paid in full any sum due him by the United States. The majority of the specifications, being claims for pay for specific periods of time (during which he was AWOL) alleged that the claims were fraudulent in that he had already been paid for the period for which claim was made. The Board of Review is of the opinion that the findings of guilty of Specifications 1,8,17 and 27 should be disapproved, and that when these payments are considered as original payments other claims for the same periods were duplicitous and therefore false.

The record shows that during the time the accused was absent without leave he traveled about the United States with his wife presenting the false and fraudulent pay vouchers to finance officers at various places. He drank heavily and spent money freely. The accused did not testify at the trial. He was defended by both civilian and military counsel, who entered a plea of insanity prior to pleading not guilty to the general issue. Several civilian psychiatrists who testified for the defense expressed the opinion that in view of his past medical history, including physical injury to his head and the excessive use of alcohol the accused could not distinguish between right and wrong nor adhere to the right. These psychiatrists appear to have based their opinion generally on what the accused had told them of his medical and personal history, and on deductions drawn from certain clinical records. On 17 September 1943 the accused had suffered a head injury and burns in a plane crash in England. He was returned to the United States where, after receiving medical treatment he was restored to duty. Prior to the trial he had been examined by a Board of Medical Officers at Madigan General Hospital, Tacoma, Washington, and also by a Board of Medical Officers at AAF Regional Hospital, Fort George Wright, Washington. Neither Board found him to be insane. Two experienced medical officers who had conducted extensive examinations of the accused and found him to be sane testified at length concerning their findings. They produced and discussed X-Ray pictures made of accused's head and an electro-encephalogram taken of his brain. The medical testimony is such that the court was justified in concluding, as evidenced by its findings of guilty, that the accused was sane both at the time of his alleged offenses and at the time of trial. After the record of trial was forwarded to my office for action under Article of War 48 I requested the reviewing authority to transfer accused to a general hospital other than one in which he had been previously examined and that a Board of Medical Officers be appointed to further examine him. The record of trial was forwarded for use of the Board. Thereafter a board composed of three medical officers and two civilian psychiatric consultants (members of the faculty at the University of California Medical School)

convened at Letterman General Hospital, San Francisco, California, and after examining the accused made findings on 4 October 1947 as follows:

"The members of the Board, having maturely considered the material of the above interrogations, the medical records, and the records of the trial, as well as the results of the several interviews they have individually had with the patient, are now unanimously agreed that the diagnosis is:

1. Pathological personality, reaction severe, manifested by a period of impulsive and anti-social behavior or 'acting out' (excessive alcoholism, being AWOL, fraudulent overdrawal of accounts and fraudulent checks) and paranoid tendencies.

Precipitating stress, severe, due to physical and psychological traumas (plane crash in September 1943) facial disfigurement, repeated operations, prolonged hospitalization, automobile accident and financial loss, grounding.

Predisposition, moderate, due to borderline pre-Army adjustment, LOD: No. EPTS (Although by regulations and pertinent directive the condition is not to be considered in LOD, it is the unanimous opinion of the Board that there were definite aggravating factors.)

"They also are of the opinion that:

(1) The accused at the time of the alleged offenses was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

(2) The accused at the time of the alleged offenses was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right.

(3) The accused at the time of his trial was sufficiently sane intelligently to conduct or to cooperate in his defense."

Copies of the proceedings of the last mentioned Board, together with the proceeding of other Boards of Medical officers are attached to the record.

4. On 8 April 1947 Mr. Lyle Keith, Spokane, Washington, special defense counsel in the case, appeared before the Board of Review and made oral argument. Consideration has been given to a letter to The Adjutant General dated 14 January 1947 from Honorable Glen Taylor, U.S. Senate, and to a letter dated 13 November 1947 from Mr. T. O. Kraabel, National Rehabilitation Committee, American Legion.

On 23 May 1947 Honorable Henry C. Dworshak, United States Senate, and Honorable Abe McGregor Goff, Member of Congress, appeared before the

Board of Review and made oral arguments in behalf of accused.

5. Five members of the court hearing the case recommended clemency upon the ground of the mental maladjustment of accused.

6. I recommend that the findings of guilty of Specifications 1, 8, 17, and 27 of Charge III be disapproved and that the sentence be confirmed but in view of the reports of the boards of medical officers showing mental maladjustment following severe physical injuries (but finding accused mentally responsible), the recommendation for clemency by members of the court, and the extended period of confinement or other restraint already imposed, I recommend that the term of confinement be reduced to one year and that the sentence as thus modified 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

(GCMO 87, 17 Dec 1947).

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGH - CM 321606

UNITED STATES	)	TWELFTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	March Field, California, 8
Colonel FRANK J. COLEMAN	)	January 1947, 12-14 February
(0-17153), Air Corps	)	1947. Dismissal

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, 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: Violation of the 94th Article of War.

Specification 1: In that Colonel Frank J. Coleman, Air Corps, 321st Army Air Forces Base Unit, did, at Patterson Field, Fairfield, Ohio, on or about 30 June 1944, present for payment a claim against the United States, by presenting to Lieutenant Colonel C. S. Marsh, Finance Department, Finance Officer, United States Army, an officer of the United States Army duly authorized to pay such claims, a voucher in the amount of $625.00, being an additional 50 per centum of his pay, as additional compensation for performance of flying duties during the calendar months of April, May, and June, 1944, which claim was false and fraudulent and was then known by the said Colonel Frank J. Coleman to be false and fraudulent in that he, the said Colonel Frank J. Coleman, was during said time under then existent orders of competent authority indefinitely suspended from flying status and was not, by orders of competent authority, required to participate in regular and frequent aerial flights and in that he did not participate in regular and frequent aerial flights, while in a duty status sufficient to entitle him to receive additional pay for flying for the months of April and May, 1944.

Specification 2: Same allegations as in Specification 1 of the Charge except the date of the offense, 31 October 1944, the amount, $624.99, the months covered by the voucher, August, September, and October 1944 and the months in which he did not participate in regular and frequent aerial flights, August and September, 1944.

Specification 3: (Finding of Not Guilty).

Specification 4: (Finding of Not Guilty).

Specification 5: (Finding of Not Guilty).

Specification 6: (Finding of Not Guilty).

Specification 7: In that Colonel Frank J. Coleman, Air Corps, 321st Army Air Forces Base Unit, did, at APO 86, on or about 30 April 1945, present for payment a claim against the United States, by presenting to Captain E. F. Kukla, Air Corps, United States Army, an officer of the United States Army duly authorized to pay such claims, a voucher in the amount of $837.00, and included therein a claim in the amount of $225.00 for an additional 50 per centum of his pay as additional compensation for performance of flying duties during the calendar month of April 1945, which claim was false and fraudulent and was then known by the said Colonel Frank J. Coleman to be false and fraudulent in that he, the said Colonel Frank J. Coleman, was during said time under then existent orders of competent authority indefinitely suspended from flying status and was not, by orders of competent authority, required to participate regularly and frequently in aerial flights.

Specification 8: Same allegations as in Specification 7 of the Charge except the date of the offense, 31 May 1945, the amount of the claim, $483.33, and the months to which the claim pertained, March and May 1945.

Specification 9: In that Colonel Frank J. Coleman, Air Corps, 321st Army Air Forces Base Unit, for the purpose of obtaining the approval, allowance, and payment of a claim against the United States, by presenting to Lieutenant Colonel C. S. Marsh, Finance Officer at Patterson Field, Ohio, an officer of the United States Army duly authorized to approve, pay and allow such claims, did, at Patterson Field, Fairfield, Ohio, on or about 30 June 1944, make a certain certificate in writing to wit:

> "I certify that I hold a rating as that during the period for which aviation pay is claimed on this voucher I was, by orders of competent authority, required to participate regularly and frequently in aerial flights; and, in consequence of such orders I did participate in regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480).
> I certify that I was not paid flying pay for the period April 1-30, 1944, inc.,"

which said certificate, as he, the said Colonel Frank J. Coleman, then knew, was partially false in that he had been by competent orders removed from flying status and was not, by orders of competent authority required to participate regularly and frequently in aerial flights and in that he did not participate in regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order 9195, 7 July 1942 (Army Regulation 35-1480).

Specification 10: Same allegations as in Specification 9 of the Charge, except the date of the certificate, 31 October 1944, the aeronautical rating held, senior pilot and aircraft observer, and the period covered by the certificate 1 August 1944 to 31 October 1944.

Specification 11: (Finding of Not Guilty).

Specification 12: (Finding of Not Guilty).

Specification 12: (Finding of Not Guilty).

Specification 13: (Finding of Not Guilty).

Specification 14: (Finding of Not Guilty).

Specification 15: Same allegations as in Specification 9 of the Charge, except the date of the certificate, 30 April 1945, the aeronautical rating held, pilot, and the last period for which flying pay was received was not specified.

Specification 16: Same allegation as in Specification 9 of the Charge, except the date of the certificate, 31 May 1945, the aeronautical rating held, pilot. The last period for which flying pay was received was not stated, and that the certificate further stated that for the period 1 March 1945 to 31 May 1948, a minimum of 12 hours flying time was performed.

He was found guilty of Specification 1 of the Charge except the figures "$625.00", substituting therefor the figures "$416.66," except the words "and June," and except the words, "in that he, the said Colonel Frank J. Coleman, was during said time under then existent orders of competent authority indefinitely suspended from flying status and was not, by orders of competent authority, required to participate in regular and frequent aerial flights and." Of the excepted words and figures NOT GUILTY, of the substituted figures GUILTY. Guilty of Specification 2 of the Charge except (This finding is identical with the finding of Specification 1 of the Charge except the figure "$624.99" is substituted for the figure "$625.00" and the words "and October" for "and June."), guilty of Specifications 7 and 8, guilty of Specifications 9 and 10, excepting as to each of the latter two Specifications the words "in that he had been by competent orders removed from flying status and was not, by orders of competent authority required to participate regularly and frequently in aerial

flights and", of the excepted words "not guilty", guilty of Specifications 15 and 16, not guilty of the other Specifications, and guilty of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the findings of guilty is substantially as follows:

Accused engaged in no flying during the months of March, April, May, July, August, and September 1944 at the stations to which he was attached for flying. During June 1944 he accomplished in excess of 12 hours of flying and in October 1944, in excess of 19 hours. (R 49, Pros Ex 10). On 30 June 1944 accused signed and presented a pay voucher to the Finance Officer, Patterson Field, Ohio, claiming additional pay for flying in the amount of $625.00, for the period from 1 April to 30 June 1944, and in connection with the claim certified that during the period for which aviation pay was claimed he participated in "regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order No. 9195, 7 June 1942 (AR 35-1480)" (R 49, Pros Ex 11). On 30 October 1944 he signed and presented a voucher to the Finance Officer, ASCTC, Fresno, California, claiming additional pay for flying in the amount of $624.99 for the period from 1 August 1944 to 31 October 1944 and in connection therewith certified that for that period he participated "in regular and frequent flights, while in a duty status, sufficent to meet the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480)" (R 50, Pros Exs 12, 12a).

On 7 July 1944 accused was given a physical examination for flying at Patterson Field, Fairfield, Ohio, and a WD AGO Form 64, "Physical Examination for Flying", was completed. On the Form 64 the opinion was expressed that accused should be removed from flying status (R 41, Pros Exs 7 and 7a). The Form 64 together with other medical records pertaining to accused were transmitted to the Air Surgeon. The 2nd Indorsement thereto, Headquarters, Army Air Forces, 29 July 1944, states: "The Air Surgeon has recommended to the Assistant Chief of Air Staff, Personnel, this Headquarters, that subject officer be indefinitely suspended from flying duty" (R 41, 42, 90; Pros Exs 8, 8a, 8b, 8c, and 8d; R 56 89, 90; Pros Ex 29). On 1 August 1944 Personnel Orders No. 183, Headquarters, Army Air Forces, were published with the following entry pertaining to accused: "8. Pursuant to authority contained in paragraph 2, sub-paragraph 12, Army Regulations 35-1480, dated 10 October 1942, the following named officers having been found physically disqualified for all flying duty, their suspension from all flying duty is confirmed."

* * * * * *
"Colonel Frank J. Coleman (O-17153), Air Corps
* * * * * *" (R 47, 90; Pros Ex 9).

Normal distribution was made of these orders (R 56, 89, 90; Pros Ex 29).

During February 1945 the Commanding Officer, Tinker Field, Oklahoma, dispatched a radiogram to The Adjutant General as follows: "Request the following information be furnished this Headquarters for Frank Jerdone Coleman 017153 Colonel AC A Special order No Par No Date and Hgs of authority placing subject officer on active duty B Personnel Order No Par No date and Hqs of authority giving subject officer command pilots rating pd C If subject officer is this date on flying status Personnel Order No Par No date and Hqs of authority placing officer on flying status if officer is not this date on flying status the authority taking him off of flying status pd" (R. 51, Pros Exs 19a, 19b). In response thereto the Commanding Officer, Tinker Field, Oklahoma, received Letter, Headquarters, Army Air Forces, 28 February 1945, Subject: Personnel and Active Duty Orders, containing the following information pertaining to accused:

> "Not on flying status. Physically disqualified per Paragraph 8, Personnel Orders 183, this Headquarters, 1 August 1944 (Incl #1)." (R. 51, Pros Ex 19, 19 b).

During May 1946 accused was interviewed by a Board of Officers composed of Colonels Earle G. Harper and Lonnie L. Koontz with reference to accused's collection of flying pay (R. 56). During the interview he was "advised of his rights" and "was told that anything he might say could be held against him" (R. 57). In response to a query by Colonel Harper as to when he had first heard of a rumor that he was suspended from flying, accused stated that he had been hearing rumors but that the first time it came to his attention definitely was the day before he entrained at some field in Nebraska in March 1945 (R. 65), but that he did not consider seriously the intimation he had at that time (R. 68). Accused claimed that his first definite confirmation was contained in "a true copy" made out by his personnel adjutant, quoting Personnel Orders 183, dated 1 August 1944, which accused received in May 1945 (R. 65). Accused was also asked why he did not submit vouchers unsigned, and replied:

> "Anybody with service in the army is fully aware that the vouchers are going to be checked and that refunds will have to be made. The refund wasn't in my mind, it was to get it straightened out. I drew no flying time from June until November, when I was restored to flying status, at which time I performed sufficient flying time in order to draw flying time back to the date of the order. I thought the matter was all cleared up and then I tried to find a way to repay the government. I have a letter showing that I discussed the matter with the Finance Officer at my first command and also with the Finance Officer at this station and talked about how to repay it and both advised me to wait. I was further advised by the Finance Officer that since this correspondence was in circulation somewhere that it would undoubtedly follow me to this station and give me definite instructions as to the amount of money owed the government and the method of repayment. This I figured would close the matter entirely with no further discredit to myself or my record as an officer." (R. 67, 68)

Accused signed and presented a voucher 30 April 1945 claiming flying pay for April in the amount of $225.00, and another on 31 May 1945 claiming flying pay for the periods 1 to 31 March 1945 and 1 to 31 May 1945, in the amount of $438.33. In each of the latter two vouchers accused certified that he held an aeronautical rating as pilot, that during the periods for which flying pay was claimed he was, by orders of competent authority, required to participate in regular and frequent aerial flights, and that in consequence of such orders he did participate in regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order 9195, 7 July 1942 (AR 35-1480) (R 49, Pros Ex 11b; R 51, Pros Exs 17, 18).

Prior to arraignment accused became ill in court and Colonel Andrew W. Smith, MC, a member of the court made a superficial examination of accused and diagnosed the case as a possible epileptic seizure, or more probably as a hysterical seizure or an attack of syncope (R 4). The court ordered that a physical and psychiatric examination of accused be performed, and then adjourned (R 5). When the court convened pursuant to adjournment the prosecution introduced in evidence, without objection by the defense, a report of a physical and psychiatric examination performed on accused on 20 January 1947. By agreement certain portions of the report were stricken out. The report stated: "No neuropsychiatric illness evident. * * * It is believed that this officer can distinguish between right and wrong and was able to do so at the time his alleged offense was committed; he had the capacity to keep from doing wrong and at the present has the mental ability to understand the nature of the proceedings against him and to do what is necessary to present his defense" (R 25, Pros Ex 22).

4. Evidence for the defense.

Accused after being advised of his rights as a witness elected to testify under oath. He testified that he received a Form 64 examination on 7 and 16 July 1944, at Patterson Field, but had not subsequently been informed of the result (R 112, 113). Between 6 December 1944 and 15 March 1945 he was stationed at Fairmount Army Air Base, Geneva, Nebraska. At this station he was given a 64 examination with an additional psychiatric examination and was informed of the results. During the period he was stationed at Fairmount he requested Oklahoma City Personnel Section at Tinker Field, his control headquarters, to get a written copy of his status as a command pilot for inclusion in his Form 5 (R 114, 115). Subsequently he was informed by his personnel adjutant that Oklahoma City had some communication referring to an order affecting his flying status (R 117). At the time he was preparing to take an organization overseas and was unable to unpack to see the communication (R 117). He finally read the letter in the latter part of May 1945 while on Iwo Jima (R 118). Prosecution's Exhibit 19 was a document of similar content (R 118). There was not appended to the letter any document to which "Personnel Order 183-3 might refer" (R 118). Within a day or so after the discovery of the paper accused flew to Headquarters 20th Air Force to straighten out any doubt that might exist as to his physical qualifications (R 118). A "64 examination" was accomplished and a copy of it

together with the psychiatric examination was air mailed to the Air Surgeon, Headquarters Army Air Forces, Washington (R. 119). A copy of the "64" stamped "Physical disqualification confirmed" with "somebody's" initials on the face of the Form 64 was returned (R. 119). Colonel Twitchell, the Air Surgeon, Headquarters 20th Air Force, informed accused of this in the latter part of June 1945 (R. 119). Accused then requested the "Inspector General" to make an investigation and an investigation was "performed" (R. 119, 120). In October 1945 accused arrived in Washington and visited General Hall, Acting Chief of Personnel, for the purpose of clarifying his flying status (R. 121). While in Washington a physical examination of accused was performed, the result of which was "the rescinding of the order removing me from flying status, PO 183" (R. 121). Accused was replaced on full flying status with the rating of Command Pilot (R. 121, 122).

On cross examination accused testified:

"Q. Do you remember this question being asked of you, 'In your answer to one of the questions propounded by the board you made this statement: 'I had been hearing rumors of this sort for the past several weeks and I was trying to get specific data on it but was unable to...'' When did you first hear of the rumor that you were suspended from flying?', and your answer 'The first intimation I ever had, which I did not in any way consider seriously at the time, was the day before entraining under secret orders at Fairmount, Nebraska, which was on or about 14 March 1945.'

"A. Yes sir.

"Q. So you will state now that what Richard told you contained an intimation that you were not on flying status?

"A. I don't know what your definition of 'intimation' is?

"Q. I am using the same word you did.

"A. Yes sir."

He admitted that Lieutenant Richard had told him there was a paper on his desk that he "had better go look at" (R. 132). He actually saw the paper in mid May and the paper specifically referred to Personnel Orders 183 and stated that "the Personnel Orders" had removed him from flying status (R. 132).

Major Alva L. Ritchie testified that he was Finance Officer at March Field and that in the spring of 1946 accused had a conversation with him with regard to paying back some flying pay which accused may have erroneously claimed. Since accused was not sure whether he was in a flying status, and was not sure of the period involved, Major Ritchie

advised the accused that refund of flying pay could not be accepted because "there was no amount admitted or shown and if he determined that any amount was payable to the Government and that he desired to pay it in installments, that he would first have to receive permission from the Secretary of War through the Chief of Finance" (R. 136). Subsequent to a stoppage sent from the War Department, approximately $1200.00 was paid on the account (R. 137).

Colonel Elvin F. Maughan testified that in November 1946 he conducted an investigation of the charges upon which accused was standing trial. In the course of his investigation he had the personnel files at Patterson Field searched for anything pertaining to Colonel Coleman. As a result of the search Colonel Maughan did not receive "a copy of any order that in any way indicated that Colonel Coleman was relieved from flying status" (R. 140). Similar searches with similar results were conducted at the Operations Office, Patterson Field, and at Sacramento (R. 141).

5. Specifications 1, 2, 9 and 10 of the Charge:

Accused stands convicted of presenting false claims and making false certificates in connection therewith in violation of Article of War 94. The uncontradicted evidence shows that from 16 February 1944 until the month of June 1944 accused accomplished no flying time. In June 1944 he flew in excess of 12 hours. On 30 June 1944 he presented a voucher claiming pay for flying for the period extending from 1 April to 31 May 1944 (Spec 1). In connection with his claim he certified that during the period covered by the voucher he participated in regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480) (Spec 9). The proof adduced in support of Specifications 2 and 10 is similar, in that accused did not fly during the months of July, August, and September 1944. In October 1944 he was credited with in excess of 19 hours. On October 31 he presented a voucher claiming flying pay for the period extending from 1 August to 30 September 1944, again certifying that for that period he had met the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480).

The authorization for flying pay was contained in par 10, Executive Order No. 9195, 7 July 1942 (par 2, AR 35-1480, 10 October 1942) as follows:

> "10. For personnel of the Army, Navy, Marine Corps, Coast Guard, or National Guard (when in the active military service of the United States and when participating in exercises or performing duties provided for by sections 94, 97, and 99 of the National Defense Act, as amended), who are required by competent authority to participate regularly and frequently in aerial flights, the following requirements are prescribed: Provided, That any officer, warrant officer, member of the Army Nurse Corps * * * (female), or enlisted man who has been required to participate regularly and frequently in aerial flights by orders of competent authority and who as a result

of such orders has participated regularly and frequently in aerial flights, as defined in this Executive Order, and who subsequently becomes incapacitated for flying by reason of an aviation accident shall not be required to perform such aerial flights during such incapacity for a period not to exceed three months following the date of said accident:

(a)	During one calendar month.	10 or more flights totaling at least three hours, or in lieu thereof to be in the air a total of at least four hours.
(b)	During two consecutive calendar months, when the requirements of subparagraph (a) above have not been met.	20 or more flights totaling at least six hours, or in lieu thereof to be in the air a total of at least eight hours.
(c)	During three consecutive calendar months, when the requirements of subparagraph (b) above have not been met.	30 or more flights totaling at least nine hours, or in lieu thereof to be in the air a total of at least twelve hours."

When, as in the present case in two instances, the requirements have not been met during <u>three consecutive calendar months</u>, there has not been compliance with Executive Order 9195, 7 July 1942, and there is no provision of law whereby aviation pay may accrue for any of three consecutive months in which flying was not performed. (3 Bull. JAG 260, 261).

It is apparent, therefore, that the vouchers presented by accused on 30 June and 31 October 1944 in which claims were made for flying pay for the periods 1 April to 30 June 1944 and 1 August to 30 September 1944 respectively, were without color of right and accused knew or should have known that his claims were without color of right. It follows also that his certificate, in connection with the two claims, in that they certified compliance with the requirements of Executive Order 9195, 7 July 1942, were false and that he knew they were false.

<u>Specifications 7, 8, 15 and 16</u>. Here the accused is likewise charged with presenting false claims against the Government and executing false certificates in connection therewith.

The evidence in support thereof shows that during July 1944 accused was given "a form 64 examination" and was found not physically qualified for flying. The report of examination was forwarded to Headquarters, Army Air Forces, and the Air Surgeon recommended that accused be suspended from flying status. On 1 August 1944, Personnel Orders 183, Headquarters, Army Air Forces, were published. These orders confirmed accused's "suspension from all flying duty." During February 1945 at the request of accused the Commanding Officer, Tinker Field, Oklahoma, by cablegram addressed to The Adjutant General, War Department, specifically asked if accused was on flying status. In response thereto a letter, Headquarters

Army Air Forces, 28 February 1945 addressed to the Commanding Officer, Tinker Field, stated that accused was not on flying status. While at Fairmount, Nebraska, in March 1945 just prior to entraining for overseas, correspondence pertaining to accused's flying status was received in his Headquarters and his attention was directed to it by his personnel adjutant. Accused denied seeing the correspondence at that time. Subsequently in mid-May 1945, at Iwo Jima, he saw correspondence substantially the same as that addressed to the Commanding Officer, Tinker Field, reciting that he had been removed from flying status and citing Personnel Orders 183, Headquarters Army Air Forces, 1 August 1944. He denied, however, seeing the cited orders at the time. On 30 April 1945 he presented a voucher claiming flying pay for the period 1 to 31 April 1945 and on 30 June 1945 he presented another voucher claiming flying pay for the periods 1 to 31 March 1945 and 1 to 30 June 1945. On each voucher he certified that for the periods for which flying pay was claimed he was by orders of competent authority required to participate regularly and frequently in aerial flight. Paragraph 2, Executive Order 9195, 7 July 1942, provided that each officer or warrant officer who is a qualified aircraft pilot and who is not unfit for duties as such, and who is commissioned in the Army Air Corps or on duty with the Army Air Forces -

> "* * * shall be required to participate regularly and frequently in aerial flights; orders requiring such flight shall be issued by the Commanding General of the Army Air Forces or by such officer or officers as he may designate * * * and such order shall remain in force for the entire period of such commission, duty or assignment, except as hereinafter provided in paragraph 12."

Paragraph 12 provides -

> "12. A commanding officer shall suspend from flying any officer, warrant officer, member of the Army Nurse Corps * * * (female), or enlisted man under his command who, in his opinion, is unfit for flying, except as a result of an aviation accident. When the suspension is for a minor illness or injury not the result of an aviation accident, the suspension and subsequent revocation thereof may be ordered by the commanding officer of the person concerned without reference to higher authority. In all other cases such action shall be reported with the reasons therefor, for confirmation to the Commanding General of the Army Air Forces or to such officer or officers as he may designate for personnel commissioned in the Army Air Corps or on duty with the Army Air Forces, the Secretary of War or such officer or officers as he may designate for other branches of the Army * * *. The confirmation of such action shall have the effect of suspending the order to participate regularly and frequently in aerial flights as to the person concerned from the date such suspension from flying was made.

In July 1944 accused had been found unfit for flying duty and Personnel Orders 183, Headquarters Army Air Forces, 1 August 1944, effectively terminated the orders requiring him to participate regularly and frequently in aerial flights, such termination being accomplished substantially in compliance with the provisions of Executive Order 9195, supra. Despite his denial of knowledge of such orders prior to June 1945, compelling evidence of record justified the court in finding that accused had knowledge or that the circumstances charged him with knowledge prior to the periods for which flying pay was claimed on 30 April and 30 June 1945 (Winthrop Military Law and Precedents, 2d Ed, Rep, Page 701). In the first place he had been subjected to a physical examination in July 1944. On 1 August 1944 he was removed from flying duty and normal distribution was made of the orders effecting his removal. In February 1945 he caused inquiry to be made to the War Department specifically asking if he were on flying status. An answer was made to that inquiry stating that he was not on flying status and citing the authority therefor. On 14 March 1945 correspondence regarding his flying status was received at his headquarters and the evidence establishes the identity of that correspondence as that containing the answer to his previous inquiry concerning his flying status.

It follows then that his claims for flying pay for the period extending from 1 March to 30 May 1945 were not valid and that such fact was known to him. Likewise his certificate in connection with the claims in which he stated that he was required by order of competent authority to participate regularly and frequently in aerial flights, were false and known to him to be false.

Specifications 9, 10, 15, and 16 allege false certification in connection with the false claims which are the subject of Specifications 1, 2, 7, and 8 and thus cover the same transactions. Under the circumstances it was unnecessary to charge two violations of the 94th Article of War for each transaction. In view of the fact that the sentence of dismissal is legally supported by a conviction of any one of the specifications, the error, if any, was harmless and did not affect any substantial rights of accused.

Specifications 1 and 2 were objected to by the defense claiming that these specifications alleged offenses in the alternative. The objection is without merit. The two specifications allege that accused made false claims and then alleged two sets of circumstances rendering the claims false. It was alleged that the claims for flying pay were false because for the periods covered by the claims accused was not required to participate regularly and frequently in aerial flights, and because he did not participate during the periods covered by the claims in regular and frequent flights while in a duty status sufficient to entitle him to flight pay. In effect it was alleged that accused did not meet the requirements for additional pay for flying as set forth in paragraphs 10, 10a, b, and c, Executive Order 9195, 7 July 1942 (AR 35-1480, 10 Oct 1942). The pertinent specifications allege, therefore, offenses of presenting false claims in that accused had not met the requirements for additional pay for flying as set forth in the Executive Order.

In the opinion of the Board all the necessary elements of proof of the offenses of which accused has been found guilty have been established by competent evidence. From uncontradicted and compelling evidence the court was justified in finding that at the various places and times alleged accused presented false claims against the United States and in connection therewith executed false certificates. The record of trial sustains the findings of guilty of the Charge and Specifications 1, 2, 7, 8, 9, 10, 15, and 16 thereof.

6. Accused is 41 years of age, married and has two children. He was graduated from the United States Military Academy in June 1928 and was commissioned as a second lieutenant in the Regular Army, 9 June 1928. He was promoted to the rank of colonel, AUS (AC) on 1 March 1942 and to his permanent rank of major on 9 June 1945. His efficiency index as of 31 December 1945 was 41.32, a numerical rating equivalent to "excellent". Since that time his efficiency ratings have been "satisfactory".

Mr. Hubert King, together with Mr. Joseph A. Carey, appeared before the Board and presented oral argument on behalf of accused.

In addition consideration was given to a letter pertaining to accused from the Honorable Alben W. Barkley, United States Senate, to The Judge Advocate General dated 15 October 1947.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War.

A. Hottenstein, Judge Advocate

John G. O'Brien, Judge Advocate

J. W. Lynch, Judge Advocate

JAGH-CM 321606 1st Ind Jan 14, 1948
JAGO, Dept. of the Army, Washington 25, D. C.
TO: The Secretary of the Army

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 Colonel Frank J. Coleman (0-17153), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of presenting for payment false claims for flying pay in four instances and of executing false certificates in connection with each claim in violation of Article of War 94 (Chg, Specs 1, 2, 7, 8, 9, 10, 15, 16). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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.

Accused performed no flying during the months of March, April, May, July, August and September 1944. In June 1944 accused performed 12 hours of flying time and in October 1944, in excess of 19 hours. When as in this case the minimum requirements of flying time prescribed by Executive Order No. 9195, 7 July 1942 have not been met during three consecutive months there is no provision of law (with exceptions not pertinent to this case) whereby additional pay for flying may accrue for any of the three consecutive months, in which flying was not performed.

Notwithstanding this order the accused submitted a voucher on 30 June 1944 claiming flying pay for the months of April and May 1944 and on 31 October 1944 he submitted a voucher claiming flying pay for the months of August and September 1944. On each voucher he certified that for the months for which flying pay was claimed he had complied with the requirements of Executive Order No. 9195, 7 July 1942.

On 1 August 1944 accused was removed from flying status because of physical disqualification by Personnel Orders No. 183, Headquarters Army Air Forces. Normal distribution was made of the order. In February 1945 accused had inquiry made by the commanding officer, Tinker Field, Oklahoma, concerning his flying status. Answer was made to the commanding officer, Tinker Field, by letter, Headquarters Army Air Forces, dated 25 February 1945, stating that accused had been removed from flying status and citing Personnel Orders 183, supra. The evidence shows that this letter was received at accused's headquarters at Fairmount, Nebraska during March 1945. It may be inferred that accused was informed of the contents of the letter since on cross-examination he testified that at that time he had his first intimation that he was not on flying status. Accused admitted that he saw the letter in the latter part of May 1945 while on Iwo Jima. The circumstances disclosed by the record are such that the court could properly charge accused with having knowledge in March 1945 of his removal from

flying status. On 30 April 1945 accused presented a claim for flying pay for the month of April 1945 and on 31 May 1945, he submitted a voucher claiming flying pay for the months of March and May 1945. In connection with each claim he certified that during the periods for which additional pay for flying was claimed he was required to participate regularly and frequently in aerial flights. Executive Order No. 9195, supra, limited eligibility for flying pay to those persons required to participate regularly and frequently in aerial flights.

4. Accused is 41 years of age, married and the father of two children. He was graduated from the United States Military Academy in June 1928 and was commissioned a second lieutenant on 9 June 1928. He was promoted to the rank of colonel, AUS (AC), on 1 March 1942 and to his permanent rank of major on 9 June 1945. His efficiency index as of 31 December 1945 was 41.32, a numerical rating equivalent to "Excellent." Since that time he has received two efficiency ratings of "Satisfactory."

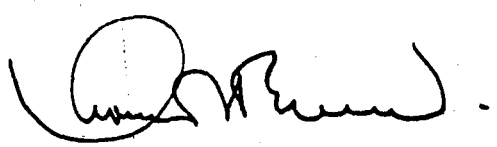
5. Mr. Hubert King, together with Mr. Joseph A. Carey, appeared before the Board and presented oral argument on behalf of accused.

In addition, consideration was given to a letter pertaining to accused from the Honorable Alben W. Barkley, United States Senate, to The Judge Advocate General dated 15 October 1947.

6. The record of trial and allied papers indicate that accused set in motion the investigation which covered the offenses of which he was found guilty and that he finally caused reimbursement to the United States by means of a stoppage against his pay. If the false vouchers were presented with a deliberately fraudulent intent there can be no doubt as to the propriety of dismissal. The question as to whether the vouchers were presented with deliberate fraud rather than as the result of heedlessness depends to a considerable extent upon the practices followed during the war by officers of the Air Corps. Inasmuch as the accused is a Regular officer of the Air Force I informed the Chief of Staff, United States Air Force, concerning the case. He has expressed the view that guilt of intentional wrongdoing is established beyond a reasonable doubt and has recommended that the sentence be ordered-executed.

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

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

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