

OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 5

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JUDGE ADVOCATE GENERAL'S CORPS

BOARD OF REVIEW AND JUDICIAL COUNCIL

HOLDINGS, OPINIONS AND REVIEWS



VOLUME 5

Including

CM 339004 CM 339910

Also

CM 336419

CM 337089

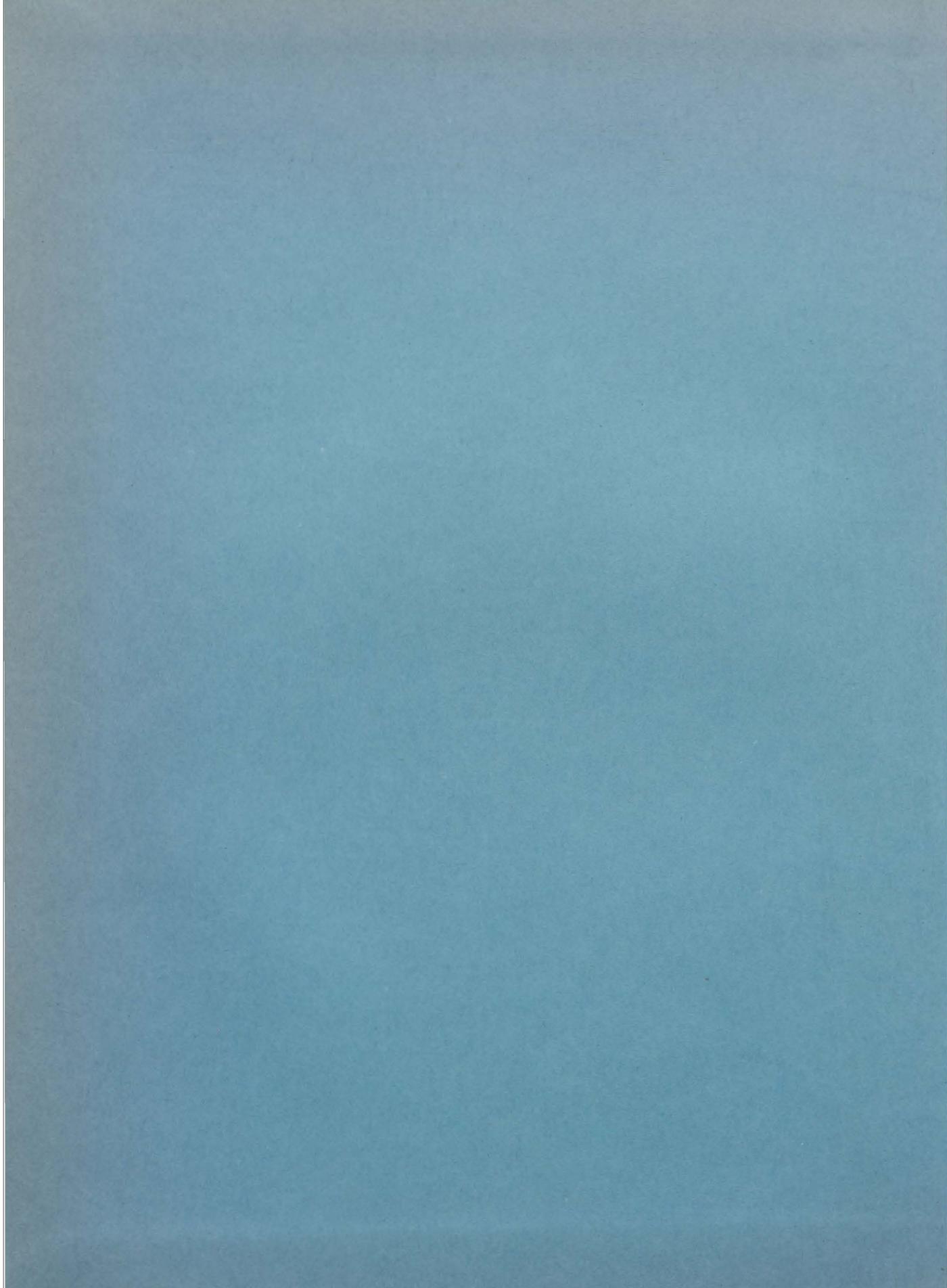
CM 337951

CM 338753

SP CM 375, 765, 928, 1144, 1213

OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

1950



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EXPLANATORY NOTES

1. References in the Tables and Index are to the pages of this volume. These page numbers are indicated within parentheses at the upper corner of the page.
2. Tables III and IV cover only the specific references to the Articles of War and Manual for Courts-Martial, respectively.
3. Items relating to the subject of lesser included offenses are covered under the heading LESSER INCLUDED OFFENSES rather than under the headings of the specific offenses involved.
4. Citator notations (Table V) - The letter in () following reference to case in which basic case is cited means the following:
 - (a) Basic case merely cited as authority, without comment.
 - (b) Basic case cited and quoted.
 - (c) Basic case cited and discussed.
 - (d) Basic case cited and distinguished.
 - (j) Digest of case in Dig. Op. JAG or Bull. JAG only is cited, not case itself.
 - (N) Basic case not followed (but no specific statement that it should no longer be followed).
 - (O) Specific statement that basic case should no longer be followed (in part or in entirety).
5. There is a footnote at the end of the case to indicate the GCMO reference, if any.

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339424	Elliot	71			
339452	Crespo	93			
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339494	Clifford	131			
339548	Green	155			
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339731	Prater	228			
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339875	Barnfield, Hall	279			
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338753	Hicks	423			
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Table II -- OPINIONS BY NAME OF ACCUSED

ACCUSED	CM NO.	PAGE	ACCUSED	CM NO.	PAGE
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Anthony	339658	205			
Barnfield	339875	279			
Basso	Sp 928	451			
Bowlin	339642	189			
Braun	339485	119			
Brown, A.	339189	27			
Clifford	339494	131			
Crespo	339452	93			
Dermott	339642	189			
Elliot	339424	71			
Green	339548	155			
Hall	339875	279			
Halprin	336419	301			
Hanold	339847	265			
Hicks	338753	423			
Hollings	Sp 1213	465			
Kelley	Sp 1144	455			
Lawrence	337951	395			
LeCleire	339794	233			
McAbee	339910	289			
Mason	Sp 765	445			
Prater	339731	228			
Rein	339462	99			
Seevers	337089	331			
Sexton	339585	175			
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189223	170(a)	251459	216(b)
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193828	256(a)	253054	256(a)
198340	96(a)	256115	83(a)
199072	96(a)	258171	184(c)
199117	96(a)	258630	81(b)
199465	327(a)	259755	226(a)
200925	96(a)	259933	226(a)
201563	226(a)	260755	320(a)
202213	256(a)	261242	389(a)
202366	442(b)	262042	85(a), 125(a)
203457	96(a), 357(a)	262750	115(a), 141(a)
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204879	116(a)	266655	275(a)
205621	257(a)	270061	18(a)
207212	83(a)	272588	441(a)
208296	226(a)	272642	82(a)
209900	466(c)	274174	319(a)
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213993	217(a)	275738	458(a)
216152	226(a)	276285	184(c)
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217842	96(a)	276435	115(a), 141(a), 256(a)
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220760	83(b)	280882	182(a)
221833	83(a)	281037	418(a)
227791	226(a)	283457	217(a)
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230736	215(a)	284149	183(a), 319(a)
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236819	96(a)	292656	256(a)
237145	66(b)	294880	319(a)
237255	256(a)	296074	163(b)
237450	256(a)	296431	125(a)
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<u>ETO</u>			
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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

CSJAGH CM 339004

U N I T E D S T A T E S	)	AAA AND GUIDED MISSILE CENTER
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bliss, Texas, 13, 14
First Lieutenant JOHN JOSEPH	)	September 1949. Dismissal.
SHEA, O-2032965, 9393rd Technical)	
Service Unit, White Sands Proving)	
Ground, Las Cruces, New Mexico)	

OPINION of the BOARD OF REVIEW
O'CONNOR, SHULL, and LYNCH
Officers of The Judge Advocate General's Corps

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant John J. Shea, 9393rd Technical Service Unit, White Sands Proving Ground, Las Cruces, New Mexico, did, on or about 30th November 1948, with intent to deceive the Commanding General, and Post Exchange Officer, Fort Bliss, Texas, officially report or cause to be reported to the Fort Bliss Exchange Officer a purported inventory for the month of November 1948, of the stock pertaining to the White Sands Proving Ground Post Exchanges which official report was known by the said Lieutenant John J. Shea to be untrue and false.

Specification 2: (Same as Specification 1, except that the date of the offense is "30 December 1948" and the month of the inventory is "December").

Specification 3: In that First Lieutenant John J. Shea, 9393rd Technical Service Unit, White Sands Proving Ground, Las Cruces, New Mexico, while acting as the duly appointed

Post Exchange Officer of White Sands Proving Ground and Oro Grande, both in New Mexico, both of which post Exchanges were under the jurisdiction and command of the Commanding General and Exchange Officer, Fort Bliss, Texas, knowing shortages to exist in the cash and merchandise stocks of both of said Post Exchanges, and having a duty to report said shortages to the Commanding General and Exchange Officer, Fort Bliss, Texas, did between about 15 November 1948 and about 25 July 1949, agree and conspire with one James H. Townsley to wrongfully and unlawfully hide and conceal said shortages from the said Commanding General and Exchange Officer, Fort Bliss, Texas.

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

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant John J. Shea, 9393rd Technical Service Unit, White Sands Proving Ground, Las Cruces, New Mexico, having knowledge of the incorrect inventory of the White Sands Proving Ground Post Exchange property, as submitted by him as Post Exchange Officer of the White Sands Proving Ground Post Exchange for the month of November 1948, did on or about 30 November 1948 and thereafter, wrongfully, unlawfully, and willfully, conceal certain property shortages of the Post Exchange and did fail to disclose and make known the same to any person in the military authority under the United States, to the prejudice of good order and military discipline.

Specification 2: (Same as Specification 1, except that the date of the offense is "31 December 1948" and the month of the inventory is "December").

Specification 3: (Finding of not guilty).

Specification 4: In that First Lieutenant John J. Shea, 9393rd Technical Service Unit, White Sands Proving Ground, Las Cruces, New Mexico, exchange officer, White Sands Proving Ground, Las Cruces, New Mexico, did at White Sands Proving Ground, Las Cruces, New Mexico, on or about 30 December 1948 knowingly and willfully allow Mr. J. H. Townsley to falsify records of the White Sands Proving Ground exchange

inventory for December 1948 by changing figures in said inventory record, with the intent of concealing shortages in said inventory record which had been disclosed by the exchange inventory.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its Specification, and of Specification 3 of Charge III; and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

In June of 1948, accused was assigned as an assistant to Major Charles M. Brown, the Post Exchange Officer at Fort Bliss, Texas, and placed in charge of a branch post exchange located at White Sands Proving Ground (hereinafter called White Sands Exchange) (R 31,32,39). At approximately the same time, Mr. James H. Townsley was appointed civilian manager of the White Sands Exchange (R 34,92).

The White Sands Exchange received its supply of merchandise, other than perishables, from the main exchange warehouse at Fort Bliss. The White Sands Exchange sent a truck to Fort Bliss to haul the merchandise and the individual who received the merchandise signed the warehouse requisition invoices (R 46-48). Daily reports were made by the White Sands Exchange to Fort Bliss (R 34). Prior to 1 January 1949, inventories of the White Sands Exchange were taken monthly by the post exchange personnel and quarterly by a team of impartial officers. After 1 January 1949, inventories were taken quarterly by the exchange personnel and by a team of impartial officers. In taking inventories the exchange personnel entered on inventory sheets the quantity, stock number and description of each item in stock, together with the retail price. On the occasions when a team of officers made an inventory, the officers made an independent count of the quantities on hand and inserted their own figures. The figures on the inventory sheets were then extended in the exchange office. At such time the inventories were available to accused and Townsley. After the inventories were completed they were forwarded to the accounting officer at the main post exchange at Fort Bliss (R 36,37,45,46,203, 204).

Sometime after the accused took charge of the White Sands Exchange a shortage of approximately \$270.00 occurred in the "Snack Bar" and a Board of Officers was appointed to make an investigation (R 103).

4

During November 1948, there were two "break-ins" at the White Sands Exchange, the first occurring on 15 November 1948, the second on 23 November 1948. Townsley's attention was called to the first "robbery" by a broken hasp on the north window of the building which he discovered at seven-thirty in the morning. He telephoned the officer of the day and, upon entering the exchange, checked the safe, finding it locked. From the appearance of the stock, nothing was missing. Townsley telephoned Major Brown and was instructed to take an immediate inventory and use it as the official inventory for that month. Townsley personally supervised the inventory and discovered that they were approximately \$25.00 or \$35.00 short, not an unusual shortage (R 99,101). On the occasion of the second "robbery," Townsley was awakened at 1:30 in the morning by military police. Upon his arrival at the post exchange, he inspected the stock and the only thing missing was a wallet valued at about \$7.00. There was in stock, however, considerable high-priced merchandise which might have been removed without its absence being detected. Townsley remained at the post exchange the rest of the night and the next morning telephoned Major Brown who ordered an immediate inventory taken. The accused came in while they were making the inventory but took no part in it except that he later helped Townsley and "Mrs. DeAmata" to "extend" the figures. The inventory disclosed a shortage of \$1,670.00 (R 101-102, 137).

When told of the shortage, accused exclaimed, "For God's sakes cover it up, we--" or "I"-- (Townsley couldn't swear as to his exact word) -- "I can't stand another investigation." (R 103) Accused went on to say that he did not believe the shortage actually existed; everybody was tired and worn out when the inventory was taken and it was possible that they had made mistakes (R 157). Townsley interpreted accused's remarks as an order and did not report the shortage to Fort Bliss (R 102). Carrying out accused's instruction Townsley raised the quantity of certain items in the inventory and called the attention of the accused to the manner in which he was "covering up," remarking that if the shortage was not cleared up by the December inventory they were liable "to get burnt." The accused did not forbid Townsley to make the changes. Townsley pointed out in court various alterations that he made in the inventory of 24 November. On page B-700, at line 4, of the inventory, the number of Bulova watches was raised from 3 to 13, an increase in the value of these watches of about \$490.00. Similarly, on page B-20275, the number of Proctor toasters was raised from one to two, an increase of \$17.75; on page B-20301 the number of Jackson shirts was raised from 4 to 14, an increase of \$39.00, and the number of military shirts was raised from 4 to 14, an increase of \$122.50; on page B-20320 the number of slips on one line was raised from 4 to 14, an increase of \$31.00, and on another line from 3 to 13, an increase of \$39.00; and on B-13341 various items, such as radios, shotgun, moving picture camera and projector, valued at

\$576.00, were listed although not in stock. These changes and additions were made "under the direction of" accused (R 106-110,221; Pros Ex 3).

The inventory of 24 November was received "in the normal course of business" by Mr. R. C. Rodan, Office Manager of the Fort Bliss Post Exchange (R 203,205,207). At that time the accountability of the White Sands Exchange was \$58,520.21. The inventory as submitted was \$58,841.39, reflecting an overage of \$321.18 (R 207). The inventory was accepted as a "true picture of the inventory record" of the White Sands Exchange as of that date (R 205).

A few days after the second "robbery" the accused and Townsley made "a cash count" of the safe and discovered a deficit of approximately \$470.00. This discrepancy was in addition to the \$1670.00 shortage disclosed by the inventory of 24 November. The cash shortage was in the money which Townsley, as branch manager, had been given for the purpose of making change. After discovering the shortage he took his personal money and placed it in the safe. Accused did not order Townsley to make the repayment but Townsley was afraid that if he reported the loss of the money from a locked safe he would probably lose his job and, anyway, he knew he would have to reimburse the exchange (R 104,122). At that time only Townsley, the accused, and Mrs. DeAmata, had access to the locked safe. Mrs. DeAmata worked in the office, kept the records, cashed checks, made change for the girls, and fixed the bank deposits. She resigned from her job in June or July, 1949 (R 105). According to Townsley, Mrs. DeAmata was suspected of dishonesty. While working in the retail sales department Mrs. DeAmata was found on one occasion to have rung up only \$25.00 on her cash register, on a \$30.00 sale; on another occasion a shortage of \$10.00 was discovered in her cash bag. The following day there was another \$5.00 shortage. The shortage increased each day until it reached \$25.00 and then, on pay day, her cash was correct. It was apparent that she was borrowing from her cash. Shortly after this incident she left the exchange (R 181-183).

The next inventory at the White Sands Exchange was taken on 28 December 1948 (R 110). The inventory records remained in Townsley's hands for 48 hours after the inventory was taken. The inventory disclosed an even greater deficit than the \$1670.00 shortage discovered in November. Townsley showed accused the December figures and "[they] decided to do the same thing as [they] had before on the November inventory." They thought that on account of the large amount of merchandise on hand, between \$48,000 and \$60,000, they might have overlooked something (R 106,107,111). With the consent of accused, Townsley made various changes in the inventory (R 111,114). On page C-26625 of the

inventory Townsley listed 300 cartons of Camel cigarettes and 150 cartons of Chesterfield cigarettes for a total of \$675.00. On page C-26635 he listed various items including cameras and luggage for a total of \$494.50. Similarly on page C-39931, he listed other items including several fishing rods and a coaster wagon for a total of \$174.25. The amount of the "write-ins" on the four pages totalled \$1443.75 (R 111-113,221; Pros Ex 4). Twenty-four hours after the inventory was completed it was forwarded to the Fort Bliss Post Exchange (R 114). The inventory of 28 December was received by Mr. Rodan in the normal course of business and accepted as a "true picture of the inventory records" at the White Sands Exchange as of the date taken (R 203,205-207). The inventory submitted totalled \$31,668.23; accountability as of that date was \$31,872.26, reflecting a shortage of \$204.03 (R 208).

After the inventory of 28 December 1948 was taken, monthly inventories were discontinued and quarterly inventories substituted. The next inventory was taken on 17 March 1949 (R 114,115). After the inventorying officer and a clerk completed a page of the inventory it was brought in to Townsley and accused for extension of the figures. There was no reason to doubt the accuracy of the count made except for minor discrepancies. After receiving the inventory Townsley, aided by accused, made various changes in it by raising the quantities of the items listed (R 115,116,221-222; Pros Ex 5). The inventory, as received in the normal course of business at Fort Bliss, totalled \$31,020.55. The accountability of the White Sands Exchange as of 17 March 1949 was \$31,203.81, reflecting a shortage of \$183.26 (R 206-208).

A special inventory was taken on 29 March 1949, due to the fact that Major Wade, then Post Exchange Officer at Fort Bliss, was transferring accountability to his successor (R 35,36,117). The inventory was made by officers and once again, with the sanction of accused, Townsley altered the inventory by raising the quantities of various items shown on the inventory (R 117,119,222; Pros Ex 6). After the alterations were made the inventory was forwarded to Fort Bliss where Mr. Rodan received it in the ordinary course of business (R 205).

The next regular inventory was taken on 16 June 1948, and it revealed a shortage of between \$4,400 and \$4,500. Townsley made several alterations in the inventory, raising the quantities of various items of merchandise (R 119-122; Pros Ex 7). As received in the normal course of business by Mr. Rodan at Fort Bliss, the inventory totalled \$49,957.39. The accountability of the White Sands Exchange on 16 June 1948 was \$50,304.07 so that a shortage of \$346.68 was reflected (R 206-208,210). Accused had no knowledge of the alterations made by Townsley in the 16 June inventory,

being on leave at that time. Townsley contended, however, that he had been "led to believe" that he should cover up the shortages (R 120,121).

Townsley further testified that after the changes were made in the inventories of 24 November 1948, 28 December 1948, 17 March 1949, 29 March 1949, and 16 June 1949, they did not accurately reflect the true condition of the White Sands Exchange. On several occasions during the period in which the alterations were made, Townsley discussed the changes with accused (R 121). Townsley thought that accused physically assisted him in changing two or three of the inventories but he was not "absolutely positive" (R 126). Accused did not assist him on the November inventory but he did on the December inventory (R 126-128). Townsley was convinced in his own mind that the \$1670.00 shortage revealed by the November inventory was the result of the "robbery" (R 139). In order to help reduce the shortage Townsley endorsed his pay checks over to the exchange and drew only part of his salary. Between 1 November 1948 and 15 May 1949 his salary totalled \$3,000.00 and by 15 May he had turned over \$1369.00 to the exchange (R 122,141,142). Townsley "personally did not believe the Lieutenant [accused] has derived one red cent from the shortage." (R 165). Furthermore, Townsley asserted he did not derive any personal gain from the shortages. During the period he was repaying money to the exchange he deprived his family and himself of a great many necessities (R 166,167). Townsley denied that one of the inventories, made in March 1949, and shown to the accused, disclosed no shortages. He did not remember accused saying, "Jim, it is good to see that we are getting control again." However, he identified his signature on a document containing his sworn testimony in the course of which he had admitted that accused made such a statement (R 162,163).

On or about 24 July 1949, Townsley wrote a letter to John Couturie, the General Manager of the Fort Bliss Post Exchange. In this letter Townsley revealed the cash shortage at the White Sands Exchange, which by then he had made up, and the merchandise shortage. He told about the \$1670.00 shortage which existed after the "robbery" and that he had been ordered to "cover it up." He asked that an investigation be made by either the FBI or the CID (R 95-97,184,185; Pros Ex 2). As the result of this letter an inventory of the White Sands Exchange was made by a Board of Officers on 25 July 1949 (R 43,44,58-63,208). The sales accountability of the White Sands Exchange on that date was \$41,081.03. The inventory was \$35,782.16 reflecting a shortage of \$5,298.87 (R 48,49, 208,209).

The entire picture is not presented by the testimony concerning the White Sands Exchange for the reason that in either April or May 1949, a branch of the White Sands Exchange was established at Oro Grande and

a large shortage subsequently appeared at this latter exchange (R 49, 54,179). This branch exchange was established at the direction of the Fort Bliss Exchange for the purpose of supplying basic requirements of troops in the field, including beer, soft drinks, toilet articles and tobacco (R 179; Pros Ex 9, p.5). Accused and Townsley supervised the operation of the Oro Grande Branch Exchange (R 123,124). When first established it operated from trailers but later, at the direction of Townsley, it was moved into a building at Oro Grande (R 54,158,159). The accused suggested that bars be placed on the windows of the building and made every possible effort to correct poor security conditions (R 160,162).

Master Sergeant Odeis F. Boyd was employed as "personnel manager" of the Oro Grande Branch Exchange from April to 16 July 1949. As such he was in charge of personnel and operations. His immediate superior was first, Townsley and later, accused (R 67). He obtained his stock of supplies for Oro Grande by placing handwritten slips in a money bag turned in to White Sands or by handing the slips to Townsley. The merchandise was delivered either from the warehouse or the exchange at White Sands or from the exchange at Fort Bliss, and was usually signed for by the caretaker or the negro porter, Billy Jones, or by Townsley. Boyd occasionally signed for soft drinks or other small items when such merchandise was delivered while he was on duty. There was no accounting system for the merchandise on hand at Oro Grande. All records were kept at White Sands (R 71,72). When the Oro Grande exchange opened there were four clerks employed. After the exchange moved into a building the number of clerks varied from five to nine. During approximately twenty days of the month their average gross sales would be between \$150 and \$250 a day. On pay days sales ran as high as \$2000 (R 75-76).

The cash registers used at Oro Grande were of an old type with no keys for "odd cents." Beer was sold for eighteen cents and the clerks rang the sale up as fifteen cents or twenty cents (R 74,75). In some sections of the exchange there were no cash registers and in lieu thereof the clerks used cigar boxes (R 124,160). There were no sales slips. The first registers had no tapes and Boyd merely counted the money. There was no regular form for accounting for cash receipts. The only records Boyd kept at Oro Grande were a few personal records of money receipts. The total cash receipts were written down on a slip of paper which was placed in the money bag at the close of business each night and turned in with the proceeds to Townsley or accused. No readings were taken from the registers (R 68-69,76).

On several occasions after Boyd turned in his cash he was advised of a shortage. The shortages ranged from 16 cents to \$45.00 and were "always" reported by Townsley. Thinking there might be errors in his

counting of the money, Boyd asked accused to have someone else count it. No action was ever taken by accused (R 69,70,71).

Boyd discovered evidence that "some persons" were passing beer over the top of the screens surrounding the beer counter (R 78). On two occasions after the exchange had closed he returned to find four or five men drinking beer and eating sardines. He told them to leave money in the cash register but none was there the next morning (R 83, 84). Boyd relieved the porter, Billy Jones, after catching him in a petty theft involving the property of a former employee (R 80,81).

The Oro Grande Exchange was separated from the White Sands Exchange for purposes of accountability on 2 July 1949, and placed directly under the Fort Bliss Exchange (R 52,215). At that time accountability for merchandise amounting to \$15,207.82 was transferred from the White Sands Exchange to the Oro Grande Exchange (R 215,216). The "accountability reconciliation" indicated no discrepancy when the separation was accomplished (R 53). On 25 July 1949, however, an inventory was taken at the Oro Grande Exchange which revealed a shortage of \$4,118.72 (R 49).

Major Edward W. Corcoran, Provost Marshal at Fort Bliss, with representatives of the CID and the FBI, interviewed accused on or about 25 July 1949 (R 50,188,189). After being warned of his rights under Article of War 24, accused gave a signed statement concerning his activities as the White Sands Exchange Officer (R 51,190,191; Pros Ex 8). In this statement accused recounted his appointment as Post Exchange Officer, the two "break-ins" into the exchange, and the fact that an inventory was taken after the second "break-in" revealing a \$1600 shortage. Accused continued, "I directed Townsley to cover up this shortage because I did not believe there actually was a shortage, due to the fact that no large amount of tangible items could be located as stolen." In March 1949, according to accused, the inventory "broke out even" but there was still a shortage of \$2000 as a "carry over" from preceding months. The May inventory revealed a shortage of \$8000 which accused "did not take serious" since the inventory was taken haphazardly. Accused concluded, "The reason for the concealment of the inventory shortage was not that I was convinced that there was actual theft going on but that either a mistake in transfers or an incorrect inventory would disclose the discrepancy or that the margin of the 1% leeway in sales, would cover up the thievery if it existed" (Pros Ex 8).

A Board of Officers, of which Lieutenant Colonel Louis B. Knight was President, was appointed to investigate the reported irregularities at the White Sands Exchange (R 192,193). Accused appeared before the Board, and, after being advised of his rights under Article of War 24, was questioned in pertinent part as follows:

- Q. Have you ever checked these completed inventories after they were turned over to your office by the person or persons making the inventory?
- A. Yes, I always insured that all pages accountable to this inventory were on hand.
- Q. Have you ever made any changes in any of the figures entered in the column headed 'No. of units' after those figures had been entered by the person or persons making the original entry?
- A. No, to the best of my knowledge, No.
- Q. Have you ever directed Mr. Townsley to change any figures in this column after original entry had been made and after these inventories had been completed by the inventorying personnel and turned in to your office?
- A. Relative to these three inventories, I never directed Mr. Townsley to change the figures in the quantity columns.
- Q. Have you ever directed Mr. Townsley to change the figures entered in this column on any inventory at the White Sands PX?
- A. Yes, I have.
- Q. When?
- A. It was on the inventory taken 24 November 1948.
- Q. Was this done?
- A. Yes sir, it was done.
- Q. Was this inventory submitted to the Ft Bliss PX Officer as a correct inventory?
- A. Yes, it was.
- Q. Have you been present or have you assisted Mr. Townsley in making changes in any subsequent inventories?
- A. I have been present but at no time have I assisted him.
- Q. Did you have knowledge that he was making these changes in inventories subsequent to the one in November 1948?
- A. I had knowledge that such changes were made for the one in December 1948 but was not aware that changes had been made in the one for March 1949 until confronted with Mr. Townsley's statement to the CID. I was under the impression that the inventory taken in March 1949 picked up the shortage that occurred back in November 1948.
- Q. When you directed the changing of the figures in the November 1948 inventory, and had knowledge of the changes made in the

figures in the December 1948 inventory, were you aware of the fact that you were directing the falsification of official papers?

A. Yes sir.

Q. Why did you direct the changing of these records, knowing that you were causing official records to be falsified?

A. Because I did not believe these records were correct.

Q. Why did you not call for a new inventory if you believed those that you directed falsified were incorrect?

A. Because I believed this shortage would be picked up in the next inventory as from past experiences" (R 193,194; Pros Ex 9, pp.11,12)

The court took judicial notice of AR 210-65, 12 June 1945, as amended on 29 December 1947, and Tentative AR 210-66 (R 29,334).

b. For the defense.

Brigadier General Phillip G. Blackmore, Commanding General, White Sands Proving Ground, New Mexico, testified that he had discussed accused's case with Major General Homer, Commanding General, Antiaircraft and Artillery Guided Missile Center, Fort Bliss, Texas. Consideration was given to accepting accused's resignation but it was decided that since embezzlement was included in the charges a resignation should not be accepted. (The court entered a finding of not guilty on the embezzlement charge). General Blackmore had recommended that the Oro Grande Exchange be separated from the White Sands Exchange. The officer in charge of the White Sands Exchange had other duties and it took too much of his time for him to go to Oro Grande and supervise that exchange also. General Blackmore thought that operating both exchanges in addition to his other duties was more than should have been expected of accused (R 197).

Major Robert G. Meguiar was the investigating officer in this case (R 224). He recommended that the charges under the 93d Article of War be dropped and that the last two specifications of the last charge not be tried because they were a duplication. He also recommended that action be taken in a civilian court against Townsley. During the investigation Major Meguiar was favorably impressed with the accused's intelligence and personality (R 225).

Agent William R. Caton, Criminal Investigation Officer, testified that he was still working on the whole case of the White Sands Proving Ground Exchange. The investigation extends "beyond Texas and New Mexico" (R 230,231,232).

Colonel George G. Eddy testified that he had known accused since 1946, when accused was a master sergeant in his command. Colonel Eddy had recommended accused for his commission (R 200,201,202).

Captain Henry C. Stone, 9393d Technical Service Unit, testified that the accused's reputation on the post for honesty and integrity is "very high;" and that he personally considered accused to be among the "upper two or three per cent" of the officers at White Sands. When Captain Stone learned of the difficulties facing the accused he offered to loan him \$5,000.00 from his personal bank account. Accused served under Captain Stone for about one year. Accused and Captain Stone are next door neighbors and they exchange visits once or twice a week (R 238-240).

Several other officers testified as to accused's good reputation for honesty, integrity, and industry, and that accused did not drink or gamble to excess (R 235-237,240-252).

Mrs. Agnes R. Grefe worked at the White Sands Exchange from May 1948 to approximately October 1948. She understood that Townsley was her boss. When Townsley assumed his position he advised the clerks that they could take out merchandise and pay for it on pay day. On one occasion Townsley permitted a trunk to be taken from her department without it being paid for until the following day (R 253-255,257). On another occasion when she inquired about an ironing board which was missing from her stock, Townsley said he had sold it and that he would pay for it (R 261). She left her position of her own will (R 265).

Various sales clerks of the White Sands Exchange, testified as to the "robberies" of the post exchange in November and the fact that there was considerable stock in their charge at that time. They were unable to detect anything missing after the robberies (R 267-279).

The court took judicial notice of paragraphs 6 and 7, Special Orders Number 113, Headquarters White Sands Proving Ground, 15 June 1949, granting the accused thirty (30) days leave effective on or about 17 June 1949 and assigning First Lieutenant Doris L. Ayers (WAC) as post exchange officer during his temporary absence (R 279; Def Ex B). The court also took judicial notice of paragraphs 3 and 4, Special Orders Number 107, 2 June 1948, Headquarters White Sands Proving Ground, which appointed accused post exchange officer at White Sands Exchange, effective 4 June 1948 (R 280; Def Ex C).

A transcript of the sworn testimony of Mr. Townsley, given on 12 August 1949, before the board of investigating officers, of which

Lieutenant Colonel Knight was president, was admitted in evidence without objection (R 281; Def Ex D). Mr. Townsley testified, in substance, that no unusual shortage was disclosed by the inventory of 15 November 1948, taken after the first burglary; that if either he or the accused had taken \$1670 worth of merchandise during the succeeding eight days, the second burglary, on 23 November, would have given them a wonderful opportunity to blame the shortage on it. When the inventory disclosed the \$1670 deficit, both he and the accused were of the opinion that the inventory was in error and that a more careful check would reveal the missing merchandise. He anticipated that the December 1948 inventory would show no shortage. When another deficit was disclosed by the December inventory he realized that the action taken on the November inventory was a mistake. But now he had "his foot in the quicksand" and he could not draw it out. Concerning operations at the exchange, Townsley testified that the accused's plan for checking the merchandise received from the Fort Bliss warehouse was not successful because they had no warehouse at that time and "when the large truck trailer was brought up loaded, we would have to use the merchandise as we needed it. Therefore, we could not make an accurate check on the merchandise in the large trailer." (Def Ex D). Townsley further testified before the board as follows:

"Q. Mr. Townsley, in your first statement you were asked the question, 'In your opinion, has Lt. Shea benefited personally from either the cash shortage or the merchandise shortage?', And you replied, 'No sir,' not one penny's worth do I believe that man has benefited'. Will you state your reason as the basis for that opinion?

A. Because every time I saw him make a purchase, he always paid for it. At no time did I see anything that would indicate that he was not paying for any merchandise that he or his wife purchased from the exchange. Its my personal opinion that Lt. Shea would not touch a thing as far as monetary value of the exchange is concerned.

Q. Insofar as any actual shortages are concerned, do you have any knowledge of any mismanagement on the part of Lt. Shea which led to the shortage?

A. No.

Q. Do you know of anything he could have done to prevent the shortage from occurring?

A. I do not.

Q. I understand that you and your wife together put a large some of money into the cash fund to make up for a shortage in said cash fund - is that correct?

A. Yes." (Def Ex D, p.3)

After being advised of his rights, the accused elected to be sworn as a witness (R 281-283). He testified generally as to his war record and assignments including the fact that he spent 40 months overseas in the European Theater from September 1943 to December 1946, participated in the Normandy, Central Europe and Rhineland campaigns and was authorized to wear four battle stars (R 283,284). He testified further that he had been in the military service for seven years. He had never been a unit commander but had property responsibility as a billeting officer. He knew that it was necessary to account for Governmental or quasi-Governmental funds although in his experience it had not been done until the past year. He knew that post exchange funds are controlled (R 300-301).

He was appointed post exchange officer at White Sands on 2 June 1948. General Blackmore told him that the White Sands Exchange had been losing money and had unaccountable shortages. General Blackmore instructed him not to interfere with the civilian manager of the exchange. Accused's predecessor had been undiplomatic and, in the preceding nine month period, had four to six civilian managers. Townsley was appointed civilian manager about 10 June 1948. About 16 June, the merchandise was inventoried and the cash counted, and all property was transferred from the former manager to Townsley (R 285,286). The White Sands Exchange cash receipts were deposited in a Las Cruces bank daily and accused signed a check payable to the Fort Bliss exchange officer for the amount of money deposited. This was accused's only interest in the White Sands Exchange until in August he was assigned to an investigation which took five weeks of his time. The investigation resulted from an excessive shortage in the White Sands Exchange in August. After determining that the loss occurred in the snack bar, he requested a Board of Officers to fix responsibility. The Board did not complete its report until early November, and failed to determine responsibility for the loss (R 286,287).

After the first "robbery," accused understood that he was to be relieved but, after a conference between Generals Blackmore and Homer, he was retained in his position. Townsley told accused that the inventory taken after the first "robbery," "had broken out even." Accused observed that the accountability figures introduced in evidence in the present case reflected an overage of some \$300 on that inventory. Prior to the second "robbery," he received leave of three days and he took his wife to William Beaumont General Hospital on 23 November. His wife gave birth to a child early the next morning. Upon arriving home he received a phone call from the Provost Marshal's office informing him of the second "robbery." He went to the post exchange and instructed all the girls to check their stock. None of them reported anything missing and there appeared to be no empty spaces in the stock shelves or display counters (R 287-289). Major Brown requested an inventory which was taken revealing a shortage of \$1630. Accused did not believe a shortage in fact existed (R 289-291). Both he and Townsley thought the shortage would

be picked up during the next month. Believing that another investigation was unnecessary and would result in his relief, he directed Townsley to conceal the shortages (R 292). Accused thought the December inventory also failed to reflect the correct quantity of stock because his help was working overtime and complaining about their hours. He never knew of his own knowledge whether the shortages reported to him by Townsley were correct or incorrect (R 293-294). Accused did not receive any gain from the reported shortages. He never had a bank account and the last deposit in his wife's bank account was made on 5 May 1946 (R 294-295). He had not been able to ascertain that any officer was present during the inventory taken in connection with the accountability separation between Oro Grande and White Sands Exchange, on 2 July 1949. He was not convinced that the alleged nine thousand dollar shortage in the White Sands and Oro Grande exchanges occurred while he was the responsible exchange officer (R 298-299).

Explaining the difficulties of his assignment, accused stated that the White Sands Post Exchange was twenty-seven miles from town. As part of his responsibility he had a gasoline station, a snack bar which operated as a beer parlor until ten o'clock, and a grocery store with three activities. The Oro Grande Exchange was twenty-seven miles away from his major activities; and supplies were hauled eighty-two miles from Fort Bliss. Accused also had to supply food to the "Launching Area." "Shoots" were conducted steadily in November and December and he had to have personnel on duty there. He could not expect the exchange manager to carry on all these activities by himself. Fort Bliss furnished no help (R 309-311). In addition, after an inspection by General Rutledge, accused had to rebuild the exchange at Oro Grande. Previously, the place was filthy, disorganized and lacked adequate security (R 328-329).

Accused reiterated that he did not believe the inventories submitted to him were correct nor that they reflected a true balance. He received the impression from Townsley that the March inventory balanced with the accountability. Accused thought that the loss reflected in the November and December inventories had been picked up in the March inventory (R 315-317). He admitted that Townsley falsified inventory figures for November at his instruction. Accused did not assist in altering and making changes on inventory sheets for December, although he was present and sanctioned such changes (R 318; Pros Ex 9). He believed the \$9,000.00 shortage was caused by "improper control." He did not know whether the \$5,000 shortage at White Sands actually belongs to Oro Grande or not prior to the 2nd of July" (R 321). He had never seen a copy of Tentative AR 210-66 governing the operation of post exchanges (R 324). He believed losses reflected by the November and December inventories were a result of careless and inaccurate work in taking the inventories, but that the March 1949 inventory was accurate and final (R 325).

A certified true copy of a letter of commendation received by accused when an enlisted man was received in evidence (R 331-332; Def Ex E).

4. Discussion.

Specifications 1 and 2, Charge I.

The accused was found guilty of officially reporting or causing to be reported, to the Post Exchange Officer, Fort Bliss, Texas, inventories of the stock of the White Sands Proving Ground Post Exchange for the months of November and December 1948, knowing such reports to be false and untrue, with intent to deceive the Post Exchange Officer and the Commanding General, Fort Bliss, Texas, in violation of Article of War 95.

To support the conviction under these specifications the evidence must establish that the accused made or caused to be made the reports of the inventories in question, that they were submitted officially and were false, that accused knew them to be false, and that they were made with an intent to deceive the person or persons to whom made (CM 324352, Gaddis, 73 BR 181,186; CM 335051, Bishop, 2 BR-JC 13).

The evidence shows that in June of 1948, accused was appointed Post Exchange Officer at the White Sands Proving Ground (New Mexico) Post Exchange, a branch of the Fort Bliss, Texas, Post Exchange. The Post Exchange Officer at Fort Bliss had general administrative supervision over accused and the White Sands Proving Ground branch exchange. Shortly after accused's appointment a loss occurred in the White Sands Exchange resulting in an investigation by a board of officers and the intimation by a Fort Bliss Exchange Officer that accused might be relieved from his assignment. In November 1948, following a "break-in" at the White Sands Exchange, an inventory was taken which revealed a \$1670 merchandise shortage. Accused told James H. Townsley, the civilian manager of the White Sands Exchange, that he could not stand another investigation and to "cover up" the shortage. Townsley thereupon falsified the inventory by increasing the quantities of various items of merchandise listed in the inventory, and showed accused the manner in which he was carrying out accused's instructions to "cover up." The completed inventory, which, after the falsification was in substantial balance with the White Sands Exchange's accountability, was forwarded to the Fort Bliss Post Exchange where it was accepted as a true report of the merchandise on hand at the White Sands Exchange. In December 1948, the regular monthly inventory at the White Sands Exchange revealed an even larger shortage than the November inventory. After Townsley and accused had

discussed the matter, it was decided to continue the course of action initiated in November. With the assistance of accused, Townsley altered the December inventory by adding quantities of various items of merchandise not actually in stock. The altered inventory, which showed that the merchandise on hand was substantially in balance with the exchange's accountability, was transmitted to the Post Exchange Officer at Fort Bliss who accepted it as a true report of the merchandise on hand at the White Sands Exchange.

The foregoing evidence, which in the main is not in dispute, clearly shows that accused submitted false inventories or reports to the Post Exchange Officer at Fort Bliss. The inventories transmitted were taken as a part of the normal operation of the White Sands Exchange in pursuance to instructions, issued by the Post Exchange Officer at Fort Bliss. The latter received the inventories in the regular course of business and relied on them as showing the amount of merchandise on hand at the White Sands Exchange. The official character of such reports is apparent. Since accused and Townsley falsified the inventories it is equally clear that accused had knowledge of their falsity. In this connection accused testified that for various reasons he believed that the inventories taken were incorrect and that no shortage in fact existed. But such belief does not in any way negative the conclusion that accused knew the inventories submitted were false. Even though the inventories taken were incorrect, they were not corrected by raising the quantities of items listed or by inserting items not actually in stock. Under the circumstances the proper action for accused would have been to order a reinventory. His failure to take any positive steps after the inventory revealed a shortage, except to alter the inventory figures, raises a question whether his alleged belief was anything more than a mere hope. As events subsequently showed the shortage was quite real. In forwarding an inventory which he did not know to be true accused was just as guilty of making a false report as though he transmitted an inventory which he knew to be untrue (CM 220269, Cox, 12 BR 373,379).

The intent to deceive may be inferred where the report submitted is known to be false (CM 314746, Garfinkle, 64 BR 215,222; CM 277595, Rackin, 51 BR 159,165; CM 275353, Garris, 48 BR 39,42). Accused's intent was to lead the Post Exchange Officer at Fort Bliss to believe that the stock on hand at the White Sands Exchange was substantially equivalent to the amount for which accused was accountable when in fact the inventories had revealed that the stock on hand was a lesser amount. Accused's intent, therefore, was to deceive the Post Exchange Officer at Fort Bliss. Since the exchange activities at Fort Bliss and at White Sands Proving Ground were under the command of the Commanding General of Fort Bliss (AR 210-10, 6 May 1947; Tentative AR 210-66, pars. 19b (5), (10), (11), and 22c(8), 19 Feb 47), the inventories were in effect submitted to him through his subordinate commanders and, consequently, there

was an intent to deceive the Commanding General (CM 270061, Sheridan, 45 BR 179,190; CM 315736, Risoli, 65 BR 91,95; CM 317655, Warmenhoven, 67 BR 1,9; CM 326147, Nagle, 75 BR 159,174).

The making of false reports of inventories of post exchange stock is conduct unbecoming an officer and a gentleman within the meaning of Article of War 95 (CM 252281, Claros, 2 BR (ETO) 299,306; CM 327988, Hogg, 76 BR 225,242).

Specification 3, Charge I.

Accused was convicted of conspiring with James H. Townsley, between 15 November 1948 and 25 July 1949, to conceal from the Commanding General and Post Exchange Officer at Fort Bliss, shortages which he, accused, knew to exist in the cash and merchandise of the post exchanges at White Sands Proving Ground and Oro Grande, accused having a duty to report such shortages. The conspiracy was charged as a violation of Article of War 95.

The Specification involves the common law offense of conspiracy. It differs from statutory conspiracy denounced by Section 37 of the Federal Criminal Code (formerly 18 U.S.C. 88, now 18 U.S.C. 371) which requires, in addition to the conspiracy, the allegation and proof of an overt act in furtherance of the conspiracy (CM 320681, Watcke, 70 BR 125,133; CM 325762, Edwards, 75 BR 35; CM 328248, Richardson, 77 BR 1, 18). A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or as an end. The word "corrupt," in the sense used, means unlawful. The intentment of this definition is that to conspire to do an unlawful act, or to conspire to accomplish a result which may in itself be lawful but to do it in an unlawful manner, or an unlawful agreement to accomplish an unlawful result, is a conspiracy (Aetna Ins. Co. v. Commonwealth (Ky) 51 S.W. 624,627; 45 L.R.A. 355). Proof of a formal agreement to accomplish the unlawful purpose is unnecessary if a tacit understanding is shown to have existed (MCM, 1949, par. 127b, p.159).

The evidence is undisputed that the shortages in the November and December 1948 inventories were made known to the accused by Townsley and that, after discussion between accused and Townsley, they agreed not to report the shortages to the Post Exchange Officer at Fort Bliss but instead to alter the inventory figures so as to hide the deficits. The evidence also establishes the existence of an agreement between accused and Townsley to conceal the shortages revealed by inventories taken on 17 March 1949, 29 March 1949 and 16 June 1949. Although accused testified that he was informed by Townsley that no shortages were found in the March inventories, and, therefore, there was no agreement to

conceal shortages arising from those inventories, Townsley flatly contradicted accused on this point and we believe the former's testimony is eminently the more credible. There is no apparent reason why Townsley, after having discussed the November and December shortages with accused, would have failed to disclose the subsequent shortages to him. It is incredible that after falsifying the November and December inventories with the knowledge, approval and even active assistance of accused, Townsley would have thereafter carried forward the practice of altering the inventories entirely on his own responsibility, and would have concealed his actions from accused. Accused's reported remark to Townsley at the time of the March inventories, "Jim, it is good to see that we are getting control again," does not impeach Townsley's testimony on this issue. Such a statement may be interpreted to mean that the March shortage was no greater than the December shortage. In his pretrial statement to Major Corcoran (Pros Ex 3) accused asserted that the March inventory "broke out even" although there was a "carry-over" of the prior \$2000 shortage. As to the June inventory, it is true that accused was on leave at the time and did not actively assist in its alteration but the procedure followed by Townsley with respect to concealing the shortage revealed in that inventory, merely carried forward the course of action which he and accused had agreed upon and followed with respect to previous inventories. There is no credible evidence in the record to show that accused had withdrawn from the agreement which he and Townsley had tacitly made in November and December 1948. It is well settled that a conspiracy once established is presumed to continue until the contrary is established (U.S. v. Perlstein, CCA 3d, 126 F. 2d 789,798; U.S. v. Beck, CCA 7th, 118 F. 2d 178,194-185; Marino v. U.S., CCA 9th, 91 F. 2d 691,695). It was not until July 1949, that the fact that the shortages existed and were being concealed, was revealed to higher authority. The disclosure came about not through any act of the accused but by reason of a letter directed by Townsley to the civilian manager of the Fort Bliss Post Exchange. This action on the part of Townsley terminated the conspiracy. In addition to the inventory shortages at the White Sands Proving Ground Exchange, there was a cash shortage at that exchange which was not disclosed to higher authority.

It was clearly the duty of accused as Post Exchange Officer to reveal to his superiors such serious matters as shortages in the merchandise and cash. His concealment of these shortages was prejudicial to good order and discipline and was unlawful. In agreeing with Townsley to conceal the shortages, accused conspired to do an unlawful act and in altering the inventories the unlawful end was pursued in an unlawful manner. The conspiracy charged was, therefore, established by the proof. Although the evidence as to the conspiracy was furnished principally by accused's

co-conspirator, Townsley, such evidence was not only competent, but under the circumstances of the case, we find that it afforded a justifiable basis for the findings of the court. (MCM, 1949, par. 127h).

The common law offense of conspiracy is violative of Article of War 95 in the case of an officer, if the object to be obtained is dishonorable as well as unlawful, as it was in the present case (CM 320455, Gaillard, 69 BR 345,377).

Specifications 1, 2 and 4, Charge III.

Under Specifications 1 and 2, accused was convicted of wrongfully concealing property shortages in the White Sands Post Exchanges, and of failing to make the shortages known to "any person in the military authority under the United States," knowing that the inventories submitted for November and December 1948, were incorrect. Under Specification 4, accused was convicted of having knowingly allowed J. H. Townsley to falsify inventory records of the White Sands Post Exchange for December 1948, with intent to conceal a shortage disclosed by the inventory. All three specifications were laid under Article of War 96.

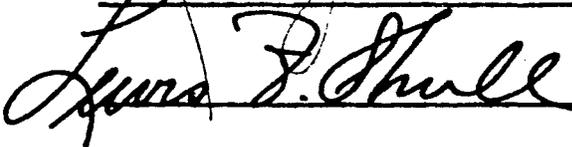
The evidence previously discussed is equally applicable to these specifications. As stated, the evidence clearly establishes that accused failed to reveal to proper authority the shortages revealed by November and December 1948 inventories but instead concealed the shortages by submitting false inventories. We are of the opinion that the phrase "any person in the military authority under the United States" does not exclude "proper authority" and that failure to inform a person in the latter category is an offense cognizable under the Articles of War. The actual falsification of the inventories was done principally by Townsley. Since Townsley's alteration of the inventories was done with the full knowledge and sanction of accused, it is clear that accused knowingly allowed Townsley to falsify the December inventory, as charged. The obvious intent was to conceal the shortages revealed by the inventories. The conduct proved is violative of Article of War 96.

While the specifications laid under the 96th Article of War are quite similar in content to the first two specifications laid under the 95th Article of War there is no duplication of charges. It has been uniformly held that identical specifications may be laid under the 95th and 96th Articles of War. We perceive, furthermore, no duplication between Specification 2 of Charge III and Specification 4 of Charge III. There is no prohibition against charging different aspects of the same act or acts. Whatever prohibition does exist is aimed at preventing the punishment of the offender for the several aspects charged, for, legally,

the offender may be punished only for the most serious aspect of his acts. In the instant case the punishment adjudged is within the maximum which may be adjudged for any one of the aspects of his several acts.

5. Department of the Army records show that accused is 33 years of age, married and the father of two small children. In 1938 he was graduated from Holy Cross College with a Bachelor of Science degree in Economics and in 1941 from Boston University, where he received a Masters degree in Business Administration. After being employed as an auditor in the Kingsbury Ordnance Plant from July 1941 through November 1942, he entered the Army as an enlisted man in December 1942 and served overseas from September 1943 to December 1946. He reached the grade of master sergeant and in November 1946, was commissioned as a second lieutenant in the Army of the United States. On 22 June 1948 he was promoted to the grade of first lieutenant. He is entitled to wear four battle stars and the Good Conduct, European Theater of Operations, American Defense, Victory and Occupation Ribbons. His AGCT score is 114. He has no previous convictions by courts-martial and has never received punishment under Article of War 104. During the period of 4 November 1946 to 30 June 1947 he received an efficiency rating of Excellent (WD AGO Form 67). During the period of 1 July 1947 to 28 February 1949, his efficiency report (WD AGO Form 67-1) over-all ratings /CA/ were 078, 074 and 078. For the period 1 March 1949 to 2 August 1949, an efficiency report was prepared, however, an over-all rating was not made.

6. 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 for a conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.


 _____, J.A.G.C.

 _____, J.A.G.C.

 _____, J.A.G.C.

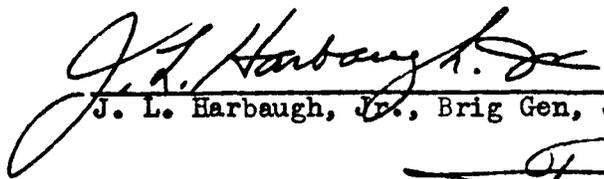
CM 339004

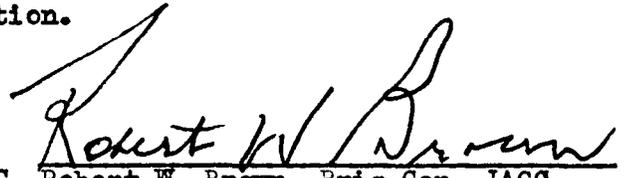
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

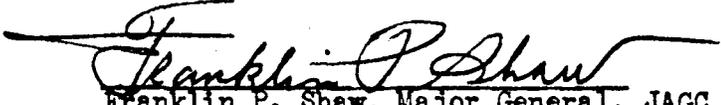
THE JUDICIAL COUNCIL

Shaw, Harbaugh and Brown
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant John Joseph Shea, O-2032965, 9393rd Technical Service Unit, White Sands Proving Ground, Las Cruces, New Mexico, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.


J. L. Harbaugh, Jr., Brig Gen, JAGC


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
Chairman

30 January 1950

(GCMO 1, 8 Feb 1950.)

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

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

CSJAGV CM 339144

UNITED STATES)	CAMP CAMPBELL, KENTUCKY
)	
v.)	Trial by G.C.M., convened at
Private FRANK WASILL, JR.)	Camp Campbell, Kentucky, 17 October
(RA 16297604), 881st)	1949. Dishonorable discharge
Ordnance MA Company,)	(suspended), total forfeitures
Camp Campbell, Kentucky.)	after promulgation and confinement
)	for one (1) year. Disciplinary
)	Barracks.

HOLDING by the BOARD OF REVIEW
GUILMONT, BISANT and LAURITSEN
Officers of the Judge Advocate General's Corps

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, under the provisions of Article of War 50e.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Frank Wasill Jr, 881st Ordnance Heavy Automotive Maintenance Company, did at Camp Campbell, Kentucky, on or about 6 February 1949, desert the services of The United States and did remain absent in desertion until he was apprehended at Gainsboro, Tennessee, on or about 1 September 1949.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Accused was sentenced to "be dishonorably discharged the service; to forfeit all pay and allowances due or to become due after the date of the order directing the execution of the sentence; and to be confined at hard labor, at such place as proper authority may direct for one and one-half (1½) years". The reviewing authority approved the sentence, remitted six (6) months of the confinement imposed, ordered the sentence executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders Number 27, Headquarters Camp Campbell,

CSJAGV CM 339144

Camp Campbell, Kentucky, 29 October 1949.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty. The only question presented and which will be considered is the legality of the sentence imposed as it pertains to forfeitures.

Paragraph 116g, page 130, Manual for Courts-Martial, 1949, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures (Appendix 9, pp 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded in pertinent part "to become due after the date of the order directing execution of the sentence". There is no authority, in the Articles of War or in the implementing provisions of the Manual, authorizing the imposition of the forfeiture of pay and allowances due (CM 335803, Berry, 2 BRJC 277). To this extent the forfeitures imposed are illegal.

4. For the foregoing reasons the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one (1) year.

J. A. Gurnard, J.A.G.C.
Thomas W. ..., J.A.G.C.
Carl R. Lauritzen, J.A.G.C.

CSJAGV CM 339144

1st Ind.

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

To: Commanding General, Camp Campbell, Kentucky

1. In the case of Private Frank Wasill, Jr. (RA 16297604), 881st Ordnance Heavy Automotive Maintenance Company, Camp Cambell, Kentucky, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one (1) year. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

2. It is requested that you publish a general court-martial order in accordance with said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

3. When copies of the published order in the 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 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 339144).



THOMAS H. GREEN
Major General
The Judge Advocate General

Incls:

Record of trial
Draft GCMO

Specification 2: In that Private First Class Angress Brown, Junior, 560th Quartermaster Supply Company, did, at Wels, Austria, on or about 31 July 1949, with intent to commit a felony, viz, rape, commit an assault upon Elfriede Mergl, by willfully and feloniously striking the said Elfriede Mergl in the face with his fist.

Specification 3: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specification 3 of Charge II; guilty of the Specification of Charge I, except the words "and with premeditation," substituting therefor the words "feloniously and unlawfully," of the excepted words, Not Guilty, of the substituted words, Guilty; guilty of Charge I; guilty of Specification 1 of Charge II; guilty of Specification 2 of Charge II, except the words, "with intent to commit a felony, viz, rape," not guilty of a violation of the 93rd Article of War but guilty of a violation of the 96th Article of War; and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

At about 7:00 o'clock in the evening of 31 July 1949, Elfriede Mergl, with her two year old daughter, Ramona, entered the Gasthaus Raudaschl, located opposite the airport in Wels (R 10,21). Elfriede, who testified that she was unmarried and that the father of her child was a "boy friend," was accustomed to frequent the Gasthaus in the company of colored soldiers (R 22,23,34). Shortly after her arrival, she went to the rear of the establishment, passed through the "pissori," and entered the ladies toilet (R 11,28). Accused followed her into the toilet, the door to which she asserted could not be locked. He "offered her ten dollars" but she informed him that she had her own "boy friend" and did not need his money. He attempted to kiss her but she pushed him back and tried to cry out. He "closed" her mouth with his hand, struck her in both eyes and pushed her onto the toilet. He then took out his penis, lay on top of her and placed his hand upon her "genital part." She was menstruating and he tried to pull away the bandage. When she attempted to get off the seat he struck her on the nose causing a nosebleed which stained the

silk dress she was wearing. Finally, for reasons not disclosed by the record, he desisted and she stood up (R 11-15; Pros Ex 1). Johann Wimmer, the proprietor of the Gasthaus, went back to the toilet and, finding five or six soldiers in the "pissori," ordered them out. Entering the toilet he observed Elfriede Mergl, with blood on her face, and a colored soldier standing with his back to her. In response to Wimmer's questioning, Elfriede asserted that the soldier had "wanted something from her" and that the blood on her face was caused when "a hand was put on her throat." (R 25-28) Wimmer observed the bolt on the toilet door when he entered and stated that it was in operating condition although not locked (R 29). On cross-examination, Wimmer admitted telling the defense counsel that there were two toilets in his establishment, one on the upper floor for "respectable girl guests" and the one on the ground floor for "the other ones" (R 33,34). On 2 August 1949, Doctor Henrich Wintersteiner examined Elfriede Mergl and found her to be suffering from a bruised and swollen nose and a discolored left eye (R 37).

At approximately 0015 to 0030 hours, 1 August 1949, Alfred Graf was walking along Eferdingerstrasse in Wels in the direction of the bridge. At a point ("A") indicated by Graf on Court Exhibit 1 (a map stipulated to be "an exact duplication and representation of the streets contained thereon, in the city of Wels * * * the scale thereon * * * one foot to two thousand feet") he was stopped and seized by accused (R 38, 52-53,57). Accused's companion, another colored soldier, struck Graf in the face. Graf was chased by the second colored soldier to a police station indicated on the map as approximately 50 meters away. Graf observed that accused proceeded in the direction of the Wallererstrasse. When last seen by Graf, accused was standing at the intersection of Wallererstrasse and Grunbachstrasse (Point "B" on the map), a distance of approximately 200 feet from the police station (R 55).

At about 0030 hours the same morning, Maria Niedermayr, who resides at 21 Wallererstrasse, a distance of approximately 750 feet from the intersection of Wallererstrasse and Grunbachstrasse, was awakened by a "great noise which was going on outside." She arose, went to the kitchen, looked out the window, and observed two colored soldiers, one of whom was searching the pockets of a civilian lying on the ground, while the other was "jumping at" the head of the civilian. (The scene of the incident was designated as "C" on the map). Maria heard the soldier who was searching the civilian say "Stop now," followed by words which she could not understand, and finally something that sounded like "Jennie," and then the same soldier dragged the other soldier away from the civilian. Maria observed a cyclist approaching and the two soldiers

went toward him (R 96-98,101).

At about the time that Maria Niedermayr witnessed the foregoing incidents, Alois Niederschick, a policeman on duty, observed a man and a bicycle lying on the ground in front of the Niedermayr residence, and two colored soldiers standing nearby. One of the soldiers asked Niederschick what he was doing there and Niederschick explained he was on his tour of duty. The soldier, whom Niederschick identified in court as the accused, and whom he characterized as the taller of the two by 10 to 15 centimeters, struck Niederschick on the left side of the face thereby compelling him to dismount from his bicycle. The other soldier exclaimed "This man is a policeman." The soldier who struck Niederschick ran away, whereupon Niederschick went over to the man who was lying on the ground (R 104-105,108-109). Niederschick recognized the man as Paul Ritzberger (R 106). He identified Prosecution Exhibit 3 as a picture of Ritzberger and testified that the face on the picture looked "substantially like" Ritzberger's face on the night of 1 August (R 106-107).

On cross-examination Niederschick admitted that at a "confrontation" of colored soldiers at the USFA Quartermaster Depot on 1 August he failed to recognize either of the two colored soldiers. He asserted that at a subsequent hearing at the Depot, held possibly about the 24th of August, he saw accused under guard and recognized him as the soldier who had slapped him. He admitted that prior to testifying at the Depot he had been informed by a "CIC" agent that the accused was "an accused". He also admitted making the following statement pertaining to accused at the investigation: "I am not certain he was the man. I am presuming and I suspect him because of his size and looks." (R 109-113).

At 0100 hours, Doctor Alois Floss was called to the vicinity of 21 Wallererstrasse (Maria Niedermayr's residence) where he examined a man lying in the street. Doctor Floss' examination disclosed that the man was dead, and that the front of the man's head was "broken in two." Doctor Floss identified Prosecution Exhibit 3 as a picture of the man whom he pronounced dead under the circumstances related by him to the court. He added, however, that the face showed more swelling than at the time of examination explaining that such a change in appearance was normal in a corpse (R 114-116).

It was stipulated that Paul Ritzberger of Wels, Austria, weighing 180 pounds, height 5 feet 7 inches, died on or about 1 August 1949, "as a result of a splintered fracture of the skull with piercing of the right forehead brain, a bruise of the brain, and subdural and sub-arachnoidal bleedings caused by being kicked in the head on Wallererstrasse between Haidestrasse and Brucknerstrasse, Wels, Austria, on or about 1 August 1949" (R 118).

At about 0030 hours, 1 August 1949, Josef Resinger left the Gasthaus Zum Schonen Aussicht, accompanied by one Raditschnig, Johann Wickenhauser and the latter's wife (R 119). Resinger and Raditschnig were riding bicycles while Wickenhauser and his wife were following them on foot (R 126). The group was travelling slowly along the Wallererstrasse and when they reached a point (designated as "D" on the map) on that street approximately 250 yards from Maria Niedermayr's house, they observed two colored soldiers who came from the opposite direction on the other side of the street (R 119,121,122,125). Whether the two soldiers were together, Resinger could not state (R 127). At the time, Resinger and Raditschnig were cycling on the left of the center of the street which, at that point, was about $4\frac{1}{2}$ meters wide and had no sidewalk. Raditschnig's bicycle was about one-half meter in front of Resinger and closer to the center of the street. Both bicycles had headlights burning (R 126-128). One of the colored soldiers jumped at Raditschnig and both Resinger and Raditschnig dismounted from their bicycles (R 119,121). Resinger parried a blow by the colored soldier and struck a blow himself, whereupon the colored soldier ran away (R 121,129). The other colored soldier remained at the scene and said to Resinger in broken German "Was Du Machen with my Comrade" which Resinger translated as "What did you do to my comrade?" Resinger responded by asking if the soldier had a knife in his hand. The soldier advanced upon Resinger who spun him around and the soldier fled from the scene (R 123-129-130). Resinger characterized the first assailant as the taller of the two soldiers and added that the first assailant was wearing a service cap and the other a garrison hat. He distinguished the two hats by stating that the service hat had a peak and that the garrison hat had two tops (R 131,132). Both soldiers went in a direction leading away from town (R 122,123,124,125). Resinger and his friends continued along the Wallererstrasse and, approximately 300 meters from where they were attacked, they saw a man lying on the ground. The man's face was "a pulp" (R 135).

At approximately 0045 hours, 1 August 1949, at the intersection of Wallererstrasse and Flurgasse, a distance of approximately 140 yards from the place where Resinger and his party were attacked, Private First Class David Edwards, Jr. met accused and "Wright." Accused was wearing an "overseas cap" and Wright was wearing a "garrison cap," which Edwards further described as a hat with a leather peak bill, fur felt top, and with a leather band. At the time, accused and Wright were breathing hard as though they had been running. While the trio was returning to camp accused told Edwards that they had some trouble (R 136-138,144). Upon hearing a siren the three men separated (R 140). In Edward's opinion both accused and Wright were under the influence of liquor since they walked in a "weaving way" (R 142-143).

On "a Thursday" in August, accused offered to trade a watch with Carl Wagner. Wagner identified Prosecution Exhibit 4 as the watch which accused offered to trade (R 153-155). On 5 August accused sold the watch designated as Prosecution Exhibit 4, to Franz Bagar for 710 schillings (R 157). The deceased Ritzberger was wearing the watch designated as Prosecution Exhibit 4 when last seen by his wife, Anna, at 1650 hours, 31 July 1949 (R 145,146).

Rudolf Barisch, a tailor employed at the "USFA QM Depot," testified that when soldiers turned in clothing to him he would make an entry in a register book under the soldier's name or number. The number would be comprised of the first letter of the soldier's "family name" and the last four figures of his serial number. He would also mark, in the same manner, the clothing turned in. He identified Prosecution Exhibit 5 as a pair of trousers which he had so marked. The mark contained thereon is "B 8594" (R 165). It was stipulated that accused's serial number is "16288594" and that the trousers designated Prosecution Exhibit 5 are quartermaster issue (R 163-164). Barisch also testified that the trousers were turned in to him on 5 August 1949, although the entry in the register book was dated 5 July (R 166,168). The trousers were taken from Barisch's shop on 8 August by Captain Frederick S. Putnam, who turned them over to a Mr. William Burden of the "CID" (R 169-170). Burden, in turn, turned the trousers over to Guy D. Stilson, who, in turn, turned them over to Doctor Werner Boltz (R 172-173). The stipulated testimony of Doctor Boltz, a qualified expert in forensic medicine, disclosed that he examined the trousers designated Prosecution Exhibit 5, and that as a result of his examination and tests he detected the presence of human blood on the trousers (R 179-180).

On 1 August 1949 James K. Brown, "CID Agent," saw accused at a routine screening of soldiers of the 560th, 440th, and 516th units in Wels. After a lineup at the Quartermaster Depot on 5 August, Agent Brown arrested accused (R 56,57). On 9 August Agent Brown, and another agent, Burden, went to the stockade and took accused to the "12th CID" in Linz. Agents Brown and Burden explained to accused his rights under the 24th Article of War and specifically told him that any statement he made might be used against him. Accused observed a book entitled "Articles of War, Annotated," and inquired if he might read it. Accused, then, ostensibly read the 24th Article of War. He also read a section concerning a decision of a reviewing board and showed it to Agent Brown. According to Agent Brown, the decision pertained to two soldiers who were being transported in a military vehicle by a military guard. During the trip one of the soldiers killed the guard. One of the soldiers was convicted and the other was not. The one who was acquitted had complained of a stomach-ache and while two of the guards were attending him the other soldier struck the third guard.

Accused was reluctant to tell the agents of his activities on the night of 31 July - 1 August 1949 but, after being shown his blood-stained trousers and a watch which had been in his possession, he voluntarily made an oral statement (R 57,60,61,62,81,85,87-88). The following day Agents Brown and Burden returned to the stockade and asked accused if he cared to make a written statement. He indicated his assent and they again took him to the "CID" office. Here, he again read the 24th Article of War, and, in addition, the Article was again explained to him by Agents Brown and Burden. Accused made a statement which was reduced to writing. According to Agents Brown and Burden the written statement was substantially the same as the oral statement accused made on the 9th of August. He read the statement and placed the letters "D.O.C." on the four corners of each page of the statement. He later stated that "D.O.C." was his nickname (R 58-59,62-64,82-86,89-90). Both Brown and Burden denied that any promises of immunity, any coercion, or threats were employed to secure a statement from accused (R 57,62).

The prosecution's presentation of its testimony was interrupted to permit the accused to testify, at his own request, concerning the circumstances under which he made the pretrial statement (R 65,66). In substance, he testified that he was arrested on 5 August and was placed in confinement the same day at Camp McCauley Stockade. On 8 August, he was visited at the stockade by "CID Agents" Brown and Burden who took him to CID Headquarters in Linz. Without apprising him of his rights under Article of War 24 the two agents interrogated him as to his whereabouts at "twelve o'clock" on the first of August. After he had told them, they stated that they had checked the story before. He was returned to the stockade and brought to Linz the following day by the same agents. En route to Linz, the agents told him that they had found his pants, with blood on them, and a watch which he had previously in his possession. After they arrived at the CID office, Agent Brown told accused they had him "pinned" for murder, that it was "a long road to travel alone," and that they had changed his confinement order from "suspicion of murder" to "murder." Agent Brown continued, however, that there was no need for accused to take the responsibility alone; that a girl had seen the killing and had said that only one soldier fought the civilian, the other soldier kneeling down. Agent Brown added that because there was blood on accused's left pants leg accused must have been the soldier who was kneeling down. Agent Brown also related that the girl who witnessed the killing stated that one of the soldiers called the other soldier "Jinny" and told him to stop. Agent Brown said that since accused's name did not sound like "Jimmy" it must have been accused telling the other to stop. The agents told accused that since it appeared he did not do the killing he should make a statement involving the one who did. While accused was in the office he noticed

a book about the Articles of War. Since he was told that he was being confined under the 92nd Article of War he asked permission to look at the book to see what it said about the 92nd Article of War. While he was reading the Article and the supplementary explanation, Agent Brown pointed out a case which he said was similar to accused's situation. Accused's understanding of the case was that there were two prisoners and a guard in a jeep and one of the prisoners complained of a stomach-ache. While the guard attended him, the other prisoner killed the guard. The prisoner with the stomach-ache was not blamed for the murder (R 67-70).

Accused continued that it was after the foregoing events and discussion that he made an oral statement covering his activities on 31 July and 1 August. He was not apprised of his rights under the 24th Article of War prior to making the statement. After making the oral statement he was returned to the stockade. The following day, 10 August, the agents called on him at the stockade and told him it would be best if he made a written statement with which they could confront the other man involved in the case, and thus get a statement of guilt from him. After arriving at Linz, accused told the Agents that he did not wish to make a written or sworn statement. Burden responded that it would have to be that way in order for them to get a statement from the other man. Accused reiterated that he did not want to make a statement because under the 24th Article of War he did not have to make one. Burden agreed that accused did not have to make a statement, but neither Burden nor Brown told accused that in the event he did make a statement it could be used against him. Accused had also been questioned about a happening with a girl and when he gave his version of that offense he was told to forget about it. Being told to forget about this incident, Brown's explanation of the case in the book, and the circumstance that he was told that the purpose of his statement was to induce the other man to confess, all persuaded accused to make a statement. His "understanding" was that if he made a statement he would not be blamed for his participation in "the activities of the 31st of July - 1st of August." (R 70-73). The only time the 24th Article of War was mentioned was on the tenth of August at which time accused told the Agents that he knew some of his rights under that Article. Specifically, what he knew he had learned from another soldier, and was to the effect that "you didn't have to say anything when you was being arrested till you could have some kind of defense." (R 73).

Upon cross-examination, accused testified that "Doc" was the name by which one soldier called him, and he admitted that he placed the letters "D.O.C." on the written statement made by him (R 75,77). He denied that during the fourteen months he had served in the Army, the Articles of War had been read to him more than two times (R 75). When examined with reference to the oral statement made by him on 9 August, and asked if that statement was made of his "own free will," he answered

that he did not know what "free will" meant. He also denied knowing "what it means to be forced to give a statement." (R 78)

After it was stipulated that accused's score on his Army General Classification test was 111, accused again took the stand and explained his denial that he knew what "force" meant by stating that he did not know to what kind of force the question pertained (R 91-93).

The written statement made by accused on 10 August was admitted in evidence as Prosecution Exhibit 2 (R 58,62,93). In pertinent part accused stated therein that in the early morning of 1 August 1949, while he was returning to "Wels QM Depot" he met Private Jerry Wright, and both continued on to Camp. En route they met a civilian who was riding a bicycle and Wright suggested, "Let's do this Kraut in." Although accused demurred, Wright grabbed the victim as he passed, pulled him off the bicycle, and struck him in the face. The civilian fell to the ground, whereupon, Wright started kicking him. Accused detailed his part in the incident as follows:

"* *Wright told me to search the man while he was still kicking him. I told Wright not to bother the man as we already had money. He insisted, and, as I stooped over and removed a watch from the man's arm, Wright continued kicking him. I told Wright that that was enough, and when he continued his actions I struck Wright in the face with my fist. He staggered backwards and I started to walk away from the scene. I looked back and observed that Wright had gone back and started kicking the man again. I then went back and grabbed Wright and pulled him away from the scene. We walked on down the street and Wright was walking ahead of me at a distance of about ten feet. * * *." (R 94)

A short distance further on, Wright espied an Austrian policeman approaching on a bicycle. Wright grabbed the policeman, but accused intervened and told Wright "come on." Accused paused and explained to the policeman, "My comrade is speiling playing with you." Wright had gone on ahead of accused and, when the latter caught up with Wright, he noticed that Wright was in an argument with several civilians. Accused sent Wright on his way and then tried to explain to the civilians that Wright did not mean any harm. One of the civilians approached accused in a menacing manner. Accused drew a pocket knife from his pocket and opened the blade. He employed the knife to ward off any attack and backed away. When he observed Wright at a safe distance, he turned and ran after him. Accused and Wright then met Private First Class David Edwards and returned to camp with him. Accused told Edwards of the altercation with the civilians. After returning to camp accused placed the watch which he had taken from the victim of Wright's assault on top of his wall

locker, and forgot about it. The following Tuesday he found it and turned it over to the first sergeant, thinking that another soldier had lost it. When nobody claimed the watch it was returned to accused. Accused tried unsuccessfully to trade the watch for another watch, and later sold it to a civilian for 210 schillings.

b. For the defense.

After being apprised of his rights, accused elected to testify on the merits (R 185,186).

With reference to Elfriede Mergl's testimony accused testified that after evening chow he went to a gasthaus, and as he was entering, Mergl was leaving. He told her he wanted to talk to her. At first, she refused stating that her boy friend was around, but then suggested that accused accompany her back to the toilet as she would be better able to talk there. After they entered the toilet accused asked her about "an intercourse" and offered Mergl ten dollars for that purpose. She took the money and put it in her purse. Accused had started to unbutton his trousers, but stopped when she told him, "Not right now, because my boy friend will come looking for me." Accused then demanded the return of his ten dollars stating that he would see her later. Mergl, however, insisted on retaining the money and so, accused resorted to force to regain it. There was a scuffle, he slapped her in the face, took his ten dollars and left the toilet (R 186-188).

Concerning the testimony of Graf, of whose assault accused was acquitted, he testified that at the time and place indicated by Graf in his testimony he (accused) witnessed an assault by Private First Class Jerry Wright upon a civilian (R 188-190).

Later, at the place indicated on the map (Court's Exhibit 1) by Maria Niedermayr, accused was walking with Wright, when an Austrian civilian on a bicycle tried to ride down Wright. Accused continued walking but, when he looked back and saw a fight between Wright and the civilian, he went back to the scene of the fight. When Wright asked accused to search the civilian for weapons, accused knelt over the civilian who was lying on the ground. He saw a watch lying near the civilian's shoulder and picked it up. While he was kneeling he noticed Wright kicking the civilian and he told Wright, "Stop Jerry." When Wright continued to strike the civilian, accused got up and struck Wright. Accused never struck the civilian nor did he assist Wright in any way. He did not search the civilian for the reason that he became interested in the watch on the ground and also because he became angry at Wright for continuing to kick the civilian (R 191-194).

The accused and Wright did not have any prior agreement to take anything from anybody and accused did not mention to Wright the fact that he had found the watch. Accused had just received his ninety dollars pay, and had most of it at the time he found the watch (R 195-196). Accused finally persuaded Wright to leave, but about 25 to 30 feet from where the fight took place, they met an Austrian policeman. Wright grabbed the policeman and struggled with him. Accused pushed Wright on his way and told him that his adversary was a policeman. Accused paused and explained to the policeman that Wright had not meant any harm and was merely playing with him (R 196-197).

Wright, meanwhile, had rushed on "like he was angry," in the direction of the place identified by Resinger in his testimony, and when accused reached that place, he observed Wright in a fight with one of a group of Austrian civilians. Accused rushed up, directed Wright to go on down the street, and tried to explain that Wright did not mean any harm. Accused then saw three Austrian men advancing upon him, drew his knife, backed away, and finally turned and ran (R 198-199).

When accused reached his billets, he placed the watch on top of his locker. He had been excited when he took the watch and had forgotten the circumstances under which he had acquired it. When he next saw the watch, he believed that some soldier might have misplaced it and so he took it to the orderly room and asked the first sergeant if he knew whose property it was. Accused eventually recalled the circumstances of his acquisition of the watch when he was interrogated about the watch by the "C.I.D." He admitted telling the CID that he had taken the watch "from the man" but stated that he meant he picked it up "near the man." He denied using the words contained in his purported statement which indicated that he had removed the watch from the man's arm (R 200-205).

Accused asserted that from about 1700 hours, 31 July, up to the time of the incidents in which he had been involved he had four glasses of wine, one shot of cognac, a bottle of beer, and a whiskey and coke (R 207).

Private Jerry L. Wright testified that at about midnight, 31 July, he and accused were at the place where the witness Graf testified he was assaulted by accused. Wright contradicted Graf's testimony and asserted that he was the one who assaulted a civilian at that place and time (R 212-214). Subsequently, at the place where the witness Niedermayr testified she saw a colored soldier kicking a civilian, Wright testified that a civilian tried to run him down with a bicycle. A fight then ensued between Wright and the civilian. Wright asked

accused to search his adversary and, as accused leaned over the adversary, he told Wright "Stop fighting, Jerry." When Wright failed to stop, accused grabbed him, hit him, and informed him that he was going to take him back to camp. Wright did not see accused take a watch from the civilian, and was not informed of that fact thereafter by accused. Wright admitted that he kicked the civilian and caused his death. He added that accused did not in any way contribute to the civilian's death (R 214-216).

While he was leaving, Wright observed a person approaching on bicycle. Believing that this person was coming to the aid of his late adversary, Wright pushed him, knocking the lamp that was attached to his chest to the ground. Accused told Wright to leave the man alone, that he was a policeman. Accused did not hit the policeman. Wright proceeded on his way and, at the place which the witness Resinger testified was the scene of the altercation in which two colored soldiers were involved, Wright bumped into one of a group of three civilians, and a fight followed (R 216-217). Wright also testified that on 31 July he had received pay of \$87.00 (R 218).

Sergeant First Class Milton Johnson testified that between 1700 and 1730 hours 1 August 1949, a lineup was held of the men in his unit and that accused was one of the men in the lineup. An Austrian policeman was present at the lineup and looked at all the men in the lineup (R 219,220,221).

Sergeant First Class Johnson, Sergeants Rufus McNeil, Fred Douglas, Richard C. Bird, and Richard W. Payne, testified that accused was an excellent soldier, that he had a good reputation for peace and quiet, and that on more than one occasion he had been selected as "soldier of the week" in his unit (R 221-227). The stipulated testimony of Lieutenant William Murray was to the same effect (R 227).

It was stipulated that the records of the finance office showed that on 31 July 1949, Private Jerry Wright received \$87.00, and accused \$89.00, in pay (R 218,219).

Anna Ritzberger, called as a defense witness, testified that the deceased carried a pocket knife with a blade 2 3/4 to 3 1/2 inches long. This knife was turned over to Mrs. Ritzberger by the Austrian police after her husband's death (R 148-149).

4. Accused was charged with assault upon Elfriede Mergl with intent to commit rape, in violation of Article of War 93, and was found

guilty merely of assault and battery, in violation of Article of War 96 (Spec 2, Chg II). The prosecution's evidence tended to show that at the time alleged accused intruded upon Elfriede Mergl in the privacy of the ladies toilet of the Gasthaus Raudaschl in Wels, Austria, and there offered her a financial consideration for a purpose which the circumstances indicated was sexual intercourse. When Elfriede refused the offer, accused struck her in the face, pushed her onto the toilet seat, and attempted to accomplish his purpose of having sexual intercourse without Elfriede's cooperation. This evidence amply supports the findings of guilty.

We also are of the opinion that if the court rejected Elfriede's statement of the reason for the assault, as it well may have, accused's version equally supports the findings. Accused testified that after he had started a conversation with Elfriede in the public part of the Gasthaus Raudaschl they adjoined to the privacy of the ladies toilet. He offered her ten dollars for "a sexual intercourse;" she accepted the offer and he gave her the ten dollars. Accused started to arrange his clothing but stopped when she indicated that their engagement would have to be postponed for a few hours when she would be sure that her "boy friend" would be elsewhere. Accused, evidently being of the opinion that his tender of money was for a service to be presently rendered, demanded the return of his money, and when it was not forthcoming, struck her. Independent evidence showed that on the following day Elfriede had a swollen and bruised nose, and a discolored left eye. We are not required to decide whether under the circumstances accused was authorized to use force to recover his ten dollars. We merely hold that under the circumstances of the case the court could find that the force employed by accused was excessive. It is well settled that where one is entitled to use force to recover possession of his property the force exercised may not be excessive (Com. v. Donohue, 148 Mass. 529; 2 L.R.A. 623). The use of excessive force constitutes assault and battery.

Accused was also found guilty of the unpremeditated murder of Paul Ritzberger, in violation of Article of War 92 (Spec, Chg I), and of the robbery of the same individual, in violation of Article of War 93 (Spec 1, Chg II). The evidence shows that at approximately 0030 hours, 1 August 1949, in front of house number 21 on the Wallererstrasse, Wels, Austria, one Jerry Wright, a companion of accused, assaulted an Austrian civilian, Paul Ritzberger. Accused's pretrial statement, his testimony at the trial, and the testimony of Wright, show that Wright requested accused to search the victim of Wright's assault. Maria Niedermayr, an occupant of the house in front of which the assault took place, witnessed the assault, and observed a colored soldier "jumping" at the head of a prone civilian, while another colored soldier knelt beside the civilian and searched the civilian's pockets. It is apparent that

Maria was witnessing the assault by Wright and the searching of the civilian by accused in compliance with Wright's request. In his pre-trial statement, accused stated that he took a watch from the victim's arm. Other evidence shows that some days later accused sold Ritzberger's watch to an Austrian civilian. The evidence also conclusively shows that accused ordered Wright to cease his assault upon Ritzberger, and when Wright did not stop, accused struck Wright. What followed is not clear from the record. In his pretrial statement, accused asserted that after he struck Wright he started to leave the scene. After proceeding a short distance, he turned and observed Wright again kicking the victim. Accused returned and dragged Wright away. This version of two separate assaults appears only in accused's pretrial statement, and accused, Wright, and Maria Niedermayr were not questioned in court with reference to the two alleged separate assaults. We are of the opinion, however, that this version of the affray is the most favorable to accused and the result we attain is predicated upon it. The record also shows that Ritzberger died as a result of being kicked on the head.

Accused's liability, if any, for murder in this case is vicarious in nature, and at most, is equal to the liability of Wright. Wright in his testimony asserted that Ritzberger, who was riding a bicycle, tried to ride him down. Accepting this as the truth, the evidence shows that after Ritzberger was prone on the ground and helpless, Wright viciously delivered a series of kicks to Ritzberger's head causing his death. These facts clearly and convincingly spell out murder. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1949, par. 179). There is no question of legal justification in this case and the only possible legal excuse would be self-defense, but the right of self-defense does not continue to accrue to a person after his adversary has been rendered helpless as in this case.

It is clearly evident that one who repeatedly kicks a helpless victim in the head, intends grievous bodily harm to such person and thus entertains the malice aforethought requisite to murder. We are not able to say that Ritzberger's act in attempting to ride down Wright, rather than malice, provoked the fatal assault. Ritzberger's act was not such "as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man" (MCM, 1949, par. 180a, p.233). The evidence in this case would support a conviction of murder as to Wright.

If accused's denial of any prior unlawful agreement with Wright is true, what is accused's liability for Ritzberger's homicide? The evidence shows that in the course of the assault upon Ritzberger, Wright asked accused to search Ritzberger, and accused acceded to the request. We find the following statement of law applicable to the factual situation:

"Mere physical presence at or about the scene of a crime is not sufficient to make one an aider and abettor. There must be a mental as well as a physical presence, that is, an awareness of what is about to happen or of what, based on the common experience of mankind, is likely to take place and, at least, a complicitous acquiescence in the event." (CM 321915, McCarson & Higgs, 70 BR 411,416)

Pertinent, too, is the following statement from CM 334790, Cruz et al, 1 BR-JC 277,293:

"* * Presence of one at the scene of the commission of a crime where, as in the instant case, the circumstances point to his consent thereto and his concurrence therein, is considered as an overt act of encouragement to the commission of the crime, and constitutes him an aider and abettor in the commission of the crime * *."

Where, as here, the accused acceded to the assailant's request to search the victim while the assailant was delivering a series of kicks to the victim which were likely to produce death or great bodily harm, accused must have been aware of that probable result, and his search of the victim was, at least, "complicitous acquiescence" in the assault. These facts and circumstances constitute accused as an aider and abettor to Wright and make him punishable as a principal (MCM, 1949, par. 27).

The facts of the case suggest consideration of the question whether accused's subsequent demand upon Wright to stop his assault upon Ritzberger, and accused's subsequent act of dragging Wright from the scene, constituted a withdrawal by him so as to negative the "complicitous acquiescence" evidenced by accused's search of the victim. Analysis of the facts, however, dispels the need for such consideration. The evidence compels the conclusion that prior to accused's interruption of Wright's assault upon Ritzberger, Wright had delivered a series of kicks to Ritzberger's prone and helpless body. The ferocity of the attack at this stage is best measured by its effect upon the accused himself: he felt compelled to attempt to stop it. Without spelling out what is considered in law as an effective withdrawal by one vicariously involved in a crime, in this case we would have to say, in order to give effect to the doctrine of withdrawal, that nothing done by Wright, prior to accused's interruption of his assault, in any way contributed to Ritzberger's death.

If Wright, prior to the purported withdrawal of accused, killed Ritzberger, or delivered a blow which subsequently killed Ritzberger, or delivered a blow or blows which contributed to the death of Ritzberger, accused, as well as Wright, is guilty of murder. Whether any of these hypotheses existed was a question of fact for the court (Cunningham v.

People, 195 Ill. 550, 63 N.E. 517; Jones v. State, 184 Wisc. 750, 198 N.W. 598; Hicks v. State, 213 Ind. 277, 11 N.E. (2d) 171, 178-179; State v. Francis, 152 S.C. 17, 149 S.E. 348; 70 A.L.R. 1133, 1155-1156). We are of the opinion that, under the evidence, the court was justified in concluding, as is implicit in its findings, that one of the hypotheses set forth existed, and, although we are empowered to weigh the evidence, we find nothing in the record which would justify us in reaching a contrary conclusion. Indeed, we are of the opinion that the evidence, at the very least, compels the conclusion that the kicks delivered before the purported withdrawal contributed to Ritzberger's death.

In our view of the case, therefore, the purported withdrawal could not be effective.

"* * * the responsibility of one who has counseled and advised the commission of a crime, or engaged in a criminal undertaking, does not cease, unless within time to prevent the commission of the contemplated act he has done everything practicable to prevent its consummation. It is not enough that he may have changed his mind, and tried when too late to avoid responsibility. He will be liable if he fails within time to let the other party know of his withdrawal, and does everything in his power to prevent the commission of a crime." (People v. King, 30 Calif. 2d 185, 85 Pac. 2d 928, 939) (CM 333860, Haynes & Lussmyer, 81 BR 375, 386) (Underscoring supplied)

We are of the opinion that accused's purported withdrawal came too late.

Other evidence introduced by the prosecution tended to show that, immediately after Ritzberger was left dead or dying, accused assaulted an Austrian policeman, and shortly thereafter assaulted with a knife an Austrian civilian. Such evidence of other offenses closely related in time to the murder, was competent as showing accused's state of mind at the time of the murder and negatived to a certain extent his contention that he was an innocent victim of circumstances in the murder of Ritzberger. The murder scene as witnessed by the disinterested witness, while consistent with the story related by accused and Wright, would raise in the minds of reasonable men a belief that accused was not as innocent as he described himself, and that belief is strengthened by the evidence of the other assaults. The evidence of the other assaults was also corroborative of the identity of accused as a participant in the murder of Ritzberger. As illuminative of accused's state of mind, and corroborative of his identity the evidence of the other assaults was competent (CM 337029, Biller (26 Aug 49)). The findings of guilty of murder are amply supported by the evidence.

Implicit in what we have stated hereinbefore is the conclusion that by lending aid and encouragement to Wright in the assaults which culminated in the murder of Ritzberger, all of Wright's acts became those of accused just as though he himself acted. Thus, on the facts of the case the court could find that accused placed Ritzberger in such position that he could make no resistance, and then took Ritzberger's property. Such a factual situation constitutes robbery (MCM, 1949, par. 180f). The findings of guilty of robbery are warranted by the evidence.

5. The Specification of Charge I alleges that accused "did * * with malice aforethought, willfully, and with premeditation kill Paul Ritzberger * *." Accused was found guilty of the Specification except the words "and with premeditation," substituting therefor the words "feloniously and unlawfully," of the excepted words, not guilty, of the substituted words, guilty. We are of the opinion that although the Specification omitted the words "deliberately, feloniously and unlawfully," it charged accused with the offense of premeditated murder. Murder as defined in paragraph 179a, Manual for Courts-Martial, 1949, is "the unlawful killing of a human being with malice aforethought." (Underscoring supplied). The word "unlawful" in the definition is surplusage since the phrase "malice aforethought" in law connotes and embraces whatever meaning is conveyed by the word "unlawful." (People v. Ah Toon (1886), 68 Cal. 362, 9 P. 311; Hall v. State (1889), 28 Tex. App. 146, 12 S.W. 739; Dickson v. State (1938), 134 Tex. Crim. Rep. 22, 113 S.W. (2d) 739; see also Davis v. Utah Territory (1893), 151 U.S. 262, 266; 38 L. Ed. 153, 14 Sup. Ct. 328).

The model specifications for murder, premeditated and unpremeditated, (Specifications 81 and 82, Appendix 4, MCM, 1949) include, in addition to the word "unlawfully," the words "deliberately" and "feloniously," which were likewise omitted from the Specification of Charge I. Despite these omissions the offense of premeditated murder was alleged. The word "deliberately" is included in the word "malice" which in its legal sense has been held to mean "A wrongful act, done intentionally, without just cause or excuse" (People v. Ah Toon, supra). The omission of the word "deliberately" is, therefore, without legal significance. The same is true of the word "feloniously" which in modern law connotes no more than does the word "unlawfully" (CM 328133, Komno, 76 BR 313), and hence, the word "feloniously," too, must be considered as included within the word "malice." The omission of the word "feloniously" from a specification alleging manslaughter has been held to be immaterial (CM 283744, Leonard, 16 BR (ETO) 279), and for the reasons stated, we are of the opinion that its omission from a specification alleging murder is likewise immaterial.

The court in excepting from its findings of guilty the words "and with premeditation," and in substituting therefor the words "feloniously

and unlawfully," found accused guilty of unpremeditated murder. The unauthorized addition of the words "feloniously and unlawfully" originally omitted from the specification, is of no materiality.

6. The defense objected to the admission in evidence of accused's pretrial statement and in support of its objection accused testified that he was never advised of his rights under Article of War 24 and that, specifically, he was not told that any statement made by him could be used against him in a court-martial. Accused's testimony was rebutted by the testimony of the two "CID" agents to whom he made the statement, and therefore, there was evidence supporting the conclusion of the court that the statement was voluntarily made upon proper warning and hence competent. We find nothing in the record which indicates that the court incorrectly weighed the evidence on this issue.

7. Accused is 20 years of age and unmarried. He was graduated from high school in 1948, and enlisted in the Army shortly thereafter. Other than odd jobs performed during school vacations he has no record of civilian employment. At the time of the offenses with which he was charged he was serving in Austria. The report of the investigation conducted in the case pursuant to Article of War 46b indicates that accused's company commander considered accused's character prior to the offenses as good.

8. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for life, is authorized upon conviction of a violation of Article of War 92. Penitentiary confinement is authorized by Article of War 42 for the offenses of unpremeditated murder and robbery, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by section 1111, act of 25 June 1948, (18 U.S.C. 1111), and section 2111, act of 25 June 1948 (18 U.S.C. 2111), respectively.

Robert J. Cannon, J.A.G.C.
Lewis J. Hull, J.A.G.C.
Herby, J.A.G.C.

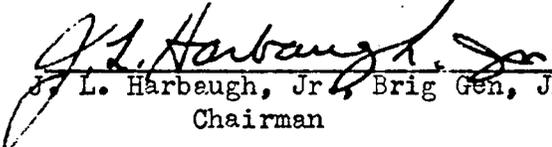
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Angress
Brown, Junior, RA 16288594, 560th Quartermaster Supply
Company, upon the concurrence of The Judge Advocate General
the sentence is confirmed and will be carried into execution.
A United States Penitentiary is designated as the place of
confinement.


Robert W. Brown, Brig Gen, JAGC C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

8 March 1950

I withhold my concurrence in the
foregoing action and transmit the record
of trial to the Secretary of the Army for
confirming action pursuant to Article of
War 48b.


E. M. BRANNON
Major General, USA
The Judge Advocate General
23 March 1950

23 March 1950

MEMORANDUM FOR THE SECRETARY OF THE ARMY

SUBJECT: Record of Trial by General Court-Martial in the Case of
Private First Class Angress Brown, Jr., RA 16288594

1. Pursuant to Article of War 48b, there are transmitted for your action the record of trial, the opinion of the Board of Review, and the action of the Judicial Council with my action thereon in the case of the soldier named above.

2. Upon trial by general court-martial, the accused was found guilty of the following offenses alleged to have been committed at Wels, Austria, on or about 31 July 1949: unpremeditated murder and robbery, in conjunction with Private Jerry Wright, of Paul Ritzberger, in violation of Articles of War 92 and 93; and assault and battery upon Elfriede Mergl, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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. The Judicial Council has confirmed the sentence, but I have withheld my concurrence pursuant to Article of War 48b for the reasons hereinafter discussed.

3. There appears to be no substantial question as to the legal sufficiency of the record to support the findings of guilty of robbery and assault and battery (Specifications 1 and 2 of Charge II). The finding of guilty of murder (Specification of Charge I), however, depends entirely upon conclusions as to Brown's vicarious responsibility for Wright's acts to be drawn from evaluation of evidence. The evidence indicates that the accused Brown initially declined emphatically to join Wright when the latter assaulted the victim Ritzberger. Thereafter, however, when Wright had knocked the victim down and was engaged in assaulting him on the head with his feet, Brown, at the behest of Wright, undertook to search the victim, in the course of which he secured the victim's watch. Wright continued to kick the victim despite Brown's protests whereupon Brown forcibly caused Wright to desist and leave the scene. Technically, this factual situation, as the Board of Review and the Judicial Council have indicated, may constitute sufficient participation by Brown in the actions of Wright to constitute him a principle in the crime of murder, but Brown's action preceding and following Wright's vicious assault on the victim indicate to me that Brown personally entertained no malice toward the victim and that such

participation or abetment as occurred on his part was impulsive and reluctant. Therefore, I am of the view that substantial justice would be done by disapproving the findings of guilty of murder and reducing the sentence to dishonorable discharge, forfeitures, and confinement in a Federal institution for ten years, this being an appropriate sentence for robbery under the circumstances.

4. A form of action is attached for your consideration and signature in the event you concur in my views.

E. M. BRANNON
Major General, USA
The Judge Advocate General

3 Incls
1 Record of Trial
2 Opinion of Bd of Review
w/ action of Judicial
Council and TJAG
3 Form of Action for
Sec of Army

(GCMO 26, April 4, 1950).

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

CSJAGK - CM 339357

UNITED STATES)

v.)

Private JERRY L. WRIGHT)
(RA 15260037), 560th Quarter-)
master Supply Company, APO 174,)
U.S. Army.)

UNITED STATES FORCES IN AUSTRIA

Trial by G.C.M., convened at Wels,
Austria, 12-14 October 1949. Dis-
honorable discharge, total forfeitures
after promulgation, and confinement
for life.

OPINION of the BOARD OF REVIEW

McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

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

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

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

Specification: In that Private Jerry Wright, 560th Quartermaster Supply Company, did, at Wels, Austria, on or about 31 July 1949, with malice aforethought, deliberately, willfully, feloniously, unlawfully, and with premeditation kill Paul Ritzberger, a human being, by kicking him in the head with his foot.

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

Specification 1: In that Private Jerry Wright, ***, did, at Wels, Austria, on or about 31 July 1949, with intent to do him bodily harm, commit an assault upon Alfred Graf, by feloniously and willfully striking the said Alfred Graf in the face with his fist.

Specification 2: (Finding of not guilty on motion).

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and its specification, guilty of Specification 1, Charge II, except the words "with intent to do him bodily harm, commit an assault upon Alfred Graf, by feloniously and willfully," and substituting therefor the words "wrongfully commit an assault upon Alfred

Graf by"; not guilty of Specification 2 of Charge II and not guilty of Charge II but guilty of a violation of Article of War 96. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as the proper authority might direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

In the interest of continuity, the evidence relating to Specification 1, Charge II, will be summarized at this time.

Specification 1, Charge II

About 12:15 a.m. on 1 August 1949, Alfred Graf, an Austrian citizen, was on his way home from a party. He was riding a bicycle along "Eferdingerstrasse" in Wels, Austria. As he approached a bridge over a railroad he dismounted and walked along the street. He had crossed the bridge and proceeded a short distance along the street when two colored soldiers approached him. The taller of the two soldiers grabbed his jacket and "said something which I did not understand." Thereafter the following occurred:

"Q What, if anything, did the other soldier do?

A The tall soldier called the other soldier, which then approached me, too. This man, too, grabbed me by my jacket and then he slapped me. I tore away and fled.

"Q Where did the soldier hit you?

A In the face.

"Q With what did he hit you?

A With the fist.

"Q Did you do anything to cause the soldier to hit you?

A No, nothing at all." (R 11)

A diagram of a portion of Wels, Austria, was introduced as Prosecution Exhibit 1, and it was stipulated that the diagram contained "a true representation, to scale, of the streets indicated thereon in the city of Wels." Using the diagram, Alfred Graf indicated that the foregoing events occurred on "Eferdingerstrasse" about a block north of a railroad bridge (R 9-13).

The prosecution offered and the court admitted into evidence as Prosecution Exhibit 2 a transcript of testimony given by the accused as a defense witness in the general court-martial of Private First Class Angress Brown, Jr. The authenticity of the transcript of testimony was

established by stipulation, however, the defense objected to its admission into evidence upon the ground that it was not relevant or pertinent to the case and because "this being a capital case the accused does not consent to the use of the prior testimony of the witness at a prior trial, against him at this trial." The transcript of this testimony shows that the accused stated that on the night of 31 July 1949 he and Private First Class Angress Brown, Jr. were together, and that just north of a railroad bridge on Eferdingerstrasse Private Brown asked an Austrian civilian to give the accused a light for a cigarette. The civilian "stalled," at which time the accused "grabbed him and *** asked why he didn't give no light to us." The civilian knocked accused's hand away and the accused then hit the civilian. The civilian "broke out of my [accused's] grasp and he ran, sir" (R 14,15,32; Pros Ex 2).

Charge I and Specification

Maria Niedermaier was asleep at her residence, Number 21 Wallererstrasse, Wels, Austria, at about 12:30 a.m. on the morning of 1 August 1949 when she was awakened by loud speaking and "stamping with feet." She looked out of the window and saw a man lying in the street with two colored soldiers standing nearby. One soldier was leaning over the man lying on the ground "going through his pockets." The other soldier "jumped on the head of the man lying on the ground." The soldier who was leaning over the man stood up and pulled the other soldier away and said, "Stop now." She also observed a cyclist approach the group and saw the soldier who had been searching the man on the ground approach the cyclist (R 20-26).

The diagram introduced as Prosecution Exhibit 1 shows that Eferdingerstrasse extends in a northeasterly direction and that Wallererstrasse extends in a northwesterly direction in the City of Wels, Austria. The two streets merge together just north of a railroad bridge. Number 21 Wallererstrasse is about two and a half blocks from the point of the assault upon Alfred Graf as detailed in the foregoing summary of evidence.

Alois Niederschick, a provisional policeman of Wels, Austria, was on duty on the night of 31 July and 1 August 1949. About 12:30 a.m. on 1 August 1949 he approached Number 21, Wallererstrasse, Wels, Austria, on his bicycle and saw a man lying in the street with two colored soldiers standing nearby. One of the soldiers approached him and asked what he was doing there. This soldier then slapped him on the face. He "explained" that he was a policeman and on duty. The two soldiers then ran away. They ran in a northwesterly direction along Wallererstrasse. Mr. Niederschick then observed that the man lying on the ground was Paul Ritzberger (R 27-30). A photograph of Paul Ritzberger made on the morning of 1 August 1949 at the General Hospital at Wels, Austria, was introduced as Prosecution Exhibit 6 (R 29,41,42,45,113). About 1:00 a.m. on the morning of 1 August 1949 Dr. Alois Floss was called to Number 21 Wallererstrasse to examine a man who was apparently lying unconscious in the street. He examined the

man and found him to be dead. The man he examined was Paul Ritzberger (R 35,36, Pros Ex 6).

On 1 August 1949, Dr. Joseph Gruber performed an autopsy upon the body of Paul Ritzberger and found:

"Bruises on the surface of the skin in the vicinity of the head, of the forehead, the face, and the upper part of the body, the chest. Peculiar bruises on the right side of the forehead which were shaped in a semi-circle. Then an impression fracture of the right, front forehead --

"... a splintered fracture of the base of the skull; a piercing of the right, front forehead, with penetration of the brain, and a contusio cerebrae. Further, a subdural and subarachnoidal bleeding of the brain. Further, an extensive fracture of the bones of the face. That was the main result of the autopsy" (R 37-40).

It was stipulated that -

"*** Paul Ritzberger, of 9 Wagner-Jaureggstrasse, Wels, Austria, died on or about 1 August, 1949, as a result of a splintered fracture of the skull, with piercing of the right forehead brain, and the base of the brain, and subdural and subarachnoidal bleeding caused by being kicked on the head on Wallererstrasse between Haidestrasse, Wels, Austria, on or about 1 August, 1949. And also that the deceased, Paul Ritzberger, weighs one hundred and eighty pounds and is five feet seven inches in height." (R 37)

It was also stipulated that the accused is 6' 2" tall and weighs approximately 175 pounds (R 113).

Private First Class David Edwards, Jr. saw the accused and Private Brown about 12:45 a.m. 1 August 1949 at the intersection of Flurstrasse and Wallererstrasse in the City of Wels. The accused and Brown were "breathing as though they had been running." The accused acted as if he had been drinking and "rocked and weaved his body" while walking. He walked with the accused and Private Brown along a path across a field until they heard a police siren, at which time they separated (R 46-50).

Anna Ritzberger, widow of Paul Ritzberger, testified that on the night of 31 July 1949 her husband was wearing "Lederhosen" which is a type of "ornamental dress" worn by Austrians. He wore a wrist watch and carried a stiletto type knife in a "small pocket on the hip of the 'Lederhosen.'" The blade of the knife was between two and a half and three inches in

length and wrapped in paper (R 51-54).

On 9 August 1949, Criminal Investigation Division Agents William B. Burden and Guy D. Stilson obtained a pair of jump boots from the accused. The accused opened his wall locker and stated that the boots belonged to him. Each boot was about 13 inches in length and weighed about one and one-half pounds. They were received in evidence as Prosecution Exhibit No. 4 without objection (R 58,59,61,62,63; Pros Ex 4).

It was stipulated that the boots (Pros Ex 4) were examined by Dr. Werner Beltz, a qualified expert in forensic medicine who determined that certain described stains on the boots originated from human blood (R 63,64).

Over objection by the defense a statement made by the accused and reduced to writing but not signed by him was introduced into evidence as Prosecution Exhibit 5. This statement reads:

"15 August 1949

"On the evening of 31 August 1949 at about 2345 hours, as I was entering the Railway Station in Wels, Austria, I met Pfc Angress Brown. At this time I asked him if any of our friends were present there and he told me that there wasn't. At this time we decided to start walking back toward our unit. After climbing the stairway to the railway bridge, I walked across the bridge and stopped an American soldier and asked him for a cigarette. He gave me a cigarettts and a light and I then rejoined Pfc Brown. My cigarette went out and as I noticed a civilian on the opposite side of the bridge approaching on a bicycle, I crossed the bridge and asked him for a light. This civilian became very frightened and left his bicycle and ran back in the direction from which he had come. Brown and I observed that this civilian ran to a police station after crossing the bridge and, in order to avoid any possible trouble, we decided to turn left after crossing the bridge and take a different route back to camp. We made a right turn on to the first street that we came to. After walking some distance down that street I observed a man coming toward us on a bicycle. When he was about twenty feet from us I heard him calling us dirty names in German. I distinctly heard him call us, 'Schwarzes Schwein,' and 'Schwarzes neger.' As he met us on the bicycle, he rode very close to me and I grabbed the handle bar of his bicycle. It slipped from my hand and he continued on for a short distance before stopping. I then told Brown that I was going back and ask the civilian what the matter was. Brown said, 'No, let's go on to camp.' Brown continued on his way. I walked back to the civilian and tried to ask him in German why he came at me so fast on his bicycle. At first he did not say anything but when I asked him the second time he started calling me names again. At this time I noticed that Brown had continued

down the street and I called to him and asked him what was happening with this comrade. I was leaning on the handle bars of the bicycle and at this time the civilian pushed my hand off and I fell off balance. The civilian then struck me in the stomach with his fist. He then struck me in the groin with his knee. At this I pushed the civilian and he fell to the ground with his bicycle. When he was getting untangled from his bicycle and as he was getting up, I struck him in the face with my fist and he fell back to the ground. I then started kicking him in the head. I then noticed that Brown was along side me and he said to me, 'Jerry, that's enough.' I kicked him one more time and then stopped. Brown then knelt down alongside the civilian and I started kicking him again. After I had kicked the civilian about two more times, Brown jumped up and struck me in the face with his fist. At this time my hat fell off. After I picked up my hat, I went and kicked the man one more time as I was still very angry. At this time Brown grabbed me by the arm and pulled me away. I was still nervous and excited. I then walked down the street ahead of Brown still angry because this man had called me names. After walking only a few steps, I noticed another man approach on a bicycle. I thought that this man had seen me fighting with the other civilian and that he was coming to help the other man. As this second man approached I reached out to grab him and he stopped of his own accord. At this time Brown told me to continue toward camp as this man was a policeman and would not harm me. I then walked on down the center of the street. I then met a group of civilians on the street and it seemed that they were coming directly toward me. As I met them, I walked between them and brushed the side of one of them. At this time one grabbed me and another stood in front of me. The one who was in front of me swung at me with his fist but missed me. When I broke loose from the man who was holding me, Brown told me to go on back to camp. I continued on my way walking a little faster. Brown then said to me, 'Run Jerry, run!' I ran on down the street and met another soldier from our unit whose name is David Edwards. He asked me why I was running. I had then stopped and was trying to catch my breath when Brown came up to us. Brown was also out of breath. When Edwards again asked us why we were running, Brown told him that he had had some trouble with civilians. Edwards then asked us if we wanted him to go back with us to get the civilians and Brown refused. We then walked across a field in the direction of camp. While walking there we heard the sound of sirens. Brown then suggested that we split up. We separated and I later seen Edwards in an MP jeep. I did not see Brown again until we arrived back at the company.

"Witnessed BY:

/s/ William B. Burden
WILLIAM B. BURDEN
Special Agent CID

/s/ James K. Brown
JAMES K. BROWN
Special Agent CID"

4. For the Defense

Sergeants Milton Johnson, James E. Harris, Richard C. Bird, Fred Douglas, and Rufus McNeil, all of the 560th Quartermaster Supply Company, and Sergeant Herschel Morgan, 488th Quartermaster Depot Supply Company, each testified that the accused was a good soldier and that his reputation for "peace and quiet" among soldiers and civilians was very good (R 153-163).

Franz Brandstoetter, an innkeeper of Wels, Austria, was called as a witness for the defense. The defense started to question him relative to the reputation of the deceased, Paul Ritzberger. This testimony was excluded upon objection by the prosecution (R 151-153).

The accused was warned of his rights as a witness and elected to testify as a witness only as to the specification of Charge I and Charge I.

He testified that he was born in Memphis, Tennessee, but that he grew up in Cleveland, Ohio. He was raised by his grandmother because his mother died when he was about four years of age and his father died when he was about seven years of age. He attended high school for one year. He worked for a foundry and a box company before joining the Army on 3 May 1949. He began drinking about noon on 31 July 1949 and had been drinking almost all day. He was not too steady on his feet.

On the night of 31 July and 1 August 1949 he was with Private First Class Angress Brown. They were on their way to camp to make bed check. They were walking north on Wallererstrasse and were in the street when they approached Number 21. A man riding a bicycle came "straight" at him (accused) and almost ran him down. He grabbed the handlebars and slowed the cyclist down, however, the handlebars slipped from his grasp and went past him some twenty feet. The accused then "moved off" away from the cyclist and towards camp. The cyclist called him "a black pig" and "a black nigger." He turned and went back to the cyclist and asked him "why he had called me those names." The man answered something in German which the accused did not understand. The accused had placed his hands on the handlebars of the bicycle. The man then knocked the accused's hands from the bicycle and hit the accused in the stomach with his left fist. The accused testified that thereafter the following occurred:

"Q After his left fist contacted your stomach, what effect did that have on you?

A It bent me slightly, sir. It bent me slightly toward him, sir.

"Q Do you know why he knocked your hand off the handlebars and hit you in the stomach?

A No, sir.

"Q After he hit you in the stomach, what did you do?

A I bent forwards, slightly, sir.

"Q Then what did you do?

A I called Brown, sir, and asked him what was the matter with this comrade.

"Q What else did you say, if anything, at that time?

A Let's do this dirty Kraut in.

"Q What, if anything, did you do then?

A Then, sir, I tried to ward off his leg, sir, he tried to knee me in the groin, sir. I stepped back slightly from him, sir, and I pushed him, sir.

"Q You pushed him?

A Yes, sir.

"Q What was the effect on him of your pushing him?

A He fell to the ground, sir, him and the bicycle both.

"Q After he fell to the ground, then what did you do?

A He then got up, sir, and was reaching for a gun, sir. He reached to his hip.

"Q What did you do then?

A I hit him, sir.

"Q When you saw him reach, what, if anything, did he say at that time?

A He called me a black nigger, and a black pig, but he said it in German, sir.

"Q What were his exact words?

A Schwarzer swine, Schwarzer nigger.

"Q After you saw him reaching back as if for a pistol, what did you do?

A Would you repeat that, sir?

"Q After you saw him reaching, as if for a gun, what did you do?

A I hit him, sir. I knocked him to the ground.

"Q After you knocked him to the ground, what did you do?

A I kicked him, sir.

"Q Why did you kick him?

A So he couldn't get up and use a gun on me, sir.

"Q What made you think he had a gun?

A By him reaching to his hip, sir.

* * *

"Q Well, tell the court how--whether or not you were angry, afraid, as to how quick all this action took place up to this point, tell them in your own words.

A Well, sir, I was very angry. I was angry at him for almost hitting me with his bike, and by him calling me names that made me quite a bit angry. But I was also afraid, that he might shoot me.

"Q Now, after you knocked the civilian to the ground, tell the court, in your own words, how you felt--what you did after that.

A After I knocked him to the grounds, sir, I felt I just couldn't let him shoot me, sir, because as I hit him and knocked him to the ground he reached to his hip, as if to get a gun.

"Q Well, were you excited, or cool, or just what was your emotion at that time?

A Well, I was very excited, sir.

"Q Well, tell the court, in your own words, what happened after that?

A Well, after that, I kicked him, sir.

"Q After you knocked him to the ground you say you kicked him?

A Yes, sir.

"Q Now, describe, in your own words, generally what happened after that--how you felt, how quick the action was, what, if anything, Brown did, and so on--just tell the court.

A Well, after I started I kicked him, sir--well, I wasn't noticing Brown, at least I don't remember seeing Brown, at the part where I started kicking him, sir. I must have been in rage, sir, the reason I didn't notice Brown, sir. And then I noticed Brown, he was pulling my arm, sir. And he told me, sir, to stop fighting the man, sir. And then I didn't stop sir, and he hit me, sir. And he knocked me back when he hit me, sir, and my hat fell off, sir. And I got my hat, sir, and I started to fight the man again, sir, and I kicked at him but I didn't kick him, sir, as Brown grabbed me, sir, to stop me from fighting, and I just kicked him on the shoulder, sir. And then after that, sir, Brown pulled me out in front of him, sir, and told me to go on to camp, sir. But when I first was aware of Brown, I told Brown to search the man for weapons, sir.

"As I said before, I thought he had a gun, sir, and if he had one, I didn't want him to use it, sir. And Brown bent over the man, and I thought he was searching for weapons, sir.

* * *

"Q Now, after you had knocked him down and then you kicked him, did you step back at that time, or did you stay up there?

A Well, I stepped back, sir. I told Brown to search him for weapons, sir.

"Q Now, what, if anything, did the man on the ground do while Brown was leaning over him?

A He grabbed my leg, sir, and tried to throw me down, sir. I kicked him some more, sir.

"Q And why did you kick him at that time?

A He was about to throw me to the ground, sir, he grabbed my leg, sir. And that's why I kicked him at that time.

"Q Then you kicked him when--after you hit him and he went to the ground you stepped up and kicked him. Is that right?

A Yes, sir.

"Q And you kicked him at that time, according to your words, to prevent him from getting to his weapon, is that right?

A Yes, sir. I kicked him, sir, to prevent him from getting to his weapon, sir.

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"Q Your testimony today is the first time you've mentioned the pistol, is that right?

A Yes, sir, it's the first time I've mentioned it, sir, to anyone, sir, outside of my attorney, sir.

"Q Now, when you told Brown to search the man for a weapon, did you know at that time whether or not he had a weapon?

A Well, by his actions I thought that he had one, sir. I was not positive, sir. I could have told Brown to search him for a gun if I had been positive he had one, sir.

"Q What was the man wearing? Clothing.

A All I know he was wearing is what I heard, sir, here, in this court, sir.

"Q You don't remember of your own knowledge, what kind of pants he had on that night?

A Yes, sir, he had on short lederhosen, sir, that's what you call those. He had on short pants, sir, short leather pants, sir.

"Q Did you have any idea where he might have had a weapon?

A Do I have any idea?

"Q Yes

A Well, sir, I did have an idea slightly, by him reaching to his hip, sir.

"Q Did you see any sign of a pistol on his hip?

A I didn't wait to look, sir. I didn't let him extract any weapon from his hip, sir, so I didn't see no sign.

"Q Didn't you hear Brown say, 'Stop, Jerry, that's enough.'

A Did I hear him? I heard him say something, sir.

"Q My question is, didn't you hear Brown say, 'Stop, Jerry, that's enough.'

A Yes, sir.

"Q What did you do when you heard him say, 'Stop Jerry, that's enough.'?

A I didn't do anything, sir.

"Q Why not?

A Well, I wish I could answer that, sir. I can't, I don't know.

*

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*

"Q Now, Wright, think carefully, did you ever jump up and down on this man's head?

A Jump up and down on him, sir? I don't think I did, sir, to tell the truth, I don't believe I jumped up and down on him, sir.

"Q Now you testified that Brown hit you.

A He did, sir.

"Q When did he do that?

A After this man grabbed my legs, sir, and I started kicking him again, sir, Brown hit me. Brown told me this when he told me to stop again, sir. He got up and he hit me, sir. He shoved me first, and he hit me, sir. He hit me and he knocked me back sir, and my hat fell off at that time, sir, too.

*

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"Q Did you kick the man any more?

A No, sir, I started to, sir, but Brown sort of pushed me and he grabbed me and he was shaking me, shaking me like that, you know, sort of shaking me away from him. And as I kicked out I kicked him on the shoulders.

*

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*

"Q Did you see anyone as you were hurrying away from the scene of this incident?

A Yes, sir.

"Q Who?

A A civilian on a bicycle, sir.

"Q Pardon?

A A civilian on a bicycle, sir.

"Q Was it a policeman?

A Well, at the time I didn't know, sir. I didn't know who it was.

*

*

*

"Q On the night of this incident, tell the court how many times you kicked, stamped on Paul Ritzenger?

A That I can remember, sir?

Q Yes.

*

*

*

"Q You have testified, I believe, Private Wright, that you did kick Paul Ritzenger. How many times, do you remember how many times you kicked him? Did you kick him once?

A Well, it was more than once, sir.

"Q Twice, three times? Just answer my question, if you can, if you can remember.

A I must have kicked him about 4 or 5 times, sir, I imagine, sir. That I remember, sir. Sir, believe me, I wasn't counting how many times I kicked the man.

"Q If I followed your testimony, you pushed him down to begin with, knocked him down with your fists. Is that correct?

A Yes, sir, I did knock him down, sir.

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*

"Q Wright, could you explain what you meant when you said, 'Let's do this dirty Kraut in,' when you said it to Brown?

A I meant that I wanted Brown to help me, sir.

"Q In what way, what did you mean by 'do him in'?

A Do him in? It means fight, sir. In Negro slang, do him in means three or four different things, sir. And the one I was referring to was to help me fight the man, sir, as I believed that I couldn't fight the man by myself, sir.

"Q In your slang, then, to what extent does that mean 'do him in'?

A Just to fight him, it don't mean—

"Q Just to fight him.

A Yes, sir, it don't mean to kill nobody, sir." (R 118-148, 165,166)

It was stipulated that if Captain Bruce L. Buschard, Medical Corps, were in court he would testify that he conducted a psychiatric examination of the accused and the following are the results of such examination:

"Soldier is neither psychotic, psychoneurotic, nor mentally deficient. Soldier is so far free from mental disease, defects or derangement as to be able, concerning the particular acts charged, to tell right from wrong and to adhere to the right. There was no evidence discovered which might indicate that any other psychiatric situation existed at the time of the alleged commission of the charged acts. Soldier is possessed of sufficient intelligence so as to be able to comprehend the proceedings against him and to conduct or cooperate in his own defense.

"A careful survey of the soldier's emotional situation reveals that he resents very remarkably any indignity brought upon him because of his color. This reaction sometimes tends to be aggressive. There is no evidence that this is a psychotic over-reaction; however, there is some evidence that the soldier has been submitted at times to indignities by white persons in the past, and he states that such an insult was thrown at him by an Austrian on the night in question. It is not of a nature which could be regarded as a medical basis upon which the soldier could be relieved of total responsibility. Recommend appropriate administrative action. No need is seen for further study of a psychiatric nature." (R 165)

5. Special Matters

The Confession

The defense objected to the admission in evidence of a pretrial statement of accused on the grounds that it was not voluntarily made.

For the limited purpose of testifying as to the involuntary nature of the confession the accused was sworn as a witness. He testified that on 10 August 1949 he saw Criminal Investigation Division Agents Brown and Burden. They told him that he might "as well make a statement, sir; that they had one already concerning me from PFC Angress Brown." On the following day the two agents took him to the "CID" office in Linz. During this trip he was told by the agents that they could show him evidence that would

prove that he was connected with the incident that happened on "July 31st." At the office he was shown a pair of pants and informed that the pants belonged to him and that there was human blood on them. "They told me, sir, that I may as well make a statement in my behalf, so, as Brown had already made a statement, sir, that I might as well get it off my chest." Angress Brown was brought into the room, at which time the agents and Angress Brown related to the accused the events which occurred on the night of 31 July 1949. On 12 August 1949 he saw Agents Brown and Burden at the stockade. On this occasion they told him that they had had his shoes checked and that human blood was found on them. The Criminal Investigation Division agents did not read the 24th Article of War to him, but merely asked him if he understood his rights under the 24th Article of War. He told them, "Fairly." By "Fairly" he meant that he knew that he did not have to say anything. On the 15th of August 1949 he was again questioned by Brown and Burden. On this occasion he was informed that he did not have to make a statement and that any statement he made would have to be voluntary. Agent Brown told him that a sworn statement could be used against him, but that an unsworn statement could not be used against him. He was asked, "Do you want to make a statement now?" to which he replied, "Yes, sir." He then proceeded to make a statement. While he was making the statement Agent Burden was typing on the typewriter. Agent Burden handed him the statement to read, however, he did not read all of it. He stated that he did not want certain things in the statement and Agent Brown gave him a pen and he scratched out one line near the bottom of the page. The statement by Agent Brown that an unsworn statement would not be used against him did not have anything to do with his not signing the statement (R 88-99).

Criminal Investigation Division Agents James K. Brown and William B. Burden each testified concerning the making of the statement by the accused. According to each of these agents the accused was warned of his rights under the 24th Article of War. He was told that he did not have to make a statement and that any statement made by him could be used against him in a court-martial. The questioning was not prolonged. Force, threats, duress or promises of rewards or punishment were not used in obtaining this statement. On 11 August 1949 the accused was warned of his rights under Article of War 24 and informed that Angress Brown had made a statement and the contents of that statement. On this occasion Angress Brown also told the accused that he had made a statement and the contents of his statement. Prior to the making of the statement on 15 August 1949 the accused stated that he would not make a sworn statement and would not sign the statement. The accused dictated the statement and Agent Burden typed it as the accused talked. The accused was given the statement to read, at which time he crossed out one line of the statement (R 65-78).

Agent James K. Brown was recalled as a witness for the court and testified that he told the accused that any statement he made could be used against him, and at no time did he tell the accused that only a written statement could be used against him (R 103).

Private First Class Charles H. DeVerger testified that on the morning

of 15 August 1949 he picked up the accused at the Camp McCauley stockade about 9:00 o'clock and took him to the 124th Station Hospital and then to the "CID" office where the accused was questioned by Agents Brown and Burden. After identifying the statement made by the accused he stated that prior to the time the statement was made the accused was told that he did not have to make a statement; that any statement was "strictly voluntary on his part"; that it was all right if he failed to make a statement, and that any statement he made could be used against him. No force, threats, promises or other inducements were made to the accused (R 81-83).

Major Rodham C. Routledge, the defense counsel, testified:

"If it please the court, the court knows that I am defense counsel for the accused in this case. Pursuant to my duties as defense counsel, I interviewed the witnesses against the accused in this case prior to this trial. Among those witnesses was witness DeVerger, the last witness to appear in this chair. I questioned him with reference to precisely what he heard the CID agents say to the accused in connection with their attempts to warn the accused of his rights under the 24th Article of War. DeVerger told me, at that time I interviewed him, that he had heard the accused advised while he, DeVerger, was present in the room with Agents Burden and Brown, that Wright did not have to make a statement, that any statement he made must be voluntary. Then I asked DeVerger: did he hear the agents say anything further to the accused about his rights. DeVerger replied, 'No.' And I specifically asked DeVerger: 'Did you hear either of the agents who were in the room at the time you were there with the accused tell the accused that any statement he may make could be used against him?' DeVerger replied he did not hear either of the agents advise the accused to that effect. Now, that's the testimony which he gave me in my office. It is in conflict with the sworn testimony which he gave before this court today." (R 85-86).

Before admitting this extrajudicial statement by the accused into evidence the court inquired into the circumstances under which it was made and determined that it was voluntarily made and admissible in evidence. There is no evidence that compulsion, duress, threats or force were practiced upon the accused. The accused admitted that he was asked if he understood his rights under the 24th Article of War, to which he replied, "Fairly," and then explained that by "fairly" he meant that he knew he did not have to make any statement. The evidence also shows that the "CID" agents investigating the events of the night of 31 July 1949 told the accused that his companion, Angress Brown, had made a statement relative to his and the accused's activities on that occasion. Angress Brown also told the accused that he had made such a statement and the contents thereof. The accused was also told that human blood stains had been found on his pants and shoes. There was nothing improper in reciting to the accused the incriminating evidence against him.

The accused contended that he was told that an unsworn statement could not be used against him and that only a sworn statement could be used against him. Criminal Investigation Division Agents Brown and Burden deny that any such statement was made to the accused, and assert that he was informed as to his rights under Article of War 24 and told that any statement he made could be used against him. Private First Class DeVerger corroborates Agents Brown's and Burden's testimony as to this point. The defense counsel then testified as to statements made to him by DeVerger prior to trial in an effort to impeach his testimony.

The voluntary or involuntary character of a confession is a question of law to be determined from the facts adduced in each particular case. It was therefore necessary for the court-martial in this case, acting through the law member, to ascertain the facts and determine as a matter of law, whether the confession was voluntary, and its decision should not be disturbed on appellate review unless there is reasonable basis in the evidence for such action (CM 313786, Howard, 63 BR 273,278).

The Board of Review has considered the evidence relating to the making of this confession by the accused and finds no cogent reason for disagreeing with the court in its decision.

Admissibility of testimony given by accused as a defense witness during the trial of Angress Brown, Jr.

One Angress Brown was being tried by general court-martial and the accused was called as a witness for the defense. Angress Brown was being represented by Major Routledge, the same officer who represented the accused in this trial, and it appears that Major Routledge was representing the accused at the time he was called to the witness stand in the trial of Angress Brown. He testified without objection on his part to an assault and battery upon an unknown Austrian civilian on the night of 31 July 1949, which assault and battery was committed by the accused in the presence of Angress Brown. When this testimony is considered in connection with the testimony of Alfred Graf it is apparent that the person assaulted on this occasion was Alfred Graf. While the authenticity of the testimony given by the accused was established by stipulation, nevertheless the defense objected to its relevancy and because "this being a capital case the accused does not consent to the use of the prior testimony of the witness given at a prior trial, against him at this trial."

Article of War 24, as well as the 5th Amendment to the Constitution, protects the accused against self incrimination only as a result of official compulsion, expressed or implied, not against a mere unwise or ill-advised disclosure of his unlawful activities (CM 324725, Blakeley, 73 ER 307, 320, and cases cited therein).

In People v. Barrios, 199 P. 58, 52 Cal. A 528, the court considered

a case embodying a similar situation as presented in the instant case and said:

"3. Counsel for defendant in this case conducted the defense of Blanco and Tappio on their trial on the same charge. During the progress of that trial, on the order of the court, and at the request of counsel for Blanco and Tappio, the defendant Barrios was brought into court from the county jail, where he was confined, for the purpose of testifying. The defendant Barrios thereupon, in response to questions propounded by his present counsel, testified in detail to the commission of the burglary and his own part in it. The testimony so given was taken down in shorthand by the official reporter, who at the trial of Barrios, and over the objection of his counsel, was permitted to relate such testimony to the jury. It was objected that this was in effect compelling the defendant to be a witness against himself, and that, treating the testimony as a confession of guilt, it was not shown to have been voluntary. If the testimony was voluntarily given, it was a waiver of the constitutional privilege, so that the objections are in effect the same.

"As stated Barrios was called and examined by his then and present attorney. ***

"(4) The testimony seems to have been given voluntarily and with the knowledge that it would probably result in his own conviction and sentence to the penitentiary. Since his testimony was given in response to questions by his own attorney, it must be assumed that he had been fully advised as to his constitutional privilege."

In People v. Mitchell, 29 P. 1106; 94 Cal. 550, the court said:

"The prosecution, in rebuttal, put in evidence statements made by the defendant while testifying as a witness in the case of People v. Long. Though charged with the same offense for which Long was tried it is not the same information. It does not appear that defendant objected to being sworn on that trial, and it seems to be conceded that he did not object to answering the particular questions, the answers to which were given in evidence against him. It was contended simply that the statements are not voluntary, because the defendant was duly sworn to answer questions and was compelled to answer or to admit that his answers might criminate himself. Bish. Crim. Proc secs 1255-1257, cites numerous authorities, and concludes that the testimony voluntarily given as a witness are admissions or confessions competent against him in a criminal cause to which they are pertinent. Unless he objected

to answering the particular matter complained of, and was forced nevertheless to testify it is considered voluntary. Some few cases there are which seem to sustain the appellant, but nearly all the authorities are the other way. See also Whart. Crim Law secs 664,669,1120. We cannot see that our Code, which allows the defendant to testify or not as he may choose, and to limit his testimony to such matters as he pleases, can make any difference."

See also State v. Wheeler, 149 P. 701, 95 Kan. 679.

The testimony given by the accused in the trial of Angress Brown was voluntary and amounted to a confession of the assault and battery upon an unknown Austrian civilian, who was shown to be Alfred Graf. This testimony was therefore admissible in evidence as a confession.

Refusal of the court to permit the defense to show the reputation of the deceased

The defense called Franz Brandstoetter, an innkeeper of Wels, Austria, as a witness and started to question him relative to the reputation of Paul Ritzberger, the deceased. Upon objection by the prosecution the court refused to permit the witness to testify.

In CM 237145, Phillips, 23 BR 281,288, the Board of Review stated the rule in reference to such evidence as:

"The court sustained the objection by the prosecution to question asked of Captain Bridgeford as to the character of Blackshear, the deceased (R 255,256). Evidence of the deceased's character is admissible in a homicide case involving a claim of self-defense. It is inadmissible when the evidence shows no basis for a claim of self-defense (Anderson v. United States, 170 U.S. 481, 504-509; I Wigmore on Evidence, 3rd Ed., Sec. 63; Ibid., Vol. 2, sec. 246). In this case, all the evidence, including the unsworn statement of accused made through defense counsel, negated the idea of self-defense. Therefore, the exclusion of evidence as to deceased's character was proper."

To avail himself of the right of self-defense, the person doing the killing must not have been the aggressor or intentionally provoked the altercation (par 179a, pp 230,231; MCM 1949, CM 307003, Hamilton, 59 BR

387, 399; CM 312207, Joyce, 62 BR 21,25,26; CM 315569, Doss, 65 BR 27,35).

The evidence in the instant case clearly demonstrates that the accused was the aggressor in the affray in which Paul Ritzberger lost his life and therefore a plea of self-defense was not available to him. Under the circumstances the court properly excluded the defense evidence touching upon the reputation of the deceased.

6. Discussion

The accused was charged with a felonious assault upon Alfred Graf with intent to do him bodily harm by striking him in the face with his fist in violation of Article of War 93. He was found not guilty of a felonious assault with intent to do bodily harm but guilty of wrongful assault upon Alfred Graf by striking him in the face with his fist in violation of Article of War 96. In support of this finding the evidence shows that at the time and place alleged in the specification the accused wrongfully struck Alfred Graf in the face with his fist.

Simple assault in violation of Article of War 96 is lesser to and included in the various assaults denounced by Article of War 93, and when a battery is alleged in the original specification, as in this case, the battery is also a lesser included offense (CM 302971, Ball, 59 BR 311, 316; CM 324463, Bohan, 73 BR 237,240).

The accused also stands convicted of a charge and specification which alleges premeditated murder.

The evidence clearly establishes that the accused committed a homicide at the time and place and upon the victim alleged.

"Murder is the unlawful killing of a human being with malice aforethought. *** Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take the life of anyone. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. *** Murder does not require premeditation, but if premeditated it is a more serious offense and may be punished by death. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design." (LHM 1949, par 179a.)

The evidence shows that shortly after midnight on 31 July 1949 the accused and Angress Brown met Paul Ritzberger who was riding a bicycle on one of the streets of Wels, Austria. The accused was the only eyewitness who testified relative to the events leading up to the death of Paul Ritzberger. According to the accused's story the deceased almost ran into him with a bicycle and the accused grabbed the handlebars in an attempt to stop the deceased. The bicycle went some twenty feet past the accused and stopped. The accused was proceeding on his way to camp when the deceased called him a "black pig" and "a black nigger." The accused turned and went to the deceased and demanded to know why he had been called such names. The deceased pushed the accused's hands from the bicycle and attempted to strike him. The accused called to Brown "and asked him what was the matter with this comrade" and also said, "Let's do this dirty Kraut in." The deceased attempted to "knee me in the groin", at which time the accused pushed him to the ground. The deceased was entangled with his bicycle and attempted to arise. The accused then struck the deceased and knocked him to the ground. He began kicking the deceased on the head and continued to kick him until he fractured the deceased's skull, driving fractured bones into his brain causing his death. He attempted to justify his kicking the deceased upon the ground that the deceased reached towards his hip as if to draw a pistol. The accused admitted that he did not see a pistol in the possession of the deceased. There was no evidence that the deceased in fact possessed a pistol. It was not until after the accused commenced his brutal assault upon the deceased that the accused conceived his idea that the deceased might have possessed such a weapon.

In CM 322487, Dinkins, 71 BR 185,193, the Board of Review said,

"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."

In the instant case the accused's testimony demonstrates that he can not avail himself of the doctrine of self-defense. The evidence wholly

fails to show that the accused had reasonable grounds to believe that his life was in danger. It also fails to show that it was necessary for the accused to kill the deceased in order to protect his own life. Neither did the accused retreat from the affray at any time nor make any effort to avoid the conflict with the deceased. On the contrary the evidence does show that the accused was the aggressor in the affray and that the deceased met his death through the vicious and brutal acts of the accused, which acts continued until he was forcibly restrained by his companion, Angress Brown. From the evidence, the court was legitimately justified in concluding that the accused commenced and persisted in his attack upon the deceased with the specific intent to kill.

7. The record shows that the accused was 20 years and eight months of age at the time of the offenses. He enlisted in the Regular Army on 3 May 1948 for three years.

8. The court was legally constituted and had jurisdiction over the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence to death or imprisonment for life is mandatory upon conviction of premeditated murder in violation of Article of War 92.

Carlos E. McAfee, J.A.G.C.

Joseph T. Black, J.A.G.C.

Roger W. Dennis, J.A.G.C.

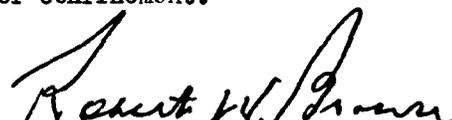
CM 339357

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

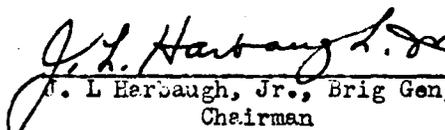
THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Jerry L. Wright,
RA 15260037, 560th Quartermaster Supply Company, upon
the concurrence of The Judge Advocate General, the
sentence is confirmed and will be carried into execution.
A United States Penitentiary is designated as the place
of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

8 March 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

(GCMO 20, March 23, 1950).

14 March 1950

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
WASHINGTON 25, D.C.

CSJAGK - CM 339424

UNITED STATES)

FORT ORD, CALIFORNIA)

v.)

) Trial by G.C.M., convened at Fort Ord,
) California, 22 November 1949. Dis-
) missal and total forfeitures after
) promulgation.

) First Lieutenant RICHARD H.
) ELLIOT, O-1638210, Headquarters,
) 6003 Area Service Unit, Fort
) Ord, California.)

OPINION of the BOARD OF REVIEW

McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Richard H. Elliot, Headquarters 6003 Area Service Unit, Fort Ord, California, did, at Las Vegas, Nevada, on or about 4 June 1948, wrongfully, unlawfully, and bigamously marry Mary Lee Ward, having at the time of his said marriage to Mary Lee Ward, a lawful wife then living, to wit: Phyllis Elliot.

Specification 2: In that First Lieutenant Richard H. Elliot, ***, being indebted to the Home Oil Company, Riverside, California, in the sum of Thirty-one dollars and forty-eight cents (\$31.48), which amount became due and payable on or about 10 November 1948, did, at Riverside, California, from 10 November 1948 to 13 July 1949, dishonorably fail and neglect to pay said debt.

Specification 3: In that First Lieutenant Richard H. Elliot, ***, having on or about 27 September 1948, become indebted to the Federal Services Finance Corporation, Long Beach, California, in the sum of Six Hundred Dollars (\$600.00) for cash received, promised in writing to said Federal Services

Finance Corporation that he would on or about 5 November 1948, 5 December 1948, 5 March 1949, and 5 May 1949, pay on such indebtedness the sum of Fifty-three Dollars and Seventy-five cents (\$53.75) did, at Long Beach, California, on or about 5 November 1948, 5 December 1948, 5 March 1949, and 5 May 1949, wrongfully and dishonorably fail to keep said promise.

Specification 4: In that First Lieutenant Richard H. Elliot, ***, having on or about 26 May 1949, become indebted to the Georgia Railroad Bank and Trust Company, Augusta, Georgia, in the sum of Five Hundred Seventeen Dollars and fifty cents (\$517.50) for cash received, promised in writing to said Georgia Railroad Bank and Trust Company, that he would, on or about 1 July 1949 and on or about 1 August 1949, pay on such indebtedness the sum of One Hundred Dollars (\$100.00) did, at Augusta, Georgia, on or about 1 July 1949 and on or about 1 August 1949, wrongfully and dishonorably fail to keep said promise.

He pleaded not guilty to and was found guilty of the charge and all specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. 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 is in the military service and assigned for duty with the G-4 Section, Headquarters, Fourth Infantry Division, Fort Ord, California (R 9,10).

Mrs. Phyllis Caillouette of San Francisco, California, testified that her maiden name was Phyllis Marie Siert. On 18 September 1941 she married the accused at Papillion, Nebraska. She was divorced from the accused on 21 April 1949 in San Francisco, California. She remarried on 29 July 1949 (R 10-16,40,41,43).

Prosecution Exhibit No. 1 was introduced into evidence without objection by the defense. This document is a duly certified and authenticated copy of a marriage license and certificate of marriage between the accused and Phyllis Siert on 18 September 1941, as recorded in the official records of Sarpy County, Nebraska (R 14, Pros Ex 4).

In 1948 Phyllis Elliot began an action for divorce against the accused

in the Superior Court of the State of California, sitting in and for the City and County of San Francisco, and on 8 April 1948 she obtained an "Interlocutory Judgment of Divorce." A copy of this judgment was received in evidence without objection as Prosecution Exhibit No. 2 after its authenticity was established by stipulation. This judgment recites in pertinent part:

"This cause came on regularly for trial on the 8th day of April 1948, upon plaintiff's complaint taken as confessed by the defendant, whose default for not answering, after having been regularly served with summons, has been duly entered, and upon the proof taken it appears, and the Court finds, that all the allegations of the complaint are true and are sustained by evidence free from all legal exceptions, and from which the Court finds and determines that a divorce ought to be granted upon the ground of defendant's willful neglect.

"Wherefore, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to a divorce from defendant and that, upon the expiration of one year from the entry of this judgment a final judgment be entered herein granting said divorce and restoring said parties to the status of single persons."

Thereafter on 21 April 1949 Phyllis Elliot applied to the court for and obtained a "Final Judgment of Divorce" from the accused. A copy of this judgment was received in evidence without objection as Prosecution Exhibit No. 3 after its authenticity had been established by stipulation. This judgment reads in pertinent part:

"The motion of the Plaintiff for final judgment came on for hearing on this 21 day of April 1949, upon all the files, papers, proceedings and records in the above entitled action, from which it appears, and the Court finds, that an interlocutory judgment of divorce was, on the 8th day of April 1948, entered in said cause in Judgment Book 769, at page 1; that no motion for a new trial has been made and no appeal has been taken;

"Wherefore it is hereby ORDERED, ADJUDGED AND DECREED that a divorce be, and it hereby is, granted and that the marriage between the above named plaintiff and defendant be, and the same is, hereby dissolved, and the said parties are restored to the status of single persons."

Mary Lee Ward became acquainted with the accused when he was stationed at March Field, California. On 4 June 1948 Mary Lee Ward and the accused were married at Las Vegas, Nevada. Following the marriage they returned to California and lived together as man and wife until about the 16th of November 1948, at which time the accused went to Georgia (R 19-21).

Prosecution Exhibit No. 4 was introduced into evidence without objection. This document is a duly certified and authenticated copy of a certificate of marriage between the accused and Mary Lee Ward, dated 4 June 1948, as recorded in the official records of Clark County, Nevada (R 20, Pros Ex 4).

Specification 2

The accused was a "credit card holder" with the Home Oil Company from 20 April 1948 to 30 September 1948. Between 6 August 1948 and 30 September 1948 various purchases of gasoline and oil and a light bulb were made by the accused and "M. L. Ward" and charged to the accused's account with the Home Oil Company. By reason of these purchases the accused was indebted to the Home Oil Company in the sum of \$31.48 on 30 September 1948. Mary Lee Ward identified the various "receipts signed at the time of purchase on the Credit Card" and they were introduced as Prosecution Exhibits 5a through 5h, inclusive, without objection by the defense. She identified the accused's signature on some of these receipts and testified that she signed the other receipts with the accused's consent and at a time she believed herself to be the accused's wife. She signed "M. L. Ward" on these occasions because -

"I had applied for work as a dental assistant, and the man for whom I was working didn't approve of married women, and the person who helped me obtain the position did not know I was married. My social security card had never had that change."
(R 22-27, Pros Exs 5a through 5h).

W. L. Swendler, assistant manager of the Home Oil Company, testified by deposition that on 30 September 1948 the accused was indebted to the Home Oil Company in the sum of \$31.48 and that this account became due and payable on 10 November 1948. Beginning in November of 1948 monthly statements were dispatched to the accused for several months; that special notices were sent to the accused on 25 January 1949, 10 February 1949, 20 February 1949, 25 February 1949, and that letters were written on 17 March 1949 and 3 May 1949 in an effort to collect the amount due and owing. In response to the demands for payment the Home Oil Company received a telegram from the accused dated 20 May 1949 wherein the accused stated that he would pay the account on 1 June 1949. Payment was not received on 1 June 1949 and the accused's account with the Home Oil Company remained unpaid until about 3 October 1949 when a Western Union Money Order was received from the accused (R 28, Pros Ex 6).

Specification 3

It was stipulated that Prosecution Exhibit No. 7 is the deposition of D. D. Kaiser, manager of the Federal Services Finance Corporation of

Long Beach, California, with one inclosure attached, and that this inclosure is a photostatic copy of the original note signed by the accused on 27 September 1948 at the Office of Federal Services Finance Corporation. In his deposition Mr. Kaiser testified that on 27 September 1948 the accused borrowed \$600 from the Federal Services Finance Corporation, at which time he executed and delivered a promissory note to the corporation dated 27 September 1948, which note was indorsed by Captain Don E. Johnson and First Lieutenant Ulmont U. Beville, Jr. in the sum of \$600.00 payable in monthly installments of \$53.75 beginning on 5 November 1948. He further testified that the accused did not make the payments which became due on 5 November and 5 December 1948 when they became due, and thereafter the following occurred:

"ELEVENTH INTERROGATORY: Did the document signed by Lt. Elliot require Lt. Elliot to make payments to your corporation for the dates as follows: 5 November 1948, 5 December 1948, 5 March 1949, and 5 May 1949?

"ANSWER: Yes.

"TWELFTH INTERROGATORY: How much were the payments that Lt. Elliot promise to pay?

"ANSWER: \$53.75

"THIRTEENTH INTERROGATORY: Did Lt. Elliot pay to the Federal Service Finance Corpn the payments he promised to pay on 5 November 1948, 5 December 1948, 5 March 1949, and 5 May 1949 when they were due?

"ANSWER: No.

"FOURTEENTH INTERROGATORY: Were any demands made by the Federal Services Finance Corpn on Lt. Elliot for the payments of 5 November 1948, 5 December 1948, 5 March 1949, and 5 May 1949?

"ANSWER: Yes.

"FIFTEENTH INTERROGATORY: Did the Federal Services Finance Corpn receive any answers to these demands made for these delinquent payments?

"ANSWER: Yes.

"SIXTEENTH INTERROGATORY: If the answer to the above interrogatory was 'Yes', will you explain fully what response was received by your office in reply to your demands made on Lt. Elliot for these delinquent payments?

"ANSWER: We received a series of post-dated checks starting 4 January 1949 for the payments.

"SEVENTEENTH INTERROGATORY: Mr. Kaiser would give a brief resume as

to facts relative to the four abovementioned delinquent installments?

"ANSWER: The installments started 5 November 1948 and nothing was received on the account until the first check was deposited on 4 January 1949. That took care of the November installment. The next credit was on the 4th of February 1949 which took care of the December installment. The March check was returned unpaid by the bank and was re-deposited on the 31st of March and again returned on the 12th of March. The check deposited on 4 April 1949 was not returned by the bank. That took care of the January payment. The check deposited on the 4th of May was returned by the bank. We also deposited/on^{the} 4 June 1949 which was also returned by the bank. And on 13th June 1949 we received \$75.00 from Lt. Elliot which was credited to the account.

"18TH INTERROGATORY: Has Capt. Don E. Johnson, serial No. O-1283781, and First Lt. Ulmont U. Reville, Jr. USAF AO 833261, the co-signers of the instrument guaranteeing the payment of the indebtedness contracted by Lt. Elliot with your corporation, ever had demands made on them by your corporation for payment of these delinquent installments?

"ANSWER: Yes.

"FIRST CROSS INTERROGATORY: What is the present status of Lt Elliot's account?

"ANSWER: Paid in full.

"2ND CROSS INTERROGATORY: On 15 February 1949 were the payments due on 5 November, and 5 December 1948 still outstanding?

"ANSWER: No. They were paid by the 15th of February 1949.

"3RD CROSS INTERROGATORY: When were the two above mentioned installments paid?

"ANSWER: The November payment was paid on the 4th of January and the December payment was paid on the 4th of February." (R 31, Pros Ex 7).

The deposition of First Lieutenant Ulmont U. Beville, Jr. was read into evidence as Prosecution Exhibit No. 8 without objection. In his deposition Lieutenant Beville identified the note to the Federal Services Finance Corporation executed by the accused, indorsed by Captain Johnson and himself, and stated that he indorsed the note upon the "urgent request of Lt Elliot." At the time the note was signed Lieutenant Elliot stated that "he would pay back this loan as required by the Federal Services Finance Corporation. He also assured me that it would be paid promptly." On 21 July 1949 he (Lieutenant Beville) paid \$56.00 on this note (R 32, Pros Ex 8).

Specification 4

The deposition of Felton Dunaway, Assistant Vice President of the Georgia Railroad Bank and Trust Company, Augusta, Georgia, was received in evidence without objection. In this deposition dated 3 November 1949 Mr. Dunaway testified that on 26 May 1949 the accused borrowed \$500 from the Georgia Railroad Bank and Trust Company, at which time he executed and delivered to the bank a promissory note dated 26 May 1949 and indorsed by Lieutenant John E. Schrengehst and Lieutenant Robert Machado, in the sum of \$517.50 payable in six monthly installments of \$86.25 each. At the time the note was executed the accused also signed and exhibited to the bank a "Class E Allotment" form whereby he authorized the proper finance officers of the Army to send the sum of \$100.00 each month from his pay to the Georgia Railroad Bank and Trust Company. The bank was to receive and credit this sum to the accused's checking account, and thereafter the bank was to charge his account each month with \$86.25 and credit this amount as a payment on the note. The accused did not make any payments to the bank, and at the time the deposition was taken (3 Nov 1949) the note was five months in arrears (R 34,35; Pros Ex 10).

The deposition of First Lieutenant John E. Schrengehst was received in evidence without objection, after it was stipulated that inclosure No. 1 to the deposition is a photograph of the accused and that inclosure No. 2 is a photostatic copy of the original note signed by the accused at the Georgia Railroad Bank and Trust Company on 26 May 1949. In his deposition Lieutenant Schrengehst testified that he indorsed the original of the note attached to the deposition, and referred to as inclosure No. 2, at the request of the accused and that he accompanied the accused "to the Georgia Railroad Bank and saw him receive the \$500.00 from the bank on the note." Lieutenant Schrengehst in his deposition also stated:

"Fourteenth interrogatory: Did Lieutenant Elliot state to you how he intended to repay this loan which you signed as co-signer?

"Answer: Yes sir, around \$80.00 per month

"Fifteenth interrogatory: Did Lieutenant Elliot offer for your scrutiny any evidence which supported his statement as to how the loan would be repaid?

"Answer: Yes he showed me the note and an allotment form he had made out.

"Sixteenth interrogatory: If the answer to the above interrogatory is 'Yes,' will you describe, as best you can recall, what he showed to you as evidence supporting his statement regarding the method of repayment of this loan?

"Answer: Allotment form."

Inclosure No. 2 to this deposition shows a promissory note dated 26 May 1949, payable to the order of Georgia Railroad Bank and Trust Company, Augusta, Georgia, in the sum of "Five hundred seven and 50/100 Dollars" in six installments of \$86.25 each, the first installment being payable one month after the date of the note and the remaining installments being payable, respectively, on the same day of each consecutive month thereafter. It is signed "Richard H. Elliot 1st Lt 01638210" and indorsed by John E. Schrengohst and Robert Machado (R 33, Pros Ex 9).

It was stipulated that Prosecution Exhibit No. 11 is the deposition of Lieutenant Colonel Frederick W. Reese, Finance Department, Class E Allotment Division, Army Finance Center, Office of the Chief of Finance, Building 205, St. Louis 20, Missouri. This deposition was received in evidence over the defense's objection that it was not relevant to the case. In his deposition Colonel Reese testified his office maintained files on each individual in the Army who has a Class E allotment in effect. He further testified:

"Fifth interrogatory: Again referring to the file of First Lieutenant Richard H. Elliot, do you have on file an application for a Class E Allotment in the amount of \$100 per month commencing with the month of June, 1949, payable to the credit of Richard H. Elliot at the Georgia Railroad Bank and Trust Company, Augusta, Georgia, which application is dated 24 May 1949?"

"Answer: There is no record. Lieutenant Elliot's file indicates that no such allotment was ever received and no such allotment was ever paid.

"Sixth interrogatory: Do your records indicate that First Lieutenant Richard H. Elliot has in effect at this time a \$100 Class E Allotment payable to his credit at the Georgia Railroad Bank and Trust Company, Augusta, Georgia?"

"Answer: There is no record of any such allotment being in effect for Lieutenant Richard H. Elliot.

"Seventh interrogatory: Do your files indicate that First Lieutenant Richard H. Elliot had a Class E Allotment in the amount of \$100, as described in the previous interrogatory, in effect at any time during the year of 1949?"

"Answer: No, sir.

"Eighth interrogatory: If First Lieutenant Richard H. Elliot had in effect at any time during 1949 a Class E Allotment in the amount of \$100 payable to his credit at the Georgia Railroad Bank and Trust Company, Augusta, Georgia, would your records reflect that? If so, please explain in what manner they would reflect this allotment.

"Answer: Yes, they would reflect any allotment that was in effect. Class E authorizations arriving in the Division are controlled by letters of transmittal from the field. These allotments are then processed through our Accounts Control Branch where detailed records are kept on any allotment currently being paid. After an allotment has been put into effect, copies of vouchers are maintained which indicate in detail the allotter, allottee, amount and check number of each payment. These records do not indicate that any such allotment was in effect during 1949 or any other time for the account of Richard H. Elliot." (R 37, Pros Ex 11).

Major Roy C. Johnston, Finance and Disbursing Officer at Fort Ord, California, was the custodian of the "officers financial records" at Fort Ord. These records include the financial records of the accused. These records show that the accused has in effect a Class E allotment in the sum of \$55 and a Class N allotment for National Service Life Insurance. He has no record of any allotment by the accused to the Georgia Railroad Bank and Trust Company (R 38-40).

It was stipulated that the Class E allotment of \$55 was to a minor child of the accused (R 41).

4. For the Defense

The accused was warned of his rights as a witness and elected to testify in his own behalf. He stated that he was first married on 18 September 1941 to "Phyllis." In November of 1945 he was sent to Korea and at this time his wife was not permitted to accompany him. In September of 1946 he received a letter stating that his wife had left home. The Red Cross located his wife in San Francisco, at which time he obtained emergency leave and returned to the States. His domestic troubles were "patched up" and he returned to Korea with an understanding that his wife would join him in Korea. When her orders were "all set" she decided not to go to Korea. He returned from Korea in December of 1947, at which time they decided that "a divorce was the only thing." In January of 1948 his wife applied to the California courts for a divorce on the grounds of cruelty but the divorce was not granted. She then filed a petition for a divorce alleging non-support and an interlocutory decree was entered on 8 April 1948. The decree was to become final on 8 April 1949. He met Mary Lee Ward at March Field in the latter part of February 1948, and they began "keeping company." He married Mary Lee Ward in Las Vegas, Nevada, on 4 June 1948. After their marriage they returned to California where they resided as man and wife. He also stated:

"Q. Did you know at the time you married that your decree was not final?

"A. I knew it was not final in the State of California but I was under the impression it was okeh outside of the state.

* * *

"Q. Did Mrs. Ward know of the fact you had been married?

"A. Yes, sir.

"Q. Did she know you had an interlocutory decree at that time?

"A. Yes, sir.

* * *

"Q. Now, Lieutenant, I want to get your testimony concerning your marriage and divorce straight: I understood you to say you understood your divorce was not final in the State of California until April of 1949, is that right?

"A. Yes, sir.

"Q. But you were under the impression that was just for the State of California?

"A. Yes, sir.

"Q. So you went to Reno, or some place in Nevada, and you and Miss Ward were married?

"A. Yes, sir." (R 50,51,54,55).

He had an account with the Home Oil Company and about 28 September 1948 he paid what he thought was the full amount due on this account. He had made purchases in September and it was not until the early part of May or June of 1949 that he received notice that there was a balance due the company. In the early part of October 1948 he had been transferred from March Field. The Home Oil Company was paid in full in August of 1949. The loan made by the Federal Services Finance Company was paid in full in August of 1949 and the loan made by the Georgia Railroad Bank and Trust Company was paid about the middle of November 1949. The delay in paying these obligations was "just the press of other debts, sir." The other debts were personal obligations, one other finance company and one bank. All of his debts are now paid in full (R 47-58).

Wilber E. Dowell, Chief Warrant Officer, Headquarters Fourth Infantry Division, is the custodian of the officers' 201 files. These files show that the accused has paid the Home Oil Company his indebtedness of \$31.48. The accused's indebtedness to the Federal Services Finance Company has been paid in full and a receipt for such payment has been received. On 16 November 1949 he wired the Georgia Railroad Bank and Trust Company the money to pay the accused's indebtedness to them, but as yet he has not received a receipt from the bank acknowledging payment. The accused's funds were used to pay these obligations (R 60,61).

Mary Lee Ward was called as a witness for the defense and stated that at the time she married the accused she knew that he had been married. She did not know the "type" of his divorce decree but she believed that he was free to marry. She could not give any definite reason why the marriage occurred in Nevada (R 61,62).

5. Discussion

Specification 1 of the Charge

This specification alleges the offense of bigamy in violation of Article of War 96.

"Bigamy is willfully and knowingly contracting a second marriage where the contracting party knows the first marriage is still subsisting" (CM 258630, Reynolds, 5 BR (ETO) 259,263).

This offense has long been recognized as a violation of Article of War 96. The essential elements of the offense are:

- (1) A valid marriage entered into by the accused prior to and undissolved at the time of the second marriage.
- (2) Survival of the first spouse, to the knowledge of the accused.
- (3) A subsequent marriage to a different spouse. (CM 326147, Nagle, 75 BR 159,173,174).

The marriage of accused to Phyllis Marie Siert on 18 September 1941 was established by the duly authenticated copy of the marriage license and marriage certificate of Phyllis Marie Siert and the accused as reflected by the official records of Sarpy County, Nebraska; the testimony of Phyllis Caillouette (Elliot) and the judicial admissions of the accused. Phyllis Elliot began divorce proceedings against the accused in the Superior Court of the State of California early in 1948. On 8 April 1948 the California court granted her an "Interlocutory Judgment of Divorce" and on 21 April 1949 that court granted her a "Final Judgment of Divorce" from the accused.

The marriage of the accused to Mary Lee Ward at Las Vegas, Nevada, on 4 June 1948 was shown by a duly authenticated copy of their marriage certificate as reflected by the official records of Clark County, Nevada, the testimony of Mary Lee Ward, and the judicial admissions of the accused. Phyllis Marie Elliot's testimony established that she was alive at the time of trial. That the accused knew that Phyllis Marie Elliot was alive was shown by his testimony concerning the arrangements for divorce proceedings and the subsequent court action and judgments as well as his

admission that he knew that at the time of his subsequent marriage to Mary Lee Ward the divorce decree was not final.

The accused admitted that at the time of his marriage to Mary Lee Ward he knew that his decree of divorce from Phyllis Elliot was not final and stated that he was under the impression that it was "okeh" to marry outside the State of California. He did not state how he acquired this impression nor does it appear that he made any inquiry to determine the legal effect of his marriage to Mary Lee Ward. Under such circumstances it cannot be concluded that this second marriage of the accused was entered into in good faith upon a reasonable and non-negligent belief that his prior marriage had ceased to exist and that he was free to remarry (CM 330282, Dodge, 78 BR 345, 357).

The interlocutory judgment of divorce entered on 8 April 1948 did not purport to dissolve the marriage between the accused and Phyllis Elliot. It merely recited that Phyllis Elliot was entitled to a divorce and that upon the expiration of one year from the date of entry of the judgment a final judgment would be entered granting a divorce and restoring the parties to the action to the status of single persons. The final judgment of divorce entered on 21 April 1949 dissolved the marriage between the accused and Phyllis Elliot and restored them to the status of single persons. These judgments were entered pursuant to the California statutes which provide that in actions for divorce the court must file its decisions and conclusions of law as in other cases and when the court determines that a divorce ought to be granted, an interlocutory judgment must be entered declaring that the party in whose favor the court decides is entitled to a divorce, and when one year has expired after the entry of such interlocutory judgment the court may enter the final judgment granting the divorce, and such final action shall restore the parties thereto to the status of single persons, and permit either to marry after the entry thereof (Sections 131, 132, Deering's Civil Code of the State of California, 1949).

In CM 328250, Lunde, 77 BR 29,34, the Board of Review said:

"Under this charge and specification the accused was found guilty of the crime of bigamy as that offense is known to military law. In military jurisprudence, it is a violation of Article of War 96, and of Article of War 95 in the case of an officer, for one wrongfully, that is intentionally and without color of right, to purport to marry another while a former marriage is still subsisting and this is so quite without reference to the statutory or other definition of bigamy, if there be such, in the particular jurisdiction in which the act of marriage decried took place (CM 272642, Bailey, 46 BR 343, 347, and cases therein cited)."

By statute, all marriages entered into in Nevada, when either party thereto has a wife or husband then living, are void (sec 4066, Nevada Compiled Laws, 1929). The accused's marriage to Mary Lee Ward on 4 June 1948 was entered into at a time when the accused was married to Phyllis Elliot and it was therefore bigamous.

Specification 2 of the Charge

In this specification the accused was convicted of dishonorably failing and neglecting to pay a debt to the Home Oil Company. Mere neglect on the part of an officer to pay a pecuniary obligation is not a military offense unless such neglect is characterized by dishonorable conduct such as fraud, deceit, evasion or fraudulent design to evade payment or specific promises of payment. The gravamen of the offense lies in the dishonorable character of his neglect and failure to pay the debt arising from circumstances which so characterize it and not from the default (CM 256115, Krouse, 36 BR 229, 233; CM 320687, Terrebonne, 70 BR 143, 148; CM 318398, Doty, 67 BR 281,285; CM 323108, Rookett, 72 BR 83, 92; CM 325231, Silverio, 74 BR 129,131).

In the instant case the accused was indebted to the Home Oil Company in the sum of \$31.48, which sum was due and payable 10 November 1948. The company sent numerous demands to the accused for payment of this sum and in response to these demands the accused promised to pay this obligation on 1 June 1949. Payment was not made on 1 June as promised notwithstanding the fact that the evidence shows that on 26 May 1949 the accused borrowed five hundred dollars from the Georgia Railroad Bank and Trust Company. The long delay in making payment and his broken promise to pay at a time when he was financially able to meet this obligation combine to show the dishonorable failure and neglect of the accused to pay this obligation as charged.

Specifications 3 and 4 of the Charge

In these specifications the accused was charged with the wrongful and dishonorable failure to keep his written promises to pay certain promissory notes executed by him. From the pleading and the evidence it is apparent that the promises which the accused was charged with dishonorably failing to keep were the promises contained within the promissory notes signed by him when he incurred the obligations.

In CM 220760, Fanning, 13 BR 61,69, the Board of Review said:

"The mere failure of an officer to keep his promise to pay a debt is not dishonorable unless the promise is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 207212, Thompson; CM 217636, Nichols; sec.453 (14) (15), Dig. Op. J.A.G., 1912-1940; Winthrop's Military Law and Precedents (Reprint), p. 715)." (See also CM 322067, Fears, 71 BR 37,46.)

In CM 320687, Terrebonne, supra, the Board said:

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

It thus appears that the rules applicable to a dishonorable failure

to pay a debt are also applicable to a charge of a dishonorable failure to keep a promise to pay a debt.

In the instant case a mere showing that the accused failed to pay the notes or any installment thereof when they became due would not establish that his default in his promise to pay, according to the tenor of the notes, was dishonorable.

The evidence shows that on 27 September 1948 the accused borrowed \$600 from the Federal Services Finance Corporation, at which time he executed and delivered a promissory note to the corporation, payable in monthly installments beginning on 5 November 1948. It is alleged in Specification 3 of the charge that he dishonorably failed to keep his promise to pay the installments of 5 November 1948, 5 December 1948, 5 March 1949 and 5 May 1949. The evidence wholly fails to show deceit or fraudulent design to evade payment on the part of the accused at the time he incurred this obligation. The evidence shows that he did not pay the installments due on 5 November 1948 and 5 December 1948, however, there is nothing to show that on these occasions the accused was able to make the required payments. When called upon by his creditor in December of 1948 to make the payments he did not deny the obligation or attempt to evade payment. He did execute a series of post-dated checks to the corporation which they accepted. Two of these checks were for the past-due installments on the note and others were for installments which were not yet due. The checks issued for the payment of the past-due installments were paid upon presentation to the drawee bank. Under these circumstances the Board of Review concludes that the evidence fails to establish a dishonorable failure to keep his promise to pay the installments due on 5 November 1948 and 5 December 1948. The only additional evidence in the record of trial concerning the failure of the accused to pay the installments due on the note on 5 March 1949 and 5 May 1949 was that the finance company deposited one of the post-dated checks during March 1949 and that it was returned from the drawee bank unpaid and that the finance company deposited another of the post-dated checks on 4 May 1949, which check was returned by the bank unpaid. These checks were not in evidence and there is no testimony to show the dates they bore. There is nothing in the evidence to show why these checks were returned by the bank. Neither is there anything in the record to show that the accused was in a financial position to pay the installments due on 5 March 1949 and 5 May 1949. Likewise there is nothing to show that when the finance company accepted the post-dated checks in December of 1948 they agreed to any change in their position in regard to the installments, which were due and payable in the future or that the post-dated checks were given with an intent to deceive the company or to evade payment of his obligations as they became due.

In State v. Crawford, 152 S.E. 504, 505; 198 N.C. 522, the Supreme Court of North Carolina in a discussion relating to post-dated checks said:

"A post dated check, given for a past due account, is not a representation, importing criminal liability if untrue, that the drawer has funds or credits in the bank sufficient to pay the same upon presentation.

"The fact that the check is post dated would seem to imply no more than that on its date the drawer will have or expects to have funds or credit in the bank sufficient to insure its payment at that time. 11 RCL 853."

The Board of Review concludes that the evidence does not show that the accused's failure to keep his promise to pay the installments due on 5 March and 5 May 1949 to the Federal Services Finance Corporation was dishonorable.

The record of trial discloses an entirely different state of facts surrounding the failure of the accused to keep his promise to pay the obligation set forth in Specification 4 of the charge.

The record of trial shows that on 26 May 1949 accused borrowed five hundred dollars from the Georgia Railroad Bank and Trust Company, at which time he made and executed to the bank a promissory note payable in six monthly installments of \$86.25 each, the first payment beginning on 26 June 1949. In obtaining this loan the accused prepared and signed a Class E allotment form whereby he authorized the proper officials of the Finance Department of the Army to send \$100 of his salary each month to the Georgia Railroad Bank and Trust Company, Augusta, Georgia, and represented to the bank and the co-signers of the note that this allotment of his pay would become effective and that the Army Finance Department would send this sum to the bank in accordance with the allotment.

The testimony of Lieutenant Colonel Frederick W. Reese, Class E Allotment Division, Army Finance Center, Office of the Chief of Finance, St. Louis, Missouri, and the testimony of Major R. C. Johnston, Finance and Disbursing Officer at accused's station at Fort Ord, California, established the fact that according to the official records of their respective offices which are under their control, the accused did not have an allotment in the sum of \$100 payable either to his bank account in the Georgia Railroad Bank and Trust Company or to said bank. In effect, this testimony proposes to establish a negative fact, i.e., that no record of an allotment for \$100 exists on the accused's finance records, which records do not appear in evidence. Whether parol testimony is competent to establish a negative fact as shown by a record without introduction of that record in evidence depends, primarily, upon whether such record is a private or public official record (CM 262042, Pepper, 5 BR (ETO) 125, 150; CM 334270, Stricklin, 1 BR JC 141, 157). If the records to which the foregoing testimony related are prescribed and required by Army Regulations, which have the force of law, we can conclude that they are

public official records thereby rendering this testimony competent and admissible to prove the negative facts stated. In this regard, Army Regulations 35-5520, 4 June 1947, as modified by Change No. 2, 20 April 1948, provide in part as follows:

"SECTION I
GENERAL PROVISIONS

"1. Statutory provisions. - a. General. - The Secretary of War is authorized to permit officers ***, to make allotments from their pay, under such regulations as he may prescribe, for the support of their families or relatives or for such other purposes, which in his discretion warrant such action. ***. (See sec. 16, act 2 March 1899 (30 Stat 981), as amended by act 6 October 1917 (40 Stat. 385) and act 16 May 1938 (52 Stat. 354; 10 U.S.C. 894; M.L. 1939, secs 1450, 1619).

* * *

"2. Definitions. - a. Allotment. - The word 'allotment' as used herein refers to a definite portion of the pay and allowance of a person in the military service, ***, which is authorized to be paid to an allottee in a manner prescribed by the Secretary of the Army.

"b. Class E allotment. - An allotment made to an individual, a fiduciary, a banking institution or a commercial life insurer, or to other eligible allottees set forth in paragraph 5 is designated as a 'Class E' allotment.

* * *

"f. Allotter. - The 'allotter' is the person from whose pay the allotment is made, ***.

"g. Allottee. - The 'allottee' is the person or institution to whom the allotment is made payable.

* * *

"i. Disbursing officer. - The term 'disbursing officer' as used herein refers to all accountable disbursing officers within the continental limits of the United States and Alaska, and to such other disbursing officers overseas who are or have been designated by theater commanders for processing and forwarding allotment forms to the appropriate allotment office.

* * *

"8. Allotment offices. - a. Active duty personnel.

(1) Class E allotments. - Class E allotments are processed by the Class E Allotment Division, Army Finance Center, OCF, Building 205, St. Louis 20, Missouri.

* * *

"SECTION VI

TRANSMITTAL AND CONTROL OF ALLOTMENT FORMS

"29. Action by officers and others who certify their own pay vouchers. - Officers and others who certify their own pay

vouchers will submit completed WD AGO Form 141 through their unit personnel officers, or direct to disbursing officers who settle their monthly pay accounts. They will NOT transmit these forms direct to the allotment division. Officers and others who certify their own pay vouchers will be held pecuniarily responsible that allotment deductions are properly stated on their pay vouchers.

"30. Action by certifying officer. - a. General responsibilities.-
The certifying officer is directly responsible for -

- * * *
- (2) Entry of all authorizations, reauthorizations, and discontinuances on numbered letters of transmittal.
 - (3) Entry of all authorizations, reauthorizations, and discontinuances in allottees' service records.
 - (4) Entry of all allotment deductions on proper pay rolls.
- * * *
- (6) Transmittal of class E allotment forms to disbursing officer in sufficient time to permit disbursing officer to take necessary action and transmit to Class E Allotment Division before 10th of month in which allotment is to become effective. See paragraph 17a.

He will be held pecuniarily responsible for omissions from pay records of any deductions that should be entered thereon, and will be called upon to make restitution of any deductions so omitted.

"b. Transmittal of allotment forms. - Allotment forms will be transmitted promptly after preparation to the disbursing officer normally paying the allottees or, where necessary or where more expeditious, to any convenient disbursing officer. In every case, forms will be transmitted direct from the preparing certifying officer to the disbursing officer. They will not be transferred from one certifying officer to another. The signed original of the allotment form will be forwarded to the disbursing officer with the original and one copy of a numbered letter of transmittal, Transmittal Letter for Allotment Forms (WD AGO Form R-5353), one copy being retained by the certifying officer. Form R-5353 (see fig. 2) is authorized to be reproduced locally on 8 by 10 $\frac{1}{2}$ -inch paper by spirit or mimeograph duplicating process. The number, title, and date will appear on all reproductions of the form. A separate letter of transmittal will be prepared for class E allotments; Class D and N allotments will be combined on the same letter of transmittal. Authorizations, reauthorizations, and discontinuances will be listed on the same letter of transmittal, listing on the numbered lines of the letter the allottees' names and serial numbers. It is not necessary to group the names of the allottees by type of action desired, or to arrange names in alphabetical or other order. However, allotment forms attached to letters of transmittal will be

arranged in the same order as the names of the allottees are listed on the letters. In order to avoid loss of documents and to detect delay in transmission, letters of transmittal will be consecutively numbered in the space provided in the upper left corner of the letter.

"c. Records. - The certifying officer will make proper entries of each allotment authorization, reauthorization, or discontinuance in the allottee's service record in accordance with the provisions of TM 12-230A. Copies of allotment forms will NOT be filed in the service record. The certifying officer will retain a file of letters of transmittal for such administrative purposes as may be necessary.

*

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"31. Action by disbursing officer. - See TM 14-501 and TM 14-502.

"32. Action by allotment division. - a. Control of transmittal letters received. - The allotment division will keep a record of all transmittal letters received and, when it is noted that the numbers of transmittal letters do not run consecutively, a notice will be sent to the disbursing officer notifying him of the number or numbers of the transmittal letters not of record in the allotment office."

In view of the mandatory duty imposed upon responsible officers to maintain prescribed records of allotments as thus authorized by statute and Army Regulations, we may and do conclude that the testimony of these witnesses was competent and admissible to establish the fact that this accused's finance records showed no allotment for \$100 in effect at the time in question pursuant to the following applicable rule of evidence:

"Where the fact to be proved is not one as to the existence of which the law declares the record to be the sole and conclusive evidence, it is generally held that if the record does not contain evidence of the fact, parol evidence otherwise competent is admissible, especially when to exclude such evidence would prejudice the rights of innocent persons or enable a public officer to take advantage of his own default.

"Where it is sought to prove a negative, that is, that facts or documents do not appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence.

"That documents or facts do not appear of record may be proved by the sworn testimony of the person who is legal custodian of the record, or, it is usually considered, by that of any other competent person. (22 C.J., secs. 1281-1283, pp. 1005, 1006. Also 32 C.J.S., sec. 807c, p. 726)." (CM 262042, Pepper, supra.)

The accused testified that delay in paying his obligations was "just the press of other debts." The Class E allotment form displayed by the

accused at the time he contracted this obligation did not reach the proper officials of the Army notwithstanding the accused's agreement with the bank that such allotment would become effective. Neither did the accused make the payments on this note as they became due. Under the circumstances the court was warranted in concluding that the accused deliberately failed to file the Class E allotment form with the proper Army officials and that at the time he contracted the indebtedness to the Georgia Railroad Bank and Trust Company he did not intend to carry out his agreement concerning the allotment of his pay. This indebtedness was therefore conceived in misrepresentation and deceit and the failure of the accused to pay the installments when due was a dishonorable failure to keep his promise to make such payments.

It is noted that Specification 4 of the charge alleges that the accused promised in writing that on or about 1 July 1949 and on or about 1 August 1949 he would pay \$100.00 on the indebtedness to the Georgia Railroad Bank and Trust Company. The note which he executed provided for six payments of \$86.25 each beginning on 26 June 1949. The accused also agreed to cause the Army Finance Department to forward \$100.00 per month from the accused's salary to the bank, which payment would begin on or about the first of each month beginning on 1 July 1949. Only \$86.25 of this \$100 was to be applied to the indebtedness due the bank. Accordingly the Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of Specification 4 of the charge which finds that the accused on 26 May 1949 being indebted to the Georgia Railroad Bank and Trust Company in the sum of \$517.50 (The note attached to Prosecution Exhibit No. 9 recites a promise to pay \$507.50 in 6 installments of \$86.25 each, $\$86.25 \times 6 = \517.50 .) for cash received, and having promised in writing to said bank that he would on or about 1 July 1949 and on or about 1 August 1949 pay on said indebtedness the sum of \$86.25, did at Augusta, Georgia, on or about 1 July 1949 and on or about 1 August 1949 dishonorably fail to keep said promise.

6. Department of the Army records show that the accused is 28 years of age. He is a high school graduate. He enlisted in the Regular Army on 22 July 1940 and was discharged on 30 November 1942 to accept a commission as a second lieutenant, AUS. On 12 March 1945 he was promoted to first lieutenant. He served overseas in Alaska and the Aleutian Islands and is entitled to wear the American Defense Ribbon and the Asiatic Pacific Ribbon. His efficiency reports for the period of 1 July 1944 to 30 June 1947 show one "Very Satisfactory" and three "Excellent." His overall efficiency ratings for the period 1 July 1947 to 12 November 1947 is 103, and for the period 1 March 1948 to 30 April 1948 is 061.

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 of Specifications 1 and 2 of the charge, legally sufficient to support only so much of the findings of guilty of

Specification 4 of the charge as finds that the accused on 26 May 1949 being indebted to the Georgia Railroad Bank and Trust Company of Augusta, Georgia, in the sum of \$517.50 for cash received, and having promised in writing to said bank that he would on or about 1 July 1949 and on or about 1 August 1949 pay on said indebtedness the sum of \$86.25, did at Augusta, Georgia, on or about 1 July 1949 and 1 August 1949, dishonorably fail to keep said promise, and legally insufficient to support the finding of guilty of Specification 3 of the charge, and legally sufficient to support the findings of guilty of the charge and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of an officer of a violation of Article of War 96.

Carlos E. McAfee, J.A.G.C.

Joseph L. Brack, J.A.G.C.

Roger W. Quier, J.A.G.C.

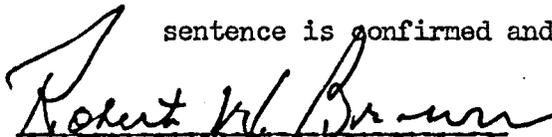
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

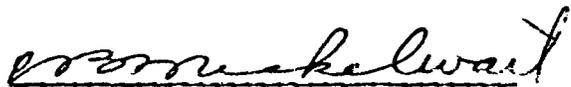
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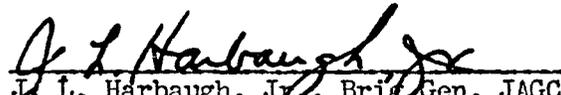
THE JUDICIAL COUNCIL

Harbaugh, Brown, and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Richard H. Elliot, O-1638210, Headquarters, 6003 Area Service Unit, Fort Ord, California, upon the concurrence of The Judge Advocate General the finding of guilty of Specification 3 of the Charge is disapproved. Only so much of the finding of guilty of Specification 4 of the Charge is approved as finds that the accused, being indebted to the creditor alleged, at the time, place, and in the amount alleged, and having promised in writing to the alleged creditor that he would pay on the said indebtedness the sum of \$86.25 on each of the dates alleged, did, on or about 1 July 1949 and 1 August 1949, dishonorably fail to keep said promise. The sentence is confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

14 February 1950

I concur in the foregoing action.

(GCMO 9, Feb 28th 1950).


E. M. BRANNON
Major General, USA
The Judge Advocate General

15 February 1950

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

CSJAGN-CM 399452

U N I T E D S T A T E S	)	UNITED STATES ARMY FORCES ANTILLES
)	
v.	)	Trial by G. C. M., convened at
	)	Fort Buchanan, Puerto Rico, 17
Private First Class	)	November 1949. Bad conduct
DOLORES CRESPO (RA	)	discharge, total forfeitures
10404273), Headquarters	)	after promulgation and confine-
and Headquarters Company,	)	ment for six (6) months. De-
65th Infantry Regiment,	)	tention and Rehabilitation
Losey Field, Puerto Rico.	)	Center.

HOLDING by the BOARD OF REVIEW
YOUNG, CORDES and TAYLOR
Officers of the Judge Advocate General's Corps

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, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private First Class Dolores Crespo, Headquarters and Headquarters Company, 65th Infantry Regiment, did, at Manati, Puerto Rico, on or about 4 October 1948, wrongfully, and without the consent of the owner, appropriate one United States Savings Bond, Series E, number Q855 337 235E, maturity value of \$25.00, issued in the name of PFC Arael Alfaro on 4 September 1948, value about eighteen dollars and seventy-five cents (\$18.75), the property of Private First Class Arael Alfaro.

Specification 2: In that Private First Class Dolores Crespo, Headquarters and Headquarters Company, 65th Infantry Regiment, did, at Manati, Puerto Rico, on or about 4 October 1948, wrongfully, and without the consent of the owner, appropriate one United States Savings Bond, Series E, number X7 291 758E, maturity value of \$10.00, issued in the name of PFC Angel M. Rosario on 4 September 1948, value about seven dollars and fifty cents (\$7.50), the property of Private First Class Angel M. Rosario.

Specification 3: In that Private First Class Dolores Crespo, Headquarters and Headquarters Company, 65th Infantry Regiment, did, at Manati, Puerto Rico, on or about 4 October 1948, wrongfully, and without the consent of the owner, appropriate one United States Savings Bond, Series E, number X7 291 734E, maturity value of \$10.00, issued in the name of TEC 5 Felix Alicea on 4 September 1948, value about seven dollars and fifty cents (\$7.50), the property of Corporal Felix Alicea.

Specification 4: In that Private First Class Dolores Crespo, Headquarters and Headquarters Company, 65th Infantry Regiment, did, at Manati, Puerto Rico, on or about 4 October 1948, wrongfully, and without the consent of the owner, appropriate two dollars and twelve cents (\$2.12), lawful money of the United States, the property of Corporal Luis Fernandez.

Specification 5: In that Private First Class Dolores Crespo, Headquarters and Headquarters Company, 65th Infantry Regiment, did, at Henry Barracks, Puerto Rico, on or about 31 October 1948, with intent to deceive Sergeant First Class Rafael A. Rivera, officially report to the said Sergeant First Class Rafael A. Rivera, that eight War Bonds as follows:

<u>To Whom Issued</u>	<u>Maturity Value</u>	<u>Month of Issuance</u>
Dario Rivera	\$25.00	September 1948
Arael Alfaro	\$25.00	September 1948
Luis Fernandez	\$10.00	September 1948
Francisco Colon Alicea	\$10.00	September 1948

Felix Alicea	\$10.00	September 1948
Angel Rosario	\$10.00	September 1948
Francisco Rodriguez	\$10.00	September 1948
Ignacio Garriga	\$10.00	September 1948

had been stolen from his foot locker, which report was known by the said Private First Class Dolores Crespo to be untrue, in that he, the said Private First Class Dolores Crespo, had cashed, and received the proceeds from, four of the said bonds at the Banco Popular de Puerto Rico, Manati, Puerto Rico Branch, on or about 4 October 1948.

He pleaded not guilty to all Specifications and the Charge and was found guilty of all Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after date of the order directing execution of the sentence and to be confined at hard labor at such place as proper authority might direct for six months. The reviewing authority approved the sentence, designated the Detention and Rehabilitation Center, Fort Buchanan, Puerto Rico, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50a.

3. All the offenses of which the accused stands convicted were alleged to have been committed in October, 1948. The information pertaining to the accused as shown on the charge sheet, dated 20 October 1949, and verified by the accused (R. 99), shows that he reenlisted at Henry Barracks, Puerto Rico, on 17 December 1948 to serve for three years. Informal advice of the Adjutant General, Department of the Army, reveals that accused was in fact honorably discharged on 16 December 1948 by reason of expiration of term of service (AR 615-360). He was tried on 17 November 1949. The only question for consideration is whether the court had jurisdiction to try the accused since he had been honorably discharged by reason of expiration of service, subsequent to the date of commission of the offenses for which he was tried.

4. Concerning this question, the Manual for Courts-Martial provides:

"The general rule to be followed in the Army is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by reentry into the military service" (MCM, 1949, par. 10, p. 9).

Following this statement of the general rule, there are listed certain exceptions not here applicable. The Manual for Courts-Martial, 1928, in effect at the time of commission of the alleged offenses, contained substantially the same provision (MCM, 1928, par. 10, pp. 8,9).

In CM 192335, Clark, 1 BR 356, the Board of Review considered a case in which the accused was honorably discharged from the enlistment under which he was serving at the time of the commission of the offense alleged. Subsequent to the discharge the accused was tried by court-martial. The Board of Review citing CM 171874, Finnimore (1926), Dig. Op. JAG 1912-40, Sec. 369(4), stated that a court-martial is without jurisdiction to try a person subject to military law for sodomy committed in a prior enlistment terminated by honorable discharge prior to the preferment of charges and trial. The same result was reached by the Board of Review in CM 198340, Congers, 3 BR 227; CM 199072, Hewitt, 3 BR 328; CM 199117, Africa, 3 BR 330, Dig. Op. JAG 1912-40, Sec. 369(4); CM 200925, Mackiewicz, 5 BR 9; CM 204194, Preston, 7 BR 322; and CM 217842, Sierer, 11 BR 327. The principle that a court-martial is without jurisdiction to try an enlisted man for an offense other than one denounced by Article of War 94, committed in a prior enlistment at the expiration of which he was discharged, has been recently tested and affirmed in the United States Supreme Court in the case of United States ex rel. Hirshberg v. Cooke, 336 U. S. 210 (1949), 8 Bull JAG 5. It should be noted that in the instant case the separation from service was by honorable discharge at the expiration of term of service. This situation is distinguishable from those cases where because of a mere change in status effected by discharge and immediate reenlistment or appointment, there is no interruption or "hiatus" of service. See CM 121586, Dig Op. JAG, 1912-40, Sec. 369(3); CM 203457, Sebastian, 7 BR 206, Dig Op. JAG 1912-40, Sec. 369(3); CM 212084, Johnson, 10 BR 213, 1 Bull JAG 13; CM 235407, Claybourne, 22 BR 35, and CM 236819, Solander, 23 BR 148. It is also distinguishable from those cases where it has been held that an honorable discharge from a particular term of enlistment does not terminate liability to trial for desertion from a subsisting enlistment. (Dig. Ops. JAG, 1912-1930, sec. 272; MCM, 1949, par. 10 p. 10).

5. For the foregoing reasons the Board of Review holds that the court-martial which tried the accused was without jurisdiction to try him and all proceedings in connection therewith are a nullity. The record of trial is legally insufficient to support the findings and the sentence.

Chas. C. Young J. A. G. C.

C. H. ... J. A. G. C.

John F. Taylor J. A. G. C.

CSJAGN-CM 339452

1st Ind

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

TO: Commanding General, United States Army Forces Antilles, APO 851,
c/o Postmaster, New York, New York.

1. In the case of Private First Class Dolores Crespo (RA 10404273), Headquarters and Headquarters Company, 65th Infantry Regiment, Losey Field, Puerto Rico, 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. Under the provisions of Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

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 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 339452).



E. M. BRANNON
Major General, USA
The Judge Advocate General

1 Incl
Record of trial

the said Military Payment Certificates to be temporarily deposited in the safe of First Lieutenant John A. Rein, with intent that such postage stamps and such Military Payment Certificates be considered by United States Army postal inspectors as being a part of the postage stamp fund of Army Post Office 178, First Lieutenant John A. Rein knowing that such postage stamps and such Military Payment Certificates did not lawfully belong to nor constitute a part of the said postage stamp fund of Army Post Office 178,

Specification 2: In that First Lieutenant John A. Rein, Headquarters 7815 Station Complement Unit, did, at Augsburg, Germany on or about 20 June 1949 with intent to deceive Captain William E. Ellis officially report as agent officer and custodian of the funds of Army Post Office 178 to the said Captain William E. Ellis a statement of account of the said Army Post Office covering the period of 3 June 1949 to 20 June 1949, which statement of account was known by the said First Lieutenant John A. Rein to be a false statement of the said account.

CHARGE III: Violation of the 96th Article of War (Finding of not guilty).

Specifications 1 and 2: (Findings of not guilty).

He pleaded not guilty to the Charges and Specifications and was found not guilty of Charge III and the Specifications thereunder, and guilty of the other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper 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.

a. For the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Accused was the postal officer of Army Post Office 178 which consisted of the main post office at Augsburg and four sub-units located in Augsburg, Sonthofen and Fuessen, Germany (R 17; Pros Ex 2). On 14 April

JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

1948, while serving in that capacity, accused was appointed Class B agent for Captain William E. Ellis, Postal Finance Officer of the European Command, "for the purpose of disbursing postal funds" in the command (R 51-52; Att. 7).

In the operation of an army post office in the European Command there are two separate funds, the money order fund which is an account of the Post Office Department, and the stamp fund which is an account of the Army (R 27). Commingling of money order funds with other cash is specifically forbidden by paragraph 76.3 of "U. S. Postal Laws of 1948" (R 42). When possible, money secured from the sale of money orders is to be transmitted daily to the Postmaster, New York, together with appropriate returns. The responsibility for the proper conduct of the money order business is that of the army mail clerk of the army post office, under the supervision of the postal officer (R 28,33,5658). The army mail clerk at Army Post Office 178 at all pertinent times in the present case was Corporal Victor G. Martin (R 23). The stamp fund at an army post office is the responsibility of the postal officer (par. 1, Sec. VI, Postal Circular, Headquarters European Command, 1 December 1948, Attachment #11). Without objection, there was received in evidence a completed "Receipt for Funds Intrusted to Agent Officer," (WD AGO Form 14-48) dated 16 August 1948, purportedly signed by accused, in which he acknowledged receipt of \$10,000.00 in cash and postage stamp stock from Captain Ellis (R 55; Pros Ex 4). According to Captain Ellis, the above described receipt was received by him in the regular course of business (R 54,55). He testified that on 8 August 1949, accused was responsible to him in the amount of \$10,000.00 (R 53).

Corporal Martin testified that on the afternoon of 1 June 1949 the quarterly inspection of APO 178 by EUCOM postal inspectors had commenced. At the time Corporal Martin had a stamp stock in addition to being in charge of money orders. His funds were audited that afternoon and nothing was found "wrong" with them (R 78,79). At about 0100 hours the following morning, accused visited Martin at the house of the latter's girl friend. Accused told Martin that "he [accused] got caught short" and he instructed Martin to take \$4,000.00 from his (Martin's) money order fund, go to Munich and purchase stamps, add enough funds to balance accused's account at \$5100.00 and put both stamps and cash in accused's safe. Accused had but \$31.00 in stamp stock in his safe at the time. Martin went to Munich and, utilizing a requisition form upon which he wrote accused's name, purchased \$4,000.00 in stamps. Upon his return he placed the \$4,000.00 in stamps and an additional \$1,069.00 in cash from the money order fund in accused's safe (R 79,80,82). It was shown that Martin had been granted immunity prior to testifying in the case (R 82,83).

The court took judicial notice of Postal Circular, Headquarters, European Command, 1 December 1948, of which paragraph 1d, Section VI, provides in pertinent part as follows:

"(1) Postal officers as Class 'B' Agents will submit WD AGO Form 14-49 in triplicate to the Postal Finance Officer, 25th Base Post Office, APO 800, on that 20th day of each month. Before submitting this report, postal officers will have their accounts verified by two disinterested officers as outlined by par. 31c, TM 14-505, and par. 4b, AR 35-1100.

"(2) The designated inspecting officers will also complete and authenticate the financial pages of Post Office Department Form 1945. Three copies will be prepared; the original and duplicate copy will be forwarded to the Postal Finance Officer. The triplicate copy will be retained in the files of the APO being audited." (R 52; Att 11).

On 20 June 1949, First Lieutenants Virgil D. Brown and Richard W. Deyo, pursuant to order of the Augsburg Military Post, made an inspection of Army Post Office 178 (R 69,70,73). Each inspected different units of the post office (R 70). Deyo concluded the inspection of his units before lunch time. He counted the cash and stamps "that were shown to him that had to be counted," and recorded his count on sheets of scratch pages which he handed to accused (R 75-77; Def Ex A). Brown likewise completed his inspection of the units assigned to him following which he signed some type of a report (R 70,71). Neither Deyo nor Brown were aware of any discrepancies in accused's account (R 70,74). According to Brown, he would not have known if there was a discrepancy since he did not know the amount for which accused was accountable (R 74).

At "about the last week in June," Captain Ellis received in the regular course of business a Report of Inspection of Army Post Office and a Statement of Accountability and Certificate of Audit, which were respectively designated as Prosecution Exhibits 3 and 10 (R 53,54). Both exhibits pertain to Army Post Office 178. Prosecution Exhibit 3 shows that as a result of an inspection performed on 20 June 1949 the money order funds of the post office were found to be in balance and that an overage in the amount of \$1.42 was found in the stamp fund. Over the purported signature of accused appears the following certificate:

"As designated officer, I CERTIFY that the money order forms in my possession are correctly stated above and that I have in my possession postage stamps amounting to \$4260.25 and stamp funds amounting to \$839.75 of the fixed credit of the Army mail clerk in charge."

Over the signatures "Virgil D. Brown" and "Richard W. Deyo" is the following certificate:

"I CERTIFY that I have counted the post office funds, paid money orders, postage stamps and stamped paper, and have verified the particulars of the accounts set out on this form and appended hereto (if any), including the serial numbers of the money order forms, and that the statements are correct." (Pros Ex 3).

Prosecution Exhibit 10 is dated 21 June 1949, bears the signatures "Virgil D. Brown" and "Richard W. Deyo" and indicates that the persons designated by those signatures had:

"* * counted the cash and verified the balance actually in the custody of John A Rein, 1st Lt, AGD pertaining to his accountability as Agent Finance Officer for William E Ellis, Captain, AGD, Postal Finance Officer, and that this amount is distributed as follows:

	FIXED CREDIT	\$10,000.00
CHECKS AND CASH ON HAND	\$ 1750.00	
STAMP STOCK ON HAND	\$ 8251.42	
REQ, IN TRANSIT		
	T O T A L	\$ 10001.42
	OVERAGE	1.42
	(To be remitted)"	(Pros Ex 10)

Lieutenants Brown and Deyo denied that the signatures "Virgil D. Brown" and "Richard W. Deyo" appearing on Prosecution Exhibits 3 and 10 were written by them (R 69,70,73).

Sometime prior to 8 August 1949, Corporal Martin, accompanied by another soldier, went to the postal authorities at Munich and reported that a shortage existed at APO 178 and added that he believed the shortage had been "running" since the last quarterly inspection (R 23, 50; Pros Ex 2). Major Bodine of the Munich office made arrangements for an immediate inspection of Army Post Office 178 and its sub-units. The following persons were detailed to make the inspection: Mr. Allen S. Hargrove, Postal Advisor to the Command Postal Officer, Captain Anthony H. Coakley, AGD, "AG Postal Branch, EUCOM," Lieutenant Alson B. Lamb, Sergeant Merlin C. Simpson, Captain George W. Parr, AGD, Major Emanuel Combs, Jr., and First Lieutenant Howard Jackson. Major Combs was directed to go to Sonthofen, Captain Parr to Fuessen, Lieutenants Lamb and Jackson and Sergeant Simpson to the units in Augsburg, and

Hargrove and Captain Coakley to the parent unit. The inspections were conducted during 7 and 8 August (R 22,23,50; Pros Ex 2).

It was stipulated that if Captain George W. Parr were present he would testify that Prosecution Exhibit 6 for identification, "concerning the money order unit of Unit 1 is the final report of his audit and is correct and true." Prosecution Exhibit 6 was admitted in evidence without objection, and shows that in the money order account of Unit 1, the clerk in charge being Corporal Chance, liabilities amounting to \$911.85 were balanced by credit items in the same amount. The audit of Chance's stamp fund showed that he was accountable for a fixed credit of \$500.00, which was balanced by his possession of \$362.11 in stamp stock, \$77.90 in cash, and a \$60.00 stamp requisition, resulting in a surplus of \$0.01 (R 60).

It was stipulated that if First Lieutenant Howard Jackson were present he would testify that Prosecution Exhibit 7 is "a true and correct copy of the results and official audit conducted of money order unit Number 3 of APO 178." Prosecution Exhibit 7 was admitted in evidence without objection and purportedly shows that the money order account of Unit 3, the clerk in charge being Sergeant Peter B. DeWitt, had debit and credit items each totalling \$668.26; and with reference to the stamp account of Henry W. Anderson, that Anderson was charged with a fixed credit of \$263.62, that his stamp stock amounted to \$260.57, and his cash to \$2.40 resulting in a shortage of \$0.65 which he made up (R 60). The exhibit also reflects that Anderson had succeeded to the responsibility of Corporal Ringleb. Corporal Ringleb initially had a fixed credit of \$450.00 but his responsibility therefor had been reduced to \$263.62 by an embezzlement of \$186.38 by Private Anton Beier (R 17; Pros Ex 1). (In record proper, at page 18, Beier's name is given as Private Anton Brier. The record at page 22 speaks of a Corporal Brier in connection with another incident and we are unable to determine if Corporal Brier is the same person referred to at page 18 as Private Anton Brier).

It was stipulated also that if Major Emanuel Combs, Jr., were present he would testify that Prosecution Exhibit 8 is "a true and correct copy of the results and official audit conducted of money order unit number 4 of APO 178" (R 60). Prosecution Exhibit 8 was admitted in evidence without objection and shows that the money order account of Unit 4 was in balance with debit and credit items each totalling \$25.73. The stamp account on the other hand, showed a shortage of \$2.40 against a fixed credit of \$500.00.

Lieutenant Alson Lamb audited the sub-unit at the Arras Kaserne and an account at the main office. He identified Prosecution Exhibit 5 as the report of his audit of the two stamp stocks and the money order account he had checked, and he testified that the report truly and accurately reflected what he had found (R 61). Prosecution Exhibit 5, which was admitted in evidence without objection, shows that Recruit McCombs was the clerk in charge of the unit which Lamb audited, and that the debits

in McCombs' money order account were in balance with the credits. The stamp account of Private James Ivey reflected an overage of \$0.14 against Ivey's fixed credit of \$450.00. The other stamp account checked by Lamb was charged to Arthur J. Water and showed a shortage of \$0.22 against a fixed credit of \$150.00. The shortage was "made up" (R 64). Lieutenant Lamb explained that his audit of the money order account was limited to but one day's business, 8 August, that the business prior thereto, extending from 21 June to 8 August, was checked by Hargrove and Sergeant Simpson, and that his (Lamb's) figures were consolidated in Hargrove's figures which are to be found in the consolidated audit of the entire post office (R 61-63).

Sergeant Simpson audited the accounts of Unit 2. He counted both the money order account and the stamp account and recorded his count on a post office form 1945. Sergeant Simpson identified Prosecution Exhibit 9 as the form on which he entered his count and testified that the exhibit correctly reflected what he found (R 64-65). Prosecution Exhibit 9, which was received in evidence without objection, shows that the audit of the money order account covered the period from 6 August and that for that period the debit and credit items were in balance. The stamp account showed an overage of \$1.24 against a fixed credit of \$450.00 (R 67).

While the audits reflected in Prosecution Exhibits 5,6,7,8 and 9 were proceeding, Hargrove and Captain Coakley went to the main post office. Accused was not present. Captain Coakley began an audit of the money order account which was in poor condition since remittances had not been made since 21 July (R 19,24,50; Pros Ex 2). Accused came in at about "6:00 o'clock," and endeavored to call Captain Coakley out but the latter told him, "Wait a minute, John, what you have to say to me, say in the presence of Mr. Hargrove, too." Accused walked over to Hargrove and said, "Mr. Hargrove, you got me. I am short." Hargrove asked, "How much, John?" and accused responded, "Approximately \$8,000.00." In response to Hargrove's question, "How did it happen; what became of the money?"; accused claimed he had lost it on maneuvers. Hargrove then asked accused to produce his money and stamps. Accused obtained the key to his safe from Corporal Martin, opened his safe, brought out an envelope which he handed to Hargrove and stated "This is the stamp stock." Hargrove inspected the stamps and found "10 and 13 cent special delivery stamps" of a total value of \$31.00. Accused also told Hargrove that he had no money, the stamps were all he had. Hargrove asked accused for his fixed credit receipts and he handed Hargrove receipts from the following men in the amounts following their names: Corporal McGuire, \$500.00; Corporal Chance, \$500.00; Corporal Ringleb, \$450.00; Private James Ivey, \$450.00; and Private Arthur J. Waters, \$150.00. Accused also handed Hargrove a receipt for \$300.00 from Recruit McCombs but Corporal Martin spoke up and said, "Lieutenant, you authorized the transfer of that credit from my money order funds to make up money order funds you got from us." Accused admitted the correctness of Corporal Martin's remark and stated, "I wouldn't count that." Hargrove laid the McCombs' receipt aside, "ran up" the account and determined accused's shortage as amounting to \$7919. Reports of the audits of the sub-units started to come in and Hargrove

noticed one item of \$450.00 in Unit 2 which was assigned to Private Thomas Donnelly. Hargrove ascertained from accused that Donnelly had a fixed credit in the amount of \$450.00 and Donnelly's receipt was produced; this reduced the shortage from \$7919.00 to \$7469.00. A trial balance was run which confirmed the shortage as amounting to \$7469.00 and accused accepted "those figures" as correct (R 19-20,50; Pros Ex 2).

Hargrove and Captain Coakley asked accused to step out into the hall with them. Hargrove asked accused if he was familiar with the 24th Article of War and then, despite accused's affirmative answer Hargrove told accused that he was not required to make any statement, and that if he did it could be used against him. Accused asserted, "I know." (R 19-20; Pros Ex 2). Hargrove asked accused for an explanation of the shortage and accused answered that the money had been lost "on maneuvers." When Hargrove commented upon accused's failure to report the loss, accused explained that he thought he could make it up. Hargrove pointed out that at the time maneuvers were held accused had only about a \$5000.00 stock on hand and wanted to know how the loss could amount to \$7469.00. Accused added that part of the loss was in money order funds. Hargrove observed that if this was so the money order funds would show a difference of about \$2400.00. Accused admitted that if Hargrove were telling him a similar story he would not believe it, but added, "that's my story, and I am stuck with it." Accused had previously told Corporal Martin that he had \$14,000.00 coming over from the states and that he would be able to make up the shortage. He explained to Hargrove that he had told this story to Martin to keep him satisfied, but that, in fact, he had no \$14,000.00. Further interrogation by Hargrove elicited from accused an admission that, at a previous quarterly inspection, Martin had a fixed credit of \$1900.00 in stamp stock which accused had taken. Accused also admitted that he had taken \$510.00 in money order funds from Martin and Corporal Brier. Hargrove's testimony concerning accused's version of the latter transaction is as follows: "[accused] stated that \$500 of the \$510 had been accounted for by transfer of the stamp stock from another of the fixed credits - that McGuire's credit was originally \$500 - \$200 was transferred to the money order account prior to this audit, the remaining \$300 of that credit was transferred during the audit to [accused's] authorization." (R 20-22) Hargrove broached the subject of repayment but when he refused to answer accused's query as to criminal liability in the event of repayment, accused indicated that he did not think it would do any good for him to try to raise "that amount of money." (R 22)

On either the 8th or 9th of August, Hargrove also interrogated accused with reference to accused's directing Martin to place money order funds in accused's safe. Accused admitted that in the early morning hours of 2 June he asked Martin to purchase \$4000 in stamp stock from money order funds and place the stamp stock so purchased

together with \$1069.00 from money order funds, in accused's safe prior to the arrival of the inspecting officer (R 42-44).

Hargrove and Captain Coakley identified Prosecution Exhibit 1 as the consolidated report of audit of "APO 178" made on the 8th and 9th of August 1949 and it was introduced in evidence without objection (R 17-18). The report was signed by Hargrove, Captain Coakley, Major Combs, and by accused (R 17). The audit was a consolidation of the audits performed at the outlying units and the audit performed at the main post office. The audit of the money order account extended back to 21 July, the last day upon which a return of money order business was made to the Postmaster, New York. Originally the audit of the money order account showed a shortage of approximately \$10.00. This shortage was immediately made up by accused (R 18). In counting the money order funds in the possession of Corporal Martin, stamp stock of a value of \$2447.33 was found. At the time, Martin asserted that the stamp stock was purchased with money order funds, and accused, who was present, corroborated Martin's assertion. For this reason the stamp stock in Corporal Martin's possession was treated as part of the money order funds. The stamp stock was later converted into a treasury check payable to the Postmaster, New York, and remitted together with the rest of the money order funds (R 26-30). The consolidated report of audit (Pros Ex 1) shows the money order account in balance with debit items totalling \$38,545.46 and credit items in the same amount. That portion of the report concerning the audit of the stamp account showed a total shortage of \$7,658.00. Part of the shortage in the amounts of \$2.40 and \$0.22 were charged respectively to Corporal McGuire and Private Waters and these amounts were made up immediately by the soldiers concerned. Part of the shortage in the amount of \$186.38 was due to an embezzlement by Private Anton Brier. The audit of the stamp account otherwise showed that \$2500 of the fixed credit of \$10,000.00 for which accused was responsible had by means of credits advanced by accused become the responsibility of enlisted men in the sub-units of "APO 178." Of the \$7500.00 of fixed credit for which accused retained responsibility, accounting could not be made for \$7469.00 (R 17,18,19; Pros Ex 1).

b. For the defense.

Accused elected to testify for the limited purpose of showing the circumstances under which his oral statements to Hargrove and Captain Coakley were made (R 46). He testified that he had known Hargrove and Coakley for about three years and knew that they were inspecting officers, but that he did not know that Hargrove was the senior inspecting officer. He denied that either Hargrove or Captain Coakley told him that he did not have to make a statement or that any statement he made could be used against him (R 48-49).

Upon cross-examination accused at first denied that Hargrove had asked him if he were familiar with his rights under Article of War 24, but qualified his denial by admitting that "later on" the question was put to him. He also admitted that he had known he did not have to make any statement, but claimed that he did not know that if he made a statement it could be used against him. He further stated that no threats or promises were used to induce him to make a statement, that his statement was "spontaneous," that Hargrove and Coakley kept asking him questions because they knew he was excited, and that it was because of his excitement that he answered them (R 47-48).

Accused's cross-examination concluded with the following colloquy:

"Q And you answered them truthfully, didn't you?

DEFENSE: Now, objection ...

PROSECUTION: I will withdraw it. It has nothing to do with the voluntariness of the statement. I have no further questions" (R 48)

Harry J. McCollister testified that he had been an Army auditor since 1945. Concerning a hypothetical auditing problem he testified as follows:

"Q I would like to give you, Mr. McCollister a hypothetical question, based upon your knowledge of auditing and accounting, and have you explain just how the problem propounded to you in the hypothetical question should be solved. Let's assume that an Army Post Office is to be inspected and that a team of inspectors of three men have been selected to perform that audit at a certain military post located in the European Command, and that upon arriving at the military post to which they were sent to perform this audit, the team, or two members of the team, go directly to the Army Post Office and start their audit in the absence of the postal officer charged with the funds thereof, and that during the course of the inspection, certain funds are found in the possession of one of the personnel of that unit, and, in addition thereto, certain stamp stock. The senior member of the team, without consulting the postal officer in charge, takes some cash from this particular individual, and the stamp stock, and sends it to another Army Post Office located in another city, and converts it to cash, that is, into Treasury Check; it is brought back to the Army Post Office from which it was sent, and there applied

to one account. I will ask you, according to the fundamental principles of auditing and accounting, what, if anything, is right or wrong about that procedure?

* * *

- A In walking into any type of account, funds cannot be changed in anyway, or moved from one account to the other. Initially the cut-off date is established, but the cash or property is there, and subsequently when the audit or inventory is taken it is compared against what he should have on hand, but nothing can be changed. Does that answer the question?" (R 87-88)

He admitted, however, upon cross-examination that he had no experience in auditing post offices (R 89).

Major James E. King testified that he had studied auditing and accounting with the International Correspondence School and at Washington and Lee University, and had been engaged in auditing and accounting for 25 years. Since 1942 he had been doing similar work in the Army and currently he is Acting Comptroller of the Augsburg Military Post (R 120-122). Concerning a hypothetical accounting problem he testified as follows:

"Q The hypothetical question is this: Let's assume that three men, one a civilian, and two Army officers, have been appointed to inspect and audit a certain Army Post Office. The civilian auditor goes directly to the Army Post Office and starts his audit. Among other things, he finds in the possession of the Army mail clerk, a certain amount of stamps and a certain amount of funds purported to be the receipts from the sale of money orders. The man in whose possession he finds the funds and stock is sent to another Army Post Office and ordered to convert the money into a Treasury Check and return the Treasury draft to him, the inspector, during the time of the audit, which is done. At the end of the audit, the total amount reported by the draft is entered in the final report of the audit as money order funds. Does that procedure in your estimation and in light of your experience constitute a proper audit?

- A I have never heard of anything in the field of auditing theory or practice where such a method would be followed. It is contrary to anything I have ever heard of." (R 123)

Lieutenant Virgil D. Brown, recalled as a witness for the defense, testified that when he finished his inspection of APO 178 on 21 June he left his notes with Corporal Martin who told him he would "fix it up"

and that Lieutenant Brown could come back later and sign it. Later, somebody called Lieutenant Brown, and he "went up and signed something." The paper he signed "had figures on it." He looked them over and "It appeared all right to him." (R 93-95)

Corporal Joseph A. Blair identified Defense Exhibit B as a sketch of the floor plan of Army Post Office 178 and indicated thereon the location of the safes which held post office money (R 102). He testified that he had known the accused since early in 1947, and had known Corporal Martin since the first of February 1948 (R 95,96). On more than one occasion, when Martin was not there, Blair had been in the room in the post office where money was kept and, a few times had seen a lot of cash lying around. On such occasions he had also seen Martin's safe open although accused's safe would be closed. Once, Blair was in the post office when somebody, who had found the key to Martin's safe, brought it back. Blair also testified that at one time Martin had an overage of \$100.00 (R 96,97,98). Upon examination by the court, Blair testified that the occasions upon which he found money lying around loose in the post office took place after accused was relieved (R 106). Upon further examination by the court, however, Blair testified that he had seen money unattended prior to the regime of Lieutenant Clausen, who succeeded accused (R 106,108).

Private First Class Kenneth C. Todd testified that he had known accused since April of 1948 when he (Todd) started to work at APO 178 (R 108). On a number of occasions prior to 8 August 1949 Todd had gone into the room where stamps and money of the post office were kept and had seen money which he judged to be in excess of \$1,000.00 lying around unattended. Todd would subsequently caution Corporal Martin about this practice (R 109,110,111). On cross-examination, Todd testified that on or about 8 August, after he and Martin had found but \$31.00 in stamps in accused's safe, he and Martin made a trip to Munich. They had opened the safe with a key which was in Martin's possession (R 111,113).

Corporal Charles Twohey testified that at about 4:30 on an afternoon in April, during maneuvers, he entered the post office and found no one there but two Germans. He walked into the registry cage and found "6 to 10 \$1000 bundles" lying on the desk. He tried unsuccessfully to get in touch with Martin, the mail clerk in charge. Finally, since he had to catch a train he called up "Swan" and had Fritz, one of the Germans, remain there and watch the money until Swan came. Since he left the post office shortly thereafter he did not know if Fritz followed his directions (R 116-117).

Prior to deliberating on the sentence the court considered Defense Exhibits C,D and E, letters received by accused which cited him for his superior performance of duty as postal officer.

c. For the court.

Corporal Victor G. Martin was recalled as a witness by the court and testified that he had on occasions left money lying around his office but that on such occasions somebody else was present. However, it had been reported to him that money had been found lying around in his office (P. 132).

4. Accused was found guilty of unlawfully causing funds of the money order fund of Army Post Office 178 to be placed in his safe with the intent to cause Postal Inspectors to consider the said funds to be part of the stamp fund of Army Post Office 178; of rendering a false account; and of embezzlement. The first two offenses were charged under the 95th Article of War, and the third under the 93rd Article of War.

The evidence shows that in the conduct of army post offices in the European Command two separate accounts are maintained, the money order fund which is the responsibility of the Army mail clerk, under the supervision of the postal officer, and the stamp fund which is the responsibility of the postal officer. The postal officer is customarily appointed a Class B agent of the postal finance officer, European Command, and in such capacity, is given a stamp stock which is designated as a fixed credit. In the operation of Army Post Office 178, which had four sub-units, it was the practice of accused as postal officer to advance to clerks in the sub-units shares of his fixed credit which shares were likewise designated as fixed credits. There was received in evidence without objection, a completed "Receipt for Funds Intrusted to Agent Officer," (WD AGO Form 14-48), dated 16 August 1948, purportedly signed by accused, in which he acknowledged receipt of \$10,000.00 in cash and postage stamp stock from Captain William E. Ellis, the postal finance officer of the European Command. Since there was in evidence a known specimen of accused's handwriting, i.e., his signature on Prosecution Exhibit 1, the court could determine by comparison therewith that the signature on the WD AGO Form 14-48 was that of accused (CM 325112, Halbert, 74 BR 89). The completed WD AGO Form 14-48 was received by Captain Ellis in the regular course of business. Captain Ellis testified that as of 8 August 1949, accused was still responsible to him in the amount of \$10,000.00.

Uncontradicted evidence shows that on 1 June 1949, Army Post Office 178 was undergoing a quarterly inspection by "EUCOM Postal Inspectors." That afternoon the inspection was completed of the accounts of Corporal Martin, the Army mail clerk at APO 178, including the account of the money order fund for which he was responsible. At some time around

midnight accused sought out Martin, told Martin that he, accused, was "short" in his accounts, and instructed Martin to take \$5,069.00 from the money order fund, purchase \$4,000.00 in stamps, and place the stamps and the balance of the cash in accused's safe. Martin complied with accused's instructions and, when he placed the stamp stock and cash in accused's safe, discovered that there was only \$31.00 in stamps in the safe. Accused's admission to Martin, corroborated by the circumstances that only \$31.00 of the \$10,000.00 stamp fund entrusted to accused were to be found in his safe, and that the fund in the safe was, at the direction of accused, increased to \$5100.00 by adding stamps and money belonging to the money order fund, establishes that at the time of the inspection a substantial shortage existed in the fund for which accused was responsible. It is apparent that the transfer of funds from the money order fund to accused's safe was for the purpose of concealing this shortage from the postal inspectors. The evidence warrants the findings by the court that accused caused funds of the money order fund of Army Post Office 178 to be placed in his safe with the fraudulent intent alleged, and that such conduct constituted a violation of Article of War 95.

While the Specification in question alleges that accused caused postage stamps and money of the money order fund to be placed in his safe, the evidence shows that accused caused \$5,069.00 to be taken from the money order fund and had \$4,000.00 of the money taken converted into stamp stock. There is no variance between the allegations of the Specification and the proof. After the postage stamps were purchased they partook of the same character as did the money with which they were purchased, and hence were in reality assets of the money order fund. Considered in this light, the proof conformed to the allegations (JM 337486 (1949), 8 Bull JAG 134).

EUCOM postal regulations required that an inspection of Army post offices be made on the 20th day of each month by the postal officer and that his accounts be verified by two disinterested officers who were to certify as to the count recorded on the report of inspection. It was also required that the report of inspection be forwarded to the postal finance officer, Headquarters, European Command. On or about 20 June Lieutenants Brown and Deyo, pursuant to orders, checked the accounts of Army Post Office 178. According to Lieutenant Deyo, he counted what was handed to him to be counted. In what manner Lieutenant Brown conducted his duties is not reflected by the record. Brown handed in his notes to Corporal Martin who told Brown he would fix them up and have Brown sign "it." Later, Brown signed something with figures on it which looked "all right" to him. Deyo, after finishing his duties, handed his notes to accused. Brown and Deyo each testified that they found nothing amiss in the accounts of Army Post Office 178. During

the later part of June 1949 Captain Ellis, the postal finance officer, Headquarters, European Command, received a report of inspection bearing the signature of accused as reporting officer, and the purported signatures of Lieutenants Brown and Deyo who presumably verified the accounts as shown in the report. Brown and Deyo in their testimony disclaimed authorship of their purported signatures. The report showed that the money order fund of Army Post Office 178 was in balance, and that there was an overage of \$1.42 in the stamp fund. In fact, as has been previously demonstrated, there was a substantial shortage in the stamp fund on 2 June. The evidence further shows, as will be hereinafter discussed, that there existed in the stamp fund on 8 August 1949 a shortage, attributable to accused, of \$7,469.00. The evidence also shows that on 8 August accused admitted that he had had a shortage in his account since April 1949. It appears to us that the evidence which shows a shortage on 2 June, and again a shortage on 8 August, affords sufficient corroboration for accused's admission that he was "short" since April, and, therefore, it is established that on the date of the report of inventory, 20 June 1949, there existed a shortage in the stamp account of Army Post Office 178 which is not reflected in the report of inventory. Inasmuch as it failed to disclose a shortage in the stamp fund, the report was false, and was known by accused to be false, presupposing that he made the report. The report which bore the purported signature of accused was admitted into evidence without objection. By comparison with accused's known signature on Prosecution Exhibit 1, the court could find that the signature on the report of inventory received by Captain Ellis was that of accused. (CM 325112, Halbert, supra). From the other circumstances shown by the record, that is, that accused was required to send the report to Captain Ellis and that Captain Ellis received the report in the usual course of business, the court could find that the false report was made by accused and submitted by him to Captain Ellis. Such conduct is violative of the 95th Article of War (CM 339004, Shea, 19 December 1949).

Any defect in the Specification in not apprising accused wherein the report was false, was waived by the failure of the defense to move for appropriate relief upon that ground (CM 279014, Byars, 52 BR 99, 103; CM 239984, Hoyt, 25 BR 301, 306-307).

On 8 August 1949 as a result of information received from Corporal Martin, a surprise audit of Army Post Office 178 was initiated. Members of the auditing team visited the main office and the four sub-units simultaneously, presumably to forestall the switching of funds, the procedure employed by accused in the quarterly inspection in June. Hargrove, a civilian auditor, and Captain Coakley conducted the audit of the main office. Accused came to the main office at about 1800 hours

after the audit was well under way. He sought out Captain Coakley and indicated his desire to speak to Captain Coakley privately. Captain Coakley demurred to accused's suggestion and told accused that anything accused had to say to him should be said in the presence of Hargrove. Accused turned to Hargrove and spontaneously announced that he was "short" in his accounts. Hargrove asked accused to show what stamps and money he had and thereby, in effect, demanded that accused account for what had been advanced to him as fixed credit. Accused thereupon produced \$31.00 in stamps. It was only upon prompting by Hargrove that accused produced receipts amounting to \$2500.00 for fixed credits advanced to enlisted men in the sub-units. Of the \$10,000.00 fixed credit in stamp stock and cash for which accused was responsible to Captain Ellis he accounted for but \$2531.00, disclosing a shortage of \$7469.00. Later, when being interrogated by Hargrove and Coakley, accused claimed that during maneuvers in April he had lost the amount for which he had not accounted. At this juncture Hargrove pointed out to accused that in April accused had only \$5000.00 in stock on hand. Accused acquiesced in Hargrove's remark but added that part of the money lost was from the money order fund. The audit of the money order fund showed a mere shortage of \$9.97, but if accused's explanation were true it should have shown a shortage of about \$2,400.00. It is noted that stamps of a value of approximately \$2,400.00 were found in the money order fund, but Martin, the custodian of the fund, claimed that the stamps were purchased with money order funds and the accused corroborated Martin's claim. To recapitulate, when accused was called upon to account for the \$10,000.00 stamp fund for which he was responsible to the postal finance officer, he failed to account for \$7,469.00 of the fund, and for his failure to account offered an explanation which was patently false in part and which the court was entitled under the circumstances to reject. Other circumstances in the record impel us, as they evidently did the court, to reject accused's explanation for his shortage of \$7,469.00. Had the loss occurred in the manner claimed by accused it is highly improbable that he would not have reported the loss. His switching of funds to conceal a shortage during the June quarterly inspection, and his submission of a false report of his monthly inspection evidence a person adept in deception and corroborate the inferences of fraud arising from his failure to account completely, when called upon so to do, for the funds entrusted to him.

With reference to his failure to account for the funds entrusted to him accused was charged with and found guilty of stealing by embezzling and fraudulently converting to his own use stamp stock and military payment certificates. He was thus charged with, albeit inartfully, and found guilty of larceny, and the specification merely particularizes, to the advantage of accused, the type of theft. We find it unnecessary

to discuss any possible problems which may arise from the use of the specification in question, but as to the case at hand find it to be legally equivalent to the form specification for larceny, Specification #92, Appendix 4, Manual for Courts-Martial, 1949. The evidence hereinbefore recounted contains every element of embezzlement as set forth in the following statement of law:

"* * There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with the proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined in the first instance at least by the court (CM 276435, Meyer, 48 BR 331,338; CM 301840, Clarke, 24 BR (ETO), 203,210; CM 262750, Splain, 4 BR (ETO) 197,204; CM 320308, Harnack). * * A person in charge of trust funds who fails to respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177,181; CM 251409, Clark, supra)." (CM 323764, Mangum, 72 BR 403).

"The fact of fraudulent conversion in embezzlement may be evidenced by *** a deliberate falsification *** by rendering a false return or account *** in which a fictitious balance is made to appear or which is otherwise falsified or purposely misstated." (Winthrop's Military Law and Precedents, Reprint 1920, page 705) (CM 334270, Stricklin, 1 BR-JC 141,155-156).

It is observed that the Specification alleges that accused's stealing extended from August 1948, to August 1949. The charging of that part of the offense committed prior to 1 February 1949 substantially in the manner prescribed by the Manual for Courts-Martial 1949, pursuant to the changes effected in the law of larceny by the act of 24 June 1948 (62 Stat. 627; Public Law 759, 80th Cong) is not objectionable as "an ex post facto application of the new legislation" (CM 336639, Cole, 24 August 1949).

It is not objectionable that the specification alleges the act of stealing as taking place in the period extending from 16 August 1948 to 10 August 1949. The record shows a pattern of concealment upon the part of accused which renders impossible the particularization of the

date or dates upon which the larceny was committed. In such case, charging the date of the offense as was done here is not only countenanced but approved as "it would be futile to require the pleader to allege a specific, definite time." (CM 204879, Fleischer, 8 BR 121,125).

Without objection there were admitted into evidence a consolidated report of audit of Army Post Office 178 together with reports of audits of four sub-units. These later reports of audits were included in the consolidated report of audit. While we have serious misgivings as to the competency of most of the reports of audits of the sub-units, and hence of the consolidated report, we deem it unnecessary to discuss the question. As we have hereinbefore noted, when called upon to account for the funds entrusted to him, accused initially failed to account for \$9,969.00 of the fund. The audits at least served the purpose of reducing accused's liability to the figure alleged in the specification, \$7,469.00. Any errors, therefore, committed by the court's consideration of the reports of audits was favorable to accused.

5. The defense objected to the introduction in evidence of accused's admissions to Hargrove and Captain Coakley, for the reason that accused was not previously advised of his rights under Article of War 24. No contention was made that the admissions were induced by duress, coercion, or promises. The evidence shows that after the surprise inspection of Army Post Office 178 had commenced accused appeared at the main office and sought to speak to Captain Coakley privately. Coakley, quite understandably, refused to talk to accused privately and suggested to accused that whatever he had to say should be said in the presence of Hargrove. Accused then turned to Hargrove and spontaneously announced that he was "short." Such an admission is considered to be voluntary from its spontaneous character and is admissible in evidence. Following this admission, Hargrove called upon accused to account for the stamp fund and in the conversation that ensued, a shortage of \$7,469.00 was established which computation accused accepted as correct. After the accounting was completed, Hargrove asked accused if he understood his rights under Article of War 24 and accused said he did. Since it is apparent that accused was aware of his rights under Article of War 24, evidence of a preliminary warning was not requisite to the competency of any of his statements (MCM, 1949, par. 127, p.157).

6. Records of the Army show that accused is 40 years of age, married and the father of one child. After graduation from high school, he attended the Case School of Applied Science and the Interstate School of Commerce. In civilian life he was employed successively as an assistant general manager of a plant manufacturing castings, as chief engineer for a heavy machinery manufacturer, and as owner of a business manufacturing precision instruments. He had enlisted service from 30 April 1945 to 14 July 1946 when he was commissioned a Second Lieutenant in the Army

of the United States. He was promoted to First Lieutenant on 24 January 1948. From 16 July 1946 to 30 June 1947 his efficiency ratings of record were uniformly "superior." Since, his over-all numerical efficiency ratings have been as follows: "113"; "110"; "117"; and "127". He is entitled to wear the Army Commendation Ribbon. He has served in the European Theatre since 8 November 1945.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors adversely 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 sustain the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to be dismissed the service is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of Article of War 93.

Robert J. Clavin, J.A.G.C.
Lewis J. Hull, J.A.G.C.
John Lynch, J.A.G.C.

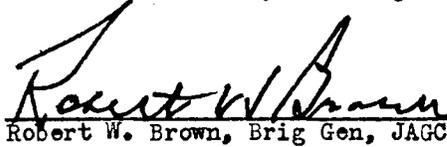
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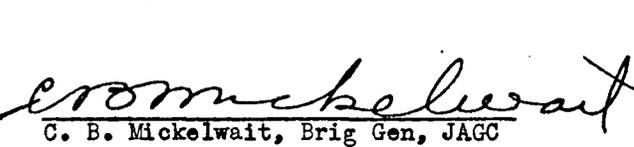
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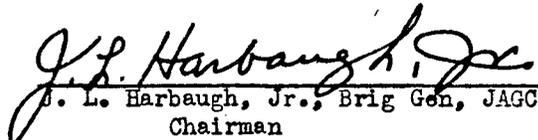
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Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant John A. Rein,
02032899, 7815 Station Complement Unit, APO 178, upon the
concurrence of The Judge Advocate General the sentence is
confirmed and will be carried into execution. A United
States Penitentiary is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

8 March 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

10 March 1950

(GCMO 21, 24 March 1950).

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

CSJAGK - CM 339485

UNITED STATES)

AAA AND GUIDED MISSILE CENTER

v.)

Trial by G.C.M., convened at Fort Bliss,
Texas, 31 October, 1 and 3 November 1949.
Dismissal.

Second Lieutenant HERBERT
WILLIAM BRAUN, O-955911,
4052d Area Service Unit,
Fort Bliss, Texas.)

OPINION of the BOARD OF REVIEW
McAFEE, BRACK and CURRIER
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that 2nd Lieutenant Herbert William Braun, 4052nd Army Service Unit, did, at Fort Bliss, Texas, on or about 12 October 1949, with intent to deceive Major R. T. Shugart in his official capacity as Investigating Officer, duly appointed to make such investigation by order of the Commanding Officer of the 3rd Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), officially certify to the said Major R. T. Shugart that, quote 'To the best of my knowledge I deposited at the same time the \$635.00 in question and received a hand receipt from Finance for same. The hand receipt was issued to me by the cashier at Finance due to the fact that no WD AGO Forms 14-38 (Soldiers Deposit Books) were available at the time' unquote, which certificate was false and known to the said 2nd Lieutenant Herbert William Braun to be untrue.

He pleaded not guilty to all charges and specifications, was found not

guilty of Charge I and its specification, but found guilty of Charge II and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

Prior to 1 July 1949, the accused was personnel officer of the 3rd Anti-aircraft Artillery Automatic Weapons Battalion (Self Propelled), Fort Bliss, Texas. On 1 July 1949, he was relieved from this position and Lieutenant Walter J. Constantine was appointed personnel officer of the 3rd Battalion. The accused continued to work in the personnel office for about two weeks after being relieved therefrom so as to "orient" his successor in his duties. Among other things, personnel officers at Fort Bliss are responsible for the "proper handling of *** Soldiers' Deposit Funds" in accordance with Army Regulations 35-2600 and Army Technical Manual 14-502. Lieutenant Constantine described this duty as follows:

"Our method of handling the money for Soldiers' Deposits runs somewhat like this: The individual soldier on pay day or shortly after pay day turns in to the Battery Commander or Battery Executive Officer whatever amount of money he so desires, so long as it is not less than five dollars. The individual soldier is given a receipt by the officer of the Battery, a hand-receipt, in that amount of money. The money is then taken to the Personnel Officer with the individual Soldier's Deposit Book, which amounts to a bank book. This money and the man's name is accounted for on a voucher, Collection Voucher, which the Battery makes out. The money, the deposit books and the vouchers are given to the Personnel Officer. He receipts one copy of the voucher and returns it to the Battery for their files. He retains the money and the books. The Personnel Officer then makes up in quintuplicate form a voucher, another Collection Voucher, known as WD AGO 14-15, which is a regular Army form. On this form are listed the consolidated names of all men in the Battalion, showing the grades, serial numbers, organization and the specific amounts of monies they have turned over to the Battery Officer. Three copies are taken to the Finance Officer together with the Soldiers' Deposit Books. The Cashier at the Finance Office checks the man's name on the Soldier's Deposit Book and his grade and serial number against that man's name on the Collection Voucher, and she also checks the amount of money. She runs a tape on the amount of money shown on the Collection Voucher and the names, grades and serial numbers and amount of monies are corroborated by the Cashier and she enters

these amounts on the Soldiers' Deposit Books. The next step is to have an official of the Finance Office, in most cases Colonel Daugherity, sign his name to that Soldier's Deposit Book. The Personnel Officer then brings the Soldiers' Deposit Books back to the organization and turns them over to the Battery Commander or Battery Executive Officer. Theoretically, these books are given back to the individual soldiers; however, in order to safeguard the books, because so many of our people are lax about safeguarding their property, most of the Battery Commanders after showing the men the books as verifying the amount deposited will, with the man's permission, if he so desires, keep the books in the Battery's safe for safekeeping." (R 13-18,28,29; Pros Exs 1,2.)

Mrs. Stella M. Sulhoff, who has been cashier of the Fort Bliss Finance Office since 5 December 1944, corroborated Lieutenant Constantine's statement regarding the handling of soldiers' deposits and further stated that the only manner in which a soldier's deposit could be made in the finance office was through the use of Soldiers' Deposits Collection Vouchers, "WD AGO Form 14-15," and "Soldier's Deposit Card/s/" (WD AGO Form No. 14-38). No "hand receipts" were ever issued by the finance office for soldier's deposits or cash (R 125-133).

During the months of May, June and July 1949, various enlisted men in the accused's unit made soldiers' deposits, amounting in the aggregate to \$1415.00. This money was turned over to the accused as personnel officer. On 1 July 1949 accused deposited \$365.00 of soldiers' deposits, and on 5 July 1949, \$415.00 of soldiers' deposits with the Fort Bliss Finance Office. These two deposits were presented with and properly receipted upon the official Army soldiers' deposits forms. On 11 October 1949, accused made another properly receipted deposit (R 37,45,46,63,71, 82,92,99,104,108,116-119,140-143,146; Pros Exs 3,5,6,7,8,9,10,11,12,13, 15,16).

Because of complaints of certain enlisted men and a report by Lieutenant Constantine that there was a discrepancy in the Battalion Soldiers' Deposits of \$635.00, Major R. T. Shugart, Executive Officer of the 3rd Anti-aircraft Artillery Automatic Weapons Battalion was appointed investigating officer for the purpose of investigating "a case concerning *** unaccounted for funds for which Lieutenant Braun was proper custodian at that time, or the agent who handled such funds" (R 18-27, 42-48,150). On 12 October 1949, Major Shugart called accused to his office, informed him of the investigation, and then asked him if he wanted the 24th Article of War read or explained. Accused replied "that he understood his rights fully under the 24th Article of War." The major then proceeded to question accused and record his answers in "longhand." At the conclusion of the interview, the notes were typewritten "in the form of a certificate," which accused read, "agreed with the contents," and signed. Without

objection by the defense, this certificate was introduced in evidence as Prosecution Exhibit 17 (R 150-158). The certificate reads:

"HEADQUARTERS
3RD AAA AW BN (SP)
Fort Bliss, Texas

12 October 1949

C E R T I F I C A T E

"I certify that the following is the truth to the best of my knowledge:

"On 30 June 1949 I was Personnel Officer, 3rd AAA AW Bn (SP), Fort Bliss, Texas and in this capacity was responsible for proper disposition of monies for Soldiers Deposits from enlisted men of this organization.

"On or about 30 June and 1 July 1949 I received the amounts of money as shown opposite each enlisted man's name, totaling six hundred and thirty five dollars (\$635.00) as shown on attached exhibit 'A' along with other monies from enlisted men of this unit. This money was to have been deposited to their credits in Soldiers Deposit Accounts at Post Finance Office, Fort Bliss, Texas.

"On 1 July 1949 I deposited a total of three hundred and sixty five dollars (\$365.00) of which I have a receipt and which Finance Office acknowledges. I put the balance of the money which I had collected from enlisted men on 30 June and 1 July 1949 in the Battalion safe, S-1 Office, for safe keeping until 5 July 1949. The Finance Office was closed from 2 July 1949 until 5 July 1949 for the week-end and the fourth July holiday. Again on 5 July 1949 I deposited four hundred and fifteen dollars (\$415.00) for Soldiers Deposit Accounts with Post Finance of which I have a receipt and which Finance acknowledges.

"To the best of my knowledge I deposited at the same time the six hundred and thirty five dollars (\$635.00) in question and received a hand receipt from Finance for same. The hand receipt was issued to me by the cashier at Finance due to the fact that no WD AGO Forms 14-38 (Soldiers Deposit Books) were available at the time. As Personnel Officer I gave hand receipts to all batteries turning over money to me for Soldiers Deposits.

"On 1 July 1949 I was relieved from assignment as Personnel Officer but remained with the present Personnel Officer, 1st Lt Walter J. Constantine, for a period of approximately two (2) weeks in order to orient him on the job and act as his assistant.

"I did not give the attached named enlisted men credit on their Service Records due to the fact that my entry into the records on 5 July 1949 would not coincide with entry made by Finance upon receipt of the WD AGO Forms 14-38. I had intended to make my entry

into the Service Records the same date as the Finance entry upon their receipt of Forms mentioned above.

"I made efforts to secure WD AGO Forms 14-38 from Lt Constantine, then Personnel Officer, during the month of August 1949 and was able to get fifteen (15) of these forms. At this time I was unable to find my vouchers and receipts from Finance showing deposits made by me on 5 July 1949, therefore, I did not complete the Forms WD AGO 14-38 on the enlisted men in question nor did I make any entry in their Service Records at this time. During the months of August and September 1949 I was more or less making an investigation of my own trying to find my vouchers and receipts. I was aware of the fact all this time that there were a few men on attached Exhibit 'A' that had not been given credit for the money they had entrusted with me.

"I was contacted by Lt Constantine on or about 10 October 1949 in regards to the men listed on attached Exhibit 'A' and was informed by him that the records had disclosed the fact that they had not been given credit for their deposits nor did they have a Soldiers Deposit Book in their possession. Lt Constantine told me that a couple of men had been to see him about not having received their books and he had asked for a report from all batteries regarding the same. The report from the units had revealed the facts as shown on Exhibit 'A' attached. To date I have been unable to find my receipts from Finance Office.

"I have nothing further to add to this statement made above.

/s/ Herbert W. Braun
 HERBERT W BRAUN
 2nd Lt CAC
 Btry 'D', 3rd AAA AW Bn (SP)" (Pros Ex 17)

Of the sum of soldiers' deposits turned over to accused during the months of May, June and July 1949, \$535.00 was not shown by the books of the finance office as having been deposited in the finance office, nor could the accused produce or account for the money as of 18 October 1949 (R 39,68,75, 87,93,94,101,102,105,111,134-137).

For the Defense

Pertinent evidence adduced by the defense was testimony showing that accused himself initiated an investigation relative to the discrepancies in the battalion soldiers' deposits, requested that additional deposit forms (WD AGO Form No. 14-38) be given him, that all outstanding soldiers' deposits turned over to him had been paid in the prescribed manner to the finance office by 3 November 1949, and that whereas the finance office did not give "hand receipts" for cash or soldiers' deposits, that office sometimes gave "hand receipts" for articles or checks (R 164-169, 180-200, 208-211, 229-232; Def Exs A,C,D,E,F,G,H,I,J).

After being apprised of his rights as a witness by the law member, the accused elected to make an unsworn statement through counsel (R 232-235). This statement reads, in relevant part:

"As to the Specification of Charge II, the accused denies that his statement means that he intended to say that he had deposited this money for Soldiers' Deposit Accounts. The statement does not say that. The accused had had several experiences prior to the 1st of July in which he had received hand-receipts and he has been able to recover only one of them. Therefore, he feels that he had a reasonable belief at the time he made this statement for believing that that is the manner in which this money might have been handled. After making this statement and after signing it he made a personal investigation at the Finance Office. He went there in person and at no one's bequest and made an extensive search of the records on file in the Finance Office. That disclosed that he was in error and he now knows and is convinced that he had not deposited that money in that manner. He does not deny that but he feels that to the best of his knowledge at the time the question was asked that is what he thought he did with it, and he had a reasonable ground for thinking so. He desires that the Court pay attention to the wording of the certificate and the fact that it does not say that he deposited this money to the credit of Soldiers' Deposit Accounts." (R 234-235)

4. Discussion

Accused stands convicted of executing a false official certificate, knowing it to be false, with intent to deceive Major Shugart, a duly appointed investigating officer. To support the conviction, there must be competent evidence of record to prove that (a) the accused made an official certificate, (b) the certificate was false, (c) the accused knew it was false, and (d) that such false certificate was made with intent to deceive the person to whom it was made (CM 318705, Jackson, 81 ER 433).

The evidence shows that in the months of May, June and July 1949, accused, as personnel officer of the 3rd Anti-aircraft Artillery Automatic Weapons Battalion, collected certain soldiers' deposits for his battalion. In accordance with Army regulations and the current procedure relative to soldiers' deposits in effect at Fort Bliss at that time, he should have deposited these collections with the finance officer as soon as practicable, receiving therefor the official receipts provided for this purpose by the Department of the Army. This he did not do. The accused instead made partial deposits over a seven-month period, the last deposit with the finance office being made on the final day of his trial by court-martial.

The evidence further shows that an investigating officer was duly

appointed to probe the matter of "unaccounted for funds" in soldiers' deposits of the accused's organization. During this investigation, conducted on 12 October 1949, accused admitted that he had received soldiers' deposits from men in his organization and had deposited only a portion of the sums received, because there was a shortage of "soldiers' deposit books." He further stated that "to the best of his knowledge" he had deposited the balance of six hundred thirty-five dollars with the finance office about 5 July 1949 and had been given a "hand receipt" therefor.

The record clearly shows that there was a shortage in the 3rd Battalion soldiers' deposits in the month of July 1949. The accused admittedly was responsible for these funds and even as late as 18 October 1949 was unable to produce or account for a portion of them. The records of the finance office disclosed that accused had made soldiers' deposits on 1 and 5 July and 11 October 1949 and at no other time during that period. Finance personnel also testified that "hand receipts" were never given for cash or soldiers' deposits. Clearly the certificate of 12 October 1949 was false. That the accused knew it to be false becomes apparent when we reflect that when he executed the certificate to an official investigating officer he did so only one day after he had deposited a portion of the funds in question with the finance office. His intent to deceive is not only obvious from the record, but also may be presumed from the falsity of the instrument (CM 314746, Garfinkle, 64 BR 215,222). Thus we conclude that accused is guilty of making a false certificate as charged beyond all reasonable doubt. Such an act has long been held to be a violation of Article of War 95 (CM 318313, Davis, 67 BR 223,230; CM 334270, Stricklin, 1 BR-JC 141,157).

The evidence to establish the negative fact that accused had not made the \$635.00 deposit in the finance office was adduced by testimony of personnel of the Fort Bliss Finance Office to the effect that their records disclosed no such deposit. These records are not in evidence. However, the records of Army finance offices relative to soldiers' deposits are required by law and Army regulations to be maintained, thereby coming within the category of official public records. Parol testimony is competent to establish a negative fact as shown by a record without introduction of that record in evidence, provided it is a private or public official record (CM 262042, Pepper, 5 BR (ETO) 125,150; CM 334270, Stricklin, 1 BR-JC 141, 157; AR 35-2600, 10 Dec 1947).

5. In a brief filed after trial with the reviewing authority, counsel for the accused contends that the court was without jurisdiction to try the accused because no law member was detailed for the court by the appointing authority. This contention is based on the theory that "The orders appointing the court stated merely that one of the members thereof was Certified as qualified Law Member but did not detail him as Law Member." If this contention is true, then indeed the court was not properly constituted and lacked jurisdiction in the case (CM 296431, Roby, 58 BR 113).

Paragraph 4, Special Orders Number 222, Headquarters Anti-aircraft Artillery and Guided Missile Center, Fort Bliss, Texas, dated 22 September 1949, promulgated the appointment of the court which tried accused "by command of Major General Homer." This order reads in pertinent part:

"***

"Major Dudley O. Rae 0366573 CAC 16th AAA Gp

(Certified as qualified law member)

"***"

(The Commanding Officer of the Anti-aircraft Artillery and Guided Missile Center was authorized to appoint general courts-martial by General Orders Number 127, War Department, dated 25 October 1946. The certification by The Judge Advocate General that Major Dudley O. Rae, 0366573, is "qualified for detail as law member(s) of general courts-martial, pursuant to the Eighth Article of War" was announced in General Orders Number 7, Department of the Army dated 1 February 1949.)

Paragraph 4e, Manual for Courts-Martial, 1949, provides:

"e. Law member for general court-martial. - The authority appointing a general court-martial shall detail as one of the members a law member who shall be an officer of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by The Judge Advocate General to be qualified for such detail (A.W. 8).

"Officers are qualified for detail as law members only if they are Regular Army officers appointed in the Judge Advocate General's Corps, or non-regular officers of any component of the Army of the United States on active Federal duty assigned to the Judge Advocate General's Corps by competent orders, or officers who have been certified by The Judge Advocate General as qualified to act as law members.

"The order appointing a general court-martial will expressly state the qualification of the law member as prescribed by Article 8. See Appendix 2 for the form of statement of qualification.

"Failure to appoint a law member of a general court-martial who is qualified as prescribed in Article 8 renders any proceeding of such a court void."

Appendix 2, Manual for Courts Martial, 1949, outlines a form to be followed in publishing special orders appointing courts-martial. It provides in relevant part:

"***

"Maj _____ (arm or Br of Sv) (JAGC) or
(Certified by TJAG as qualified),
Hq 29th Inf Div, LAW MEMBER."

The question presented is whether Special Orders No. 222 purported to appoint Major Rae as law member or merely to state that Major Rae had the qualifications required by law for law members of general courts-martial. If in the order appointing the court the parenthesis followed the word "qualified" instead of the word "member," or a comma were inserted between the words "qualified" and "law," it would be apparent that a law member with proper qualifications had been appointed.

Paragraph 7a, Army Regulations 310-110, 26 May 1949, provides inter alia:

"*** Purpose. - Special orders will normally be used to promulgate *** the appointment of boards of officers, courts-martial, and courts of inquiry."

"Promulgate" is defined: "To publish, to announce officially, to make public as important or obligatory" (Black's Law Dictionary, 3rd Ed., 1933).

The power to appoint the court in question was vested solely in the Commanding General of the Anti-aircraft Artillery and Guided Missile Center at Fort Bliss. When he appointed a court-martial he published that appointment through the medium of a special order in accordance with Army Regulations. The written order merely made public what the commanding general had already done (SPJGA 1946/3484, 10 May 1946; V Bull JAG 145).

Major General Homer had a duty under the law to designate a law member on every general court-martial he appointed. Can the Board of Review subscribe to the theory of the defense that the intent and will of the appointing officer was warped or changed by a missing comma or misplaced parenthesis in the writing which published that mandate? Such a proposition is patently fallacious and chimerical. The Board concludes that the court included a law member appointed within the purview of Article of War 8 (CM 264724, Bauswell, 42 BR 213,216).

6. Department of the Army records show that the accused is 27 years of age and single. He is a high school graduate. He enlisted in the National Guard on 11 November 1938, was inducted into Federal service on 16 September 1940, successfully completed a course at the Parachute School, Fort Benning, Georgia, served in the European Theater of Operations from 26 January 1945 to 20 August 1945, and was honorably discharged in the grade of first sergeant on 19 October 1945. He was awarded the European-African-Middle East Theater ribbon with one bronze battle star and the Good Conduct medal. On 16 April 1948, accused was appointed a second lieutenant, National Guard of the United States, in the Army of the United States. On 29 October 1948 he was ordered to extended active duty. His overall efficiency rating is O61.

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

(On leave of absence) _____, J.A.G.C.

Joseph L. Brack _____, J.A.G.C.
Roger M. Currier _____, J.A.G.C.

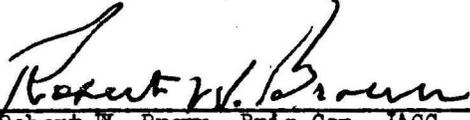
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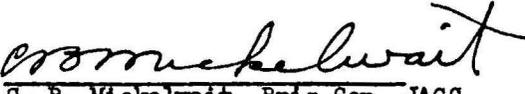
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Herbert
William Braun, O-955911, 4052d Area Service Unit, Fort
Bliss, Texas, upon the concurrence of The Judge Advocate
General the sentence is confirmed and will be carried into
execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

23 February 1950

I concur in the foregoing action.

(GCMO 14, 1 March 1950).


E. M. BRANNON
Major General, USA
The Judge Advocate General

24 February 1950

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

CSJAGH CM 339494

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
)	
v.	)	Trial by G.C.M., convened at
	)	Stuttgart, Germany, 17 November
Second Lieutenant ROBERT J.	)	1949. Dismissal.
CLIFFORD, JR., 01685630,)	
Troop C, 24th Constabulary)	
Squadron.)	

OPINION of the BOARD OF REVIEW
O'CONNOR, SHULL, and LYNCH
Officers of The Judge Advocate General's Corps

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

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

Specification: In that Second Lieutenant Robert J. Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about 26 October 1949, with intent to deceive Major Lawrence R Seely, Headquarters, 24th Constabulary Squadron, officially state to the said officer in substance that Soldier's Deposits intrusted to his care in the amount of \$305.00 had been placed in safe keeping with Second Lieutenant John Blasing, 529th Military Police Company, Giessen, Germany, during the time that he, Second Lieutenant Robert J Clifford, Jr. was a patient in the 57th Field Hospital, Giessen, Germany, from about 8 October 1949 to about 18 October 1949, which was known by the said Second Lieutenant Robert J Clifford, Jr. to be untrue.

CHARGE II: Violation of the 61st Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about August, 1949, feloniously steal money, to-wit, military payment certificates, of the value of ten dollars (\$10.00), the property of Private First Class Wilbur P Bunch.

Specification 2: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about 30 September 1949, feloniously steal money, to-wit, military payment certificates, of the value of five dollars (\$5.00), the property of Private First Class Wilbur P Bunch.

Specification 3: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about 30 September 1949, feloniously steal money, to-wit, military payment certificates, of the value of fifty dollars (\$50.00), the property of Corporal Norman N Quick.

Specification 4: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about 30 September 1949, feloniously steal money, to-wit, military payment certificates, of the value of ten dollars (\$10.00), the property of Private First Class Andrew L Hickman.

Specification 6: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about 30 September 1949, feloniously steal money, to-wit, military payment certificates, of the value of thirty dollars (\$30.00), the property of Private First Class Russell Little.

Specification 8: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld, Germany, on or about 30 September 1949, feloniously steal money, to-wit, military payment certificates of the value of sixty dollars (\$60.00), the property of Private First Class Donald P Schwartz.

Specification 9: In that 2d Lieutenant Robert J Clifford, Jr., C Troop, 24th Constabulary Squadron, did, at Hersfeld,

Germany, on or about 30 September 1949, feloniously steal money, to-wit, military payment certificates of the value of twenty-five dollars (\$25.00), the property of Private First Class Lowell E Eisenhour.

Specifications 5 and 7: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its Specification, and of Specifications 5 and 7 of the Additional Charge; and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Accused was assigned to Troop C, 24th Constabulary Squadron, Hersfeld, Germany, APO 171. The date of the assignment is not shown in the prosecution's evidence, but it appears that when Captain James F. Wilson assumed command of the troop on 24 September 1949, accused was a member of the organization and that he remained with it until 30 October 1949.

By troop order accused was designated to receive soldiers' deposits (R 47). Troop officers receiving soldiers' deposits turned the money in to the squadron personnel officer, Second Lieutenant Melton G. Spruill, who paid it over to the finance office (R 34).

Several soldiers of Troop C paid money to accused to be credited to their respective soldier's deposit. Accused gave the soldiers signed receipts for their payments in most instances. The names of these soldiers and the amounts and dates of their payments are as follows:

Pfc Wilbur P. Bunch	31 August 1949	\$10.00	(R 9)
Pfc Wilbur P. Bunch	30 September 1949	\$ 5.00	(R 9)
Corporal Norman N.Quick	30 September 1949	\$50.00	(R 12)
Pfc Andrew L. Hickman	30 September 1949	\$10.00	(R 14-15)
Pfc Russell Little	30 September 1949	\$30.00	(R 27-28)
Pfc Donald P. Schwartz	30 September 1949	\$60.00	(R 30-31)
Pfc Lowell E. Eisenhour	30 September 1949	\$25.00	(R 32)

Each of the above named soldiers, except Quick, identified the "Soldier's Deposit Book" issued to him for the purpose of recording his deposits (R 9,15,27,31-33; Pros Exs 1,2,4,6,7). Quick had no deposit book because the above described payment to accused was an initial deposit (R 38). None of the aforementioned payments to accused were recorded in the respective deposit books but a deposit of \$40.00 by Schwartz on 10 October is shown (Pros Exs 1,2,4,6,7).

Lieutenant Spruill testified as to his normal course of procedure with respect to soldiers' deposits. After he had received all the deposits he thought would be made for the month, he would enter the deposits in the individual deposit books. Usually the deposits were entered in the deposit books from two to five days after they were received (R 38,39). He then would turn the collected deposits over to the finance officer, located 38 miles away. Normally from five to ten days elapsed between the time the money was received by Spruill and the time he turned it in to the finance officer although in some instances he held money for as long as fifteen days. The finance officer, upon receiving the deposits, signed the deposit books indicating his receipt of the monies (R 36,43). Spruill further testified that his records did not show a deposit by Bunch of \$10.00 during August, 1949, or of \$5.00 on 30 September 1949; nor deposits of \$50.00 by Quick, of \$10.00 by Hickman, of \$30.00 by Little, of \$60.00 by Schwartz, or of \$25.00 by Eisenhower; on 30 September 1949. The records did show a \$40.00 deposit by Schwartz (R 34-35).

About 26 October 1949, Captain Wilson learned that some of his men were complaining that their deposits were not entered in their deposit books. He questioned various members of the troop, examined the deposit books, and reported his findings to Major Lawrence R. Seely, squadron executive officer (R 44,48). Seely called accused to his office, and in Captain Wilson's presence, told accused that certain soldiers claimed they had left deposits with him which did not appear in their deposit books (R 44,45). Seely did not warn accused of his rights under Article of War 24 prior to the interview. Accused said to Seely, "Yes, I have the money. In fact, I have \$305 from soldier's deposits which I did not deposit, which I had with me on the night of the 7th or 8th of October when I was wounded and which I took with me to the Giessen hospital." Seely asked accused where the money was "now" and accused responded, "I gave it to Lieutenant Blasing of an MP outfit down there to keep for me, for safe keeping, because I did not want to send it back by a G.I." (R 46) Accused identified Blasing as Lieutenant John Blasing of the 529th MP Company (R 52).

Major Seely instructed accused to go down to Giessen with Captain Wilson that afternoon, or the next day, and to bring the money back to him, Seely, at his office the following morning (R 46). Accused arranged with Captain Wilson to go to Giessen that afternoon but, when Captain Wilson called for him, accused said he had phoned Blasing's residence and he was away. Accused said he was sure Blasing would get in touch with him and at that time accused would obtain the money. That evening

Captain Wilson telephoned accused's residence and was told he was in Giessen. Accused did not report for duty the next day and could not be found (R 46,48).

Second Lieutenant John Blasing of the 529th Military Police Service Company testified that accused did not turn over any money to him for safekeeping during October. Blasing, who had known accused since May, 1948, said that about 14 October he received a call from accused from the hospital and that accused invited him to call on him but he did not do so (R 49,50).

Accused repaid the soldiers' deposits on 15 November 1949. The money was paid to Lieutenant Colonel Orth who returned it to the individual soldiers (R 9-10,13,27-28,31-33,52; Def Exs A,B,C,E,G, and H).

The court took judicial notice of paragraph 53, Technical Manual 14-502, relating to the manner of making soldiers' deposits, their effective dates, and the duty of the transmitting agent (R 51).

b. For the defense.

Accused, after having been duly apprised of his rights, elected to become a witness in his own behalf (R 68-69).

He testified that on or about the 15th of August 1949, he was appointed, in addition to his other duties, bonds and allotments officer, savings officer and National Service Life Insurance Officer. Two officers had been sent to schools and some of their duties had been delegated to him. He was not familiar with the requirements of these assignments but tried to fulfill them to the best of his ability. Since the troop was preparing for a visit by the Inspector General, he had little time to study the pertinent regulations (R 70).

On pay day, 31 August, the accused assumed the responsibility of savings officer. He accepted soldier's deposits savings from the enlisted men and issued receipts for the money. This money was kept apart from bond money. The receipts were tagged and the money fastened to the paper with a paper clip. The two separate sums of money were placed in the safe at the time the executive or company commander left troop headquarters building. There were two keys to the safe, the executive officer having one and the company commander the other (R 70).

The following day, 1 September 1949, accused went to company headquarters, obtained the soldiers' deposits and delivered them to the troop or personnel clerk, who had the amounts entered on the soldier's

deposit books. About a week later Private First Class Schwartz gave him \$60.00 for deposit. This money was given to him in the evening after the safe was locked so he took the money home and placed it in a dresser drawer. He forgot to turn this money in on pay day, 30 September. On this pay day he collected \$340.00 in soldier's deposits which was placed in the office safe. Since the men on patrol did not return to be paid until about 1800 hours, accused remained in the office to collect soldier's deposits. He collected about \$140.00 and since no one was present with the key to the safe he took that money home and placed it with the other money in the dresser drawer. During this period he was under the impression he could not turn over the money to the squadron personnel officer except directly after pay day (R 70-71).

On Monday, 3 October, while accused was officer of the day, Lieutenant Wyatt took the soldiers' deposits from the safe and turned them in for deposit. When the accused returned to troop headquarters the next day he learned that the money in the safe had been deposited. Since he was still under the impression that he could deposit money only once a month he retained the deposits which he had in his home (R 71). Accused's usual procedure was to take the soldier's deposits to Corporal William L. Coalson, personnel clerk, 24th Constabulary Squadron, who would make out a receipt for the personnel officer's signature. Coalson and accused would then go to the personnel officer who would receive the money, sign a receipt therefor, and give the receipt to the accused. According to Coalson, someone delivered \$340.00 to him on 3 October. He entered the various amounts on the "soldiers' cards - deposit books" and a certificate was prepared for Lieutenant Spruill to sign. Persons other than accused delivered money to Coalson and he did not remember who gave him the money on 3 October (R 57-58).

On the 7th of October, Coalson gave accused \$15.00 of the soldier's deposit money, which was to be returned to Bunch and Hickman because they had neglected to turn their deposit books in with their money. Coalson told accused to obtain the books from the two soldiers and bring the books, with the money, to him by the following morning as he was going on furlough. At that time, in response to accused's query, Coalson told him "he could deposit soldier's deposits any time during the month." The accused then told Coalson that he had some money to deposit the next day, but he did not in fact make a deposit (R 53-54,71).

Accused was to inspect border patrols at 2100 hours on 7 October. He departed from his house about 2030 hours (R 71). Accused testified that prior to leaving he placed either \$305.00 or \$310.00 in an envelope and put it in a pocket of his field jacket (R 71,72). According to his wife, the accused put on an OD shirt and a field jacket. He asked her for an envelope and then took a large sum of money out of the dresser

drawer, placed it in the envelope and put the envelope in his "right hand pocket." He took a fur lined jacket and threw it over his arm. He stuck the envelope in the pocket of the field jacket "on the left hand side" (R 66). Private First Class Joseph S. Mecowitch drove accused in a jeep on the inspection (R 60,71). At this time there was an alert because the Russians had opened their border and were permitting Germans to enter the American Zone. About 0015 hours the accused heard a disturbance off the road and went to investigate (R 71). He put a round in the chamber of his .45 and; when he stumbled on some cobble-stones, the weapon was accidentally discharged, wounding him in the leg. He was taken to a police station where "Sergeant Easley" removed his field jacket and Private Mecowitch removed his field boots. About an hour and a half later an ambulance arrived and a medical officer gave accused an injection of morphine. The accused did not remember much about the return trip until he arrived at Hersfeld. After his wound was dressed there, he was transported to the hospital at Giessen where he was x-rayed and his leg placed in a cast. When he awakened the next morning he asked the nurse about his clothes and she told him they were in the locker. The following day he learned that his field jacket which had contained the money was gone. He knew he was responsible for the money and would have to replace it. Therefore, he decided to say nothing about the missing money and to see if his jacket would be found. When accused's wife visited him she told him that neither the field jacket nor boots had been returned to their home (R 72). Private Mecowitch corroborated accused's testimony as to the accidental shooting, the administering of morphine to accused and the removal of his field jacket and combat boots. Mecowitch did not know what happened to the clothing removed from the accused (R 60-61).

About the 24th or 25th of October the accused told his wife of the loss of the money. He then went to Frankfurt and attempted to borrow the missing sum from a friend but the trip was unsuccessful. The day following, accused went to Eschwege where he saw Chaplain (Major) Lehman and told him about the lost, or stolen, money (R 64,72-73). The accused returned to his home that evening and was placed in arrest of quarters. However, he was returned to duty within two or three days (R 73).

With reference to Charge I and its Specification the accused stated:

"* * Not knowing that I would be making an official statement, a false official statement, unless having been warned under the 24th Article of War, and still trying to cover up the fact that the money had been lost, knowing that eventually it would be repaid, I told the Major [Seely] the facts that he stated here, the story that he told you, because at that time I was quite sure that within two or three days I could raise the money."
(R 73,75)

Accused's friends, however, did not have sufficient funds on hand to loan him the necessary amount of money. On 1 November accused drew his pay, and at Colonel Orth's request, surrendered \$160.00 to be placed in the squadron safe until he could make up the balance due (R 73,79).

On or about 1 November 1949, the accused explained his situation to Sergeant William P. Harriman, A Troop, 24th Constabulary Squadron, and asked him for a loan of \$300.00. Harriman agreed to lend him the money. Although Harriman had \$372.00 coming to him, because of some confusion as to entries on his pay card he was able to draw only \$101.00. Of this amount he loaned \$100.00 to the accused (R 59,74). Accused also borrowed \$60.00 from Lieutenant Littlefield of Hersfeld. The \$160.00 previously given to Colonel Orth and the \$160.00 borrowed from Harriman and Littlefield enabled accused to replace the missing funds. He had been ordered to a new post and lacked time to pack his belongings, catch the train and also disburse the money so Colonel Orth agreed to reimburse the individual soldiers concerned and to obtain receipts from them (R 74).

On cross-examination the accused admitted he had never turned any money over to Lieutenant Blasing and that his statement to Major Seely that he had given approximately \$305.00 to Blasing was untruthful (R 75). Accused said he was released from the hospital about the 18th of October; on the 26th of October he told a Sergeant Crater the money had been stolen or lost; on the 27th he told the Chaplain; on the 27th Colonel Orth, and on the 29th or 30th, a Lieutenant Caldwell (R 76). When asked why he took the money out of safekeeping in the drawer he "thought" it would be "just as safe on my person for one night." He had learned from Coalson that he could turn the money in the next morning and he planned to do so when he came in from patrol (R 78).

The stipulated testimony of Lieutenant Blackwell, Corporal Lee, Sergeant Tebo and Sergeant Fontenot attested the good character and high efficiency of accused (R 65).

4. Discussion.

Specification, Charge I.

The accused was found guilty of making a false official statement to Major Lawrence R. Seely, with intent to deceive him, knowing such statement was untrue, in violation of Article of War 96.

In order to sustain the conviction the evidence must show that the accused made the alleged statement, that it was official, that it was false, that he knew it to be false, and that the statement was made with an intent to deceive the person to whom it was made (CM 334658, Flanagan, 1 BR-JC 233; CM 324352, Gaddis, 73 BR 181).

The evidence establishes conclusively the making of a false statement by accused as alleged. It is shown that when Major Seely questioned accused concerning the disposition made of certain soldiers' deposits entrusted to him, accused stated that while he was a patient in the hospital he had given \$305.00 in soldiers' deposits to Lieutenant John Blasing for safekeeping. In fact, accused had never given any soldiers' deposits to Lieutenant Blasing. Admittedly, Major Seely did not advise accused of his rights as a witness under Article of War 24 prior to questioning him, but such circumstance is immaterial. The accused's statement that he had given the money to Lieutenant Blasing for safekeeping, was not received in evidence as a confession or as an admission pertaining to the offense charged. The statement itself constituted the basic element of the said offense (CM 334658, Flanagan, supra; CM 245724, Lawson, 29 BR 257,261). It is obvious from the nature of accused's statement that he intended to deceive Major Seely. Apprehensive of a criminal charge for mishandling soldiers' deposits entrusted to him, accused sought to avert a reckoning by advancing a wholly fictitious explanation of the disposition made of the money. The accused admitted this deception while on the witness stand. He stated: " * * * trying to cover up the fact that the money had been lost, knowing that eventually it would be repaid, I told the Major [Seely] the facts that he stated here, the story that he told you, because at that time, I was quite sure that within two or three days I could raise the money." If the accused's statement to Major Seely had been true and the money had been in fact deposited with Lieutenant Blasing by accused, it would have been a complete defense to a charge of larceny.

It is equally clear that the statement made by accused was of an official nature. The accused, who had been designated by troop order to receive soldiers' deposits, was called to the office of Major Seely, the squadron executive. He was shown soldiers' deposit books and told that the soldiers to whom the books pertained, claimed that their deposits had not been credited to them. Major Seely thereupon asked accused to explain the reason for these apparent discrepancies. Since a superior officer was questioning accused with reference to his performance of one of his official duties, any answers in response to such questions were necessarily official in nature. We are of the opinion that all of the elements of a false official statement have been established beyond any reasonable doubt.

Specifications 1,2,3,4,6,8 and 9, Additional Charge.

The accused was also found guilty of feloniously stealing money, in the form of military payment certificates, of an aggregate value of \$190.00, the property of six different enlisted men, in violation of Article of War 93.

The evidence shows that six enlisted men entrusted to accused the seven sums of money alleged in the specifications. These sums were to be credited to them as soldiers' deposits. Although the form of the money paid to accused is not shown in the record we may take judicial notice of the fact that military payment certificates are the media of exchange in the European Command. The accused had been designated by troop order to receive such deposits. His acceptance of money in such capacity created a trust relationship between the depositors and him whereby it became his duty to deposit or cause to be deposited with the squadron personnel officer the money received for that purpose. That the accused did not perform the acts required of him by reason of the fiduciary relationship, is amply proved by the testimony of the soldiers concerned, by the fact that the soldiers' deposit books failed to show such deposits and by accused's own testimony. With respect to the \$60.00 entrusted to accused by Private First Class Donald P. Schwartz about 8 September 1949, the soldier's deposit card reflected a deposit of \$40.00 on 11 October 1949. It is apparent that this is a separate and distinct deposit since accused subsequently refunded \$60.00 to Schwartz through Colonel Orth.

Paragraph 180g of the Manual for Courts-Martial, U. S. Army, 1949, provides at page 239:

"Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment. In military law former distinctions between larceny and embezzlement do not exist.

"Once a larceny is committed, a return of the property or payment for it is no defense. An intent to buy the property stolen or otherwise to replace it with an equivalent is not a defense even though such an intention existed at the time the larceny was committed. * *."

The following statements of law are applicable to the factual situation:

"* * There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with the proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when

balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined in the first instance at least by the court (CM 276435, Meyer, 48 BR 331,338; CM 301840, Clarke, 24 BR (ETO) 203,210; CM 262750, Splain, 4 BR (ETO) 197,204; CM 320308, Harnack). * * A person in charge of trust funds who fails to respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177,181; CM 251409, Clark, supra). (CM 323764, Mangum, 72 BR 403)

"The fact of fraudulent conversion in embezzlement may be evidenced by *** a deliberate falsification *** by rendering a false return or account *** in which a fictitious balance is made to appear or which is otherwise falsified or purposely misstated." (Winthrop's Military Law and Precedents, Reprint 1920, page 705). (CM 334270, Stricklin, 1 BR-JC 141,155-156)

When asked to account for the deposits entrusted to him, accused gave the wholly fictitious explanation that he had left the money with a Lieutenant Blasing. The accused admitted on the witness stand that this statement was untrue. His inability to produce the money coupled with the false statement permits the inference to be drawn that he fraudulently converted the money to his own use with the requisite felonious intent (CM 335586, Wilkins, 2 BR-JC 153).

Accused testified he had the money at home, that he took it on patrol with him on the night of 7 October 1949, intending to deposit it the next morning, and that the money was lost or stolen when he was injured and hospitalized. His wife corroborated his testimony that he had the money in his possession when he went on patrol. The court rejected this defense. It was within the province of the court to believe or disbelieve the witnesses and we see no reason to disturb its decision in this instance. It may be noted that \$10.00 of the missing funds was entrusted to accused on 30 August and the balance on 30 September. Why accused retained this money in his personal possession until 7 October, instead of placing it in the available troop safe, was not adequately explained. Furthermore, if the money was lost or stolen on 7 October it is most improbable that accused would have failed to report that fact to any person in authority but instead would have concealed the loss and when called upon officially to account, on 26 October, would have offered a false explanation of the disposition made of the money. The Board is of the opinion that the accused's defense was properly rejected by the court.

5. The record of trial and accompanying papers show accused is 28 years of age, married, and the father of two children. After graduating from high school in 1939, he worked as a laborer for a steel company. He entered the military service as an enlisted man on 3 May 1943 and was discharged on 18 November 1945, attaining the grade of private first class. His wartime service included fifteen months' service in the European Theater. He was awarded the Good Conduct Medal and four campaign stars. He reenlisted on 25 September 1946 and, having completed Officer Candidate School at Fort Riley, Kansas, was commissioned as a second lieutenant in the Army of the United States, on 27 October 1948. He entered on active duty on that date. The accused claims several decorations but Department of the Army records fail to confirm his claims.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 93 and 96.

Robert Clouner, J.A.G.C.
Lucie S. Thull, J.A.G.C.
W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of the Judge Advocate General

CSJAGU CM 339494

24 February 1950

UNITED STATES

UNITED STATES CONSTABULARY

v.

Trial by G.C.M., convened at
Stuttgart, Germany, 17 November
1949. Dismissal

Second Lieutenant ROBERT
J. CLIFFORD, JR., 01685630,
Troop C, 24th Constabulary
Squadron

- - - - -
Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of the Judge Advocate General's Corps
- - - - -

1. The record of trial in the case of the officer named above has been submitted to the Judicial Council pursuant to Article of War 50d(2) for confirming action under Article of War 48c(3). The record of trial and the opinion of the Board of Review have been examined by the Judicial Council, which submits this opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused was found guilty of having made, with intent to deceive Major Lawrence R. Seely, a false official statement to the effect that he had placed in safekeeping with Second Lieutenant John Blasing certain Soldiers' Deposits in the amount of \$305.00 which had been entrusted to his care, in violation of Article of War 96 (Charge I, Specification). He was also found guilty of seven specifications alleging larceny of military payment certificates in violation of Article of War 93 (Charge II, Specifications 1, 2, 3, 4, 6, 8 and 9). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review held the record of trial legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The Council finds the evidence to be as stated by the Board of Review in its opinion. The only substantial question presented by the record of trial involves the admissibility of accused's alleged statement to Major Lawrence R. Seely, Executive Officer of the 24th Constabulary Squadron, in view of the latter's failure to warn the accused of his rights under Article of War 24. The evidence pertinent to this issue is briefly summarized as follows:

The accused was designated to receive soldiers' deposits in Troop C, 24th Constabulary Squadron. It was the accused's duty to collect individual deposits from soldiers in the Troop and to turn them over to the Squadron personnel officer. The latter then would make appropriate entries in the soldiers' deposit books and deposit the funds with the finance officer. On or about 26 October 1949, Captain James F. Wilson, the accused's troop commander, learned that some of his men were complaining that their deposits were not entered in their deposit books. Apparently he reported the matter to Major Seely, Squadron Executive Officer. At any rate Major Seely ordered Captain Wilson to investigate the matter. Captain Wilson questioned various members of the troop, examined their deposit books, and reported his findings to Major Seely. Major Seely called the accused to his office, and in the presence of Captain Wilson told the accused that certain soldiers claimed that the entries in their deposit books did not reflect certain deposits which they had turned over to the accused. Major Seely did not warn the accused of his rights under Article of War 24 prior to the interview. Accused told Major Seely - "Yes, I have the money. In fact I have \$305 from soldier's deposits which I did not deposit, which I had with me on the night of the 7th or 8th of October when I was wounded and which I took with me to the Giessen hospital." Major Seely asked where the money was and the accused replied, "I gave it to Lieutenant Blasing of an MP outfit down there to keep for me for safekeeping, because I did not want to send it back by a G.I." Major Seely instructed accused to go down to Giessen with Captain Wilson that afternoon, or the next day, and to bring the money back to him at his office the following morning. Accused arranged with Captain Wilson to go to Giessen that afternoon but, when Captain Wilson called for him, accused said he had telephoned Lieutenant Blasing's residence and ascertained that the latter was away. Accused stated that he was sure that Lieutenant Blasing would get in touch with him and at that time accused would obtain the money. That evening Captain Wilson telephoned accused's residence and was told that he was in Giessen. Accused did not report for duty the next day and could not be found.

Lieutenant Blasing testified that the accused did not turn over any money to him for safekeeping during October.

As a witness in his own behalf the accused admitted receiving the money from enlisted men for deposit and related that he had taken the money with him on an inspection of border patrols on 7 October. During the course of this inspection he accidentally wounded himself in the leg. He was taken to a hospital at Giessen where the money disappeared from his clothes.

With reference to the alleged false official statement the accused testified:

"* * * Not knowing that I would be making an official statement, a false official statement, unless having been warned under the 24th Article of War and still trying to cover up the fact that the money had been lost, knowing that eventually it would be repaid, I told Major [Seely] the facts that he stated here, the story that he told you, because at that time I was quite sure that within two or three days I could raise the money."

During the direct examination of Major Seely as a witness for the prosecution, the defense attempted to object to any testimony as to accused's statements to the witness without a showing that he had apprised the accused of his rights under Article of War 24. The law member stated:

"As far as the court is concerned, it is immaterial whether he did or not. He was conducting a line of duty investigation which did not involve any particular person at that time."

The defense offered to cite authorities in support of its contention whereupon the law member said:

"It is my recollection, Mr. Van Atta, that we have had this out several times before in here and I don't see any point in taking the court's time on it." (R 45)

On the cross examination of Major Seely it was brought out that the witness had not apprised the accused of his rights under Article of War 24 (R 46).

The Council is of the opinion that the defense's action sufficiently indicated an objection to the admissibility of Major Seely's testimony with respect to the accused's statement.

4. Discussion.

The principal problem presented by the record is whether the prohibition against the reception of any statement obtained by coercion or unlawful influence renders inadmissible evidence of a false answer made to a question asked by a superior officer, in line of duty - but without preliminary warning - as the corpus delicti of a false official statement.

The second subparagraph of Article of War 24, which was added to that article by the revisions made by Title II, Selective Service Act of 1948 (62 Stat. 627) provides:

"The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from an accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement,

admission or confession shall be received in evidence by any court martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

Traditionally it has been the custom of the service to bring to trial before a general court-martial an officer who has made a false official statement regardless of whether the officer had been warned of his rights against self-incrimination.

In CM 245724, Lawson, 29 BR 257, 261, the Board of Review said:

"* * * The defense objected to the testimony of Captain Wilson as to the reasons given by accused for his absence on the ground that accused had not been warned of his rights not to incriminate himself. * * * In the opinion of the Board of Review the objection was properly overruled. This evidence was not offered as an admission or a confession, but in proof of an essential element of the offense of making a false official statement. The failure to give warning of rights under the 24th Article of War is material on questions whether a confession or admission is voluntary and admissible in evidence, but it does not create a license to make false official statements."

At the time the Lawson case was decided Article of War 24 did not expressly render statements obtained by coercion or unlawful influence inadmissible. As construed by the Manual for Courts-Martial 1928 and by the Boards of Review, the Article rendered inadmissible involuntary extrajudicial confessions but permitted the reception in evidence of an involuntary pretrial admission unless, in the opinion of the court, it was procured by means which might have caused the accused to make a false statement (MCM 1928, par 114b).

The rationale of the Lawson case finds support in the Federal and State cases wherein the right against self-incrimination was considered in connection with a prosecution for perjury or false swearing.

In Glickstein v. United States (1911) 222 U.S. 139, 141, the United States Supreme Court had occasion to consider the effect of the immunity clause of Section 7 of the Bankruptcy Act upon allegedly perjured testimony given in a bankruptcy proceedings by the bankrupt. That statute required a bankrupt to make full disclosure of his pertinent affairs and concluded: "but no testimony given by him shall be offered in evidence against him in a criminal proceedings." The Supreme Court held that this statute did not prevent a prosecution for perjury in the giving of testimony by a

bankrupt and the immunity was held to apply to past transactions concerning which the bankrupt might be examined. The court said:

"It is undoubted that the constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony even although the testimony when given might serve to incriminate the one testifying, provided immunity be accorded, the immunity, of course, being required to be complete; that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation * * *

"As the authority which the proposition just stated embraces exists, and as the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony, they are included in the grant of authority and are not prohibited by the immunity as to self incrimination, * * * This must be the result, as it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury." (underscoring supplied)

This proposition was reaffirmed by the Supreme Court in Cameron v. United States (1913) 231 U.S. 710, 719.

In Claiborne v. United States (CCA 8, 1935) 77 F 2d, 682, the Circuit Court of Appeals considered the right of self-incrimination as affecting a charge of perjury before a Federal grand jury.

"Claiborne was charged with being, and was, a material witness, in an investigation relating to the possession of the guns claimed to have been in Gorgeta's possession on August 12, 1933, and was subpoenaed to appear before the grand jury. There were two courses open to him. If his testimony would incriminate him (and he alone knew whether it would), he had the privilege of refusing to testify, and if he had properly refused, no proceedings could have been taken against him. Or he could have testified truthfully. There was nothing in the situation, assuming the facts stated in his plea of abatement to be true, which would grant him a license to commit perjury."

The court then pointed out that the answers to the questions put to Claiborne would not have been under the protection of the Fifth Amendment even though they might have incriminated him as to a violation of state law.

"He had violated no law of the United States at the time he was called as a witness. He was not an accused. If he was to be regarded as a prospective perjurer, on the theory that, 'one who rides a tiger cannot dismount', it must be remembered that the immunity afforded by the Fifth Amendment relates to the past.

It is not a license to the person testifying to commit perjury.
Glickstein v. United States, 222 U.S. 139, 142, 32 S. Ct. 71, 56 L. Ed 128.

"The following cases from state courts support this view: State v. Faulkner, 175 Mo. 546, 614, 615, 75 S.W. 116; State v. Lehman, 175 Mo. 619, 627-629, 75 S.W. 139; Hardin v. State, 85 Tex Cr. R. 220, 211 S.W. 233, 240, 4 ALR 1308; Commonwealth v. Turner, 98 Ky. 526, 33 S.W. 88, 89; Mackin v. People, 115 Ill. 312, 3 N.E. 222, 224, 225; State v. Turley, 153 Ind 345, 55 N.E. 30, Chamberlain v. People, 23 N.Y. 85, 88, 80 Am. Dec. 255." (underscoring supplied)

In Hardin v. State, 85 Texas Cr. R. 220, 211 S. W. 233, 240, 4 ALR 1308, the Texas Court of Criminal Appeals, in considering a similar problem had occasion to say:

"Can one on trial for perjury, alleged to have been committed before a grand jury, or a court either, for that matter, have the case decided on the question as to whether the alleged false statement was freely and voluntarily made, or otherwise? Is it sound law, reason, or right, when one under oath has been even wrongfully required to answer a question, to hold as law the proposition that, by reason of the fact that he answered such question under compulsion, he is thereby licensed to answer falsely? Is it sound to hold that, if in such case he be called to account for making a false statement, he may justify and excuse the falsehood upon the sole ground that his speech was not voluntary? It would be a sad day for the administration of the law if a defendant, having placed himself or having been placed in the position of having been ordered or directed to answer, may thus destroy the power and effectiveness of our Perjury Statute. Such is not the law.

"The men who wrote the Perjury Statute stated, in chapter 1, title 8, of our P.C., that if a false statement, under an oath required by law, be made deliberately and wilfully, the same is perjury. They wrote further that, if the statement alleged to be perjury was made through inadvertence, or through mistake, or any agitation, then same would not be perjury; but there the lawmakers stopped, and there is not a line or a syllable in our written law which, after giving to an accused the benefit of a charge that his act must have been deliberate and wilful, and that it must not have been the result of agitation, mistake, or inadvertence, requires the court to go further and tell the jury that, unless the alleged statement was freely and

voluntarily made, it could not be perjury. The paramount inquiry in every case is, What is the truth: and the courts have existed and all legal formalities have been created out of the experience of the years, as being the very best means of getting at this one end. We wish to write here, now, that one must tell the truth in every judicial proceeding, even when he speaks under compulsion. He has the right, under our Constitution and law, not to speak, under given circumstances, which are well understood, and in such case, if effort be made to illegally compel him, the courts are ready and willing to accord substantial and speedy relief; but, whenever for any satisfactory reason he does speak, then he must speak the truth. We further held that if in any case it be decided that his utterance was wilful and deliberate, and was not made under the broad exceptions of our written law, and was false, then this court is unwilling, by judicial construction, to ingraft any other exceptions upon our procedure than those written by the lawmakers. Especially is this true when we believe that the principle contended for in this special charge is substantially embraced by the exceptions already written into our law. The language used by our lawmakers is that the statement must be wilful, and this means that it must emanate from the will of the accused, and not from the will of another; and the two words, 'wilful' and 'deliberate,' have been construed to mean that the accused must have known the statement to have been false, and, so knowing himself, have deliberately and wilfully made the same. In the instant case, this phase of the case was fully covered by the charge, and no complaint is made thereof. What we have said above is not intended to apply to a case properly embraced under our statute regarding statements under duress."

See also Bain v. State (1890) 67 Miss. 557, 7 So 408.

In the light of the foregoing authorities it becomes pertinent to examine the legislative history of the amendment to Article of War 24 which became effective on 1 February 1949. In submitting a proposed bill (introduced as S 903 and HR 2575, 80th Congress, 1st Session) revising the system of military justice, the War Department proposed amending Article of War 24 by adding thereto the following paragraph:

"The use of coercion or unlawful influence in any manner whatsoever by any person subject to military law to obtain any degrading statement not material to the issue, or any self-incriminating statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court martial."

In the hearings on this bill before Subcommittee No. 11, Legal, Committee on Armed Services of the House of Representatives, General Hoover testified as follows with respect to the War Department proposal:

"Article 24 is amended to prohibit expressly coercion or unlawful influence in the obtaining of confessions or admissions or self-incriminating statements.

"Now, under the present Manual for Courts Martial no confession is admissible unless voluntary. We have a little difficulty, especially during wartime, when the Army is big, in preventing zealous investigators from getting confessions by third degree or other so-called police methods.

"We are here trying to put a stop to it!" (Subcommittee Hearings on HR 2575, Committee on Armed Services, House of Representatives, 80th Congress, 1st Session, P. 2043).

The War Department's proposed amendment to Article of War 24 was accepted by the subcommittee and the full committee and reported to the House of Representatives without change (H.R. Rept No. 1034, 80th Cong., 1st Sess. p. 16 (1949)). During the consideration of H.R. 2575 by the House of Representatives, however, three changes were made in the proposed amended Article of War 24. The first change was inserting the word "or" between "issue" and "when" in the phrase, "or to answer any question not material to the issue [or] when such answer might tend to degrade him," contained in the original article. The second change was striking out the words "degrading statement not material to the issue or any self-incriminating" in the War Department's proposed amendment. In offering this change in the proposed amendment, Representative Fulton said:

"I am striking out those words, and the reason for that is as follows: The way the committee has it written they would bar only the use of coercion and unlawful influence when it is to obtain any degrading statement not material to the issue or any self-incriminating statement. Actually, what the committee meant to do is this: They want to say the use of coercion or unlawful influence in any manner whatsoever by any person subject to military law to obtain any statement, admission, or confession from any accused person or witness shall be deemed to be conduct to the prejudice of good order and military discipline. In other words, you cannot have coercion or unlawful influence used to get any statement, admission, or confession." (94th Cong Rec 182 (1948)).

The third amendment of the proposed amended Article of War 24 consisted in the addition of what is now the final sentence of that Article. In proposing this amendment, Representative Burleson stated:

"Mr. Chairman, in most of our State jurisdictions, when a man is placed under arrest he must be warned of the offense against him before he gives a written confession. As he gives a written statement, it devolves upon the officer taking that statement to advise him that any statement he may make can be used against him on the trial of the offense of which he is accused.

"In the case of men charged with an offense against military law I have seen this thing happen, and you can visualize it: A boy has committed some offense. An officer goes down to investigate. I have been that officer -- asking for his statement, asking what he has done, and so forth, and asking him all the leading questions he can think of. The boy does not know his legal rights. He will give a statement. Some of the questions are very leading. Oh, I know someone will say 'You will be fair about those things.' In reply I say you are playing a game; you are working for the prosecution; and I repeat that I have been on both sides of the table -- and you would like for your side to win. Finally it becomes a game. You lawyers know how it works.

"I feel that when anyone authorized to take statements from an accused interrogates him for that purpose that he should tell the accused that any statement he makes may be used against him on the trial of the offense with which he is charged.

"I hope, Mr. Chairman, that the committee may accept this amendment. I believe it is entirely fair, and I feel that if the accused is apprised of his rights justice will not be harmed." (94 Cong. Rec. 184 (1948))

Subsequently the following discussion occurred:

"Mr. ELSTON. As I understand the gentleman's amendment it is to assure the accused the same right a civilian has who is charged in the civil courts with a crime, of being told that any statement he may make may be used against him.

"Mr. BURLESON. That is right.

"Mr. ELSTON: I have no objection to the amendment." (94 Cong. Rec. 185 (1948))

Article of War 24, as approved by the House of Representatives in H. R. 2575, was not amended in the Senate.

Article of War 24 now reads as follows:

"Compulsory Self-Incrimination Prohibited.--No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any

officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

"The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

It appears from the foregoing that Congress intended to forbid the use of coercion or unlawful influence in obtaining any statement from a person accused or suspected of having committed an offense triable by court-martial relative to a recital of some past act. Obviously, it was not intended to confer a license to persons subject to military law to lie with impunity whenever interrogated by a military superior. There does not appear anything in the legislative history of the amendment to the 24th Article of War which warrants the inference that Congress intended to make inadmissible the corpus delicti of a culpable lie, be it either in a prosecution for perjury, false swearing or making a false official statement.

It follows that the accused's statement considered as the basis of charges of having made a false official statement was properly received in evidence.

The Judicial Council has not overlooked the fact that the accused's statement to Major Seely, although obviously introduced in proof of the corpus delicti of the false official statement alleged in the Specification of Charge I, also contained a minor admission as to the uncontested fact that the accused had received the funds in question from the enlisted men referred to in the Specifications of Charge II. This fact was fully established by other uncontradicted evidence adduced by the prosecution and was judicially admitted by the accused as a witness in his own behalf. As pointed out earlier in this opinion, the accused's statement was properly admitted as proof of the corpus delicti of the offense alleged in the Specification of Charge I. In view of the compelling nature of the other evidence the admission contained in the accused's statement, even if it

had been technically inadmissible for consideration with respect to the Specifications of Charge II, was insignificant and could not have prejudiced any substantial right of the accused within the meaning of Article of War 37. (Compare CM 329162 Sliger, 77 BR 36L)

5. For the foregoing reasons the Judicial Council concurs in the conclusion 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.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

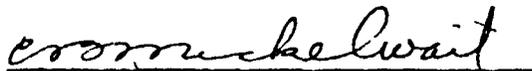
THE JUDICIAL COUNCIL

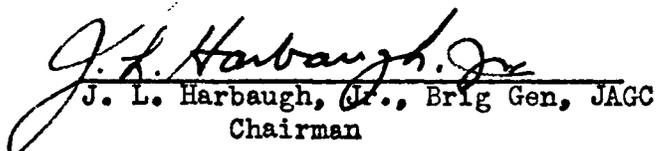
CM 339494

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Robert J.
Clifford, Jr., 01685630, Troop C, 24th Constabulary Squadron,
upon the concurrence of The Judge Advocate General the sentence
is confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

24 February 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

6 March 1950

(GCMO 17, 20 March 1950).

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

CSJAGK - CM 339548

UNITED STATES)

FOURTH ARMY

v.)

Second Lieutenant BERNARD
GREEN, O-2011949, Signal
Corps, 4006th Area Service
Unit, Fort Sam Houston,
Texas.)

Trial by G.C.M., convened at Fort
Sam Houston, Texas, 28 October, 1
and 4 November 1949. Dismissal,
total forfeitures after promulga-
tion, and confinement for one (1)
year.)

OPINION of the BOARD OF REVIEW

McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

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

Specifications: In that Second Lieutenant Bernard Green, 4006th Area Service Unit, did, without proper leave, absent himself from his station at Fort Sam Houston, Texas, from about 15 July 1949 to 13 August 1949.

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

Specifications 1, 2 and 3: (Findings of not guilty).

Specification 4: (Nolle Prosequi).

Specification 5: (Finding of not guilty).

Specification 6: In that Second Lieutenant Bernard Green, 4006th Area Service Unit, did at San Antonio, Texas, on or about 25 June 1949, with intent to deceive and injure, wrongfully and unlawfully make and utter to the Sol Frank and Company, of San Antonio, Texas, a certain check, in

words and figures as follows, to wit:

SOL FRANK CO.
San Antonio, Texas

San Antonio, Texas, 25 June 1949

Pay to the order of Sol Frank Co \$110 ⁰⁰/_{xx}

One Hundred Ten and ⁰⁰/_{xx} DOLLARS

Value Received, and Charge to Account of With Exchange and Collection Charges

To National Bank of Fort Sam Houston) Bernard Green
 _____) _____
 _____) Home Address

Phone No. Temporary Address

and by means thereof did fraudulently obtain from the said Sol Frank Company, One Hundred and Ten Dollars (\$110.00) in lawful money of the United States, he the said Bernard Green, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, for the payment of said check.

Specifications 7 and 8: (Findings of guilty disapproved by reviewing authority).

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

Specifications 1, 2 and 3: (Findings of not guilty).

Specification 4: (Nolle Prosequi).

Specification 5: (Finding of not guilty).

Specification 6: In that Second Lieutenant Bernard Green, 4006th Area Service Unit, did, at San Antonio, Texas, on or about 25 June 1949, with intent to deceive and injure, wrongfully and unlawfully make and utter to the Sol Frank and Company of San Antonio, Texas, a certain check, in words and figures as follows, to wit:

SOL FRANK CO.
San Antonio, Texas

San Antonio, Texas, 25 June 1949

Pay to the order of Sol Frank Co \$110 ⁰⁰/_{xx}
One Hundred Ten and ⁰⁰/_{xx} Dollars

Value Received, and Charge to Account of With Exchange and
Collection Charges

To National Bank of Fort Sam Houston } Bernard Green
San Antonio } Home Address

Phone No. Temporary Address

and by means thereof did fraudulently obtain from the said Sol Frank Company, One Hundred and Ten Dollars (\$110.00) in lawful money of the United States, he the said Bernard Green, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, for the payment of said check.

Specifications 7 and 8: (Findings of guilty disapproved by reviewing authority).

He pleaded not guilty to all charges and specifications and was found guilty of the specification of Charge I and Specifications 6, 7 and 8 of Charges II and III, respectively, not guilty of all other specifications, and guilty of Charges I, II and III. Specification 4 of Charges II and III was nolle prossed. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for five years. The reviewing authority disapproved the findings of guilty of Specifications 7 and 8 of Charges II and III, respectively, and approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for three years, two months and 27 days, but reduced the period of confinement to one year. The record of trial was forwarded for action under Article of War 48.

3. Evidence. Only the evidence relating to the offenses of which accused was found guilty as approved by the reviewing authority will be summarized.

a. For the Prosecution

(1) Specification of Charge I

A duly authenticated extract copy of the morning report entries of Headquarters 4006th Area Service Unit, Station Complement, Fort Sam Houston, pertaining to the accused, for 4 July 1949, 13 July 1949, and 15 July 1949 was received in evidence over defense objection (R 26-27; Pros Ex 1). These entries show the accused's status as follows: 4 July 1949, "Dy to Ord lv (5 days) departed *** /s/ J.S. Bordovsky WOJG USA"; 13 July 1949, "Ord Lv (5 days) extended (5 days) *** /s/ J.S. Bordovsky WOJG USA"; 15 July 1949, "Dy to AWOL as of 0001 15 Jul 49 *** /s/ J.S. Bordovsky WOJG USA". A duly authenticated extract copy of a morning report of the same organization, pertaining to the accused, for 31 October 1949, was received in evidence over defense objection (R 27, Pros Ex 2). The morning report entry contained in this exhibit serves to correct the morning report entry of 15 July 1949 as follows: "Dy to AWOL as of 0001 15 Jul 49 should read *** Ly to AWOL as of 0001 15 Jul 49 *** /s/ J. M. Yates 2d Lt AGD." A duly authenticated extract copy of the morning report entries, concerning the accused, on the morning report of Headquarters Detachment (Operating) 6004 Area Service Unit, Fort MacArthur, California, for 17 August 1949, was received in evidence over defense objection (R 28, Pros Ex 3). This entry shows the accused as "Atchd & Jd fr Post Sig Hq Ft Sam Houston Tex appd Long Beach AFB Long Beach Calif 13 Aug 49 retd mil contl this sta 15 Aug 49 race (W) confd," and a further entry showing accused "Reid atchd & confd trfd March AFB Riverside Calif VCG EDCMR 17 Aug 49 deptd w/gds *** /s/ William A. Davis /t/ WILLIAM A DAVIS Capt. Inf."

(2) Specification 6, Charges II and III

Mrs. Gloria M. Riedel, credit manager for the Sol Frank Company, San Antonio, Texas, identified the accused and testified that on 25 June 1949 the accused came into the store of the Sol Frank Company and presented a check for cash. Witness cashed the check and gave him \$110.00 from the funds of the Sol Frank Company. She identified Prosecution Exhibit 8, for identification, as the check she cashed for the accused on 25 June 1949, and this check was received in evidence as Prosecution Exhibit No. 8 "subject to being connected with the issues in the case" (R 50,52). The check was in the form of a draft for the sum of \$110, dated 25 June 1949, made payable to Sol Frank Company, drawn on the National Bank of Fort Sam Houston, San Antonio, and signed "Bernard Green." Mrs. M. E. Burris, bookkeeper and office manager of the Sol Frank Company, identified Prosecution Exhibit No. 8 as a check made out to the Sol Frank Company for \$110 on the National Bank of Fort Sam Houston, and she testified that she deposited it to the account of Sol Frank Company in the National Bank of Commerce, and that it was subsequently returned with the notation "NSF."

Witness further testified that the Sol Frank Company never received any "consideration" for that check and that it was charged to the accused's charge account in the company (R 56,57).

Mr. Ernest J. Vogel, assistant cashier of the National Bank of Fort San Houston, San Antonio, Texas, testified that it was his duty to know and supervise the keeping of records of the National Bank of Fort Sam Houston (R 70). He identified a signature card bearing the signature "Bernard Green" as the signature card covering the account of the accused and kept on file at the National Bank of Fort Sam Houston. This card was admitted in evidence over defense objection (R 71-73, Pros Ex 12). He identified Prosecution Exhibit 8 and stated that the records of the bank showed that it was returned to the depositor unpaid because of insufficient funds (R 84). Indorsements on the reverse side of the check show that it was deposited in the National Bank of Commerce payable to the account of the Sol Frank Company and that on 27 June 1949 and again on 6 July 1949 the latter bank indorsed the check for payment through the San Antonio Clearing House. A printed memorandum attached to the check from the National Bank of Fort Sam Houston (drawee bank) shows that the check was returned, the reason given being, "not sufficient funds." A bank record showing this return was identified by the witness and received in evidence (R 77-79, Pros Ex 15). A ledger sheet, identified by the witness as an official record of the National Bank of Fort Sam Houston showing the debits, credits and bank balance of accused's checking account for the period 20 May 1949 through 18 July 1949, was received in evidence over defense objection (R 73-75, Pros Ex 13). This ledger shows that on 24 June 1949 accused had a credit balance of \$59.84 in his account and that on 25 June 1949 a deposit of \$180 was credited to his account and that ten checks totaling \$195.28, exclusive of the check dated 25 June 1949 for \$110 (Pros Ex 8), were debited to his account on said date, leaving a credit balance of \$44.56. This ledger further shows that between 25 June and 13 July 1949 accused's credit balance never had been sufficient to pay the alleged check and all other checks which were charged to his account on any particular day. It also shows that although accused deposited various sums in his checking account which exceeded the amount of the alleged check the aggregate amount of other checks charged against his account on the day of deposit reduced the balance of his account to an amount which was insufficient to pay the alleged check. From 13 July to 3 October 1949 his checking account is shown to have been constantly overdrawn (R 77; Pros Ex 14). Mr. Vogel further testified that when the check for \$110 (Pros Ex 8) was presented for payment there were not sufficient funds to pay the check (R 106-107).

b. For the Defense

Having been advised by the law member of his rights as a witness, accused was sworn and, relevant to the offenses of which he was convicted,

testified substantially as follows: He entered the Army in December 1942 at Fort Dix, New Jersey. He was sent to Fort Monmouth, New Jersey, and then overseas to the European Theater of Operations until 21 November 1945. His principal duty as an enlisted man was supply work. He held all the enlisted grades up to master sergeant and was given a direct commission as second lieutenant in March 1944 by General Eisenhower. He returned to the United States in December 1945 and was placed on reserve status as a second lieutenant in January 1946. His efficiency ratings as an officer include three "superior," one "excellent," and one "unsatisfactory," which latter rating he received at his present station. He re-entered the service in March 1949 at Fort Sam Houston, Texas (R 115-119). Concerning the check for \$110, dated 25 June 1949, to the Sol Frank Company, accused stated that when this check was returned to the store by the bank it was charged to his account and that he had been billed for it by the Sol Frank Company and that as far as he knew, he was still carried on the books of that company for it. Accused further testified that he had been in confinement since 13 August 1949; that since that date he has received pay amounting to \$241; that there was due him approximately \$800 in pay and allowances; that he was desirous of having the money due him liquidate his outstanding checks, but that he was told that his pay was being withheld because of his indebtedness to the Post Exchange and the Officers' Club (R 119-121).

4. Discussion

Under the specification of Charge I accused was charged and found guilty of being absent without leave from his station, 4006th Area Service Unit, Fort Sam Houston, Texas, from 15 July 1949 to 13 August 1949. His initial absence, as alleged, is clearly shown by the extract copy of the morning report of his station for 15 July 1949 (Pros Ex 1) as corrected by the morning report of his organization for 31 October 1949 (Pros Ex 2). The entries in these exhibits show that the accused was on leave from 4 July 1949 to 14 July 1949 and that at 0001, 15 July 1949, he was dropped from leave to absent without leave. His return to military service is established by the extract copy of the morning report of Headquarters Detachment (Operating), 6004th Area Service Unit, Fort MacArthur, California, for 17 August 1949 (Pros Ex 3), which shows that the accused was returned to military control at that station on 15 August 1949.

Defense counsel objected to the admission of Prosecution Exhibits 1 and 2 on the ground that the entries contained therein were hearsay because it was his belief that the authenticating officer "should first be brought to testify to prove up the extract copy of the morning report" (R 25). Concerning this objection, suffice it to say that such contention, without some showing of irregularity or illegality in the authentication, is contrary to the purpose for which authentication of public official records

was designed and to the established rules of evidence pertinent thereto. Official records are generally proven by authenticated copies thereof (MCM, 1949, par 129b). The authentication consists of an attesting certificate which is a signed statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original, or his deputy and is sufficient, prima facie, to establish the truth of the record so authenticated (MCM, 1949, supra). The authentication appearing on Prosecution Exhibits 1 and 2 meets every essential requirement of attesting certificates prescribed by the Manual for Courts-Martial and thus renders these exhibits admissible in evidence without further requiring the testimony of the authenticating officer to prove up the extract copy of the morning report.

Defense counsel also objected to Prosecution Exhibit 3 on the ground that "Whatever transpired at Fort MacArthur, California, or what may have transpired at Long Beach, California, is pure hearsay, ***" (R 27), and that it was not shown who the person was who made the original morning report entries or that such person knew the events therein recorded (R 28). The defense introduced no evidence to support its contention or to rebut the competency of Prosecution Exhibit 3. This exhibit shows that the original morning report entries extracted therein were signed by "William A. Davis Captain Inf." In this respect the exhibit is drawn in substantial compliance with the requirements prescribed by Army Regulations and thus is sufficient to refute so much of the defense objection as contends that it was not shown who the person was that made the original morning report entries (par 27, AR 613-30, 17 Mar 1947). Concerning the contention that it was not shown that Captain Davis as maker of the entries contained in the exhibit in question, had knowledge of the entries therein recorded, suffice it to say that the burden of adducing such evidence rests on the defense (MCM, 1949, par 64e). In this regard, the Manual for Courts-Martial expressly provides that morning reports are competent evidence of the facts recited in them, except as to entries therein which the recording official obviously had no duty to record or concerning which he obviously had no duty to know or ascertain the truth, and that any such record, as an official statement in writing, is competent prima facie evidence of the fact or event, without calling to the stand the officer or other person who made it (MCM, 1949, par 130b; see also CM 320957, Boone, 70 BR 223,225). Since the defense introduced no evidence to show that Captain Davis did not have personal knowledge of or had not ascertained the truth of the events recorded in Prosecution Exhibit 3 it may be presumed that, except as to so much of such entries as appear to be patently hearsay, they were made upon his personal knowledge or that the truth of such events were ascertained by him through customary and trustworthy channels and, therefore, the exhibit was admissible in evidence. Accordingly, so much of the entry as states, "Atchd & Jd *** retd mil contl this sta 15 Aug 49 race (W) confd" is competent prima facie proof of the termination of accused's unauthorized absence. In view of the above, we conclude

that the objections of the defense to Prosecution Exhibits 1, 2 and 3 were not well founded, that they were properly admitted in evidence and are legally sufficient to support the findings of guilty of the specification of Charge I.

Specification 6, Charges II and III

An identical specification under each of these charges alleges that the accused wrongfully and unlawfully made and uttered a check to the Sol Frank Company of San Antonio, Texas, in the sum of \$110 with an intent to deceive and that thereby he fraudulently obtained from that company \$110 when he knew he did not have and did not intend to have sufficient money in the National Bank of Fort Sam Houston, Texas, the drawee bank, for payment of that check, in violation of Articles of War 95 and 96.

The elements of proof of the offenses charged are set forth in CM 322695, Thomas, 71 ER 313, as follows:

- "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 and that he did not have sufficient funds on deposit to pay it when it was presented in due course to the drawee bank.

That the accused was the maker of the check is undisputed. When it was introduced in evidence the accused raised no objection to the genuineness of the signature appearing thereon, which purports to be his signature, and consequently, it may be assumed that he acknowledged it to be his signature. Accordingly, the court was justified in finding that the accused was in fact the maker of the check (MCM, 1949, par 129b; CM 324725, Blakeley, 73 ER 307,325; In re Goldberg, 91 Fed 2d 996).

The only substantial question presented by the record with respect to these specifications is whether the evidence is sufficient to support the allegation that the check was uttered with intent to deceive and injure.

An examination of the ledgers of accused's bank account (Pros Exs 13 and 14) reveals that from the date of the check in question to 13 July 1949, the accused at no time had sufficient funds on deposit in

the drawee bank for the payment of this and all other checks drawn against his checking account. While it appears that he made substantial deposits in his account on and after the date of the alleged check, which deposits exceeded the amount of that check, his account was constantly depleted by the prior payment of other checks which he had drawn and thus rendered his account insufficient to pay the alleged check. After the accused learned that the check was dishonored for nonpayment and charged to his charge account at the Sol Frank Company (payee) he made no effort to redeem this check nor, in his testimony, offer any reasonable explanation for not doing so. Of particular significance, with respect to the accused's alleged intent to deceive and injure, is the fact that notwithstanding his knowledge of this dishonor he never offered to make his check good while, at the same time, he continued to deposit funds in his account, larger than the amount of the instant check, but against which he further continued to draw other checks, thus rendering his account insufficient to pay the alleged check whenever it was presented to the drawee bank for payment. This, we are constrained to conclude, reflects with disfavor upon the accused's intention at the time of issuance of the check since he was at all times charged with knowledge of the status of his bank account. In this connection, it is stated in CM 275648, Creighton, 48 ER 123:

"It is true that the duplicate statement of accused's account shows a balance on the dates of 23 and 26 September of slightly more than the amounts of the respective checks issued on such dates; but in view of the stipulation as to the insufficiency of the account, and the actual insufficiency shown by the statement on 27 September, it seems apparent that accused, at the time he gave the checks, had already issued other checks in amounts which he knew would deplete the account before the checks dated 23 and 26 September would clear the bank in the ordinary course of business. Under such circumstances the court was justified in finding him guilty of an intent to defraud as to such checks (22 Am. Jur. 479)."

Judging from the frequency, number and amount of checks drawn by the accused, as well as from the course of his deposits as disclosed by the record of his bank account, it is only reasonable to impute to him knowledge of the status of his account at the time of the issuance of the alleged check. Accordingly, it was held in CM 296074, Chemault, 58 ER 75:

"In writing the sixteen \$25 checks described in Specifications 4 to 19, which he drew upon his account in the National Bank of Fort Sam Houston, San Antonio, Texas, he admittedly acted with knowledge that he did not have sufficient funds to honor his drafts. Although, on two dates on which he wrote checks, there was over \$25 in the account, it was promptly

exhausted by payment of other checks outstanding when the checks in question were given. It does not avail the accused that he had the money in the bank at the date he wrote the checks. It was his duty to see that the money remained in the bank and was available for payment upon timely presentation. The Specifications are proven beyond any reasonable doubt."

It is therefore the opinion of the Board of Review that the facts and circumstances in this case justify the inference by the court that the accused issued the check in question with knowledge that he did not have and that he did not intend to have sufficient funds in the drawee bank for the payment of said check when it was presented for payment.

The fraudulent passing of a worthless check constitutes a military offense and is conduct unbecoming an officer and a gentleman in violation of Article of War 95 (CM 236509, Veal, 23 BR 38; CM 322695, Thomas, supra, and cases therein cited). Proof of the same elements is also sufficient to establish a violation of Article of War 96 (CM 277799, Dowd, 51 BR 216). There is no inconsistency in charging the same act, in identical specifications, as violations of both the 95th and 96th Articles of War. A conviction under both Articles for the same act is not illegal as placing the accused twice in jeopardy for the same offense (McRae v. Henkes, 273 F. 108; Cert. Den. 258 U.S. 624; CM 230222, Daly, 17 BR 334; 2 Bull. JAG 96).

5. It remains to be considered whether so much of the approved sentence as provides for confinement at hard labor for one year is legal. Under paragraph 116c, Manual for Courts-Martial, 1949, a sentence to confinement in the case of an officer shall not exceed the maximum prescribed for soldiers by the Table of Maximum Punishments. The maximum confinement authorized for 29 days absence without leave (Spec Chg I) is two months and 27 days. A sentence to confinement is not authorized for a conviction under Article of War 95 (Spec 6, Chg II). The maximum confinement authorized by the Table for obtaining money by check without having sufficient funds in the bank of a value of more than \$50 (Spec 6, Chg III), if obtained with intent to defraud, is three years but, if obtained without intent to defraud, confinement for only four months is authorized (MCM, 1949, p 140).

Specification 6, Charge III, of which accused was convicted, alleges that he did "***, with intent to deceive and injure, wrongfully and unlawfully make and utter to ***, a certain check, in words and figures as follows, to wit: *** and by means thereof did fraudulently obtain from *** the amount of said check in lawful money of the United States, knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment thereof." The Table of Maximum Punishments does not prescribe a specific punishment for such

offense committed with intent to deceive and injure.

In CM 335786, Welsh, 2 BR-JC 267, 269-270, it is stated that an offense of the nature alleged in the specification under consideration of obtaining money with "the intent to deceive" has been held to be an offense which is "without intent to defraud," citing, CM 329503, Frith, 78 BR 83, 89-90, and accordingly held that since the specification alleged only an intent to deceive, the authorized maximum confinement is four months, regardless of the amount involved. Although the instant specification alleges an intent to deceive and injure we do not consider the addition of the words and injure to materially distinguish the gravamen of the instant offense from that considered in the Welsh case, supra, as affecting the punishment applicable thereto. Accordingly, we conclude that the maximum confinement authorized for the offenses found under the specification of Charge I and Specification 6, Charge III, is six months and 27 days.

6. Department of the Army records show that the accused is 26 years of age and married. He completed two years of high school. He enlisted in the military service on 31 October 1942, served overseas as an enlisted man for 22 months and attained the grade of master sergeant. He received a direct battlefield commission on 30 March 1945 and operated Signal dumps in France, Luxembourg and Belgium for eight months. He was awarded the Good Conduct Medal, European Theater ribbon with three battle stars, American Campaign Medal and World War II Victory Medal. He was separated from the service on 3 January 1946 and he re-entered on active duty 3 March 1949. His record of efficiency ratings is not available at this time.

7. Mr. Milton Lerner, Attorney at Law, 270 Broadway, New York 7, New York, appeared before the Board of Review and presented oral plea for clemency on behalf of the accused. Letters from Mr. Emanuel Celler, Representative in Congress; the Sol Frank Company of San Antonio, Texas, and Milton Lerner, Esquire, also present matters upon which clemency is urged. The board has carefully considered the matters presented.

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 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 legally sufficient to support only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances to become due after the date of order directing execution of the sentence, and confinement at hard labor for six months

and twenty-seven days, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 61 or 96 and is mandatory upon conviction of a violation of Article of War 95.

Carlos E. McQueen, J.A.G.C.

Joseph T. Brack, J.A.G.C.

Roger W. Currier, J.A.G.C.

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

CSJAGU CM 339548

14 March 1950

U N I T E D S T A T E S

FOURTH ARMY

v.

Second Lieutenant BERNARD
GREEN, O-2011949, Signal
Corps, 4006th Area Service
Unit, Fort Sam Houston,
Texas

Trial by G. C. M., convened at Fort
Sam Houston, Texas, 28 October, 1
and 4 November 1949. Dismissal,
total forfeitures after promulgation,
and confinement for one year.

- - - - -
Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps
- - - - -

1. Pursuant to Article of War 50d(2) the record of trial by general court-martial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, absence without proper leave at Fort Sam Houston, Texas, from about 15 July to about 13 August 1949 (Specification, Charge I), in violation of Article of War 61; and making and uttering checks, with intent to deceive and injure, and thereby fraudulently obtaining money, at San Antonio, Texas, on 25 and 30 June 1949, and at Fort Sam Houston, Texas, on 1 July 1949 (Specifications 6, 7 and 8, Charges II and III), in violation of Articles of War 95 and 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for five years. The reviewing authority disapproved the findings of guilty of Specifications 7 and 8 of both Charges II and III, and approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for three years, two months and twenty-seven days, but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six months and twenty-seven days, and to warrant confirmation thereof.

3. The Judicial Council finds the evidence to be as set forth in the opinion of the Board of Review and concurs in the Board's opinion that the record of trial is legally sufficient to support the findings of guilty. The only question which the Council finds it necessary to consider is whether the record of trial is legally sufficient to support the sentence as modified by the reviewing authority. The Board of Review concludes that Specification 6, Charge III, does not include an allegation of fraudulent intent and that as a consequence the maximum sentence of confinement that may be imposed upon a finding of guilty of that specification is four months. Inasmuch as the maximum confinement authorized for the absence without leave (Specification, Charge I), of which the accused was also convicted, is two months and twenty-seven days, the Board holds the record of trial legally sufficient to support only six months and twenty-seven days of the confinement approved by the reviewing authority. (See MCM 1949, pars. 116c, 117a, 117c, pages 128, 131, 134, 140.)

4. Specification 6, Charge III, alleges in substance that the accused did, at San Antonio, Texas, on or about 25 June 1949, with intent to deceive and injure, wrongfully and unlawfully make and utter to Sol Frank and Company a check dated 25 June 1949, for \$110.00, payable to the order of "Sol Frank Co.", drawn on National Bank of Fort Sam Houston, San Antonio, and by means thereof did fraudulently obtain from the payee \$110.00, the accused then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of the check.

The Board's view that the instant specification fails to allege an intent to defraud is based upon CM 335786, Walsh, 2 BR-JC 267, 269-270. In that case the specification alleged that the accused, with intent to deceive, wrongfully and unlawfully made and uttered a check and by means thereof fraudulently obtained money, with allegations of scienter and intent as to insufficiency of funds for payment similar to those herein. The Board of Review held that the specification alleged "only an intent to deceive" and that the maximum authorized confinement for that offense was that prescribed in the Table of Maximum Punishments for the offense committed without intent to defraud, or four months, regardless of the amount involved. The Board cited CM 329503, Frith, 78 BR 83, 89-90 in support of its conclusion.

An examination of the opinion of the Board of Review in the Frith case leads the Council to conclude that it was not determinative of the questions presented in the Walsh case and in the instant case. The specification in the Frith case merely alleged that the accused, with intent to deceive, wrongfully and unlawfully made and uttered a check in partial payment of a personal debt, with the usual allegations of scienter and intent as to insufficiency of funds for payment. There was no allegation that the accused fraudulently obtained anything by means of his intent to deceive. Such an allegation is included in the specifications in the Walsh case and in the instant case. The Board in the Frith case held that the specification did not allege an intent to defraud.

The question for decision here is whether an allegation of wrongfully and unlawfully making and uttering a check, with intent to deceive and injure, and thereby fraudulently obtaining money from the payee, the drawer knowing that he has not, and not intending to have, sufficient funds in the drawee bank for the payment of the check, is equivalent, for the purpose of determining the maximum authorized confinement under the Table of Maximum Punishments, to an allegation of the offense of obtaining money by check without sufficient funds in the bank with intent to defraud (MCM 1949, par. 117c, p. 140).

The verb "defraud" is thus defined: "to deprive a person of property or any interest, estate or right by * * * deceit or artifice." (Black's Law Dictionary, 3d Ed., p. 544). The foregoing definition accords with that recognized in the civil courts generally. In Horman v. United States, 116 Fed. 350, 354, certiorari denied, 187 U.S. 641 (1902), for example, appears the following: "To deprive of something dishonestly is to defraud." (See also Berry v. State (1922), 153 Ga. 916; State v. Vandenburg (Del., 1938), 2 A. 2d 916, 922).

As a guide in the interpretation of specifications the Judicial Council may appropriately refer to the rules recognized and applied in the Federal courts with respect to indictments in civil cases (cf. AW 38). The cardinal principles applicable to the interpretation of indictments in the Federal courts may be thus summarized: Refinements and technicalities required by the common law "must yield to substantial things". The test is whether the words employed make the charge clear to the "common understanding," and whether the indictment contains every element of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. Reasonable implications from facts clearly charged may be indulged in ascertaining the true meaning of the indictment (Ex parte Pierce (C.C.E.D. Mo. 1907), 155 Fed. 663, 665, aff'd. 210 U.S. 387 (1908)). The sufficiency of a criminal pleading should be determined by practical, as distinguished from technical, considerations (Judge Dobie in Newton v. United States (CCA 4, 1947), 167 F. 2d 795, 797, cert. den. 333 U.S. 848 (1943)); and in determining its sufficiency, the indictment should be considered as a whole (United States v. Armour and Co. (CCA 10, 1943), 137 F. 2d 269, 270; McCoy v. United States (CCA 9, 1948), 169 F. 2d 776, cert. den. 335 U.S. 898)).

That these general principles apply to the interpretation of specifications in trials by court-martial is apparent from the provision in the Manual for Courts-Martial that no finding or sentence should be disapproved by a reviewing authority solely because a specification is defective, if the facts alleged therein and reasonably implied therefrom constitute an offense, unless the accused was misled or his substantial rights were otherwise injuriously affected thereby (MCM 1949, par. 87b, p. 92). All the specification need contain, in this respect, is a statement in simple and concise language of the facts constituting the offense, which facts include all the elements of the offense sought to be charged (MCM 1949, par. 29, p. 22). It has been held that the specification should contain

by direct averment or by reasonable implication from facts alleged all elements of the offense sought to be charged (CM 154185 (1922), Dig. Op. JAG, 1912-1940, sec. 428(8), p. 296). Thus in CM 189223, Johansen, 1 BR 141, 160, the Board of Review held that specifications alleging that the accused included vouchers in accounts against the United States, well knowing that they were false and fraudulent, in violation of Article of War 94, sufficiently alleged by implication that the vouchers were made for the fraudulent purpose of obtaining the approval and allowance of the accounts. In CM 251075, Circle, 33 BR 129, 134, the Board of Review held that a specification alleging that the accused made a statement which he did not believe to be true sufficiently alleged by implication that the statement was false.

Applying the foregoing rules, reading the specification here involved as a whole and in the light of practical and substantial considerations, and giving effect to reasonable implications from the facts clearly alleged, it is apparent that the intent charged is to deprive the payee fraudulently of money by deceit, and therefore, as a matter of fact and law, to defraud the payee. This specification fairly puts the accused on full notice that he is required to defend against a charge of making and uttering a check with intent to defraud, the maximum authorized confinement for which is three years (MCM 1949, par. 117c, p. 140). In view of the remaining allegations in the specification, we do not deem the presence therein of the words "and injure," describing the intent, to be material to this determination. Moreover, the Council is of the opinion that the determination of whether a specification alleges an offense as defined in the Table of Maximum Punishments is governed by even more liberal rules than those applicable to the interpretation of indictments under civil penal statutes.

The foregoing interpretation of the specification is in accord with the opinions of the Board of Review in CM 321734, Creighton, 70 BR 355; CM 288599, Dartez, 56 BR 403; and CM ETO 2506, Gibney, 7 BR (ETO) 91. (See also CM 330282, Dodge, 78 BR 345, 354-355). In the Creighton case the accused was charged with wrongfully and unlawfully making and uttering checks, with intent to deceive, and by means thereof fraudulently obtaining money from the payee, with the usual allegations of scienter and intent as to insufficiency of funds for payment. The Board stated at page 359:

"Under the specifications as drawn it was incumbent upon the prosecution to show not only that the accused issued the checks in question but that he did so with the intent to defraud * * *

"In order to defraud by issuing a check with insufficient funds it must be shown that the accused received something of value in exchange for the check. Obviously the issuing of a check to pay a past due bill would not defraud anyone if this check was returned for insufficient funds. There being no evidence in this case to show that the accused received anything of value when the checks were issued there is no evidence to show an intent to defraud."

In the Dartez case, the specification included allegations of intent to defraud and fraudulently obtaining money. The reviewing authority disapproved the findings as to the intent to defraud but left undisturbed the findings as to fraudulently obtaining the money. The Board of Review stated that it was clear that if the accused made and uttered the check without intent to defraud, "he can not be guilty of fraudulently obtaining anything as a result of the transaction." The Board held in effect that the record of trial was legally insufficient to support the modified finding as to the inconsistent allegation of fraudulently obtaining money. In the Gibney case the specification alleged wrongfully making and uttering a check and thereby fraudulently obtaining money, with the usual allegations of scienter and intent as to insufficiency of funds, but with no specific allegation of intent to defraud or deceive. The Board of Review pointed out that the gravamen of the offense charged was the intent to defraud and held that the evidence supported the findings of guilty.

The Board of Review in the instant case quite properly concludes that the evidence establishes all elements of the specification. The Judicial Council is of the opinion, however, that the specification sufficiently alleges an intent to defraud, either with or without the words "and injure" qualifying the intent. Insofar as the holding in CM 335786, Welsh, 2 BR-JC 267, is inconsistent with this opinion it should no longer be followed.

5. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation thereof.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 339548

THE JUDICIAL COUNCIL

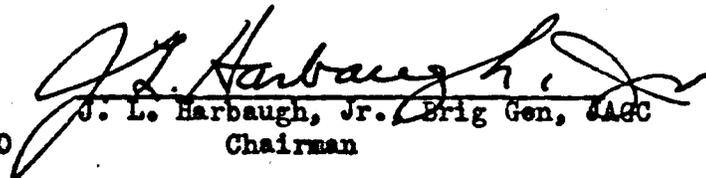
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Bernard Green, O-2011949, Signal Corps, 4006th Area Service Unit, Fort Sam Houston, Texas, upon the concurrence of The Judge Advocate General the sentence, as modified by the reviewing authority, is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

14 March 1950


J. L. Harbaugh, Jr. Brig Gen, JAGC
Chairman

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

16 March 1950

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

JAN 19 1950

CSJAGH CM 339585

UNITED STATES)

v.)

First Lieutenant EARL L. SEXTON,
O1080577, Headquarters and Head-
quarters Battery, 68th Antiair-
craft Artillery Gun Battalion,
Fort Bliss, Texas.)

AAA AND GUIDED MISSILE CENTER

Trial by G.C.M., convened at
Fort Bliss, Texas, 22 November
1949. Dismissal.

OPINION of the BOARD OF REVIEW
O'CONNOR, SHULL. and LYNCH
Officers of The Judge Advocate General's Corps

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

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

Specification: In that First Lieutenant Earl L. Sexton, Headquarters and Headquarters Battery, 68th Antiaircraft Artillery Gun Battalion, Fort Bliss, Texas, did, without proper leave, absent himself from his station at Fort Bliss, Texas, from about 6 October 1949 to about 22 October 1949.

CHARGE II: Violation of the 70th Article of War (Nolle prosequi prior to arraignment (R 4)).

Specification: (Nolle prosequi prior to arraignment (R 4)).

CHARGE III: Violation of the 95th Article of War (Finding of not guilty).

Specifications 1,2,3,4 and 5: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Earl L. Sexton, Headquarters and Headquarters Battery, 68th Antiaircraft Artillery Gun Battalion, Fort Bliss, Texas, on or about 12 October 1949, with intent to defraud, wrongfully and unlawfully make and utter to J. O. Slaton, owner and operator of the Golden Horseshoe Inn, a certain check, in words and figures as follows, to wit: El Paso, Texas 12 October 1949 No. (blank) Pay to the order of Cash \$10.00 Ten and no/100 Dollars El Paso National Bank El Paso, Texas (signed) Earl L. Sexton, and by means thereof did fraudulently obtain from J. O. Slaton \$10.00, he, the said First Lieutenant Earl L. Sexton, then well knowing that he did not have sufficient funds in the bank for payment of said check.

Specification 2: (Same as Spec 1 except for the amount "\$20.00").

Specification 3: (Same as Spec 1 except for the date "17 October 1949").

Specification 4: In that First Lieutenant Earl L. Sexton, Headquarters and Headquarters Battery, 68th Antiaircraft Artillery Gun Battalion, Fort Bliss, Texas, on or about 18 October 1949, with intent to defraud, wrongfully and unlawfully make and utter to J. O. Slaton, owner and operator of the Golden Horseshoe Inn, a certain check, in words and figures as follows, to wit: El Paso National Bank El Paso, Texas 18 October 1949 No. 34 Pay to the Order of Cash \$10.00 Ten and no/100 Dollars (signed) Earl L. Sexton and by means thereof did fraudulently obtain from J. O. Slaton \$10.00, he, the said First Lieutenant Earl L. Sexton, then well knowing that he did not have sufficient funds in the bank for payment of said check.

Accused pleaded not guilty to all Charges and Specifications. Accused was found not guilty of Charge III and its Specifications; and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

Accused was assigned as assistant S-4 of the 68th AAA Gun Battalion, Fort Bliss, Texas (R 25). On or about 6 October 1949, Major William I. Woodford, then battalion executive officer, had occasion to inquire into

accused's whereabouts but was unable to find him (R 24,25). There was introduced in evidence without objection an extract copy of the morning report of Headquarters and Headquarters Battery, 68th AAA Gun Battalion, for 7 October 1949, showing accused, "Dy to AWOL 0800 hrs eff 6 Oct 49" (R 29; Pros Ex 7).

Between 12 October and 18 October accused uttered several checks at the Golden Horseshoe Inn in El Paso, Texas (R 9,54). Mr. J. O. Slaton, the owner and operator of the Inn, testified that he had known accused for approximately three months and during that time had cashed checks for him frequently (R 9,15). Mr. Slaton identified a check dated 12 October 1949, drawn on the El Paso National Bank, El Paso, Texas, payable to "Cash," in the sum of \$10.00, and signed "Earl L. Sexton," as having been given him by accused (R 9,10; Pros Ex 1). The signature "Earl L. Sexton" on the check was that of accused (R 9). A second check, identical with Prosecution Exhibit 1 except that the amount was \$20.00, was identified by Mr. Slaton who stated that he thought it was accepted by his "partner" (R 10,11; Pros Ex 2). As to the date the two checks were received Mr. Slaton stated that the date of the checks was all he had to go by (R 10). They did not cash post-dated checks at the Inn (R 11). A third check dated 17 October 1949, in the sum of \$10.00, and otherwise identical with the checks dated 12 October, was identified by Mr. Slaton as having been received by him on 17 October 1949 from the accused (R 11,12; Pros Ex 4). A fourth check, dated 18 October 1949, payable to "Cash," in the sum of \$10.00 drawn on the El Paso National Bank and signed "Earl L. Sexton" was identified by Mr. Slaton as having been "received in the normal course of * * business activities," on the 18th of October (R 12, 13; Pros Ex 4). When asked if he remembered seeing accused personally in the Inn on the 12th and the 18th of October, Mr. Slaton responded affirmatively (R 14). On further questioning Mr. Slaton asserted, "I am sure I did see him, or I wouldn't have cashed his check" (R 15). The evidence relating to the value received by accused for the checks consists of the following question and answer contained in the record immediately after testimony that accused had redeemed the four checks:

"Q I would like to ask one other question. In each case when these checks were given you, did you give him the money shown on the check in return?

A Yes, sir." (R 60)

The four checks were endorsed "Golden Horseshoe Inn" by either Mr. Slaton or his "partner" and were deposited for collection or were negotiated to other business establishments in payment of bills (R 10,12,56,57). According to the testimony of Mr. C. S. Tompkins, assistant cashier and custodian of the records of the drawee El Paso National Bank, the four checks, Prosecution Exhibits 1 to 4, were received by the bank for payment on 17 October, 18 October, 18 October, and 19 October, respectively. The balance in accused's account on 17 October was \$4.38; on 18 October was

\$4.13 and on 19 October \$3.88 (R 20,21,22). To each of the four checks was affixed a slip reading:

"This check is returned on account of insufficient funds.

"The drawer's account has been charged 25¢ to cover cost of handling.

EL PASO NATIONAL BANK"

The presence of such a slip indicated that there were insufficient funds in the account when the checks were presented to the bank (R 20,21). The checks were returned by the bank to the last endorser. No notification was given by the bank to accused; any notice to him would have come from the persons to whom the checks were returned (R 23).

Around midnight, 21 October 1949, following receipt of a telephone call, Sergeant William R. Simmons, 591st Military Police Company, went to the Ysleta Recreation Club in Ysleta, Texas, where he found the accused in civilian clothes. Simmons asked accused if he was absent without leave and accused admitted that he was. In compliance with Simmons' request accused accompanied him to Military Police headquarters in El Paso (R 39,40,41). Accused appeared to have been drinking but his attitude was very cooperative (R 42). There was introduced in evidence without objection an extract copy of the morning report of Headquarters and Headquarters Battery, 68th AAA Gun Battalion for 22 October 1949, showing accused, "AWOL to apprehended by Mil auth Ysleta Tex 0130 hrs 22 Oct 49 & conf Post Stockade Ft Bliss Tex 0200 hrs 22 Oct 49 & awaiting trial violation 61st AW" (R 29,30; Pros Ex 8).

On 22 October 1949, Major Woodford, who had become battalion commander, questioned accused during the course of an "informal investigation" of his absence (R 25,26). Major Woodford first read Article of War 24 to him and asked if he understood it. When accused replied affirmatively Major Woodford asked him if he cared to explain his absence. Accused said he had been working on a special court-martial case in his capacity as assistant trial judge advocate, on 6, 7 and 8 October. His family went home on 8 October and the next day, a Sunday, he decided to take a drive into Mexico. After crossing the bridge at Zaragosa and travelling a few miles he was apprehended by some Mexicans who claimed to be police. They held him until 21 October and when he was released he returned to the United States over the Zaragosa bridge and stopped at Ysleta where he was arrested. Accused further stated that \$50.00 was taken from him by the Mexicans and that the \$7.00 found on his person when he was arrested was the proceeds of a check which he cashed at Ysleta. Accused could not give the name of the town in Mexico where he was held (R 26,27). Accused reduced the substance of his oral

statement to writing and signed it, after substituting "United States" for "Ysleta" as the place to which he returned after being released by the Mexicans (R 28,29; Pros Ex 6).

Following the interview Major Woodford took accused to William Beaumont General Hospital (R 36). Accused's absence without leave was so unusual for an officer that Major Woodford thought there should be a mental examination (R 37). Furthermore, the hospital was a good place to keep accused pending action on charges (R 38).

About the 24th or 25th of October Mr. Slaton turned over accused's dishonored checks to Major Woodford (R 14,31; Pros Ex 5). Mr. Slaton said he had no intention of bringing charges against accused. He came out to the post merely to find out what had happened to accused. On 21 November Mr. Slaton received the face amount of the returned checks from accused through his counsel (R 16,17-18,59-60).

b. For the defense.

Accused, having been advised of his rights as a witness, elected to make an unsworn statement through counsel (R 63,64). He stated that about 15 February 1949, he became the supply officer of a newly activated battalion. As the result of his performance of duty he was recommended by the battalion commander for promotion to the grade of captain but Fourth Army Headquarters turned it down. On 10 August he was transferred to another battalion and assigned as assistant supply officer, a temporary position. As a result of family troubles and a feeling of insecurity he became worried and upset so that his mind was not upon his military duties (R 65). His wife and child went home to her parents on 8 October, and immediately after their departure, he became involved in a situation, the particulars of which he preferred not to disclose, "adding to the laxity that I may have displayed toward my military duty." "He had no intention of shirking his duties in the Army, or to illegally draw pay and allowances for a period of absence, and had he not been upset by personal problems, he would not have absented himself from duty" (R 65,66). Part of his family troubles were due to his desire to be released from duty as an officer and return to his permanent grade as a master sergeant. During his tour of duty as an officer, a period of seven years, his family had been with him less than four years, which contributed to his family troubles. Accused further asked the court to consider that he did not admit he was absent for the entire period charged (R 66). "That because of the demands of these people in Mexico, he did give up certain of his private papers which they held as a matter of hostage, you might say, and he was permitted to return to the United States from time to time for the purpose of satisfying their demands, and until that was done the demands were so urgent and so pressing it just was not possible for him to return to military control, in the face

of his difficulties. Those difficulties were not finally cleared until the 21st or 22nd of October, whichever date it is, in a short time of which he was apprehended in the Recreation Club in Ysleta, and the accused asks the court to take notice of the fact that that Club is on the road leading from the center of Ysleta to the Zaragosa Bridge going over to Mexico." (R 88,89).

Concerning the check specifications accused asserted that he did not know he did not have sufficient funds in the bank. Although he kept a record of his checks in his check book, he did not carry a balance forward. Because of unusual expenses at the time his wife went home he had to write a number of checks and if he wrote checks in excess of his balance he was not aware of it. Neither the bank nor the persons concerned notified him that the checks were returned, until after charges were filed and it was "only yesterday" that he was given an opportunity to make restitution. Since his return on 22 October he had been in a confinement status and unable to leave the hospital except in custody (R 67).

Major Woodford, recalled for the defense, testified that accused had been in William Beaumont General Hospital since the date that he originally interviewed him (R 50). On one occasion the hospital wanted to release accused, and after Major Woodford had made some preliminary arrangements to obtain a room for accused in the Bachelor Officers' Quarters, Major Woodford called the hospital and asked them to keep accused there (R 49,50). When accused's car was impounded after his return to the post, clothing and other personal effects were found in the car (R 50,51).

Mr. Slaton, testifying for the defense, stated that during the period he had known accused, he had always conducted himself as a gentleman. Accused did not drink to excess. He was usually in the Inn three or four times a week. Mr. Slaton thought accused's checkwriting did not bring discredit upon the military service and he, Mr. Slaton, bore no ill will toward accused. During the period that accused cashed the checks he was depressed; he did not talk freely as he formerly did; he sat over to the side, would remain only a short time and then would leave (R 54,55,56,57).

First Lieutenant Gordon E. Tucker, assistant defense counsel, testified that at the pretrial investigation accused was in civilian clothes and was in the custody of a "Captain White" who was armed with a .45 calibre automatic (R 62,63).

c. For the court.

Major Woodford, called as a witness for the court, testified that accused joined his battalion in August. During the two months accused

was with the battalion his work was unsatisfactory (R 71). His relief or reassignment was under discussion (R 72). Major Woodford gave no assistance to accused in solving his personal troubles. He asked accused if he had family trouble and when accused said it was "all smoothed over," Major Woodford did not pursue the matter further (R 69,70).

After the law member had instructed the court concerning the presumption of innocence, the court was closed, and then reopened, the president stating that the court desired to have a psychiatric report on accused, to recall Major Woodford, and to receive additional evidence on Charges III and IV (R 73).

It was stipulated that if Major Paul J. Schrader, Chief, Neuropsychiatric Service, William Beaumont General Hospital, testified under oath, he would "report" as follows:

"This is to certify that I, PAUL J. SCHRADER, Major, MC, Chief, Neuropsychiatric Service, William Beaumont General Hospital, Fort Bliss, Texas, have thoroughly examined Sexton, Earl L., 1st Lt., RA 01080577, Headquarters Battery, 68th AAA Gun Battalion, Fort Bliss, Texas, this date. Relevant findings and conclusions are as follows:

"1. That the diagnosis is: Acute situational maladjustment, manifested by disinterest, failure to report for duty, violations of regulations and absence without leave; predisposition, marked lifelong passive dependent makeup; stress, recent stress of change in Military assignment with disappointment over change of orders; incapacity, minimal impairment.

"2. a. That the accused was at the time of the alleged offense so far free from mental defects, disease, or derangements, as to be able, concerning the particular act charged, to distinguish right from wrong.

b. That the accused was at the time of the alleged offense so far free from mental defects, disease, or derangements, as to be able, concerning the particular act charged, to adhere to the right.

c. The accused is now sufficiently sane to conduct or cooperate intelligently in his defense.

"3. RECOMMENDATION: Subject officer is an individual who always has had latent, within him, the potentiality for developing the difficulties in which he found himself when

his orders were suddenly changed. Nothing in the diagnosis above could be considered as preventing administrative action or trial by court-martial as is indicated. There is no basis for retirement or for discharge for medical reasons at the time the alleged acts occurred or subsequent to that time." (R 74-76)

Major Woodford testified that accused did not have authority to be absent from his place of duty on 6, 7 and 8 October for the purpose of preparing a court-martial case. Although authorized to work on the case he was expected to perform his duties at the S-4 office where he was assigned. To the best of Major Woodford's knowledge accused was not in the office during those three days (R 77-78). Accused did not say in his written statement that he was in Mexico until 21 October but he did in his oral statement (R 79,80).

4. Discussion.

Charge I and its Specification.

Accused was convicted of absence without leave from his station at Fort Bliss, Texas, from 6 October 1949 to 22 October 1949, in violation of Article of War 61.

Accused's initial unauthorized absence on 6 October was established by a duly authenticated extract copy of the morning report of Headquarters and Headquarters Battery, 68th AAA Gun Battalion, to which he was assigned. Corroborating the morning report was the testimony of Major Woodford, then battalion executive, that accused could not be found on or about 6 October and that, to the best of Major Woodford's knowledge, accused was not at his assigned place of duty at Fort Bliss on 6, 7, and 8 October. The unauthorized absence of accused is shown to have been terminated by his apprehension at the Ysleta Country Club in Ysleta, Texas, around midnight 21-22 October. The town of Ysleta is located about 12 miles south of El Paso.

In a pretrial statement accused asserted that on 6, 7 and 8 October he was working on a special court-martial case in his capacity as assistant trial judge advocate. Presumably, for this reason he could not be found at his assigned place of duty on those dates. As to the period 8 October to 22 October, accused asserted in a pretrial statement that on the afternoon of 8 October while taking a drive into Mexico he was captured by Mexican police. When he was released he returned to the United States. In the face of evidence that accused had cashed checks in El Paso, Texas, on 12, 17 and 18 October, accused amplified his pretrial statement by making an unsworn statement in court to the effect that certain of his private papers were held by his Mexican captors "as a matter of hostage"

and that he was permitted to return from time to time to the United States but was not finally released until the day of his apprehension at Ysleta.

The court rejected accused's defense, and, in our opinion, correctly. If accused's duties as trial judge advocate on 6-8 October required his full time, his proper course of action was to ask to be excused from his regular duties. He was not authorized to stay away from his assigned place of duty for three days without making his whereabouts known to his superiors. In view of his fanciful explanation of the succeeding period of absence little credence can be given to his defense of his absence during the three days. Since accused was absent without leave on 8 October 1949, his apprehension by Mexican police, even if true, would not change his status of being absent without leave (par. 149, MCM, 1949; CM 283499, McKinnon, 12 BR (ETO) 49,50). We believe, however, that under the circumstances disclosed by the record, his explanation of the protracted absence is not worthy of serious consideration.

Charge IV and its Specification.

Accused was also convicted of wrongfully and unlawfully making and uttering four described checks to J. O. Slaton, owner and operator of the Golden Horseshoe Inn, with intent to defraud, and by means thereof fraudulently obtaining the face amount of each check, accused well knowing that he did not have sufficient funds in the bank for payment. The checks were dated 12, October, 12 October, 17 October and 18 October, were in the sums of \$10, \$20, \$10 and \$10, respectively, and were drawn on the El Paso National Bank.

The evidence establishes that accused uttered the four checks in question at the Golden Horseshoe Inn of which J. O. Slaton was owner and operator. Mr. Slaton testified that he received two of the checks from accused (Pros Exs 1,3); that one was received by Slaton's "partner" (Pros Ex 2); and that the fourth was received "in the normal course of * * business" (Pros Ex 4). Whether Mr. Slaton was present when Prosecution Exhibits 2 and 4 were uttered, was not specifically brought out, but his personal knowledge of the transactions is not excluded by anything contained in the record. Under these circumstances the utterance of the four checks to Mr. Slaton is substantially established. Mr. Slaton further testified that the signature "Earl L. Sexton" on the check marked Prosecution Exhibit 1 was that of accused. Although Mr. Slaton was not specifically questioned as to the signatures "Earl L. Sexton," on the other checks, the court, having before it the proved signature of accused, could find that the remaining checks were in his handwriting and bore his signature (CM 325112, Halbert, 74 BR 89).

Mr. Slaton had no independent recollection of the dates on which the checks were uttered. We may, however, rely on the presumption that the

checks were written on the dates they bear, namely 12 October, 17 October and 18 October (CM 332879, Boughman, 81 BR 223,232). Since they were received at the drawee bank for payment between 17 and 19 October, it is apparent that they were uttered on or about the dates they were written. Mr. Slaton testified that he gave accused cash for each check which accused gave him. The question is suggested whether Mr. Slaton was referring only to the two checks which he personally received from accused or to all four checks which accused uttered at the Golden Horseshoe Inn. The testimony, however, was not expressly limited to the two checks which he personally received and, when read with the surrounding testimony, may reasonably be inferred to apply to all four checks especially since the fair inferences of record do not exclude the presence of Slaton when the other two checks in question were negotiated. The record contains many references to the "cashing" of accused's checks by Mr. Slaton and there is nothing whatever to suggest that the checks in question were given for other than a present cash consideration. The showing made by the defense that just prior to the trial accused reimbursed Mr. Slaton for the total amount of the checks, corroborates to some extent the conclusion that accused received cash for each check. When presented to the drawee bank on 17, 18 and 19 October, payment of the four checks was refused because of insufficient funds in accused's account, his balance on these dates being \$4.38, \$4.13 and \$3.88, respectively.

It is accordingly established that accused made and uttered the checks in question and that he obtained cash for the checks as alleged. The specifications further allege that accused made and uttered the checks with intent to defraud, well knowing that he did not have sufficient funds in the bank for payment. The allegation ordinarily found in a fraudulent check specification, "not intending that he should have" [sufficient funds in the bank for payment] is omitted. The effect of such an omission was discussed in the recent case of CM 336515, Stewart, 3 BR-JC 115,120-123, the Board concluding that although the allegation is desirable to explain the fraudulent intent alleged in the specification, the remaining language sufficiently alleges the offense of making and uttering a check with intent to defraud. Although the Board's holding of legal sufficiency in the case was reversed by the Judicial Council, the Board's opinion with respect to the import of the specification was not disapproved, the opinion of the Judicial Council assuming without discussion that the specification alleged making and uttering a check with intent to defraud (id., 3 BR-JC 115,128-129). A specification identical to that under discussion is found in CM 280882, Hofferber, 53 BR 391, in which the Board apparently assumed, without discussion, that intent to defraud was sufficiently alleged.

In discussing the subject of fraudulent intent in "bad check" cases, the Judicial Council in the Stewart case, supra, said:

"* * * When a specific intent is an essential element of an offense the evidence by which its existence may be established

or refuted is governed by the principles generally applicable where the state of mind of a person is in issue. Intent may be established by indirect or direct evidence. It may be gathered from the attending facts and circumstances. It may be determined by inference from evidence of other acts of the accused closely connected in time and circumstances to the offense for which he is on trial. * * *."

Concerning the inference of fraudulent intent from evidence that a check has been dishonored, the Judicial Council states:

"The authorities leave no room for serious question that although, in this and like cases, evidence that the accused after uttering the check, failed to maintain an adequate balance in the drawee bank would be competent on the issue of fraudulent intent, proof of such failure is not legally requisite. * * *."

The weight of the inference to be drawn from the fact of dishonor is discussed in CM 245507, Payne, 29 BR 189,192, in the following language:

"* * * The act of delivering a check, presently payable, in exchange for cash is in itself a representation that the check will be honored when presented for payment at the bank upon which it is drawn. If the check is dishonored because of the lack of funds on deposit belonging to the maker of the check, fraud may be implied from those facts alone. This implication or presumption however may be overcome by an explanation of the circumstances which, if believed, may explain the otherwise fraudulent act." (acc: CM 284149, Brown, 55 BR 261,272).

Proof of dishonor alone has been held insufficient to establish fraud. In CM 320578, Himes, 70 BR 31,37, the Board said:

"* * * Although the issuance of a check against an account which is in fact insufficient at the time of issuance to meet payment of such check, or which is nonexistent or will be insufficient upon prompt presentment for payment because of prior outstanding checks which will deplete the account, is presumptive evidence of fraud, the maker being charged in the ordinary case with knowledge of the condition of his account, the inference of fraud must be based on some proof of the actual condition of the account at the time the check or checks was given. * * *."

The Board held that since the prosecution failed to show the condition of accused's account at the time certain of his dishonored checks were uttered, that there was insufficient evidence to permit the inference

that accused knew that he did not have and did not intend to have funds in the bank for payment of these checks.

In CM 258171, Lucas, 37 BR 327,335, and in CM 276285, Lucas, 48 BR 265,271, the Board held that where an accused had sufficient funds in the bank for payment of a check at the time it was written but not at the time of presentation, intent to fraud could not be inferred from the fact of dishonor, there being no showing that the withdrawals which caused the insufficiency resulted from checks issued by accused or under his authority prior to those under consideration.

In the present case it is shown that on 17 and 18 October, when accused wrote the checks described in Specifications 3 and 4, each in the sum of \$10, his bank balance was \$4.38 and \$4.13, respectively. No specific testimony was adduced as to the condition of accused's bank account on 12 October when he wrote the checks described in Specifications 1 and 2. In his unsworn statement accused inferentially admits the insufficiency of his account on 12 October when he attempted to absolve himself by saying that he had to write a number of checks when his wife left on 8 October and he inadvertently lost sight of the status of his account. We think that under these circumstances the conclusion could legitimately be drawn that accused's bank balance was insufficient to pay any of the checks at the time they were written.

Supporting the inference of fraud drawn from the fact that the checks were drawn against an insufficient account and were dishonored upon presentation, is the showing that accused was absent without leave from his organization at the time the checks were written as well as the fact that he did not make the checks good for some time after they were dishonored. The exact date that notice of dishonor was given to accused is not disclosed by the record but since it is shown that the charges were served on accused on 9 November it is apparent that it was prior thereto. Accused did not reimburse Mr. Slaton until 21 November, the day before trial. Although accused was confined to William Beaumont General Hospital prior to trial, it did not necessarily preclude his making some arrangements to pay the checks. His contention that he was prevented from paying off the checks because of his confinement appears to us to be without merit. At any rate the failure of reimbursement was another factor to be considered and weighed by the court in connection with the other circumstances of the case, and the court having rejected accused's contention that he acted in good faith and without fraudulent intent, we perceive no reason why their decision should be disturbed.

5. During the questioning of Major Woodford by members of the court, he was asked how he evaluated accused's work with his Major Woodford's battalion, and he answered, "unsatisfactory." Accused's

performance of duty with Major Woodford's battalion and his character generally, were not in issue, and, therefore, the question and answer were incompetent. No prejudice to accused resulted, however, since in a prior unsworn statement, he himself asserted that for various reasons he had been lax in the performance of his duties while a member of the battalion.

6. In his unsworn statement through counsel, accused asserted that the difficulty which existed at the time of his absence without leave was "so personally obnoxious to him that he is risking not taking the stand as a sworn witness, rather than have to disclose it. * * *." The following then transpired:

"PROSECUTION: Captain Adderley, the prosecution would like to point out at this time if you wish to reconsider the type of testimony that the accused is to give and ask for a closed court, the prosecution would certainly have no objection to it.

DEFENSE: I see nothing to be gained by that. It would still be in the nature of the statement that I have made." (R 66)

Subsequently the law member ruled:

"There is one thing I wish to remind the court of, that the accused elected to make a statement through his counsel, and he is not in any way bound to make any other explanation, or to make any other type statement. It was purely his election, and the court will disregard the offer made by the prosecution to close the court, or have the court closed." (R 67-68)

Whether the trial judge advocate's words be interpreted as a suggestion that accused testify under oath in a "closed" session, or that he give a more detailed unsworn statement in a "closed" session, his statement was improper, although apparently made in complete good faith. We think that any prejudice which might have resulted from the statement was removed by the subsequent explanation and admonition by the law member and that under the circumstances accused's substantial rights were not infringed.

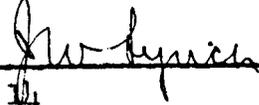
7. Although the question of accused's sanity was not raised in the case, the court requested and received in evidence a report of a psychiatric examination of accused. The report showed that accused was mentally accountable at the time of the commission of the offenses and that he possessed the requisite mental capacity at the time of trial.

8. Department of the Army records show that accused is about 37 years and 6 months of age, married and has a 4 year old daughter.

Following graduation from high school in 1932, he was employed as a carpenter from 1932 until 1938 and as an automobile mechanic from 1938 until 1939. He had service with the Kansas National Guard from 1933 until 1939. He enlisted in the Regular Army on 24 July 1939, and served continuously as an enlisted man until 30 October 1942, when he was commissioned a Second Lieutenant, Army of the United States, upon graduation from Coast Artillery Officers' Candidate School, Fort Monroe, Virginia. On 22 August 1945 he was promoted to the temporary grade of First Lieutenant, Army of the United States, and on 6 November 1945, he was appointed to the same grade in the Organized Reserve Corps, Army of the United States. From 24 January 1944 until 1 September 1945 he served overseas. He was relieved from active duty effective 10 December 1945. He reenlisted in the Regular Army (CAC) on 29 December 1945 in the grade of Master Sergeant and was discharged 23 July 1946 to accept a commission as a First Lieutenant, Army of the United States, with date of rank from 5 April 1946. From 9 December 1946 until December 1948 he again served overseas. He is authorized to wear the American Defense, American Theater, Asiatic-Pacific Theater and the Victory Ribbons. During the period of 14 November 1942 to 30 September 1947 he received three ratings of superior, nine of excellent, and one of satisfactory. From 1 October 1947 to 9 August 1949, his efficiency report (WD AGO Form 67-1) over-all ratings [OA] were 072, 055 and 056. On 3 July 1944, he was convicted by a general court-martial of being drunk and disorderly in a public place, in violation of Article of War 96, and was sentenced to forfeit \$150.00 of his pay. (In an "unsworn statement" made "for mitigation" by accused's counsel following the findings, it was said: "He wants the court to know that in his entire service as an enlisted man and officer to date he has never been brought before a court-martial, and also this applies to his time as an officer and goes further to the point he has never received punishment under the 104th Article of War until these proceedings which the court is now hearing." (R 92)).

9. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96.


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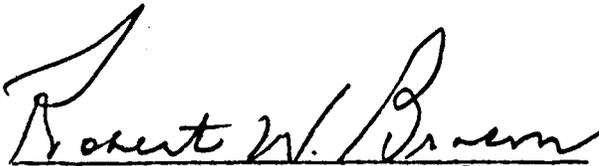
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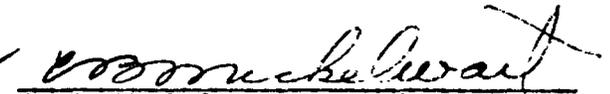
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

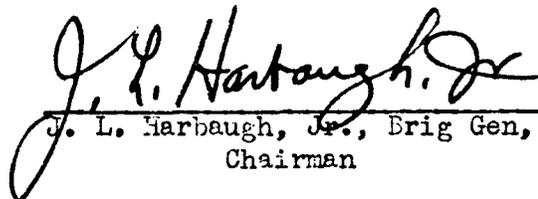
THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Earl L. Sexton, 01080577, Headquarters and Headquarters Battery, 68th Antiaircraft Artillery Gun Battalion, Fort Bliss, Texas, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

9 February 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

14 February 1950

(GCMO 7, Feb 27, 1950.)

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

CSJAGH CM 339642

U N I T E D S T A T E S)

ZONE COMMAND AUSTRIA)

v.)

Corporal EUEL A. BOWLIN, RA)
44042158, and Private ALBERT)
E. DERMOTT, RA 12283660, both)
of Heavy Tank Company, 350th)
Infantry.)

Trial by G.C.M., convened at)
Camp Truscott, Salzburg, Austria,)
29-30 November 1949. Both: Dis-)
honorable discharge, total for-)
feitures after promulgation, and)
confinement for life.)

OPINION of the BOARD OF REVIEW
O'CONNOR, SHULL, and LYNCH
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

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

Specification: In that Corporal Eucl A. Bowlin, Heavy Tank Company, 350th Infantry, and Private Albert E. Dermott, Heavy Tank Company, 350th Infantry, acting jointly and in pursuance of a common intent, did, at or near Glasenbach, Austria, on or about 12 September 1949, forcibly and feloniously, against her will, have carnal knowledge of Lily Derry, a female.

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

Specification 1: In that Corporal Eucl A. Bowlin, Heavy Tank Company, 350th Infantry, in conjunction with Private Albert E. Dermott, Heavy Tank Company, 350th Infantry, did, at or near Salzburg, Austria, on or about 12 September 1949, wrongfully push Hildegard Burgstaller to the ground with his hands.

Specification 2: In that Private Albert E. Dermott, Heavy Tank Company, 350th Infantry, in conjunction with, Corporal

Euel A. Bowlin, Heavy Tank Company, 350th Infantry, did, at or near Salzburg, Austria, on or about 12 September 1949, wrongfully push Anna Schrock to the ground with his hands.

Each accused pleaded not guilty to, and was found guilty of, the Charges and Specifications applicable to him. Evidence of one previous conviction by summary court-martial for violation of standing orders was introduced as to the accused Dermott. Each accused was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

About 2200 hours on the evening of 12 September 1949, Hildegard Burgstaller, age 20, and her married sister Anna Schrock, age 24, had walked across the Karolinen bridge in Salzburg, Austria, when they were approached by the two accused, who appeared to be drunk (R 7,8,11,16). The accused asked them where they were going and attempted to engage them in conversation. At first the two women did not reply but finally told the accused they were on their way home. Mrs. Schrock told "the taller" accused Dermott that she and her sister lived at the "barracks Alpensiedlung," and would like to be left alone. The accused stated they were stationed at Camp Truscott, Glasenbach (R 7,8,45). Mrs. Schrock and Miss Burgstaller stopped at the bus station in Aspergasse but the accused "grabbed" them and forced them to continue on. "The smaller" of the accused Bowlin stumbled several times, falling off the sidewalk. Dermott, who had hold of Mrs. Schrock, would then release her and assist his companion. On one of these occasions the women endeavored to "escape" to the other side of the road but the accused "grabbed" them again. A military bus passed the group and stopped for the accused but they did not board it (R 8,9).

When the party had approached the gate to the stockade in the Alpensiedlung, Bowlin left in the direction of his quarters but Dermott called him back, whispered something to him, and he remained with the group. Miss Burgstaller was trying to persuade Dermott to release them as she was very sick when Bowlin tried forcibly to kiss her (R 9). He grabbed her on an "open wound" on her right shoulder and they engaged in a "real struggle." The accused attempted to take the women in the direction of the bridge and, while struggling, Bowlin and Miss Burgstaller fell to the ground. Bowlin looked for his hat and she pushed it over to him. She then went to the aid of her sister who was struggling with

Dermott but Bowlin pursued and seized her again. He had a doll and kept placing it in her arms while she repeatedly pushed it away. He became angry, threw the doll on the ground and struck her twice on the mouth with the back of his hand. She saw her sister running away. Summoning up the last of her strength she managed to evade Bowlin and ran about five steps away but he caught her by the hair and threw her to the ground. An Austrian policeman and Corporal James F. Lengel, a stockade guard, came to her rescue. She did not see Dermott anymore that evening. Bowlin, however, accompanied them to the gate of the stockade. Bowlin had a conversation with Corporal Lengel which Miss Burgstaller did not understand and then ran to the woods in the direction of Glasenbach. After falling down several times, he disappeared from view. It was then about 2245 hours. Miss Burgstaller and Mrs. Schrock were taken to the "MPs" at Mozartstrasse (R 10,14).

Mrs. Schrock corroborated her sister's testimony generally as to the actions of the accused. She further testified that Dermott tried to kiss her and threw her on the ground "a couple of times." She cried out for help and the guard and "Mr. Wieder" came to their aid (R 16-20). Both Mrs. Schrock and her sister denied making any attempt to obtain a pocket-book from one of the accused (R 15,21-22).

Corporal Lengel testified that while he was on guard at the tank park, near the Zone Command Austria Stockade, between 2230 and 2300 hours on 12 September 1949, he heard screams and went to investigate, a civilian policeman accompanying him. Lengel found the accused Bowlin and two women. Bowlin claimed one of the women had taken some of his money so Lengel had them accompany him to the guardhouse. The accused Dermott came on the scene about this time and Lengel told him to leave because he did not know Dermott had anything to do with the incident. Bowlin, who appeared to be drunk, "took off". Lengel knew he could find Bowlin at his company and made no effort to stop him. After escorting the policeman and the two women to the Officer of the Day, Lengel returned to his post (R 22-24).

Mrs. Lily Derry, hereinafter referred to as the prosecutrix, testified that she was a seamstress, 43 years of age, and a Rumanian of Hungarian nationality (R 34,46). For a long time she was married and taught piano. After she divorced her husband she had a clothing store. She had a daughter, 18 years of age, who was employed in Salzburg. The prosecutrix has lived most of her life in Rumania and had left there on 25 March 1949. At the time of the trial she was staying at the Gasthaus, Sandwirt, Salzburg. She planned to leave Austria in a short time, to join her brother in Buenos Aires (R 34-35). Pursuant to a prior arrangement to meet a family from her home town by the name of Balla, she went by train to Glasenbach, arriving about 2300 hours. Not finding the Balla

family at the station, she obtained directions to the International Refugee Organization Camp from an Austrian policeman, Walter Ottmann (R 59). She walked to the Salzach bridge and started to cross it but realizing that she was going away from the camp, she retraced her steps (R 36).

Although it was quite dark she noticed two soldiers running toward her (R 36,46). The pair seized her and, thinking that they planned to rob her, she offered them her handbag which they did not take. The soldiers jerked her about in a rough manner and she cried for help. They beat her on the head and pulled her off the road down into a meadow on the Camp Truscott side of the river. They tore off her coat and when she cried for help tried to strangle her. They tore her blouse to pieces, lifted her skirt and tore her panties. During all this time she was unable to free herself. One of the soldiers, identified as "the brown one," held her hands while the other, "the blond one," opened his trousers and forcibly had sexual intercourse with her. Several cars crossed the bridge and each time she endeavored to cry out, but they always "shut" her mouth (R 35-38).

The soldier who was holding her hands continued to beat her and endeavored to get her to take his penis in her mouth and in her hands. After the first soldier completed his act of sexual intercourse with her, the "brown one" forcibly had sexual intercourse with her while his companion pinched her breasts and held her hands. After the "brown" soldier finished, the prosecutrix thought it was all over, only to have both soldiers repeat the act. The prosecutrix knew that the act of intercourse was completed because she "felt that" inside her female organs (R 39).

The prosecutrix was carrying a handbag containing a night skirt and a yellow undershirt. When the soldiers left she found the handbag, the strap torn and the buckle torn off, in the grass a short distance away. After looking in the bag to see if her immigration papers for Buenos Aires were safe, she walked to the Salzach bridge. At the second house at which she knocked a woman came to the door but refused to help her, directing her to the station (R 39-40). She went to the station, woke up the stationmaster, explained what had happened to her and he called the gendarmerie. She called for a physician and the military police. A physician came and examined her and she was taken in a jeep to military police headquarters. From there she was taken to the hospital where she stayed four weeks (R 40,41).

In the course of the struggle with the two soldiers, the prosecutrix lost a ring, a knife and 150 Schillings. She identified Prosecution Exhibit 2 as the ring in question. An Austrian policeman returned the ring to her while she was at the hospital. She identified Prosecution Exhibit 4 as the handbag which she carried at the time of the assault (R 39-41). The jacket, skirt, blouse, brassiere, "combination" garment, panties,

and a jacket button, which she was wearing on the night of 12 September were identified by her and marked for identification as Prosecution Exhibits 5 to 11, inclusive. The blouse, brassiere and panties were torn, and the button pulled off her jacket, during her struggle with the two soldiers (R 41-43).

The prosecutrix identified both accused as the soldiers who attacked and raped her on the night of 12 September (R 44). She was positive of her identification of the "brown" one (Dermott) (R 7,44,45). During the pretrial investigation of the case she was not certain of her identification of the "blonde" one and asked that the accused converse in order that she could listen to their voices. Because of her training in music she was then able to identify Bowlin as the other or "blonde" accused (R 44-45). On recross-examination the prosecutrix testified that she identified Dermott in a lineup of seven soldiers at the investigation, about three weeks before the trial. He was about the fifth soldier she scrutinized. The CID agent did not help her in her identification in any way (R 45-46). The prosecutrix said she wondered how she was able to identify even one of the accused because she was "very much injured by this brain concussion. For instance my right eye is still blurred and I have this trembling in my hands" (R 47).

Walter Ottmann, gendarmerie official, testified that on the night of 12 September 1949, he was on duty at Glasenbach station. He saw the prosecutrix about "11:05 hours" when she came up to him and asked for directions to the DP Camp in Glasenbach. He saw her again about 0130 hours in the station house at which time the right side of her face was swollen and there were "strangling marks" on her face or neck. Her blouse bore bloodstains and she was no longer carrying a parcel which he had observed when he saw her for the first time. Ottmann and a Mr. Duchet went to the area the prosecutrix described as the scene of the incident. About 25 meters from the bridge Ottmann discovered a trampled spot on the grass (R 59-60). Franz Matejka, a gendarmerie official, went to the same area on 14 September 1949 and found a white gold ring with two small beads and a greenish colored button. He identified Prosecution Exhibit 2 as the ring which he found and Prosecution Exhibit 11 as the button. Matejka placed an "X" and a "Y" on a photograph (Def Ex A), at the places where he found the ring and the button (R 61,62).

Pursuant to a call "from the Gendarmerie," Dr. Norbert Meixner went to the Glasenbach railroad station between 0130 and 0145 hours on the night of 12 September. Upon arriving there he examined an injured woman whose name, he was told, was Derry. The right part of her face was heavily swollen and there were signs of "strangling marks" on her neck. There were several serious lacerations inside her mouth and one tooth

was loose. She was very depressed and spoke scarcely a word. She did not tell him that she had been raped (R 28-30).

Dr. Herbert Goetzinger examined the prosecutrix on the morning of 13 September. His examination disclosed:

"* * that the whole right of the face was swollen; several lacerations of the skin around the right eye with dark blue colored spots; and a part of the skin around the right eye was heavily swollen; also parts in the vicinity of the lower lip and chin. The left lower cutting tooth was loose. Then there were some strangulation marks in the vicinity of the neck. The right eye was bloodshot and the tissues were bloody red. We confirmed the examination of the female sexual parts which was taken in the female section of the hospital. There were injuries at the female parts. The skin in that vicinity was dirty and there were small pieces of grass and soil inside the right leg and on the right leg there were other lacerations and bruises. There were marks of being scratches on both upper legs. There were parts of substance taken out of the femal parts of this woman and were made subject of a close examination. There was also a brain concussion of middle severeness."
(R 31)

Dr. Goetzinger identified Prosecution Exhibit 1 as a picture of the prosecutrix and stated it reflected her condition at the time the picture was taken. The picture shows severe discoloration around the eyes and lacerations about the face (R 32).

Subsequent to Dr. Goetzinger's appearance on the witness stand it was stipulated that if he were recalled to the stand he would testify as follows:

"In gynaecological respect there was an insignificant superficial excoriation of epithelium on the right labium pudendum near the entrance of vagina. The skin on the perineum and in the introitus was dirty, probably soiled by the earth, since smallest fragments of grass were found there." (R 47).

Sergeant First Class Verna Tindell was charge of quarters in the Heavy Tank Company on the night of 12 September and the morning of 13 September 1949. About 0125 that morning the accused came into the orderly room and signed in. Tindell told them to go to bed. They appeared to be "a little intoxicated." It had been raining that night and there were mud splashes on their trousers below their knees. There was something of a light red color on the back of Bowlin's hand but Tindell did not notice any cut. The colored substance could have been lipstick (R 25-27).

Mr. Patrick B. Brannen, a CID agent, identified Prosecution Exhibit 12 as a sworn statement made to him on 13 September 1949 by the accused Dermott. No threats, coercion or promises were used to induce Dermott to make the statement. His rights were explained and the 24th Article of War read to him before he gave the statement (R 49-50). Mr. Brannen further identified Prosecution Exhibits 13 and 14 as statements made by the accused Bowlin, under similar circumstances, on 13 September 1949 and 28 September 1949, respectively (R 50-51). Prosecution Exhibits 12, 13 and 14 were received in evidence without objection by the defense, after the law member explained to the accused their right to produce evidence as to the circumstances surrounding the taking of the statements (R 53-54). The court was advised that the statements, admissions or confessions of accused entered in the record should be considered only against the declarant, and not against the other (R 76).

In Prosecution Exhibit 12 accused Dermott stated that on 12 September 1949, Bowlin and he attended the carnival in Salzburg arriving there about 2000 hours. Each won a bottle of cognac at the shooting gallery and after approximately an hour they departed for camp. At the large bridge near the military government building they met and talked with two girls. They walked with them to the bus stop located near the stockade and the Heavy Tank Company motor pool. The group conversed there for about twenty minutes and then Bowlin and Dermott left for Camp Truscott. They walked along a dirt road through the woods until they came to the one lane bridge extending across the Salzach river.

"Standing near the bridge we saw a woman. At this time I was feeling my drinks but was not drunk. I asked this woman, 'Do you fuck?' The girl did not answer but grinned at us and made a come-on motion with her arm and started walking toward the woods. BOWLIN and I followed and caught up with her. All three of us then walked about a hundred and fifty yards into the woods. BOWLIN told me that he wanted to have sexual intercourse with her first and I agreed. I waited on a dirt road which runs through the woods while BOWLIN went into the woods with the girl. About five minutes later BOWLIN came out buttoning his pants. The girl did not come out with BOWLIN. I then went into the woods and saw the girl half lying and half sitting on the ground with her dress pulled up to her stomach. She did not have anything on under the dress. I unbuttoned my pants and underwear and took out my penis. I then got on top of her and she took my penis in her hand and placed it in her vagina. I did not kiss her nor did she kiss me nor did either of us say anything. We began the act of sexual intercourse and she cooperated fully. The act lasted about three or four minutes at which time I experienced an ejaculation. Immediately afterward I got up, cleaned my penis with a handkerchief the girl had

and, buttoning my pants, left her. I went out to where BOWLIN was waiting and we went back to Camp Truscott. I did not at any time hit the girl or scratch her or abuse her in any way. At no time did she offer any resistance to my advances." (Pros Ex 12)

In Prosecution Exhibit 13 accused Bowlin, in general, relates a similar sequence of events. He stated that after he and Dermott accompanied the two girls to the area near the stockade the following occurred:

"* * I remember pushing the girl I was with and I think she fell to the ground. I think she screamed when she fell. DERMOTT and I had been drinking and I was a little drunk. I did not see DERMOTT push the girl he was with at any time. Sgt AHRENS, the Sgt of the Guard at the stockade came up about this time. DERMOTT and I left immediately. * *."

Bowlin described meeting "the woman" by the road near the bridge. He and Dermott walked with "the girl" about one hundred and fifty yards into the woods. At that point he left Dermott standing beside the road and went into the woods with the girl. He asked her if she would have sexual intercourse with him and she agreed to do so for the sum of \$5.00. He looked through his billfold for the correct "change." She said she would find the money and he handed her the billfold. She removed some money but he did not know how much. They then proceeded for about fifteen minutes to engage in sexual intercourse to the complete satisfaction of both participants. Bowlin told the woman he would send his buddy to her and she agreed. He rejoined Dermott and advised him of the agreement. Dermott went into the woods and in approximately twenty minutes returned with the girl. After Bowlin examined his billfold and discovered there was no money in it, he told Dermott the girl had taken it. Dermott asked her for it. When she said she did not have it Dermott struck her in the face with his fist. She said "to go ahead and hit and that she was not going to give it back." After Dermott struck her again he and Bowlin returned to Camp. Bowlin added that at the time the girl took the money from his billfold she gave him seven Austrian schillings which he later gave to Mr. Brammen of the CID (Pros Ex 13).

In Prosecution Exhibit 14 Bowlin states that the woman willingly engaged in sexual intercourse with him. Upon rejoining Dermott and examining his billfold he discovered that he "was missing seventy dollars." He heard Dermott ask the woman for the money and saw Dermott strike her twice with his right hand but

"I got so drunk so suddenly at that time that there was nothing I could do to stop him. I called to DERMOTT to come on and then

I staggered up the road towards TRUSCOTT. DERMOTT did not answer me when I called. I went on up the road. I was so drunk at the time that my mind would just come and go. I know I passed out and when I came to I was lying on the grass over the bank near the back gate of Camp Truscott and DERMOTT was washing my face with wet grass. DERMOTT told me at this time that he had screwed the woman too. DERMOTT helped me into camp and on into the company orderly room. At this time I was more sober and I signed in myself. At the time I signed in the orderly room clock showed it was 2400 hours. I then went to bed. I would also like to add that after DERMOTT hit the woman a second time she started off down the road in the direction of the stockade. I don't know whether he went after the woman again or not. I don't know whether the woman we screwed was the same one I saw at the civilian hospital in Salzburg or not." (Pros Ex 14)

Brannen identified Prosecution Exhibit 1 as a photograph of the prosecutrix taken at his direction by the Salzburg Criminal Police on 15 September. He was present at the time the photograph was taken and it reflected a true representation of her at the time. This exhibit was received in evidence by the court over the objection of the defense (R 52). Brannen further identified the following prosecution exhibits as items of clothing which he had received from the prosecutrix: jacket (Pros Ex 5); skirt (Pros Ex 6); blouse (Pros Ex 7); brassiere (Pros Ex 8); "combination" or slip (Pros Ex 9); panties (Pros Ex 10) (R 53-54). Each of the above items were in the same condition at the time of trial as when he took them from her. They were taken to the CID office, listed in the property book, placed in the property room and later taken to the Pathological Department, Salzburg Hospital, where an analysis was requested of any stains that might appear. It was stipulated that if Professor Dr. H. K. Barrenscheon, a chemist qualified to analyze "blood and stains," were present he would testify that the jacket, blouse and panties, on chemical analysis, revealed blood stains, and the skirt and slip revealed both blood and grass stains (R 48). Prosecution Exhibits 7 to 10, inclusive, were received in evidence over the objection of the defense (R 54-55). Prosecution Exhibits 5 and 6 were received in evidence without objection (R 63). Prosecution Exhibit 4, a brown leather purse or handbag, was also received in evidence (R 54-55).

On cross-examination, Brannen stated that the accused readily agreed to giving their written statements (R 56). When Brannen was assigned to investigate the alleged rape case, he investigated the military police blotter for similar crimes which might have been committed about the same time. His examination of the record disclosed the assaults on Miss Burgstaller and Mrs. Schrock. He investigated that report as a possibly related incident and this led to the American guard, and, in turn, to

Dermott and Bowlin (R 57). Brannen described the method employed in placing the accused in a lineup of seven soldiers. There was only a small room available. He told the two accused not to arrange themselves in the lineup with the soldiers until the door was closed as he had no desire to know where they placed themselves in the lineup. He stated that he did not place his hands on anyone. The prosecutrix had no difficulty in identifying Dermott. He did not see her identify Bowlin (R 58).

4. For the defense.

After having their rights as witnesses explained to them by the law member, both accused elected to take the stand and testify under oath (R 71,74).

Accused Bowlin stated that he and Dermott left the carnival after winning a bottle of cognac and some dolls. They carried these items with them as they walked up the main road. They met two girls walking in the same direction. He went to the side of one girl and Dermott to the side of the other. The girls said it was "O.K." to walk along with them. He gave one of the girls some of the toys he had won and Dermott and he drank the bottle of cognac. He became a "little drunk" and kept wandering out into the road. His girl companion brought him from the road and put her arm around him so he would not get off the sidewalk. As they neared the stockade she searched his hind pocket and he pushed her out of the way. She shouted for the police, the guard came, and he heard someone say "take off Bowlin." He went up a dirt road towards Truscott a short distance and then returned. Someone else advised him to leave. In going up the road the second time he was rejoined by Dermott. At this time it was about 11:30 p.m. He then saw "this woman" on the other side of the bridge standing on the little road which leads into the woods. In response to Bowlin's inquiry she said he could go walking with her. They walked towards the stockade and "she began to proposition him, feeling him up." Bowlin asked her "how much money for intercourse and she said five dollars." This was agreeable with Bowlin. Because he was excited or clumsy he was unable to extract the money from his billfold. She offered to help him and he handed her the billfold. Bowlin could not recall how much she took out. They then proceeded to engage in sexual intercourse in which act she cooperated fully. Bowlin then rejoined Dermott. Upon checking his billfold he discovered that all of his money, \$70.00, was missing. Dermott went over to the woman and asked for the money. Dermott struck the woman. She said she would not return it and Dermott struck her again. Bowlin "began to get pretty drunk" and suggested to Dermott that they "go home." He wandered across the bridge towards camp and blacked out. Dermott aroused him and helped him to the orderly room. Bowlin was "pretty sober" then. The time was 2400 hours (R 71-73).

Bowlin testified further that there was quite a bit of light during the time he was with the woman and he estimated her age at not less than 19 and no more than 21. He had observed the prosecutrix on the stand and she was not the woman with whom he had intercourse (R 73). Bowlin recognized the bridge in Defense Exhibit A. The place where he had intercourse was across the bridge towards Salzburg and to the left towards the stockade a distance of "approximately a quarter of a mile, something like that" (R 73). On cross-examination Bowlin testified that the first two girls he met the evening of the carnival did not take any money from him. He did not recover his \$70.00 (R 74).

Accused Dermott testified that on the night of 12 September 1949 Bowlin was drunker than he and staggered frequently. In general he corroborated Bowlin's testimony as to the events of the evening. He stated he had intercourse with the woman they met. After Bowlin told him the woman had taken his money, he tried unsuccessfully to recover it. When she refused to return it he hit her twice. "He didn't hit her hard." He left her and found Bowlin "passed out" about five feet from the back gate. He took him to the creek, washed his face, brought him into camp and sobered him up. The clock indicated 2400 hours at the time they signed in. The Charge of Quarters told them to go to bed, which they did. The girl with whom they had intercourse was taller, heavier and much younger than the prosecutrix (R 74-75).

At the lineup in the hospital, the prosecutrix at first did not identify Bowlin. She observed him three or four times and was having difficulty when Brannen put his hand between him and the other men in the lineup and "more or less separated us and then pointed to me and said that is the one" (R 75). When shown Defense Exhibit A, Dermott recognized the bridge in the photograph. He placed the location of the incident he had described "on the other side of the river and up a dirt road leading to a road towards Salzburg." The intercourse with the woman did not occur in the place identified by marks placed on the exhibit by the prosecution witness (R 76).

Captain Donald A. Soll testified that he was counsel for the accused at the pretrial investigation. He was present when the sisters Burgstaller and Schrock testified through an interpreter. He inferred from the answer made by the one woman that she remembered that the other made a gesture toward the pocket of the soldier who was walking with her. The prosecutrix identified both accused in his presence. He did not recall her asking that one of the accused speak in order to hear his voice (R 65).

Sergeant Joseph G. Chess testified he was in a lineup with the accused for the CID agent, Mr. Brannen. The lineup was in an Austrian hospital in Salzburg and six to eight men were present. The prosecutrix

identified accused Dermott but not Bowlin. On a few occasions Mr. Brannen was behind the line of men and arranged them in different positions (R 65-66). Chess testified further that he had been Bowlin's platoon sergeant since March of 1949 and had found his performance of duty to be excellent. Bowlin never came to his attention as being a trouble maker, belligerent or pugnacious, nor had he been in trouble with women prior to the offense for which he was on trial (R 68).

Sergeant First Class Lewis C. Raines testified he had known Bowlin for approximately six months. Bowlin's performance as a soldier was excellent and he did not know of a case wherein Bowlin had been a sex offender, nor had he ever been a trouble maker, belligerent or pugnacious (R 67).

Captain Lloyd E. Nobles testified he was Bowlin's company commander from February 1949 until 1 August 1949. To his knowledge, Bowlin had never been involved in any sex offenses, nor in the molesting of women. He promoted Bowlin to Corporal and considered his performance of duty excellent (R 69).

Captain Charles P. Parrish testified he had been accused Bowlin's commanding officer for the preceding three months. Bowlin had not been involved in any sex offenses, was not belligerent and was a very good soldier (R 69-70).

5. The accused have been found guilty of rape as alleged in the Specification of Charge I. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1949, par. 179b). The competent evidence sustains every element of the offense. The record shows that the accused forcibly accomplished sexual intercourse with the prosecutrix despite the great and continuous degree of resistance offered by her.

The accused admitted having sexual intercourse with a woman on the night in question and in the general area where the rape occurred. They contended, however, that the person with whom they had intercourse for an agreed price consented willingly and cooperated fully in the act; further, that the person with whom they had intercourse was not the prosecutrix but a much younger woman.

It was established that Lily Derry, the victim of the rape alleged, was in fact raped at the time and place indicated in the Specification of the Charge. The condition of her clothes and belongings, as well as the physical injuries she suffered, reflected the nature of her resistance and the vicious character of the attack upon her. Medical examinations of the prosecutrix on the day following the offense disclosed injuries to her vagina.

The accused, admittedly, were in the area at the time the rape occurred. Shortly before they had been engaged in an assault and battery upon two Austrian women. If their activity had not been interrupted by the timely arrival of an armed guard, their actions in that incident might have culminated in rape. After this incident the accused met a woman and had sexual intercourse. Further, accused Dermott struck the woman, at least twice. We experience no doubt that both the prosecutrix in her testimony and, accused in their pretrial statements and in their testimony, were discussing the same incident. The coincidence of time and place, when considered with her manifest injuries, her identification of accused Dermott by sight, and accused Bowlin by the sound of his voice, and her story of what occurred that night, leave no doubt as to the identity of the accused (CM 325571, James, 74 BR 342, CM 317526, McClellan, 66 BR 355).

Accused have also been found guilty of assault and battery. The evidence conclusively shows that at the time and place alleged, accused Bowlin wrongfully pushed Hildegard Burgstaller to the ground and accused Dermott wrongfully pushed Anna Schrock to the ground, and warrants the findings of guilty of Charge II and the Specifications thereunder.

6. Accused Bowlin at the time of the commission of the offenses was 23 years of age. He had prior service of one year, nine months and five days. His current enlistment extends from 15 May 1948, and presently he is serving in the U. S. Zone of Austria. His AGCT score is "43" and he has no record of time lost under Article of War 107. He has had two punishments under AW 104, both for AWOL. His company commander rates his character as good and his attitude towards his duties as excellent. He has no record of previous convictions by courts-martial.

Accused Dermott at the time of the commission of the offenses was 22 years of age. He had prior service of three years, five months and two days. His current enlistment extends from 14 October 1948, and presently he is serving in the U. S. Zone of Austria. He has lost no time under Article of War 107, and has had no punishments under Article of War 104. His AGCT score is 105. His company commander rates his character as poor and his attitude towards his duties as unsatisfactory. He was convicted by Summary Court-Martial on 10 February 1949 for wrongfully appearing at Marburg, Germany, without proper authority.

7. The court was legally constituted and had jurisdiction of the persons 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 as to each accused, and

to warrant confirmation of the sentence as to each accused. A sentence to confinement at hard labor for life is authorized upon conviction of rape in violation of Article of War 92.

Robert J. Clancy, J.A.G.C.
Lewis S. Hull, J.A.G.C.
John L. Myers, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 339642

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal Euel A. Bowlin, RA 44042158, and Private Albert E. Dermott, RA 12283660, both of Heavy Tank Company, 350th Infantry, upon the concurrence of The Judge Advocate General the sentence as to each accused is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

17 February 1950

I concur in the foregoing action.
Under the direction of the Acting
Secretary of the Army, the term of
confinement as to each is reduced
to twenty (20) years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

8 March 1950

(GCMO 18, 21 March 1950).

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

CSJAGK - CM 339658

UNITED STATES	)	UNITED STATES ARMY, EUROPE
)	
v.	)	Trial by G.C.M., convened at
	)	Heidelberg, Germany, 17-18 November
First Lieutenant ALBERT SIDNEY	)	1949. Dismissal.
ANTHONY, JR., O-2020098, 7809 Sta-)	
tion Complement Unit, APO 403,)	
U.S. Army)	

OPINION of the BOARD OF REVIEW
McAFEE, BRACK and CURRIER
Officers of The Judge Advocate General's Corps

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 Judicial Council and 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 Albert S. Anthony, 7809 Station Complement Unit, did, at Rhine Ammunition Depot, APO 403-A, on or about 19 August 1949, dishonorably abuse the authority vested in him as an officer of the United States Army, by wrongfully and wilfully soliciting and obtaining, for his personal use, from Continental Allied personnel then under his command, the sum of seven hundred and twenty Deutsche Marks (720 DM), and about fifty-four (54) cartons of cigarettes.

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

Specification 1: In that First Lieutenant Albert S. Anthony, ***, did, at Rhine Ammunition Depot, APO 403-A, on or about 1 August 1949, gamble with enlisted men, to wit: Sergeant LeRoy C. Miller, Sergeant James R. Dallas, and First Sergeant Lyle O. Johnson, to the prejudice of good order and military discipline.

Specification 2: In that First Lieutenant Albert S. Anthony, ***, did, at Rhine Ammunition Depot, APO 403-A, on or about 31 August 1949, gamble with enlisted men, to wit: Sergeant

LeRoy C. Miller, Sergeant James R. Dallas, and First Sergeant Lyle O. Johnson, to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Specification and Charge I

It was stipulated that -

"*** from on or about 15 August 1949 to on or about 15 September 1949, the 96th Labor Supervision Company was an organization composed of one United States Army officer and five United States Army non-commissioned officers, whose primary function was to supervise the activities of the 4227th Labor Service Company which was an organization composed of about one hundred and fifty Polish nationals, including officers, non-commissioned officers, privates and recruits." (R 8)

The 4227th Labor Service Company was doing guard duty at the Rhine Ammunition Depot APO 403-A (R 9, 15,18).

At the time the offenses, charged herein, were alleged to have been committed the accused was the commanding officer of the 96th Labor Supervision Company.

Captain Stanislaw Hankiewicz was the Polish commanding officer of the 4227th Labor Service Company, a civilian guard company. About the end of July 1949 the accused stated to Captain Hankiewicz that he was in need of money and that he wanted to borrow money from the men in the 4227th Labor Service Company. Captain Hankiewicz told the accused that the men in the company did not have any money at that time. About fifteen days later the accused showed Captain Hankiewicz a bill for repairs on an automobile and stated that if he did not get the money to pay for the repairs he would lose his automobile. On 16 August the accused told Captain Hankiewicz that he would like to get all of the men together "and see if he could borrow money from them *** about the loan."

As a result of the last conversation between the accused and Captain Hankiewicz "there was a meeting," at which time Captain Hankiewicz told the Polish officers that the accused wanted to borrow money from the company. The accused spoke to the Polish "noncoms" through an interpreter (R 9-11).

Sergeant Josef Zwolak, supply sergeant and interpreter of the 4227th Labor Service Company, acted as interpreter between the accused and the noncommissioned officers of the 4227th Labor Service Company on or about 15 August 1949, and the following occurred:

"Q Now, on or about 15 August 1949, did you have occasion to talk with the accused about any matter?

A (The Interpreter) They talked together.

"Q What was that conversation about?

A About a loan to take the car out of the garage.

"Q What did the accused say about that loan?

A At the present he asked for their help to get his car.

"Q By 'their help' what do you mean?

A For a loan of money through the company.

"Q What, if anything, did you tell the accused?

A I told the Lieutenant that as company commander he can do what he wishes.

*

*

*

"Q For whom did you interpret, to whom?

A In the name of Lieutenant Anthony to the squad leaders. To the squad leaders.

"Q What did Lieutenant Anthony tell you to tell the squad leaders?

A In the best manner to get the loan and to get the car from the garage.

"Q Did the accused state how much of a loan he wanted?

A He didn't state how much money was needed.

"Q Did he state how much he would like to have from each man in the company?

A He has not.

"Q Did you explain to the squad leaders what the accused asked you to explain to them?

A (The Interpreter) He explained them.

"Q What did you explain to them?

A The Lieutenant asked for a loan and that he was leaving to America, and that he would like to take the car with him.

"Q Did he say anything about when he would repay the loan?

A If he could, he will pay before he leaves to America.

"Q What action was taken in the company as a result of the accused's request for a loan?

A They gave a sum of money and some cigarettes.

"Q What did they do with those cigarettes and that money?

A It was given to Lieutenant Anthony.

"Q Who gave it to Lieutenant Anthony?

A I, myself, gave it to him.

"Q Where did you get it?

A From the squad leaders.

"Q Was any record made of the men who had contributed to this loan?

A There was a list made.

"Q Who made it?

A (The Interpreter) Sergeant Zwolak did.

(The Witness) I did myself.

"Q What did you do with that list?

A I took the list to Lieutenant Anthony for his signature, and then I took it to the company commander -- to the First Sergeant, the Polish First Sergeant.

*

*

*

"Q In what form was the money which the tent leaders brought to you?

A Deutschemarks.

"Q How many Deutschemarks did they bring you?

A Somewhat over one thousand.

"Q How many cigarettes did they bring you?

A Fifty-four and a half cartons of cigarettes.

*

*

*

"Q At the time the accused requested the loan from the men in your company, did he say anything about cigarettes?

A He told me it could be either money or cigarettes." (R 19,20)

Lists were made which showed the names of the men contributing to the loan and the amount each contributed. When a man gave a carton of cigarettes the list showed that he gave 20 Deutschemarks.

The lists of names mentioned by Sergeant Zwolak were identified as Prosecution Exhibits 1-A through 1-K inclusive and received in evidence without objection. Sergeant Zwolak testified that the signature on each list was the signature of the accused. Each list contained the typed statement: "I have the above amount received," followed by the signature, "A. S. Anthony, Jr." These exhibits show 91 names with a total of 1810 Deutschemarks received by the accused (R 19-22, 26-28; Pros Exs 1-A through 1-K).

The members of the 4227th Labor Service Company were paid on the 15th or 16th of August 1949 and the loan was made on the 17th or 18th of August 1949. A Polish "private" receives 160 to 170 marks per month, \$5.00 in scrip, together with food, clothing and housing (R 17,24,25).

The men of the 4227th Labor Service Company were displaced persons and most of them had filed applications to emigrate to other countries. Emigration applications are handled by an independent emigration center at Mannheim, Germany. This center, however, sends the applications to the Supervision Company "and they attend to the matters and send it back to them," and "Every commanding officer of every supervision company has an opinion of the men and he can decide whether he can go or not." At the time the loan was made there was no talk about preventing people from emigrating. Captain Hankiewicz also stated, "As well as I know, the lieutenant has not kept anyone from going to America" (R 15-17).

It was stipulated that:

"*** by orders dated 19 August 1949, Heidelberg Military Post, the accused was relieved from his assignment at the 96th Labor Service Company, APO 403-A, and assigned to the Second Infantry Division, Fort Lewis, Washington; that he was ordered to report to Bremerhaven for processing prior to return to the Zone of Interior not later than 18 September 1949; that on 21 September 1949 orders were issued by the 7749th Staging Area, Bremerhaven, returning the accused to the 7809 Station Complement Unit, Heidelberg Military Post, with an EDCMR of 1 October 1949." (R 28)

On 16 September 1949 there was a roll call of the 4227th Labor Service Company, at which time the accused said "goodbye to everyone." A second roll call was held "just for the people who loaned money." The accused told these men that he was unable to repay the money but when he returned to America he would try to pay them with presents and

gifts. Some men had left the company before the accused departed for Bremerhaven and these men were paid by the accused. Some of these men were paid in cash and several of them took a radio as payment of the amount due them. By 6 or 7 October 1949 all of the men were repaid the money loaned to accused (R 13, 22-24).

In May of 1949 the accused had his automobile repaired by "Autohaus George von Opel and Company," at Offenbach, Germany. The charges for the repairs and a horn amounted to 4037 marks and 5 pfennigs. On 5 September 1949 the accused paid on this account 386 marks and 5 pfennigs, and on 15 September 1949 he paid an additional 100 marks. On 6 October 1949 the accused sold the automobile to Autohaus George von Opel and Company for the sum of 5151 marks. From the proceeds of this sale the accused's account with the company amounting to 3551 marks was paid and the accused received 1600 marks (R 50-53).

Specifications 1 and 2 of Charge II

On 1 August 1949 Master Sergeant Lyle O. Johnson, Sergeant James R. Dallas, both of the 98th Labor Supervision Company, and Sergeant LeRoy C. Miller of the 96th Labor Supervision Company were playing poker in the mess tent used by their organizations. The game began about 7:00 p.m. and continued until about 6:00 a.m. About three hours after the game started the accused entered the mess tent and he was "invited to play cards with us." The accused joined the game and played poker with them until after 5:00 a.m. They were using chips valued at twenty-five cents, fifty cents, and one dollar. On this occasion Sergeant Miller lost approximately \$200.00 (R 29-32; 35,36,39,40).

On 31 August 1949 Sergeants Johnson, Dallas and Miller were again playing poker in the mess tent when the accused entered the tent. The accused was again invited to join the game, which he did. This game lasted until two or three o'clock in the morning. The value of the chips on this occasion was the same as on 1 August 1949. On this occasion Sergeant Miller lost approximately \$100.00 (R 31,32,36,37,40,41).

4. For the Defense

On 23 August 1949 First Lieutenant Frank Edward Gettner reported to the 96th Labor Supervision Company as a replacement for the accused as company commander. The officers of the company were quartered with the enlisted men in tents and the officers and enlisted men ate in the same mess hall. Lieutenant Anthony left the company shortly after he was replaced by Lieutenant Gettner. Before leaving the station the accused gave Lieutenant Gettner the title and insurance papers on his car. He also told Lieutenant Gettner that he would send him money every month to be converted into marks and paid upon his debt to the garage.

When the debt against the car was paid Lieutenant Gettner was to sell the automobile and use the money to clear the accused's debts. The accused did not give him a list of the debts he owed but was going to mail him such a list. Later the accused called Lieutenant Gettner on the telephone from Heidelberg and requested the return of the papers pertaining to the automobile (R 44-46).

The accused was advised of his rights as a witness and elected to testify in his own behalf.

He stated that his birthplace was Little Rock, Arkansas, and that he would be 30 years of age on 25 November 1949. He graduated from high school and was working for Montgomery Ward when he enlisted in the Air Corps in May of 1941. After recruit training he was stationed at an air base on the Mojave Desert until October 1943 when he was sent to Camp Kilmer. He went to England from Camp Kilmer and from England to France in August of 1944. Early in 1945 he applied for Officers Candidate School. He was a staff sergeant at the time of his application. He graduated from Officers Candidate School and was commissioned in June of 1945, after four years and one month of service as an enlisted man. He was sent to a replacement depot where he was assigned to duty on Okinawa. He spent approximately five months on Okinawa and returned to the states where he was stationed with the Fifth Infantry Division at Camp Hamilton, Kentucky. In August 1946 he was notified to report for overseas assignment and sent to Europe. He spent about 14 months with various Labor Supervision Companies including the 96th Labor Supervision Company. He was on detached service with the Berlin air lift at Rhine-Main for four or five months. From February 1949 to June 1949 he was at Hanau as an executive officer of a labor supervision company. In June 1949 he was informed by the Labor Supervision Center in Frankfurt that they were sending a company to the French Zone and, since he had been with the company before, he was asked to take over the company. He was the only officer with the company. There were no separate quarters for officers and he lived in the same tent with the enlisted men of his company and the adjoining company. In regard to the offenses charged herein he testified:

"Q Lieutenant, will you explain to this court the conditions under which you obtained a loan from some of the members of your organization?

A Before -- while I was still in Frankfurt I had put my car in the garage in Offenbach for repairs. I had a contract with the German garage that they would do the work that I had requested for three thousand marks. I had it in writing from the foreman and signed by the -- I suppose he was the chief. He wasn't the man that owned the garage, but he acted in his place. Before I could -- or rather, the car was not to my

knowledge completed -- the job was not completed when I left Frankfurt, and after I got to RAD it wasn't very easy for me to get back up to Frankfurt in order to make arrangements with them, and while I was at RAD I received two letters from the firm, notifying me that the car was finished and that they would like payment. Well, I knew I would be going home shortly, and I didn't want to see this German garage get the automobile. I further saw that I wouldn't be able to get that many marks and pay off the car, and I stood to lose it to this German firm. Then I received a bill from them. That bill was for four thousand marks instead of three thousand. At one time we were -- I was in a conversation with several of the Polish men in my company and we were talking, and I said 'Well, it looks like the only thing I can do is just borrow some money from you boys and get the car out of the garage.' This was not one of the times I mentioned it to the captain, but just a remark made, with no intention of borrowing money at that time, but I thought that was the only possible solution to get the car out before I went home. And I mentioned it to the captain later on, and he told me the men had not been paid in quite a while, but he felt that at a later date it might be possible for me to get the money from the men, because he felt sure all the men in the company would want to help me out, and at a later date I asked him about it. This was the month -- this was in the latter part of August, and he said 'We will talk to the non-commissioned officers about it.' At a meeting that was called of the noncoms and the officers, in which we discussed the transfer, promotion and demotion of incompetent people we had in the company, at the close of the meeting the captain told the men about the loan. He asked the squad leaders and the platoon sergeants what they thought of the idea. At that time, though I don't recall it specifically, according to previous testimony I talked to them myself. The conversation in regard to the loan did not, to the best of my knowledge, last over five or six minutes. All the men present were -- they knew my position even before the captain mentioned it to them, with regard to the automobile, and they were all in favor of it, and they said they knew the men in the company would help me out. I knew when I borrowed the money from them that the money would be paid back and this -- I told them that it would be in the form of a loan and to show them that I didn't intend to take the money and not return it, I signed several receipts which have already been presented, to show them that I meant to keep my word in regard to paying the loan back. In September, around the 14th or 15th, I had received my orders to report to Bremerhaven on the 18th. I told the captain that I wasn't going to be able to pay the men back before I left, although I had already given one of the men a radio in an agreement with eight of the men that worked for me in the motor pool. They wanted a radio for

their tent, and since I couldn't carry it along with me, they accepted that as payment for their part of the loan. I told the -- I talked to the other men the morning I was to leave, and talked to the company as a whole. I said I appreciated their efforts and everything they had done for me, not in regard to the loan, but in regard to their duties and responsibilities, and after this meeting I talked to some of the men -- or most of the men, that is -- that had let me have, or had participated in the loan. At this time I explained to them that I wouldn't be able to get the car out before I left for the States. They -- the Polish people are not only generous, but they are -- they have a close feeling for anybody that they figure is a good friend, and they wanted to laugh it off and say 'Forget about it; twenty marks don't mean anything to me.' I told them no, that wasn't the way of it, that I had borrowed the money on a loan basis and that it would be paid back and that when I arrived in the States I would see that each one of them got his money or something of equivalent value, whatever they desired -- I left it up to them -- in repayment for their participation in the loan. The afternoon I left I turned over to First Lieutenant Gettner all the papers for my automobile. I told him that when I got to Heidelberg I would get a proper power of attorney for him from the Vehicle Registration Bureau and mail them to him from Bremerhaven, and that I would send him money to pay off the debt on my car and he was to get it out and sell it for me, and I would write him and tell him what disposal he should make of the money he received for the sale of the car. I picked up the power of attorney forms in Heidelberg, and when I arrived in Bremerhaven -- the day after I arrived there -- they notified me -- that was two days after I arrived there, on the 20th, they notified me that I was being recalled to Heidelberg. No one gave me any explanation for it, and I delayed mailing the power of attorney forms to Lieutenant Gettner. When I got back to Heidelberg I was notified by Colonel Jackson of the Heidelberg Military Post that I was being brought back for investigation in regard to some money I had borrowed from the displaced persons in my company. I asked him several questions, but he said that we shouldn't talk about it; that we would wait for an investigating officer and see what the investigation brought out, and it was two or three days later, when I found out I was going to be here for some time, that I called Lieutenant Gettner and asked him if he would bring me the papers for the car; that I was going to be here for some time and I would have a chance to dispose of the car myself. When I received the papers, I got permission from Captain McDaniel, my company commander, to go to Frankfurt and make arrangements with this Opel firm to take the car off my hands and pay me enough in return to pay off the debt that I owed at RAD. The first time

I went to Frankfurt in regard to selling the car we didn't get all the transaction completed, and I had to go back the following Saturday to finish up the transaction. I got an appraisal from an Opel dealer as to the value of the car and we made the necessary arrangements to turn the license plates in to the American Vehicle Registration, had the registration stamp voided, and we then went to the German Vehicle Bureau and had the papers changed over to the Opel firm. They paid me a balance of 1600 marks over and above the labor bill.

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"Q There has been testimony before this court that you received, in addition to Deutschemarks, a number of cartons of cigarettes. What happened to the cigarettes?

A I had the cigarettes in a car that belonged to Sergeant Miller, and these fifty-four cartons of cigarettes were stolen out of the car in Frankfurt.

"Q Why did you not pay the Deutschemarks that you collected to the company that made the repairs on your car?

A The 386 marks that were paid was part of that money I received. The balance was used to pay off a repair bill on a motorcycle which I had had some work done on. The 1600 marks I received from the Opel firm I turned over to Captain Hankiewicz, my Polish company commander, approximately two or three days after I received them.

"Q Lieutenant, to the best of your knowledge, are all of your obligations to the Polish company cancelled and paid?

A As far as I know or have been told, I have no obligations to anyone on this side of the ocean or on the other side. The 1600 marks that I turned over to Captain Hankiewicz paid off the balance that was owed to the Polish company. That is all I have.

"Q Lieutenant, there has been some testimony in regard to poker games. Did you have much money over what you went into the games with, when you finished?

A Well, on one occasion I had \$50 or \$60, but on another occasion I was minus approximately the same amount, which just about balanced out the card games."

On cross-examination he stated:

"Q On the first of August 1949, did you engage in a gambling game of poker with Sergeants Johnson, Dallas and Miller?

A Yes, sir.

"Q How long did you play in that game?

A I couldn't say the exact time, sir. Around, maybe, six and a half or seven and a half hours.

"Q On 31 August 1949 did you engage in another poker game with Sergeants Johnson, Dallas and Miller?

A Yes, sir.

"Q In those two poker games, were the values of the chips twenty-five cents, fifty cents and a dollar?

A They were, sir.

"Q Did the pots run between seven and twenty-five dollars?

A There might have been some as high as twenty-five, but the average pot was around ten, sir." (R 59,60,61,66,67)

5. Discussion

Specifications and Charge I

The evidence shows that during August and September 1949 the accused was the commanding officer of the 96th Labor Supervision Company and that his duties included the supervision of the activities of the 4227th Labor Service Company, a civilian guard company composed of about one hundred fifty Polish nationals, including officers, noncommissioned officers, and enlisted men. Immediately after the members of the 4227th Labor Service Company were paid in August of 1949 the accused addressed the officers and noncommissioned officers of the 4227th Labor Service Company and informed them that he desired to borrow money from the men in the organization. The noncommissioned officers in turn contacted the men under their command and as a result of the accused's request the officers and men of the 4227th Labor Service Company loaned the accused over a thousand Deutchemarks and fifty-four and a half cartons of cigarettes. The accused testified as a witness in his own behalf and admitted borrowing money and cigarettes from the men of the 4227th Labor Service Company in the amount set forth in the specification of Charge I.

In CM 248934, Murray, 31 BR 389, 398, the Board of Review said:

"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 (1943); II Bull. JAG, April 1943, p. 144). While the 'mere act of an officer borrowing money

from an enlisted man is an offense under A.W. 96, it is not an offense under A.W. 95 unless it is accompanied by such conduct on the part of the officer as evidences a moral delinquency' (CM 122920 (1918); Dig. Op. JAG, 1912-1940, sec. 453 (5)).

"The conduct which constitutes 'moral delinquency' falls into two categories. It may consist of (1) the use of dishonorable and disreputable methods in inducing or compelling the loan; or (2) of inexcusable and unduly prolonged delay in repayment, whether intentional or neglectful."

In CM 251459, Sprino, 33 BR 253, the accused was charged with a violation of Article of War 95 in that he wrongfully borrowed money from officers and enlisted men, all aviation students receiving flight instruction from the accused. The Board of Review said:

"The accused borrowed various amounts, totaling \$185, from an enlisted man and three officers, all of whom were his flying students. Because of their status as students, these three officers, regardless of their relative rank to accused, should be considered as occupying positions analogous to that of enlisted men. It is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man of his organization. However, such conduct constitutes an offense under the 96th Article of War and not under the 95th Article of War, unless the conduct of the officer is such as to indicate a moral delinquency on his part (Dig. Op. JAG, 1912-40, sec. 453 (5); Bull, JAG, April 1943, sec. 454 (19)). It is therefore necessary to examine the character of the conduct of accused in making these loans to determine if such constituted a violation of the 95th Article of War. *** The accused attempted to justify his conduct by saying he had been told by the bank that he could obtain another loan, and it was his intention to repay his students out of this second loan. However, the accused testified several times that he had tried to borrow the money from the bank prior to approaching his students, and had been told he could not negotiate a second loan until his first loan of \$200 was paid up, which would not be accomplished until January 1944. The accused's testimony concerning his knowledge as to his inability to obtain a second loan from the bank is contradictory, but the Board of Review is of the opinion that the accused's testimony as a whole indicates he knew he could not obtain any additional money from the bank at the time he made his representations as to repayment of the loans to the students. Accordingly, the Board is of the opinion that the accused's conduct at the time he obtained the loans from his students was a violation of Article of War 95."

While the members of the 4227th Labor Service Company were not officers and enlisted men of the United States Army they were nevertheless continental allied personnel (Polish civilian guards) employed by the United States Army and under the accused's supervision. Under these circumstances they may be considered as occupying positions analogous to that of enlisted men. It was shown that the accused as commanding officer of the 96th Labor Supervision Company made recommendations concerning the members of the 4227th Labor Service Company when they applied for emigration papers, and that most members of the company had applied for emigration papers. The pay of a private in the 4227th Labor Service Company was shown to be between 160 and 170 marks and five dollars in scrip in addition to food, clothing and housing.

The members of the 4227th Labor Service Company were displaced Polish nationals and exiles from their homeland. They were seeking to emigrate to a new country in order to better their conditions. They knew that the accused made recommendations on their applications for emigration papers. This fact alone would tend to coerce them into acceding to accused's request for a loan. It was also shown that prior to their pay day in August of 1949 the members of the Polish Guard Company did not have money with which to make a loan to the accused. It would therefore appear that these displaced persons were without funds other than their pay as civilian guards. Instead of borrowing money from recognized business sources the accused chose to solicit a loan from the virtually destitute displaced Polish nationals under his supervision. Suggestions of favors or possible injuries to them by the accused in his official capacities were implicit in the circumstances (CM 213993, Casseday, 10 BR 297, 322).

The Board of Review is of the opinion that the accused abused his authority in calling together the officers and noncommissioned officers of the 4227th Labor Service Company to discuss the obtaining of a loan to the accused from the men of the organization and in having the officers and noncommissioned officers solicit the individual members of the company for the loan, and that his actions in so inducing the loan were dishonorable and disreputable and a violation of Article of War 95.

Specifications 1 and 2 of Charge II and Charge II

The evidence shows, and the accused admitted from the witness stand, that on 1 August 1949 and 31 August 1949 the accused participated in a poker game with the enlisted men named in the specifications of this charge. The average "pots" in these games were about \$10.00. Each game lasted for several hours.

It is a well-established rule of law that gambling by an officer with enlisted men constitutes conduct prejudicial to good order and military discipline in violation of Article of War 96 (CM 283457,

Stallworth, 55 ER 97, 101; CM 286548, Welch, 56 ER 233, 239; CM 307028, Morris, 60 ER 49, 57; and cases cited therein).

6. Records of the Department of the Army show that the accused is 30 years of age and married. He is a high school graduate. Prior to entry into the Army he worked for Montgomery Ward at a salary of \$35 per week. He enlisted in the Army on 15 May 1941. On 21 June 1945 he was commissioned a second lieutenant, Army of the United States, and on 24 January 1948 he was promoted to first lieutenant. His efficiency reports for the period 13 July 1945 to 30 June 1947 vary in numerical ratings from 3.9 to 5.0, which are "excellent." His overall ratings show 080 for the period 2 October 1947 to 31 January 1948; 059 for the period 24 May 1948 to 31 August 1948; 056 for the period 1 September 1948 to 24 January 1949 and 070 for the period 1 March 1949 to 31 May 1949. On 28 October 1948 he was convicted of violating Article of War 96 in that he knowingly, willfully and wrongfully imported 486 cartons of cigarettes into the United States zone of occupied Germany in violation of a circular of the European Command and was sentenced to forfeit \$50.00 of his pay per month for ten months.

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

On leave

_____, J.A.G.C.

Joseph T. Brack _____, J.A.G.C.

Roger M. Currier _____, J.A.G.C.

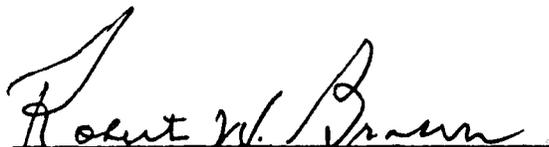
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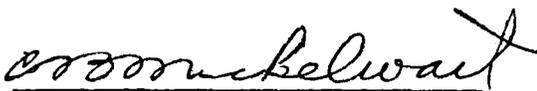
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

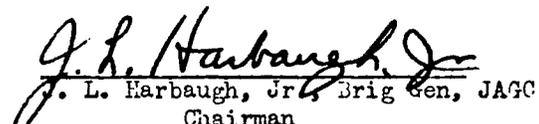
THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Albert Sidney Anthony, Jr., O-2020098, 7809 Station Complement Unit, APO 403, U.S. Army, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

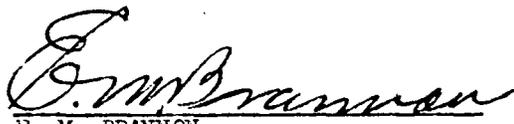

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

9 February 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

14 February 1950

(CCMO 8, 28 Feb 1950).



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

CSJAGH CM 339731

JAN 30 1950

UNITED STATES)

v.)

Second Lieutenant RAYMOND A.
PRATER, 0948594, Company H,
17th Infantry, APO 7, Unit 1.)

7TH INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Schimmelpfennig, Sendai,
Honshu, Japan, 30 November
1949. Dismissal.

OPINION of the BOARD OF REVIEW
O'CONNOR, SHULL; and LYNCH
Officers of The Judge Advocate General's Corps

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

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

Specification: In that Second Lieutenant Raymond A. Prater, Company H, 17th Infantry, a married man, did, at Sendai, Honshu, Japan, on or about 4 September 1949, conduct himself in a manner unbecoming an officer and a gentleman by wrongfully occupying a bed with a Japanese female, to wit, Toshiko Inugami, not his wife.

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

Specification: In that Second Lieutenant Raymond A. Prater, Company H, 17th Infantry, did, at Sendai, Honshu, Japan, on or about 4 September 1949, wrongfully strike Tadashi Hayasaka on the head with his hand.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit one hundred dollars (\$100.00) of his pay. The reviewing authority approved the sentence, but remitted the forfeiture imposed, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

On the night of 3 September 1949, Tadashi Hayasaka, a jeep driver for the 77th Motor Pool, went to a club to pick up an officer of his unit. When Tadashi arrived at the club the officer was not there (R 6, 7). Although Tadashi refused a ride to accused and another officer, they, nevertheless, got into Tadashi's jeep and had him drive them to the 172nd Hospital. Upon arrival there, accused and his companion had Tadashi drive them to the Railroad Transportation Office, and from there, toward Kawaramachi. En route, they had Tadashi stop the jeep. The officers alighted and one of them knocked on the door of a house. Later, the owner of the house approached Tadashi and inquired if he could speak English. Tadashi did not reply. Shortly thereafter the accused kicked the owner of the house. The officers got back in the jeep, accused occupying a front seat (R 7,9). The officers told Tadashi to drive in the direction of Camp Schimmelpfennig and on the way, they came upon two Japanese girls standing in the road (R 7,8). Accused told Tadashi to stop the jeep and when he failed to comply with the order accused slapped him in the face. The other officer asked what was wrong. Further on, a stop was made at a Japanese house. A Japanese girl came out and talked with the officers for a while and then the ride was resumed. Sometime around two o'clock, they stopped at another Japanese house which the accused entered. Accused came out and told Tadashi that he was going to remain at the house for the night. Tadashi took the other officer to Haranomachi and then returned to the motor pool where he reported the incidents of the evening to the "OD." (R 8,10)

At about 1:30 in the morning of 4 September 1949 accused, in a drunken condition, entered the house of Toshiko Inugami at #28 Tsubamezawa-Jyutaku, Sendai, Japan (R 13). Inugami was a dancer in a dance hall (R 15). Accused had visited her on two prior occasions but these visits had taken place in the early hours of the evening (R 15). After a brief conversation with her, he went outside saying he was going to send the jeep back. About ten minutes later he reentered the house, went to Inugami's bed, removed his shirt and trousers and, attired in "T" shirt and shorts, lay down "on top of the covers" (R 13,14). Seven or eight minutes later, when he was asleep, Inugami lay down on the bed "under the covers." At no time did accused make any improper advances toward her. Inugami was not married to accused (R 14).

In the meanwhile Sergeant First Class Willis M. McIntyre and Sergeant Robert H. Sullivan, military police investigators on duty at Sendai, were

called upon to investigate an alleged assault case (R 16,19). As a result of information received, they proceeded to #28 Tsubamezawa-Tyutaku. On approaching the house at that address they noticed an open window. McIntyre opened the window a little more and looking through the opening observed a soldier in bed with a woman (R 16). Both were "underneath the covers" (R 18). The woman, who was Inugami, awakened and asked McIntyre what he wanted. McIntyre inquired of Inugami who the man was, and she responded that it was a lieutenant and that McIntyre had better leave him alone (R 16). The man "slid" the covers down and sat up in the bed. McIntyre recognized him as accused and observed that he was wearing "OD" shorts and a "T" shirt (R 16,17). Inugami had on a white nightgown (R 18). McIntyre requested accused to accompany him to the police station. Accused eventually arose from the bed, had Inugami procure his trousers, dressed, and left the house with the military police (R 17,18).

It was stipulated "that if Captain William Bennett of Headquarters, 17th Infantry, were called as a witness, he would testify that the accused is a married man" (R 19).

b. For the defense.

Accused after being apprised of his rights elected to remain silent (R 20).

First Lieutenant Aud L. Tadlock, accused's company commander, testified that he would rate accused's efficiency as "very high excellent," or superior, and his character as excellent; that accused is an excellent officer; and that he desired accused to remain in his organization (R 20-21).

It was stipulated that Lieutenant Colonel Denzil L. Baker, accused's battalion commander, would testify that the efficiency rating of accused was excellent, and that he desired accused to remain in his organization (R 21).

It was also stipulated that identical testimony would be given by Captain Robert C. Kendrich, "S-3" of accused's battalion (R 21).

4. On the basis of accused's nocturnal peregrination on the night of 3-4 September 1949 as hereinbefore narrated, he has been charged with and found guilty of assault and battery in violation of Article of War 96, and of, as a married man, conducting himself in a manner unbecoming an officer and a gentleman by wrongfully occupying a bed with a Japanese female not his wife, in violation of Article of War 95. As to the former offense it was shown that accused unjustifiably slapped the face of Tadashi Hayasaka, a jeep driver, when the latter failed to

comply with accused's order to stop the jeep in which accused was riding, at a place where accused espied two Japanese females. This evidence warrants the findings of guilty of assault and battery in violation of Article of War 96.

Concerning the other finding of guilty, if the evidence introduced by the prosecution in support thereof is credible in its entirety it may be said of accused, as was said of Lot, that he "perceived not when she lay down nor when she arose" (Genesis 19:30-38). It is obvious, however, from its findings of guilty that the court did not give credence to the claim of Inugami, accused's bed companion and a witness for the prosecution, that she entered the bed after accused was asleep, nor was it incumbent upon the court so to do. By calling Inugami as its witness the prosecution did not place its imprimatur upon her entire testimony. Whether the prosecution is bound by the testimony of its own witnesses is the subject of two contrary rules in the Federal courts. Thus, in Cartello v. United States, 93 F.2d 412,415 (C.C.A. 8th 1937), it is stated: "Ordinarily, a litigant is bound by the testimony of his own witnesses, especially if that testimony is uncontradicted and there is no claim of mistake." The contrary rule is stated in United States v. Palese, 133 F.2d 600,603 (C.C.A. 3rd 1943):

"It is true that courts have held under other circumstances that a party is bound by the testimony of a witness whom he produces. We think that rule does not apply to prosecutions in a criminal case, however. In such a case the government does not necessarily give credence to a witness merely by introducing him, for it is the duty of the prosecution in a criminal trial to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused.

We are of the opinion that no lesser duty devolves upon the trial judge advocate of an Army court-martial, and when a trial judge advocate, in fulfillment of his duty, presents to a court all the evidence, favorable and unfavorable to his cause, it cannot be said that he vouches for the verity of the unfavorable. Consequently, in the instant case the trial judge advocate by introducing the testimony of Inugami did not stipulate to the truth of her testimony. In the final analysis the court was the sole judge of her credibility and was not bound to accept her "testimony in its entirety, but could accept that portion of the testimony which it deems credible and reject the remainder" (United States v. Reginelli, 133 F.2d 595 (C.C.A. 3rd 1943)). The case last cited is strikingly similar to the instant case in its testimonial aspect. The accused in the cited case was found

guilty of a violation of the "White Slave Law." It was undisputed that accused furnished transportation for the woman involved from Philadelphia to Miami. According to the woman's testimony, after her arrival at Miami, she, at her own insistence, shared accused's room for ten days and had sexual relations with him. The court commented on her testimony as follows:

"The jury was free to accept the facts * * *, which in the main came from the woman as a witness. The appellant insists, however, that the jury could not accredit so much of the woman's oral testimony unless they also accepted as verity the witness' further testimony that the idea of her going to Florida to join Reginelli originated with her and that he had frowned upon it, and also that he had objected to her going to his room when they arrived at his hotel in Miami. The probabilities of the woman's testimony were for the jury whose duty it was to accept and interpret such thereof as seemed credible and to reject the improbable. * * *."

We are of the opinion that in the instant case the court similarly rejected the improbable, i.e., the accused's unconscious occupancy of the bed with the female alleged.

The sole evidence, however, relating to the circumstance of accused's alleged subsisting marriage is the stipulation that "If Captain William Bennet * * * were called as a witness, he would testify that the accused is a married man." By entering into the stipulation accused did not admit the truth of the indicated testimony, nor did he disjoin the issue created as to his marital status by his plea of not guilty. "Such a stipulation does not admit the truth of the indicated testimony, nor does it add anything to the weight of the testimony" (MCM, 1949, par. 140d, p.190). This evidence tending to show accused as a married man at the date of trial, 30 November 1949, gives rise to a permissible inference that it tended to show he was a married man on 4 September 1949 (MCM, 1949, par. 125, p.151). In a criminal prosecution, however, where the fact of marriage is in issue, such a bald statement, while competent evidence upon the issue, is not sufficient to establish the fact of a valid marriage. The following statement from State v. Wakefield, 111 Or. 615, 288 Pac. 115, has been held by the Board of Review to encompass the law on the subject:

"No case has been cited, and we have been unable to find any case where a conviction for adultery has been sustained without evidence of the marriage ceremony, except where the statute has expressly provided that cohabitation and reputation shall be sufficient evidence of marriage." (Emphasis supplied) (CM 328797, Mansfield, 77 BR 195,205).

Admissions of the accused person, depending upon the circumstances, may be considered as tending to show a "formal marriage contract" (Miles v. United States, 103 U.S. 304,311). The statement that accused is a married man is no more than a declaration of accused's reputation. "The general reputation in the community of the existence of the marriage relation is competent as tending to prove such relation, but is not alone sufficient to establish it" (United States v. Higgeson, 46 Fed. 750). "There must be proof of actual marriage before the accused can be convicted." (Gaines v. Hernen, 65 U.S. (24 Howard 553,605). Except in jurisdictions recognizing common law marriages, evidence of reputation and cohabitation is not sufficient to establish a valid subsisting marriage in a criminal prosecution (Mansfield, supra). In CM 220518, Quigley, 13 BR 7, the only competent evidence pertaining to accused's subsisting marriage was contained in his unsworn statement as set forth:

"At the time I married here in Iceland I knew that the annulment proceedings were in progress in the case of my marriage at home. I was not trying to take advantage of my present wife, as I felt that the annulment would go through.
* * *"

The Board of Review held that such evidence was insufficient to establish the prior valid subsisting marriage alleged. An exhaustive search of the opinions reveal no cases where lesser than the proof we deem requisite has been held sufficient to establish a valid subsisting marriage (CM 228971, Tatum, 17 BR 1; CM 233132, Larch, 19 BR 323; CM 240832, Harrison, 26 BR 149; CM 326117, Nagle, 75 BR 159,174; CM 201563, Davis, 5 BR 255; CM 208296, Huskea, 9 BR 1; CM 216152, Wells, 11 BR 111; CM 218647, Moody, 12 BR 119; CM 227791, Fahres, 15 BR 357; CM 259933, Erno, 39 BR 57). So much of the finding, therefore, as finds that accused at the time alleged was a married man is not supported by the evidence.

The remaining allegations of the specifications are sustained by the evidence. The occupancy of a bed by accused with a woman not his wife is the essence of both the offense alleged and the offense which we find is supported by the record, the former being aggravated by accused's alleged subsisting marriage. In proving the offense alleged, it is readily perceived to be necessary to prove every element of the offense which we find is sustained by the evidence, and the latter, is, therefore, lesser and included in the former (MCM, 1949, par. 78c, p.77). The circumstances that accused is not shown to be married, and that there was no flagrant display of his conduct lead us to conclude that the offense established is a violation of the 96th rather than the 95th Article of War (CM 259755, Kelly, 39 BR 1,6).

5. Tadashi in his testimony, without objection, related the commission of another assault and battery by accused upon an unknown person,

which, except as to being fairly coincidental in time, was otherwise unrelated to the assault charged. Evidence of offenses not charged may be introduced against an accused when such evidence tends to establish his intent with respect to, or identity in connection with, the offenses charged. In the instant case, the evidence of the assault upon the unidentified person is unnecessary upon the question of identification, and intent is not an element of the offense of assault and battery. The consideration of the evidence of the uncharged assault was, therefore, error, but in view of all the circumstances shown by the record of trial, we are of the opinion that the error had no prejudicial effect upon the minds of the court, and hence, may be considered harmless.

6. Records of the Army show that accused is 29 years of age, married and the father of one child. He attended high school for three years and after separation from the Army in 1945 attended West Virginia Institute of Technology for four years. In civilian life he worked as a coal miner. He had enlisted service in the Army from 27 November 1940 to 5 July 1945. He was commissioned as Second Lieutenant, Infantry, National Guard of the United States in the Army of the United States, on 26 January 1948, and entered upon extended active duty on 9 June 1949. He had foreign duty in the British West Indies from 30 April 1941 to 6 December 1943, and is currently serving in Japan.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as hereinbefore noted, no errors injuriously affecting the substantial rights of accused were committed during trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support so much of the finding of guilty of the specification of Charge I as finds that accused did, at the time and place alleged, wrongfully occupy a bed with a Japanese female, to wit, Toshiko Inugami, not his wife; legally sufficient to support so much of the finding of guilty of Charge I as involves a violation of Article of War 96; legally sufficient to support the findings of guilty of Charge II and its specification; and legally sufficient to support the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of a violation of Article of War 96.

Robert J. Cannon, J.A.G.C.
Harold J. Smith, J.A.G.C.
W. H. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CSJAGU CM 339731

16 February 1950

U N I T E D S T A T E S

7th INFANTRY DIVISION

v.

Second Lieutenant RAYMOND
A. PRATER, 0948594, Company
H, 17th Infantry, APO 7, Unit 1.

Trial by G.C.M., convened at
Camp Schimmelpfenning, Sendai,
Honshu, Japan, 30 November 1949.
Dismissal

Opinion of the Judicial Council

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

1. The record of trial in the case of the officer named above has been submitted to the Judicial Council pursuant to Article of War 50d(2) for confirming action under Article of War 48c(3). The record of trial and the opinion of the Board of Review have been examined by the Judicial Council, which submits this opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused was found guilty of the following charges and specifications:

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

Specification: In that Second Lieutenant Raymond A. Prater, Company H, 17th Infantry, a married man, did, at Sendai, Honshu, Japan, on or about 4 September 1949, conduct himself in a manner unbecoming an officer and a gentleman by wrongfully occupying a bed with a Japanese female, to wit, Toshiko Inugami, not his wife.

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

Specification: In that Second Lieutenant Raymond A. Prater, Company H, 17th Infantry, did, at Sendai, Honshu, Japan, on or about 4 September 1949, wrongfully strike Tadashi Hayasaka on the head with his hand.

He was sentenced to be dismissed the service and to forfeit one hundred dollars of his pay. The reviewing authority approved the sentence, but remitted the forfeiture imposed, and forwarded the record of trial for

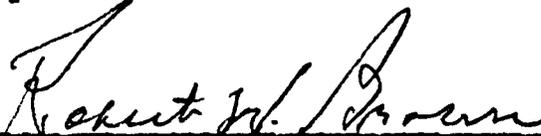
action under Article of War 48. The Board of Review expressed the opinion that the record of trial is legally sufficient to support so much of the findings of guilty of the specification of Charge I as finds that accused did at the time and place alleged, wrongfully occupy a bed with a Japanese female, to wit, Toshiko Inugami, not his wife; legally sufficient to support so much of the finding of guilty of Charge I as involves a violation of Article of War 96; legally sufficient to support the findings of guilty of Charge II and its specification; and legally sufficient to support the sentence as modified by the reviewing authority, and to warrant confirmation of the sentence.

3. The Judicial Council concurs with the Board of Review as to the statement of the evidence, its conclusion that the record of trial is legally sufficient to support the findings of guilty of Charge II and its specification and the sentence as modified by the reviewing authority. The Council also concurs in the conclusion of the Board that the evidence is legally insufficient to prove that accused was a married man at the time of the commission of the offense alleged in the specification of Charge I. The Council, however, does not concur with the Board as to the legal sufficiency of the record of trial to support so much of the findings of guilty of Charge I and its specification as involve a violation of Article of War 96.

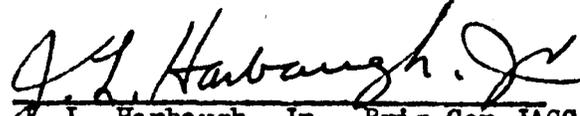
The gist of the offense sustained by the Board of Review as a violation of Article of War 96 is that accused at the time and place alleged wrongfully occupied a bed with a Japanese female, not his wife. It is to be noted that the accused was not charged with fornication and there was no direct evidence to the effect that he had engaged in illicit sexual intercourse. Nevertheless the principles expressed in the opinions of the appellate agencies in The Judge Advocate General's Office with respect to fornication as a military offense are considered to be pertinent guides in the determination whether disorderly or discrediting conduct is proved by the evidence in this case.

Fornication attended by disorderly or discreditable circumstances has been considered an offense in violation of the Articles of War (CM 522257, Hartman, 71 BR 111, 118). On the other hand fornication unattended by such circumstances has not been considered a disorder per se in violation of Article of War 96 (CM 317233, Martin, 66 BR 259). In the instant case no disorderly or discreditable circumstances were proven in connection with the offense here under consideration. The woman involved was called as a witness by the prosecution and her testimony, while establishing that the accused did share her bed for several hours, negated any other conduct on his part which could be regarded as disorderly or discreditable. Inasmuch as the precedents upon which the Council relies indicate that the attending circumstances established by the evidence would not have been such as to make an act of fornication punishable under Article of War 96, it follows that the evidence is legally insufficient to establish the legal wrongfulness of accused's conduct in being in bed with a woman not his wife.

4. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support the findings of guilty of Charge II and its specification and legally sufficient to support the sentence and to warrant confirmation thereof. In view of all the circumstances of the case, including the legal insufficiency of Charge I and its specification, the Council is of the opinion that the sentence should be commuted.


 Robert W. Brown, Brig Gen, JAGC


 C. B. Mickelwait, Brig Gen, JAGC


 J. L. Harbaugh, Jr., Brig Gen, JAGC
 Chairman

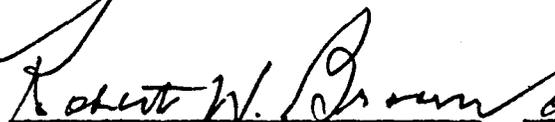
CM 339731

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

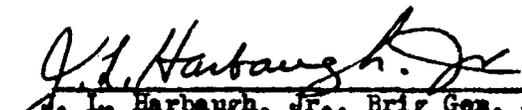
THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Raymond A. Prater, 0948594, Company H, 17th Infantry, APO 7, Unit 1, upon the concurrence of The Judge Advocate General, the findings of guilty of Charge I and its specification are disapproved. The sentence as modified by the reviewing authority is confirmed but commuted to a reprimand and forfeiture of Fifty Dollars (\$50.00) pay per month for three months. As thus commuted the sentence will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

16 February 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

17 February 1950

(GCMO 15, 1 March 1950).

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

CSJAGK - CM 339794

28 FEB 1950

UNITED STATES)
)
 V.)
)
 First Lieutenant DONALD B.)
 LeCLEIRE, O-1111733, CE,)
 46th Engineer Construction)
 Battalion, APO 929.)

I CORPS

Trial by G.C.M., convened at Kyoto,
Honshu, Japan, 1 and 2 December 1949.
Dismissal and total forfeitures after
promulgation.

OPINION of the BOARD OF REVIEW
McAFEE, BRACK and CURRIER
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

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

Specification: In that First Lieutenant Donald B. LeCleire, CE, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, during the period from about June, 1948, to about March, 1949, feloniously embezzle by fraudulently converting to his own use about One Hundred Fifty (\$150.00) Dollars face amount of military payment certificates, value about One Hundred Fifty (\$150.00) Dollars, the property of the Far East Command Motion Picture Service, entrusted to him as theater officer, First Engineer Construction Group, and 73d Engineer (L) Equipment Company.

CHARGE II and its Specifications: (Findings of not guilty).

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

Specification 1: In that First Lieutenant Donald B. LeCleire, ***, did, at Fukuoka, Kyushu, Japan, on or about 9 June 1949, with intent to deceive, wrongfully and unlawfully make and utter to Custodian Eighth Army Exchange Fund, at Branch Exchange 817, a certain check, in words and figures as follows, to-wit:

PEOPLES FIRST NATIONAL BANK
Hoosick Falls, N. Y.

9 June 1949

Pay to the Order of Custodian Eighth Army Exchange Fund \$100.00

One Hundred - - - - - Dollars

Donald B LeCleire
 Donald B LeCleire, 1st Lt CE
 01111733, 46th Engr Const Bn
 APO 929

in payment of a personal debt, he, the said First Lieutenant Donald B. LeCleire, then well knowing that he did not have and not intending that he should have sufficient funds in the Peoples First National Bank for payment of said check.

Specification 2: In that First Lieutenant Donald B. LeCleire, CE, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, on or about 9 June 1949, with intent to deceive, wrongfully and unlawfully make and utter to Custodian Eighth Army Exchange Fund, at Branch Exchange 817, a certain check, in words and figures as follows, to-wit:

PEOPLES FIRST NATIONAL BANK
 Hoosick Falls, N.Y. 9 June 1949

Pay to the Order of Custodian Eighth Army Exchange Fund \$100.00
 One Hundred - - - - - Dollars

Donald B LeCleire
 Donald B LeCleire, 1st Lt., CE
 01111733, 46th Engr Const Bn
 APO 929

in payment of a personal debt, he, the said First Lieutenant Donald B. LeCleire, then well knowing that he did not have and not intending that he should have sufficient funds in the Peoples First National Bank for payment of said check.

Specifications 3 and 4: (Finding of guilty disapproved by reviewing authority).

Specification 5: In that First Lieutenant Donald B. LeCleire, CE, 46th Engineer Construction Battalion, having received a lawful order from Lieutenant Colonel Wythe P. Brookes, CE, not in the future through any means of communication to contact a higher headquarters concerning his (the said First Lieutenant Donald B. LeCleire's) letter of resignation without the approval of the said Lieutenant Colonel Wythe P. Brookes, the said Lieutenant Colonel Wythe P. Brookes being in the execution of his office, did, at Fukuoka, Honshu, Japan, on or about 11 August 1949, fail to obey the same.

Specification 6: (Finding of not guilty).

Additional Charge I and its Specifications: (Findings of not guilty).

Additional Charge II: Violation of the 96th Article of War.

Specification 1: In that 1st Lt Donald B. LeCleire, O-1111733, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, between the dates of 13 April 1949 and 26 September 1949, with intent to conceal contents of same from his Commanding Officer, willfully, wrongfully and unlawfully secrete a letter, Office of Chief of Finance, file CSACF-EU 132/519055 Watters, N. S., X-201 LeCleire, Donald B, dtd 17 March 1949, subject: "Loss of Funds", with three indorsements.

Specification 2: In that 1st Lt Donald B. LeCleire, O-1111733, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, between the dates of 4 June 1949 and 26 September 1949, with intent to conceal contents of same from his Commanding Officer, willfully, wrongfully and unlawfully secrete a letter, Office of the Chief of Finance, file CSACF-EU 132/519055 Watters, N.S., dtd 18 May 1949, subject: "Tracer Letter", with three indorsements.

Specification 3: In that 1st Lt Donald B. LeCleire, O-1111733, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, between the dates of 25 August 1949 and 26 September 1949, with intent to conceal contents of same from his Commanding Officer, willfully, wrongfully and unlawfully secrete a letter, Office of Chief of Finance, file CSACF-EU 132/519055 Watters, N.S., dtd 8 August 1949, subject: "Unanswered Correspondence", with three indorsements.

Specification 4: In that 1st Lt Donald B. LeCleire, O-1111733, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, between the dates of 13 September 1949 and 26 September 1949, with intent to conceal contents of same from his Commanding Officer, willfully, wrongfully and unlawfully secrete a letter, Headquarters I Corps, file AG 130-P (LeCleire, Donald B), dtd 12 September 1949, subject: "Tracer Letter".

Specification 5: In that 1st Lt Donald B. LeCleire, O-1111733, 46th Engineer Construction Battalion, did, at Fukuoka, Kyushu, Japan, between the dates of 18 September 1949 and 26 September 1949, with intent to conceal contents of same from his

Commanding Officer, willfully, wrongfully and unlawfully secrete a letter, Headquarters I Corps, file AG 130-P (LeCleire, Donald B), dtd 17 September 1949, subject: "Unanswered Correspondence".

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge II and all specifications thereunder; Specification 6 of Charge III; Additional Charge I and all specifications thereunder, and guilty of all other 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 to become due after the date of the order directing execution of the sentence. The reviewing authority disapproved the findings of guilty of Specifications 3 and 4 of Charge III, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Charge I and Specification

It was stipulated that the accused was the duly appointed and acting theater officer of the First Engineer Construction Group and the 73d Engineer Light Equipment Company, both located at APO 929, during the period May 1948 to 31 May 1949 (R 17).

The First Engineer Construction Group was deactivated on 1 June 1949 and replaced by the 46th Engineer Construction Battalion. The personnel of the Group was transferred to the Battalion (R 51).

It was further stipulated that if Mr. George Inatsuka were present he would testify that he is the Chief of the Auditing Section, Japan Regional Office, Far East Command Motion Picture Division, Headquarters Eighth Army, and that in the ordinary course of business the Auditing Section receives and audits weekly financial statements and cash remittances submitted in conjunction with the financial statements of all theater officers in Japan including the theater of the First Engineer Construction Group and the 73d Engineer Light Equipment Company. That all theater officers of the occupation forces in Japan are required to forward at the end of each week a weekly financial statement and all funds in excess of the authorized working balance to the "FEC" Motion Picture Division, Japan Regional Office, Headquarters Eighth Army. That the records of said Auditing Section reveal that the theater officer of the First Engineer Group did not forward any remittances with his weekly financial statements covering the periods 29 October 1948 to 11 March 1949 but that the weekly financial statements for the period mentioned acknowledged a cash accountability each week for the cash retained and

that the name of the person signing the weekly financial statements as theater officer was First Lieutenant Donald B. LeCleire. That the theater officer of the 73d Engineer Light Equipment Company made no remittances during the period 18 November 1948 to 11 March 1949, but that the theater officer did submit weekly financial statements during the period mentioned and that these statements acknowledged a cash accountability equal to the total cash indicated as being retained and that the name of the person signing the weekly financial statement was First Lieutenant Donald B. LeCleire (R 18,19).

On 14 March 1949 Captain Harry C. Thoma, Inspector General's Department, Headquarters I Corps, went to the Headquarters of the First Engineer Construction Group, Fukuoka, Japan, to make an investigation concerning some alleged shortages in the "motion picture service account" of the First Engineer Construction Group and the 73d Engineer Light Equipment Company. Lieutenant LeCleire was the theater officer and he warned Lieutenant LeCleire of his rights under the 24th Article of War "and the pertinent Army Regulations." He audited the accounts of the two theaters by checking the weekly financial statements and the remittances submitted by the accused, against the number of tickets which had been sold, and determined that there should have been on hand "six hundred eight dollars and some cents." He asked for the money and the accused "stated he did not have it and could not produce it - he thought he had part of it, but not the entire amount." The accused further stated that he had kept the money in a drawer in his desk and from time to time as he needed money "for cigarettes and such things" he would purchase them from the funds in the desk but he was not certain what had happened to the entire amount. Captain Thoma did not count the money which the accused indicated was in the desk drawer because the accused "indicated that there was other monies beside what was supposed to be for the theaters in whatever amount of money was in his desk - that there was no segregation" (R 21-25).

The deposition of Miss Margaret Kukanich was received in evidence without objection by the defense as Prosecution Exhibit 1 (R 26). In her deposition Miss Kukanich testified that on 21 March 1949 the accused was called to testify in the Office of the Inspector General, Headquarters I Corps, APO 301, Kyoto, Honshu, Japan. She was a clerk-stenographer in the Office of the Inspector General and as such she made a record of the testimony given by the accused. The accused was asked if he understood his rights under the 24th Article of War and he replied, "Yes, sir." The provisions of paragraph 7, "Army Regulation 20-30" were read and explained to the accused. The accused was sworn and testified under oath. Her notes reflect that the following transpired:

"Fourteenth interrogatory: Did the accused in your presence acknowledge that he had been designated as Theater Officer in orders?

"Answer: Yes, sir.

"Fifteenth interrogatory: Did the accused acknowledge that he recognized that money collected from the sale of theater tickets and turned over to him was the property of the Far East Command Motion Picture Division?

"Answer: Yes, sir.

"Sixteenth interrogatory: Did he admit that he used some of the money collected from the sale of motion picture tickets and turned over to him for his own use?

"Answer: Yes, sir.

"Seventeenth interrogatory: Will you state the exact words that he said at that time:

"Answer: Question - 'Do you then admit that you used some of this money for your own use? Answer - I don't admit that what I did use was not going to be paid back; at times I'd borrow from it and then pay it back. Question - You did borrow from this money and use it for your own personal use. Is that what you are talking about? Answer - Yes, sir.'

"Eighteenth interrogatory: Was any mention made of the use of the money taken from the fund, and, if so, what use was indicated?

"Answer: There was mention made, as follows 'Well, there would be times when I would not have any funds with me, like some time I would run out of a carton of cigarettes in the office. Instead of borrowing money from a fellow officer, more naturally I would borrow it from this account.' Also, question - 'To your knowledge what is the largest amount that you ever took at one time from the theater fund which you used for yourself? Answer - I believe the largest amount was \$10.00. Question - What was this amount used for? Answer - Well, whenever I'd be short of money down at the office - sometimes they would come around collecting for monthly bills for meals.'

"Nineteenth interrogatory: Did the accused state how cash collections received by him were kept and safeguarded?

"Answer: Yes, sir; as follows: 'Did you attempt to retain the cash collections separate for the two theaters? Answer - No, sir, I did not. Question - Where was the money kept? Answer - The money, as I stated before, was kept in my desk in my office. Question - In a drawer? Answer - It was not in a drawer; it was - you pull the drawer all the way out and there was a space, about a foot - in there. Question - Was the drawer locked? Answer - No, sir.'

"Twentieth interrogatory: On 21 March 1949 did this accused produce checks or money orders to the investigating officer; if so, what were they, in what amounts were they drawn, and what were they for?

"Answer: Yes, sir; Lt LeCleire produced two checks, No 6 and 7, drawn on the City National Bank, Tokyo, Japan, in the amounts of \$100.00 and \$50.00, respectively, dated 20 March 1949, signed by Howard G. Peoples, Captain, CE, O1104335, representing a loan from Captain Peoples to make up the deficiency existing in his theater funds.

"Twenty-first interrogatory: Did Lt LeCleire acknowledge that the shortage which existed prior to the beginning of this investigation was at least in the amount of the checks produced at this hearing?

"Answer: Yes, sir.

"First cross-interrogatory: Do your notes indicate that complete restitution had been made at the time of the taking of the statement?

"Answer: My notes read, 'Do you have any additional information you care to give now in this investigation? Answer - The only additional information I have is that I am prepared now to submit the corrected copy of the 73d. I have two money orders here in the amount of \$143.00. (Money orders Nos 105434 and 105435, in the amounts of \$100.00 and \$43.00, respectively, payable to the FEC Motion Picture Service, verified as being in the possession of 1st Lt Donald B. LeCleire).'

"Second cross-interrogatory: In answer to a question as to where the money was to make up the cash accountability of \$462.40 on 16 March 1949, did Lt LeCleire state that the money was in his desk but that he would have to borrow some to make up the total?

"Answer: The notes read, 'This money in these money orders was in my desk. What I was waiting for I was trying to obtain some, borrow so I would have the total of the 73d and Headquarters.'

Specifications 1 and 2, Charge III

Captain Lincoln C. Drake, 46th Engineer Construction Battalion, became post exchange officer of Branch Post Exchange No. 817 in April of 1949.

Prior to the time Captain Drake became exchange officer of Branch Exchange No. 817 the Branch Exchange accepted two checks, each in the sum of \$100.00, from the accused. These two checks were returned to Captain Drake because of insufficient funds on deposit with the drawee bank. Captain Drake called the accused and informed him that the two

checks had been returned because of insufficient funds. The accused went to Captain Drake's orderly room and looked at the checks. He then informed Captain Drake that he had made arrangements with his brother for depositing the necessary amount of money in the bank to cover the checks. Captain Drake suggested that the accused contact his brother to see whether or not the money was in the bank before replacing the checks. On 9 June 1949, about one week after the foregoing conversation the accused went to Captain Drake and gave him two checks, in the sum of \$100.00 each, at which time Captain Drake gave the accused the two checks which had been returned to the exchange because of insufficient funds. Captain Drake prepared his monthly list of checks received "and deposited them with my cash and sales report at Depot #3." These checks were returned unpaid. Captain Drake identified the two checks given him by the accused on 9 June 1949 and they were received in evidence as Prosecution Exhibits 2 and 3, respectively, without objection by the defense (R 26-35). These two checks show that they were drawn by the accused on the Peoples First National Bank, Hoosick Falls, New York. They are each dated 9 June 1949 and are payable to the order of the Custodian Eighth Army Exchange Fund (R 26-35).

The deposition of Arthur A. McLinden, cashier of the Peoples First National Bank, Hoosick Falls, New York, was received in evidence as Prosecution Exhibit 6 over the objection of the defense that the exhibit attached to the deposition did not appear to be complete (R 35,36). In his deposition Mr. McLinden testified that the accused maintained a checking account in the Peoples First National Bank of Hoosick Falls, New York, and he attached a certified copy of the ledger sheet of accused's account for the months of June, July, August and part of September 1949. He also testified that on 13 July 1949 two checks in the amount of \$100.00 each, drawn on accused's account, were presented to the bank for payment and that payment was refused because there were not sufficient funds to pay them. The ledger sheet attached to the deposition shows that on 6 June 1949 the accused's balance in the bank was \$49.28 and that from that date until the last entry shown under date of 13 September 1949 accused's account never exceeded the sum of \$49.28. On 13 September 1949 his balance was \$29.88. The ledger also shows a \$20.00 deposit in June, July, August and September 1949. Mr. McLinden testified that these deposits were "from U S Army paymaster's office. Amount \$20 per month."

Specification 5, Charge III

Lieutenant Colonel Wythe P. Brookes was the commanding officer of the First Engineer Construction Group and the accused was the adjutant of that Group when it was deactivated on 1 June 1949 and replaced by the 46th Engineer Construction Battalion. Colonel Brookes became the Commanding Officer of the 46th Construction Battalion and the accused became the Battalion Adjutant. On 15 May 1949 the accused submitted a letter of resignation from the service. Colonel Brookes testified that in June 1949 the following occurred:

"Q. Were any instructions ever given to Lieutenant LeCleire?

"A. They were, prior to the discussion on this letter in question.

"Q. On approximately what date?

"A. Around the 24th of June.

*

*

*

"A. That Lieutenant LeCleire would not, through any means of correspondence, message, or any other method, contact a higher headquarters concerning the return of his letter of resignation. The only method through which he could do this in the proper manner would be in accordance with the provisions of AR 600-275, which stated that a request for return could be submitted through channels.

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"Q. Directing your attention once again to the instructions you gave Lieutenant LeCleire not to correspond with higher headquarters except through channels, will you state what Lieutenant LeCleire told you about that correspondence?

"A. You mean further correspondence?

"Q. Did you ever have occasion to speak to Lieutenant LeCleire further concerning the order you gave him in June?

"A. I gave that order subsequent to several previous instances where contact was made with either this Headquarters or Eighth Army concerning the letter of resignation submitted by Lieutenant LeCleire. Between that time and the submission of the information copy of the request for the return of his resignation, there were no additional instances that I was aware of" (R 54,55,56).

This order was given after a radiogram had been sent to the Eighth Army and several telephone calls had been made to I Corps and Eighth Army concerning the letter of resignation and after Colonel Brookes had been required by his superior to explain why these communications had not been made through military channels (R 62).

On 4 August 1949 the accused submitted in writing a request to The Adjutant General, through the Commanding General, I Corps, that his letter of resignation be returned to him. This letter and the indorsements thereon were introduced as Prosecution Exhibit No. 14 without objection by the defense (R 50). This exhibit shows the accused's request for the return of his resignation as the basic communication. The first indorsement thereto is by Colonel Brookes as Commanding Officer of the 46th Engineer Construction Battalion to Commanding General, I Corps. The succeeding four indorsements are by successively higher headquarters including General Headquarters, Far East Command. The fourth indorsement by General Headquarters, Far East Command, reads in part as follows:

"GENERAL HEADQUARTERS, FAR EAST COMMAND, APO 500, 23 AUG 1949

TO: Commanding General, Eighth Army, APO 343

Returned without action in view of Department of the Army

radiogram WCL 36190, 19 August 1949.

BY COMMAND OF GENERAL MacARTHUR:

/s/ Charles A. Rowan
 CHARLES A. ROWAN
 Major, AGD
 Asst Adj General"

Colonel Brookes was shown Prosecution Exhibit 14 and identified his signature on the first indorsement thereto. Upon being asked to state the circumstances surrounding or connected with that particular piece of correspondence Colonel Brookes stated that he received a telephone call from Headquarters I Corps, after which he took the following action:

"***I called Lieutenant LeCleire in and discussed the matter with him and he said he did not think he had communicated in any way with the Department of the Army concerning the matter. I reminded him of the fact that I Corps apparently had a radiogram sent by the Department of the Army, in which they stated they had information concerning Lieutenant LeCleire's request for the return of his letter of resignation. He then stated that approximately three days after he submitted his letter of resignation through normal channels, he did stamp a copy 'information' and send it direct to the Department of the Army." (R 54)

Prosecution Exhibit 15 was identified as being a classified document which had been received at I Corps. It was received in evidence without objection by the defense (R 71,72). This exhibit consists of an unsigned copy of the accused's request to The Adjutant General for the return of his tender of resignation as the basic communication with four indorsements. The basic communication is stamped "information copy." The first indorsement was to the Commanding General, I Corps, and was prepared for Colonel Brookes' signature as the commanding officer of the 46th Engineer Construction Battalion. The second indorsement reads as follows:

"AGPO-S-C 201 LeCleire, Donald B. 2nd Ind CTD/mjf/1D735
 (4 Aug 49)
 AGO, Department of the Army, Washington 25, D.C. 19 August 1949
 TO: Commander-in-Chief, Far East Command, APO 500, c/o Postmaster,
 San Francisco, California

1. For appropriate action.
2. Withdrawal of resignation, for the good of the service, submitted by First Lieutenant Donald Burdick LeCleire, O1111733, CE, has been approved by the Department of the Army. Lieutenant LeCleire

will be tried by court martial.

BY ORDER OF THE SECRETARY OF THE ARMY:

1 Incl Adjutant General
Resignation dtd 10 May 49
w/20 Inds & 3 Incls"

The third indorsement reads as follows:

"GENERAL HEADQUARTERS, FAR EAST COMMAND, APO 500, 30 AUG 1949

TO: Commanding General, Eighth Army, APO 343

For necessary action in compliance with paragraph 2, 2d Indorsement.

BY COMMAND OF GENERAL MacARTHUR:

/s/ C. A. Beall, Jr.
C. A. BEALL, JR.
Lt Col, AGD
Asst Adj Gen

1 Incl
n/e"

It was stipulated that if Lieutenant Colonel C. A. Beall, Jr., were present in court that he would testify that -

"*** he is an Assistant Adjutant General at GHQ, FEC, APO 500, that he is in charge of the Officers' Branch, Personnel, Adjutant General Section, GHQ, FEC, APO 500; that in the course of his duties as an Assistant Adjutant General, GHQ, FEC, APO 500, and in the normal course of business, and on 30 August 1949, he signed the third indorsement to letter, Headquarters 46th Engineer Construction Battalion, APO 929, subject: 'Request for Return of Letter', dated 4 August 1949; that the second indorsement forwarding the correspondence to the Commander-in-Chief, Far East Command, APO 500, apparently was prepared in the Adjutant General's Office, Department of the Army, Washington 25, D.C., on 19 August 1949; that there is no record of this correspondence ever having been received in GHQ, FEC, prior to the receipt from the Department of the Army on 30 August 1949, but that a letter similar to basic communication had been previously received through channels from Headquarters Eighth Army." (R 18)

Specifications 1,2,3,4, and 5, Additional Charge II

From January 1949 to 16 October 1949 Lieutenant Colonel Aloysius

Seipel was the Assistant Adjutant General of I Corps. On 16 October 1949 he became the Acting Adjutant General of I Corps. His duties included the receiving and dispatching of official correspondence originating or channeling through Headquarters I Corps. He identified Prosecution Exhibit 7 as being a communication originating from the Department of the Army, Office of Chief of Finance. This communication had been received at I Corps through channels. The basic communication reads as follows:

"DEPARTMENT OF THE ARMY
Office of the Chief
of Finance
Washington 25, D. C.

CSACF-EU 132/519055 Watters, N. S.
X 201 Le Cleire, Donald B.

17 March 1949

SUBJECT: Loss of Funds

TO: Commander-in-Chief
Far East
APO 500, c/o Postmaster
San Francisco, California

1. Attention is invited to the attached copies of letters from this office, dated 6 January 1948 and 27 February 1948, addressed to the attention of Lieutenant Donald B. Le Cleire, O-1111733, CE, to which this office has no record of receipt of reply.

2. In view of the time that has elapsed, it is requested that Lieutenant Le Cleire be called upon to reply to the correspondence referred to above without further delay.

FOR THE CHIEF OF FINANCE:

2 Incls	/s/ C. C. Green
1. Cy ltr 6 Jan 48	C. C. GREEN
2. Cy ltr 27 Feb 48	Major, FD
	Asst, Rec & Disb Div "

The letter dated 6 January 1948 referred to in this communication reads as follows:

"FINEU 132/519055 Watters, N.S.
x 201 Le Cleire, Donald B.

6 January 1948

SUBJECT: Loss of Funds

TO : Commanding Officer
 1st Engr. Const. Group
 APO 929, c/o Postmaster
 San Francisco, California
 ATTN: Lt. Donald B. Le Cleire
 O-1111733

1. This office is in receipt of a Report of Board of Officers convened to investigate and fix responsibility for the loss of funds intrusted to you by Lieut. Col. A. H. Miller, F.D., 172nd Finance Disbursing Section, whose accounts were transferred to Captain N. S. Watters, FD.

2. The records indicate that the original intrustment was in the amount of eight thousand two hundred forty-six dollars and eighty-eight cents (\$8246.88) and that vouchers were received accounting for two thousand one hundred ninety-three dollars and thirty-eight cents (\$2193.38) and five thousand five hundred eighty-six dollars and twenty-one cents (\$5586.21) leaving a balance outstanding of four hundred sixty-seven dollars and twenty-nine cents (\$467.29). There is no information as to whether that amount is a loss of cash or loss of vouchers. In the event vouchers for that amount are in your possession, it is requested they be furnished this office, or if you have information as to the disposition made thereof it is requested this office be advised. It is also requested that this office be furnished a certificate attesting to all facts known to you relative to this balance due the United States.

FOR THE CHIEF OF FINANCE:

/s/ C. C. Green
 Major, FD
 Asst, Rec & Disb Div

A CERTIFIED TRUE COPY:

/s/ T. W. Dean
 T. W. Dean, WOJG, USA"

The first indorsement to the letter of 17 March 1949 was by General Headquarters, Far East Command, and addressed to the Commanding General, Eighth Army. The second indorsement was by Headquarters Eighth Army, to the Commanding General, I Corps. Lieutenant Colonel Seipel placed a third indorsement on this communication, which reads as follows:

"AG 130 - P 3rd Ind APR 12 1949 WM/js

HEADQUARTERS I CORPS, APO 301,

TO: Commanding Officer, 1st Engr. Const. Group, APO 929
ATTN: Lt. Donald B. Le Cleire, O-1111733

For compliance with basic communication.

BY COMMAND OF MAJOR GENERAL COULTER:

2 Incls:
n/e

/s/ A. Seipel
A. SEIPEL
Lt Col, AGD
Asst Adj General"

This basic communication with inclosures and indorsements was then forwarded to the Commanding Officer, First Engineer Construction Group (R 37-39, Pros Ex 7).

Lieutenant Colonel Seipel also identified Prosecution Exhibit No. 11 as being papers received by the Adjutant General's Section, Headquarters I Corps, and which had been dispatched by I Corps in the normal course of business. This exhibit was received in evidence without objection by the defense (R 45,46). Prosecution Exhibit 11 consisted of the letter described in Specification 3 of Additional Charge II. There were four inclosures with the original communication, the fourth one being the tracer letter described in Specification 2 of Additional Charge II. This communication had been sent to the Commanding Officer, 46th Construction Battalion, by third indorsement (R 44,45, Pros Ex 11).

Lieutenant Colonel Seipel identified Prosecution Exhibit 12 as being a tracer letter which had originated at Headquarters I Corps, and which was addressed to the Commanding Officer, 46th Engineer Construction Battalion. (This letter is the one described in Specification 4 of Additional Charge II.) Prosecution Exhibit No. 12 was received in evidence without objection by the defense (R 45,46).

Lieutenant Colonel Seipel identified as Prosecution Exhibit 8 as being a letter dated 17 September 1949, which had originated at Headquarters I Corps and which was addressed to the Commanding Officer, 46th Engineer Construction Battalion. (This letter is the one described in Specification 5 of Additional Charge II.) It was mailed to the addressee by registered mail. Prosecution Exhibit 9 was the receipt for registered article No. 1044 as issued by the Post Office Department when this letter was mailed. Prosecution Exhibit 10 was a "Return Receipt" for registered article No. 1044. This receipt was dated 19 September 1949 and signed "Donald B LeCleire 1st Lt CE" as "addressee's agent." Prosecution Exhibits 8, 9 and 10 were received in evidence without objection of the defense (R 40-44).

The letters mentioned herein were not brought to the attention of Colonel Brookes, the commanding officer of the 46th Engineer Construction Battalion. Colonel Brookes received a telephone call from Headquarters

I Corps about the 23rd or 24th of September 1949 relative to unanswered correspondence. He thereupon asked Lieutenant LeCleire about four or five letters. Lieutenant LeCleire gave Colonel Brookes the correspondence introduced as Prosecution Exhibit 12 and "a carbon copy of one other letter that had an indorsement that he had sent through channels" (R 53). This carbon copy of the letter produced by the accused was introduced as Prosecution Exhibit 13 without objection by the defense (R 49). The exhibit (except the certificate attached thereto) reads as follows:

"AG 130 - P

3rd Ind

AMB/sn

11 Jun 49

Headquarters I Corps, APO 301

TO: Commanding Officer, 46th Engineer Cons Bn, APO 929

1. Correspondence referred to in preceding indorsement was forwarded to 1st Engineer Construction Group, by 3rd indorsement, this headquarters, file AG 130 - P, dated 12 April 1949.
2. Request reply to this headquarters not later than 11 June 1949.

BY COMMAND OF MAJOR GENERAL COULTER:

Asst Adj General

"4th Ind.

HEADQUARTERS 46th ENGINEER CONSTRUCTION BATTALION, APO 929
15 September 1949

TO: Commanding General, I Corps, APO 301

1. Attached herewith is a certificate, which as near as possible was prepared in November 1946 and mailed to the Chief of Finance, Washington, D.C. in regards to this matter.
2. The last known military address of the following named officers who were the Labor Officers mentioned in the certificate are as follows; statements from these officers can substantiate inclosed certificate., is attached:
 - 1st Lt George A Smith, Company A 544th EB&BR, APO 660
 - 1st Lt George W Nelson, Company B 544th EB&BR, APO 660
 - 1st Lt Bernard Shook, Company C 544th EB&BR, APO 660

1 Incl:
As indicated

DONALD B LeCLEIRE
1st Lt., CE
Adjutant"

When the accused handed Colonel Brookes the two pieces of correspondence he stated "that he had not received or seen the other pieces of correspondence" (R 53).

On 28 September 1949 Lieutenant Colonel John H. Casper and Lieutenant Colonel Brookes made an inspection of the desk used by the accused in the Headquarters of the 46th Engineer Construction Battalion, at which time they found an accumulation of between 30 and 33 pieces of personal mail, two soldier deposit books, one civilian pay check, and between 20 and 40 pieces of official correspondence. Some of this official mail was found in the desk drawer and some was found behind the desk drawers. Only about three of the pieces of personal mail had been opened. Two of the personal letters were registered letters (R 52,53,56,57,67-70).

Prosecution Exhibits 7 and 11 were found behind the drawers of Lieutenant LeCleire's desk and Prosecution Exhibit 8 was found in the top drawer of the desk (R 52,53).

4. Evidence for the Defense

Kathryn LeCleire, the accused's wife, testified that during 1943 she was a "WAC" stationed at Bend, Oregon. She met the accused on 8 June 1943 and they were married on 10 July 1943. Twelve days after their marriage the accused was transferred to North Carolina "because we were married." She joined the accused in September of 1943. The accused was "shipped overseas Easter Day and I did not see him again until January 1946, by which time I had a baby." The accused was like a stranger upon his return and they did not live as husband and wife. They could not find a place in which to live for about six months. Three months after they established a home the accused was again sent overseas. The accused left the States on 1 January 1947 on his present tour of duty, and was due to return to the United States in June 1949. She joined the accused in June 1947 at Amagi, about 29 miles from Fukuoka, where she lived in a "BOQ" with a captain and his wife and a "First Lieutenant - a bachelor officer." She became involved with the single officer and had what she "thought was a love affair." She told her husband of the affair and she "thought he would go crazy." The lieutenant returned to the United States in November 1947. They moved to Fukuoka. The accused was adjutant of the First Engineers where:

"*** I had a gay time - I wanted to be an Army wife, but I thought it took high living and was very extravagant, all of which time I was very mean to Don. He never did anything right - I thought he was stupid - we just fought. Every time he was home I would never let him even so much as tell my little girl not to do something, until it got to where he didn't even want to come home. Then it was fighting all the time." (R 83).

Colonel Hawkins was the accused's commanding officer and in December 1948 he was killed. The accused believed that Colonel Hawkins was murdered. The night Colonel Hawkins was killed the accused "came home and sat and cried and cried. This went on for days on end - he wouldn't talk or say anything." The accused's attitude toward his work began to change. He came home at night "and sat and read *** he didn't care." He stated that Colonel Brookes treated him as an office boy and not as an adjutant. Prior to 11 June 1949 the accused told her that he was sending her home. On 11 June 1949 she was at a party at Colonel Brookes' home. She asked Colonel Brencherhoffer about when she would be going home. Colonel Brencherhoffer told her that the only papers he had seen was her husband's resignation from the Army. This was the first knowledge that she had of her husband's resignation. "I was shocked and upset and went down to see my husband. Don never said a word. I came home and I took poison, then I called my husband and asked him to come home - I told him what I had done. He was OD and he didn't come home so I called this friend of mine and she called the MPs ***." She begged the accused to recall the resignation. The accused told her that he had sent a "TWX up there" and gave her a copy of it. She went to the Signal Office and discovered that her husband had not sent the TWX. She attempted to jump out of the window but was prevented from jumping by her husband. The next day she called Eighth Army and found that the accused's resignation was at that headquarters. She called Captain Emery and asked him to request the return of the accused's resignation. Captain Emery stated that he could not do anything until authorized by his colonel. She took the copy of the TWX given her by the accused and with the help of "Buck Bachtell, Adjutant of Military Government" drafted a TWX and dispatched it to Eighth Army. About two weeks later Colonel Brookes called her in and asked if she had sent a TWX, to which she replied that she thought it was a telegram. She requested Colonel Brookes to help her husband, but he stated that nothing could be done. Later she "found that under AR 605-275 you could recall papers and I made my husband submit a paper recalling them and taking the court-martial." During cross-examination, she stated:

"Q. Did Colonel Brookes ever give you and your husband a direct order not to communicate with higher headquarters?

"A. Yes, sir, after I sent the TWX, and I told my husband that I would not contact anyone.

"Q. Did you thereafter contact anyone?

"A. No, sir, I did not." (R 80-68)

The accused was warned of his rights as a witness and elected to make an unsworn statement. He stated that he was born in Hoosick Falls, New York, on 18 May 1917. His father died in 1931. He worked his way through high school and one year of college, but was forced to discontinue college because of lack of funds. In October 1941 he enlisted in the Army and

by 23 December 1942 had risen to the rank of "buck sergeant" when he was sent to Engineer Officers Candidate School. He graduated from Officer Candidate School and was stationed at various posts in the United States until April 1944. He served in New Guinea and Japan before returning to the United States in January 1946. He earned the following "citations and awards": American Defense ribbon, American Theater ribbon, Asiatic-Pacific Theater ribbon with arrowhead and three bronze stars, World War II Victory medal, Army of Occupation Medal for Japan and the Philippine Liberation medal with one bronze star. He identified a statement he made to a Medical Board convened at the 118th Station Hospital. Concerning this report he stated:

"*** I made this statement to be included in their report. In the first paragraph here, I mention that I felt that I should go to the hospital for a psychiatric examination because there were times that I would not recall incidents that people would call my attention to. I had got worked up at times - I had started feeling this after - it was after Colonel Hawkins' death. Why that was, I never knew. Maybe it was accumulation of duties that I had, and more or less domestic troubles that was causing me to feel that something was wrong with me mentally. I had not mentioned this to anyone, but approximately at the time that I received orders to report to the 118th Station Hospital for this Medical Board, I was preparing myself to enter the hospital for such an examination." (R 95)

Without conceding any criminal liability for his actions he stated:

"At this time, I am in a position to make restitution on these four checks. Two of them I never had any opportunity to make restitution on, and the other two checks I had such a short period of time to make restitution that it was impossible. Colonel Brookes gave me twenty-four hours to make restitution and at that time, it was impossible for me to get the money to make the restitution, but at this time I am ready to. This is the first opportunity that has been offered me." (R 95)

The proceedings of a Board of Officers, convened at the 118th Station Hospital, APO 24-5, on 11 October 1949, was introduced in evidence as Defense Exhibit A with a stipulation that the various officers who testified before the Board would if present in court testify substantially as they testified before the Board (R 88,89). In their testimony before the Board of Officers Lieutenant Colonel W. P. Brookes, Major Harry I. Conklin and Captains Melvin R. Poer and Lincoln C. Drake, all of the 46th Engineer Construction Battalion, detailed to the Board what they knew concerning the manner in which the accused performed his duties. They all stated

that they believed that the accused knew right from wrong but that his actions in letting his work accumulate for days at a time appeared abnormal. Colonel Brookes also stated:

"A. He knows right from wrong, but he definitely from the things that he has done is not able to carry out the right for some reason because to any one who knows the whole story it is impossible to believe that he did all this." (Def Ex A, p 7)

Lieutenant LeCleire stated to the Board:

"A. At times, I have felt that I have been doing something wrong for a reason I could not understand.

"Q. Would you care to elaborate?

"A. Yes, I kept those things to myself all the time and more or less tried to hide them from my wife. I have felt that there is something wrong, and I would like to find ways of correcting that wrong.

"Q. You say that you have felt that there is something wrong? What do you mean by 'something'?

"A. I mean something wrong with me personally. What makes me do these things.

"Q. Is it something that you don't have control over?

"A. I would say that I don't have control over it.

"Q. Are you aware at the time that those things are wrong that you are doing?

"A. I am aware that it is wrong." (Def Ex A, p 13)

He then made a personal history statement to the Board.

Major Jerome P. Knight, Fukuoka Civil Affairs Team, testified that:

"A. Approximately 2 to 2½ months ago, Lt LeCleire asked me to defend him on a charge involving misappropriation of funds of the theater of the Engineers. The only point mentioned was the misappropriation of funds. Since that time I have on two different occasions received additions to the charges which entailed the defendant. At no time did he give his appointed defense the full list of charges on which he expected to be tried and yet he expected me to give him adequate defense. As a matter of fact it was not until the talk with the Corps Engineer Officer that I became aware of the full extent of the charges.

* * *
 "Q. Have you had dealings with Lt LeCleire which would indicate

to you that he did not know right from wrong?

"A. Possibly on the question of the development of additional charges which he did not mention to me. Also the fact that certain charges were never made known to Mrs LeCleire on the basis that he preferred to carry the burden of these charges on his own shoulders without confiding in her.

"Q. Is there anything about his conduct in your opinion that could be explained by an abnormal degree of shortsightedness? What is your opinion as to what seems to be the basis of his conduct?

"A. As a matter of my opinion he lacks a slight shade of appreciation of the difference between right and wrong. He considers wrong as correct until he is corrected. I feel that some of the charges under which he is to be tried were the result of a lack of feeling of the degree of wrong involved." (Def Ex A, pp 19-20)

The Board made the following findings:

"The board having carefully considered the evidence before it finds:

"1. That the accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"2. That the accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

"3. That the accused does possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

"Minority Recommendations by Lt Col S. W. French, MC

"1. It is felt that the interests of justice require that a psychiatric evaluation be undertaken by a qualified psychiatrist.

"2. Basis of this request is as follows:

"I have reason to feel that serious domestic difficulties are a more significant feature of this problem than testimony would indicate." (R 20-21)

5. Rebuttal Evidence

The proceedings of a Board of Officers convened at the 361st Station Hospital, APO 1055, on 14 October 1949, under the provisions of AR 615-361, to determine the sanity of the accused was introduced as Prosecution Exhibit

16. The authenticity of this report was established by stipulation. The Board made the following findings and recommendations:

"FINDINGS:

"The patient was admitted to the Neuropsychiatric Service, 361st Station Hospital, on 2 November 1949 and was discharged to duty with the diagnosis 'Observation, psychiatric (no disease found). Complete psychological tests were made and the patient was interviewed on several occasions by the ward doctor. He was then presented to the Neuropsychiatric Disposition Board which also functions as a Sanity Board. He was personally interviewed. He answered questions relevantly and coherently, made no attempt at evasion. He displayed no peculiar mannerisms, was well oriented and denied any previous mental illness. There was no demonstrable evidence of psychosis or psychoneurosis.

"IMPRESSION:

"(a) It is our opinion, based on medical observation, that the patient at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"(b) Furthermore, it is our medical opinion that this man at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right.

"(c) It is our medical opinion that the patient does possess sufficient mental capacity to understand the nature of the proceedings against him and is able intelligently to conduct or cooperate in his defense." (Pros Ex 16, pp 1-2)

6. Discussion

Mental Responsibility of Accused

Considerable evidence touching upon the accused's mental condition was introduced during the trial. The defense introduced the proceedings of a Board of Officers, which report was completed on 14 October 1949, wherein the Board found that the accused at the time of the offenses was so far free from mental defects, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong and to adhere to the right, and further that he had sufficient mental capacity to understand the nature of the proceedings against him and to intelligently conduct or cooperate in his defense. One member of this Board "felt that the interests of justice require a psychiatric evaluation be undertaken by a qualified psychiatrist." This recommendation was predicated upon his belief that "the serious domestic difficulties

of the accused were of a more significant feature of this problem than testimony would indicate." In reaching its findings the Board had before it the testimony of several officers who knew and worked with the accused. These same officers appeared as witnesses during the trial of the accused.

During the trial the wife of the accused testified at length concerning their domestic life and difficulties.

In rebuttal the prosecution offered in evidence the report of the proceedings of a Board of Officers convened at the 361st Station Hospital, APO 1055, on 14 October 1949, which Board was convened to determine the sanity of the accused. Complete psychological tests were made and the accused appeared before the "neuropsychiatric Disposition Board which also functions as a Sanity Board." The Board determined that at the time of the offenses the accused was 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 adhere to the right and further that he possessed sufficient mental capacity to understand the nature of the proceedings against him and to intelligently conduct or cooperate in his defense.

The court by its findings of guilty inherently found that the accused was not affected by mental disease and that he was able, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right. The determination of the accused's mental condition was essentially a question for the court and its determination, where supported by substantial evidence, will not be disturbed by the Board on appellate review (CM 298814, Prairiechief, 21 BR (ETO) 129,134; CM 319287, Phinezy, 68 BR 221,228, and cases cited therein). From our examination of the evidence we conclude that the finding is based on substantial evidence and that there is no reason to disturb the court's findings.

Specification and Charge I

In this specification the accused was charged with embezzling \$150, during the period of June 1948 to March 1949, the property of the Far East Command Motion Picture Service, which had been entrusted to him as theater officer of the First Engineer Construction Group and of the 73d Engineer Equipment Company, in violation of Article of War 93. The accused was the duly appointed and acting theater officer of the units named in the specification. In his capacity as theater officer he received the proceeds of the sale of tickets from the cashiers of the theaters. He submitted weekly financial reports for the periods from June 1948 to March 1949 to the Far East Motion Picture Service. Each weekly report acknowledged a cash accountability for money belonging to the Far East Motion Picture Service which was retained in his possession.

An audit of the accused's accounts made by Captain Thoma on 14 March 1949 showed that he should have had in his possession \$608 and some cents which was the property of the Far East Motion Picture Service. The accused kept these funds in a drawer of his desk. When called upon to produce this sum of money the accused was unable to do so, stating that he did not have the full amount of the monies collected because he had spent some of it for his own personal use and because the balance thereof was intermingled with other funds entrusted to him. Thereafter during an investigation, held in the Office of the Inspector General, I Corps, the accused produced two checks totaling \$150.00. These checks were drawn by Captain Howard G. Peoples on his personal account in the City National Bank, Tokyo, Japan. The accused stated that he had borrowed this money to make up the deficiency existing in the theater funds.

Embezzlement is defined in the Manual for Courts-Martial, 1928, paragraph 149h, as follows:

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

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

The owner of the receipts from the operation of the theaters under the accused's supervision was the Far East Command Motion Picture Service. A fiduciary relationship existed between the Far East Command Motion Picture Service and the accused when he was detailed and acted as theater officer. The money received by the accused as theater officer was at all times the property of the Far East Command Motion Picture Service.

In CM 334214, Brown, 81 BR 389, 393, the Board of Review said:

"There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined in the first instance at least, by the court. Here the court, by its findings of guilty of embezzlement

resolved this question against accused and the reviewing authority did not, nor do we, find any reason to disturb such findings.' (Underscoring supplied) (CM 320308, Harnack, 69 BR 323, 329).

"Accused's statement that at the time he took the money he intended to make restitution thereof by borrowing or other means is not a defense to the embezzlement of the funds (CM 253054, Howard, 34 BR 235, 250; CM 276435, Meyer, 48 BR 331, 338)."

In the instant case when Captain Thoma demanded the funds in accused's possession so that he could complete his audit, and the accused was unable to and failed to produce them, a legal presumption that accused had embezzled the funds was established. This presumption was buttressed by accused's admissions that he had converted some of the funds for his personal use. Subsequent to the date on which the accused was requested to produce these funds and was unable to do so, he admitted that he was short \$150 and tendered two checks drawn by a Captain Peoples totaling \$150 which, he stated, he borrowed to make up said shortage. While it is axiomatic that an accused cannot be convicted upon his "uncorroborated" extrajudicial confession or admission, the evidence adduced by the testimony of Captain Thoma creating the presumption of embezzlement together with the evidence of accused's tender of two checks in the sum of \$150 to cover his shortage after his inability to account when requested constitutes sufficient proof of the *corpus delicti*, i. e., that an offense of embezzlement was probably committed, to corroborate the accused's extrajudicial admission of conversion of a part of the funds for his personal use. In this connection, the repayment of the \$150 to the Far East Command Motion Picture Service after the offense was complete is no defense to the charge (CM 292656, Fertick, 57 BR 257, 264, 265, and cases cited therein). In CM 239085, Jones, 25 BR 41,43, the Board of Review considered the evidence necessary to corroborate a confession and said:

"An accused cannot legally be convicted upon his unsupported confession. There must be, in the record, other direct or circumstantial evidence that the offense charged probably has been committed (MCM 1928, par. 114a). The general rule which has been stated and applied by the Board of Review in numerous cases is that while the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of the evidence or at all, nevertheless some evidence must be produced to corroborate the confession and such evidence must touch the *corpus delicti* (CM 202213, Mallon; CM 220604 Antrobus; CM 237225 Chesson; and CM 237450 Ivy). In CM 193828 Morandi and Mingo, the Board quoted with approval the following language from Daeche v. United States (CCA 2nd) 250 Federal 566; 'The

corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel'."

This rule has been stated and applied in numerous recent cases by the Board of Review (CM 325377, Sipalay, 74 BR 169; CM 325378, Catubig, 74 BR 179; CM 335123, Green, 2 BR-JC 53; CM 334214, Brown, supra; CM 325056, Balucanag, 74 BR 67; CM 325381, Datu, 74 BR 195; CM 325480 Promito, 74 BR 249).

In CM 316347, Fever, 65 BR 305,307, the Board of Review said:

"Accused received the money in question and when the pay roll had been paid he failed to return the balance on hand to the proper authority. When demand was made therefor he could not deliver the money because, as he stated, he did not have it. According to the evidence, he never made restitution of the shortage. The proof offered by the prosecution therefore established a prima facie case of embezzlement. The specific facts constituting the actual conversion to his own use are peculiarly within accused's own knowledge and it was his duty, upon the establishment of a prima facie case by the prosecution, to go forward with the evidence. Failing to make an explanation, a conviction of guilt may rest upon the facts of possession, absence of accounting or delivery and the presumption arising from same (CM ETO 1302, Splain; CM 205621, Curtis, 8 BR 207, 227)."

As stated in CM 334214, Brown, supra, the burden of going forward with the proof to controvert the prosecution's prima facie case of embezzlement was on the accused. No such proof was introduced by the defense and no exculpatory evidence otherwise appears in the record. Under these circumstances, therefore, the evidence of the accused's inability to render an accounting or to produce the alleged funds when called upon to do so and his admitted conversion of \$150.00 of such funds is, in the opinion of the Board of Review, legally sufficient to support the finding that the accused embezzled \$150, property of the Far East Command Motion Picture Service as charged in this specification.

Specifications 1 and 2, Charge III

In each of these specifications it is alleged, in effect, that with intent to deceive, the accused wrongfully made and uttered to the Custodian, Eighth Army Exchange Fund, at Branch Exchange No. 817, a certain described check in payment of a personal debt, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of the check. The evidence shows that two

checks given by the accused to Branch Exchange No. 817 had been returned unpaid by the drawee bank. Captain Drake as manager of the Branch Post Exchange informed accused that these checks had been returned. The accused inspected the checks and stated that he had arranged with his brother to deposit sufficient funds in the bank for the payment of the checks. Captain Drake suggested that the accused contact his brother in order to ascertain whether the deposit had been made before he replaced the checks. About a week after this conversation and on 9 June 1949 the accused gave Captain Drake two checks payable to the Custodian of the Eighth Army Exchange Fund, in the sum of \$100.00 each, whereupon Captain Drake returned to the accused the two checks which had been returned unpaid by the drawee bank. The two checks delivered to Captain Drake on 9 June 1949 were signed by the accused and were drawn on the Peoples First National Bank of Hoosick Falls, New York. Captain Drake forwarded these checks for collection in the usual course of handling the affairs of the Branch Post Exchange. The checks were returned by the drawee bank unpaid. The status of the accused's bank account with the Peoples First National Bank of Hoosick Falls, New York, was established by the deposition testimony of Mr. McLinden, the cashier of the bank, and the statements of accused's account attached as an exhibit to his deposition. Mr. McLinden testified that the two checks in question were presented to the drawee bank on 13 July 1949 and that payment was refused because there were insufficient funds in the accused's account for the payment of the checks.

At the time these checks were issued the accused did not have sufficient funds on deposit in the drawee bank for payment of the checks. Between 6 June 1949 and 13 September 1949 his account in the bank never exceeded \$49.28.

Although the defense counsel objected to the exhibit attached to Mr. McLinden's deposition upon the grounds that it did not appear to be complete, he did not point out in what manner the exhibit was incomplete. We have examined this exhibit and are unable to see wherein it is incomplete. The Board of Review therefore concludes that this exhibit is competent to establish the amounts on deposit in accused's account during the periods stated in the exhibit.

The accused knew at the time he issued these two checks that the drawee bank had already refused payment on checks which he had previously drawn. The evidence shows that he issued these two checks without making deposits in his bank account which would assure their payment. In CM 320020, Jones, 69 BR 217,224, the Board of Review said: "It has been uniformly held that one is charged with knowledge of the day to day condition of his bank account." Consequently, the Board is of the opinion that the evidence establishes that at the time the accused made and uttered the two checks described in these specifications he did so well knowing

that he did not have and not intending that he should have sufficient funds in the drawee bank for their payment.

The making and uttering of the checks by the accused in the manner and under the circumstances as shown by the evidence shows an intent to deceive and is conduct prejudicial to good order and military discipline in violation of Article of War 96 (CM 329503, Frith, 78 BR 83,89,90).

The specifications allege that the accused intended to deceive the custodian of the Eighth Army Exchange Fund. The evidence shows that the accused delivered the checks in question to Captain Drake who was the Post Exchange officer of a branch exchange. They were made payable to the custodian of the Eighth Army Exchange Fund. There was no showing that the accused actually presented the checks to the custodian of the Eighth Army Exchange Fund. The checks however were property of the Eighth Army Exchange Fund and the custodian of the fund was the person who was to rely upon them and account for their presence in the fund. The Board of Review concludes that when the accused made the checks payable to the custodian of the Eighth Army Exchange Fund and delivered them to Captain Drake, the Post Exchange Officer of a Branch Post Exchange, he knew that the custodian of the Eighth Army Exchange Fund would rely upon them, and therefore they were made with an intent to deceive the custodian of the Eighth Army Exchange Fund the same as if the checks had been personally delivered to him by the accused (CM 315736, Risoli, 65 BR 91,95; CM 337318, Shearman).

Specification 5, Charge III

In this specification the accused was charged with failing to obey a lawful order of Colonel Brookes, his superior officer. The evidence shows that the accused had submitted his resignation from the Army and thereafter had submitted a letter through channels requesting the return of his letter of resignation. Before final action on the resignation had been taken, various higher headquarters were contacted concerning their disposition. These contacts had not been made through Colonel Brooke's headquarters. Colonel Brookes then gave the accused an order not to contact in any manner a higher headquarters in reference to the return of his letter of resignation except through military channels. Military channels in this instance would require a communication to be submitted to Colonel Brookes as commanding officer of the 46th Engineer Construction Battalion for his indorsement thereon. Thereafter the accused submitted through channels a letter requesting the return of his letter of resignation. By first indorsement, Colonel Brookes approved this request and forwarded it through channels to The Adjutant General of the Army. After this request was so forwarded, however, the accused forwarded a copy of this request, together with an unsigned copy of Colonel Brookes' indorsement thereon, direct to The Adjutant General of the Army which he stamped "Information copy" and which was forwarded

without Colonel Brookes' knowledge or approval.

An order of a superior officer is presumed to be lawful when the order given relates to a military duty and is one which the superior officer is authorized to give under the circumstances (par 152b, MCM, 1949). Army Regulations 605-275, 27 June 1949, require that letters of resignation and letters requesting the return of resignations previously submitted be forwarded through military channels to The Adjutant General.

In CM 322546, Barton, 71 BR 257, 261, the Board of Review said:

"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."

See also CM 302885, Payne, 59 BR 133,138, wherein the Board of Review held that an order to the accused "to drink no intoxicating beverages while on duty" was a lawful military order.

In the instant case Colonel Brookes issued the order to the accused after he had been required by his superiors to explain why their headquarters had been receiving communications relative to accused's resignation, which communications had not been transmitted through military channels. In the opinion of the Board of Review such an order was not an attempt to unreasonably interfere with accused's personal affairs. It was a reasonable, valid, lawful military order given by Colonel Brookes who was endeavoring to command his unit in conformity with the desires and instructions of his superior officers.

The accused's action in forwarding a copy of his letter requesting the return of his letter of resignation to The Adjutant General of the Army without first obtaining the approval of Colonel Brookes, was a clear violation of the order given.

Specifications 1 through 5, Additional Charge II

In these specifications it was alleged that the accused did with intent to conceal the contents thereof from his commanding officer secrete certain described letters and the indorsements thereon. The evidence shows that the Office of Chief of Finance initiated a letter under date of 6

January 1948 addressed to the Commanding Officer, 1st Engineer Construction Group, APO 929, Attention: Lieutenant Donald B. LeCleire. Thereafter, in an attempt to get a reply to this letter from the accused, the letters described in Specifications 1 through 5, Additional Charge II, were initiated and forwarded through military channels to the accused's commanding officer, who was Lieutenant Colonel Wythe P. Brookes, originally the commanding officer of the First Engineer Construction Group, who became the commanding officer of the 46th Engineer Construction Battalion when that unit replaced the First Engineer Construction Group. The accused was Adjutant of the First Engineer Construction Group and continued in the capacity of adjutant when the Unit was changed to the 46th Engineer Construction Battalion. The duties of an Adjutant normally include the preparing and the dispatching of indorsements to communications received by his unit.

The communications received by the Battalion were not answered nor were they called to the attention of the commanding officer, and from the evidence in this case it is clearly shown that the accused neglected his duties. While it might be argued that, because some of these communications were addressed to the commanding officer of the organization, attention Lieutenant Donald B. LeCleire, the accused was under no duty to show the contents thereof to the commanding officer, we believe that the accused was under the duty to answer this correspondence within a reasonable time or to bring it to the attention of the commanding officer so that it could be answered without undue delay.

The accused however is charged with concealing certain letters with intent to secrete the contents thereof from his commanding officer, and the only serious question presented is whether the evidence shows that the accused secreted the letters with the intent alleged. The question of whether the letters were secreted is essentially a question of fact to be determined from the evidence. About the 24th of September 1949 Colonel Brookes asked the accused about four or five unanswered letters, at which time the accused produced the letter described in Specification 4 of Additional Charge II and "a carbon copy of one other letter that had an indorsement that he had sent through channels." The accused denied that he ever received or had seen the other pieces of correspondence.

On 28 September 1949 Lieutenant Colonel Cospers and Lieutenant Colonel Brookes made an inspection of the desk used by the accused at the headquarters of the 46th Engineer Construction Battalion and found between 20 to 40 pieces of unanswered official correspondence as well as 30 to 33 pieces of personal correspondence. Most of the personal correspondence was unopened.

The letters described in Specifications 1 and 3, Additional Charge II, were found behind the drawers of the accused's desk, while the letter

described in Specification 5 of this Charge was found in the top drawer of accused's desk. The letter described in Specification 4 of Additional Charge II was produced by the accused on 24 September 1949 when Colonel Brookes inquired concerning unanswered correspondence. The letter described in Specification 2 of Additional Charge II was attached to an inclosure to Prosecution Exhibit 11, which exhibit was introduced in connection with the allegations of Specification 3. The carbon copy of an indorsement produced by the accused on 24 September 1949 was a reply to this letter.

In CM 212505, Tipton, 10 BR 237, 243, the Board of Review said:

"*** The word 'secrete' is defined by Webster's New International Dictionary as 'to keep secret or hidden; to keep from general knowledge; esp., to deposit in a place of hiding; to hide; conceal; as, to secrete stolen goods; to secrete one's self'. As compared to 'hide', secrete means 'to deposit in a place of close hiding' (see 'hide', Webster's New International Dictionary). The word 'secrete' thus connotes a positive act to prevent discovery. ***."

The accused failed to bring any of this correspondence to the attention of Colonel Brookes, the commanding officer of the 46th Engineer Battalion, until Colonel Brookes ordered the accused to produce certain unanswered correspondence. When ordered to produce this correspondence the accused produced two items of correspondence and denied receipt or knowledge of other unanswered correspondence. The other items of correspondence described in the specifications were found in the accused's desk. Two of these letters were found behind the drawers of his desk. The basic letter from the Office of the Chief of Finance dated 6 January 1948 referred to a possible indebtedness of the accused to the Government. The letters described in the specifications were initiated in an effort to get the accused to reply to this letter. They remained unanswered for an unconscionable length of time. Under the circumstances the court was justified in finding that the accused had secreted and deliberately withheld these letters from his commanding officer with the intent to conceal the contents thereof from him.

7. Department of the Army records show that the accused is 33-9/12 years of age and married. He graduated from high school and attended college for one year. He enlisted in the Air Corps on 30 October 1941. He graduated from Officers Candidate School and was commissioned a second lieutenant, AUS, on 17 March 1943. On 4 June 1945 he was promoted to first lieutenant. He served in the Pacific Theater for twenty months and is entitled to wear the American Defense ribbon, American Theater ribbon, Asiatic-Pacific ribbon, Philippine Liberation ribbon with arrow-head, and World War II Victory medal. His efficiency records for the

period 1 July 1944 to 30 June 1947 are generally "Excellent." His "overall" efficiency ratings are 059 for the period 23 November 1947 to 29 February 1948; 056 for the period 1 March 1948 to 17 May 1948; 058 for the period 18 May 1948 to 31 August 1948, and 074 for the period 2 October 1948 to 28 February 1949.

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

Carlos E. McAfee, J.A.G.C.

Joseph T. Black, J.A.G.C.

Roger W. Quisenberry, J.A.G.C.

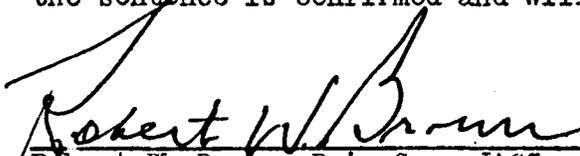
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

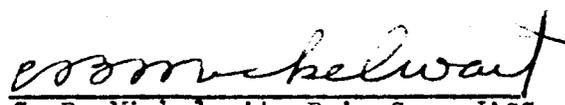
CM 339,794

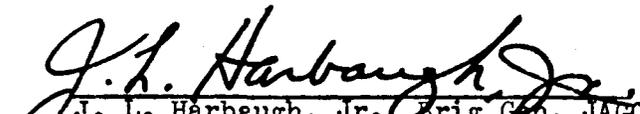
THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Donald B.
LeCleire, O-1111733, CE, 46th Engineer Construction Battalion,
APO 929, upon the concurrence of The Judge Advocate General,
the sentence is confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr. Brig Gen, JAGC
Chairman

21 April 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

24 April 1950

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

CSJAGH CM 339847

U N I T E D S T A T E S	)	1ST CAVALRY DIVISION (INFANTRY)
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Drake (Tokyo, Honshu, Japan),
First Lieutenant JOHN F.	)	16 December 1949. Dismissal.
HANOLD, JR., O1339987, Head-)	
quarters and Headquarters)	
Company, 2nd Battalion, 7th)	
Cavalry (Infantry).)	

HOLDING by the BOARD OF REVIEW
O'CONNOR, SHULL, and LYNCH
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50d.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that John F. Hanold, Jr., 1st Lieutenant, Headquarters & Headquarters Company, 2nd Battalion, 7th Cavalry (Infantry) then on temporary duty with Company F, 7th Cavalry (Infantry), having received a lawful command from 1st Lieutenant Loren G. DuBois, his superior officer, to remain at Camp Palmer, did, at Camp Palmer, Honshu, Japan, on or about 21 November 1949, willfully disobey the same.

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

3. Evidence for the prosecution.

The accused was assigned to Headquarters and Headquarters Company, 2nd Battalion, 7th Cavalry (Infantry) Regiment, throughout the month of

November 1949. About 10 November, pursuant to instructions from Lieutenant Colonel Herbert B. Heyer, Commanding Officer of the 2nd Battalion, the accused was told by his company commander, First Lieutenant John H. Metz, that he would accompany F Company of the Battalion to the firing range at Camp Palmer. Subsequently, about 14 November, the accused told Lieutenant Metz that he had received instructions to the same effect from Lieutenant Loren G. DuBois, the commanding officer of F Company (R 9-10; Pros Ex 1).

Colonel Heyer testified variously that the accused was "attached" but not "assigned" to Company F for duty, and also that accused was "assigned" to Company F "since he was under the command of the Company Commander of F Company" (R 12,13). Colonel Heyer asserted he was cognizant of the regimental "Daily Bulletin" for 31 October 1949, which was issued "by order of Colonel Millener." The bulletin, introduced in evidence as Defense Exhibit A, reads in pertinent part as follows:

"3. SPECIAL DUTY: a. Effective immediately, no member of this command will be placed on duty with any other organization, activity, section, etc., without written authority (Special Orders), from this headquarters.

"b. In effect, this means all Special Duty, TDY and DS assignments will be made in written orders only." (R 13,14,19; Def Ex A).

Colonel Heyer admitted that he did not issue written orders placing accused on temporary duty with F Company. It was customary, however, within the regiment to send one or more officers from another company to assist a company on the range (R 14,43). Such officer would act as "pit officer" and would certify the scores during the record firing. The accused in this case was so designated and as such was under the command of the senior officer, Lieutenant DuBois, at all times (R 10,15, 16). Colonel Heyer considered duty on the firing range as a "detail." Assignments to it were made verbally (R 17). Colonel Millener was aware of the custom of detailing officers to the range on verbal orders (R 19).

Colonel Heyer further testified that the Table of Organization for F Company provided for six officers. From 14 to 21 November 1949, there were four officers on duty with the company besides accused. Of the 180 men assigned to the Company, about 100 men went to the range. F Company returned to Tokyo to participate in a parade on Wednesday, 16 November, and went back to the range on Saturday, 19 November. During this interval the accused was on duty with his own company. He was "assigned or detached or detailed" to F Company only while they were on the range (R,17,18,19).

First Lieutenant Loren G. DuBois was the commanding officer of F Company, 2nd Battalion, from 1 September 1948 through 21 November 1949

(R 19,20). Sometime prior to 14 November Colonel Heyer told him the accused "could go" to the range with F Company, the following week (R 20). The accused did accompany them to Camp Palmer and was used there as a certifying officer (R 20,21). The company went to the range on Monday, 14 November, returned to Tokyo on Wednesday, 16 November, for a parade, departed for the range again on Saturday, 19 November, and returned to Tokyo the following Tuesday, 22 November. The firing for record was completed at 3:00 p.m., 21 November (R 20-21).

The accused reported to DuBois in F Company orderly room on 14 November and again on 19 November (R 21). He was on duty with F Company for the period of about seven days except for the break which occurred when the company returned to Tokyo for the parade (R 37). During the entire time the company was at Camp Palmer accused was on duty in the pits (R 23). Each morning the accused marched out to the range with the company (R 25). He carried out all instructions DuBois gave him during this period with the exception of what occurred on the last day (R 38).

On the morning of 21 November 1949, DuBois held several conversations with the accused. The first occurred after the company had started firing (R 25). The accused came to DuBois and said he had heard "his orders were in division, relieving him from duty, and he wanted to leave, since he would be going back to the states very shortly." DuBois was irritated because of the interruption and "said something to the effect that I didn't particularly give a damn if he went or not" (R 25,26). After the accused left to obtain his raincoat, DuBois realized that he had to have a disinterested officer present to certify the scores so he telephoned the pits and instructed a Lieutenant Stone to tell the accused he could not go to Tokyo that day and to stay in the pits (R 26). Later, while DuBois was on the firing line, he noticed accused coming in from the pits. He approached accused and told him what he had said over the telephone. DuBois added, however, that he would call Colonel Heyer with reference to accused returning to Tokyo (R 26,27). He told accused to return to the pits and accused answered that he would as soon as he made some telephone calls about his orders. Sometime during the morning the Battalion S-1, a Major Johnson, inspected the firing and DuBois asked him to inquire of Colonel Heyer whether the accused could be relieved from duty, as soon as record firing was completed. Firing was completed in the morning by all but three men, who completed their firing about three o'clock in the afternoon (R 27-28).

About 12:00 o'clock, on 21 November 1949, Colonel Heyer instructed his battalion sergeant major to telephone to F Company orderly room at Camp Palmer and inform Lieutenant DuBois that the accused "was not to leave Camp Palmer and return to Tokyo at this time, inasmuch as his re-assignment orders had not yet been received, or words to that effect" (R

11,12). DuBois received Colonel Heyer's message about 12:20 p.m., before the officers had eaten lunch. DuBois testified, "my understanding was that Colonel Heyer said that the man could not go to Tokyo." DuBois returned to the messing area and "relayed" to accused the message "that Colonel Heyer had said that he couldn't go to Tokyo, and that he would not go to Tokyo." DuBois further testified, "I told him Colonel Heyer would not permit him to come to Tokyo," but added that the "order * * was mine." DuBois did not remember the exact words he used "other than that he would stay at Camp Palmer" (R 28,29). During the lunch hour, there was further conversation relative to accused leaving. Concerning this conversation DuBois testified as follows:

"A I realized that he was very 'unhappy' about the whole thing, sir, and I talked to him about it. I don't remember if I talked to him once or twice, or more than once. I thought that he might possibly go in, and I told him that he would really be sticking his neck out if he did.

Q Did you further discuss the consequences of his leaving Camp Palmer with him?

A I don't know how many times I talked to him, sir. We were eating within ten yards of each other. I don't remember exactly where he was eating. I know at that one time, when I got in the jeep, he said rather jokingly that he would take his chances on a court martial." (R 29,30)

After lunch, DuBois saw the accused leave the messing area in a jeep with Captain Harold H. Birch and a driver. DuBois did not see accused at Camp Palmer thereafter (R 30,39).

On cross-examination DuBois stated that all men had fired the course for record by noon but three had failed and were to fire again in the afternoon (R 31). He denied telling accused that he could return when the record firing was completed. He did tell accused that he would have to stay until the firing in process was completed and that he would contact Colonel Heyer concerning accused's release after that. DuBois said he telephoned Colonel Heyer to see if he had "jurisdiction to release" the accused although there was no doubt in his mind that accused was under his command. When asked if he told the accused, in the course of their conversations, that he did not know why Colonel Heyer would not let him go into Tokyo, DuBois answered: "I don't remember, sir" (R 32). DuBois knew accused was being released from the service in the near future and had to box and pack his household effects, and thought that under the circumstances it was perfectly natural for the accused to be concerned (R 33).

When questioned about the conversation he held with the accused at the pits on the morning of 21 November, DuBois said he gave accused "a

positive order" to stay "there" although he did not tell accused "This is a direct order." Further questioning of DuBois transpired as follows:

- "Q Didn't you tell him, in effect, that Colonel Heyer wouldn't let him come in to Tokyo?
 A I told him Colonel Heyer would not grant permission for him to go to Tokyo.
- Q You were merely relaying Colonel Heyer's order, rather than giving him one of your own?
 A No, sir; I believe I was giving him a reason, since the man had a right to a reason in that case.
- Q Didn't you tell him that if he went in, he'd go 'on his own', and that you wouldn't take the responsibility for it?
 A I don't believe so.
- Q You don't think so? Do you know whether you did, or not?
 A I remember telling him that he was 'sticking his neck out.'
- Q Didn't you, in fact, tell him that you thought if he did go in,
 • there wouldn't anything come of it?
 A I don't believe so, sir.
- Q You are not sure?
 A No, sir.
- Q You may have told him that?
 A I don't know, sir. I talked to him many times that day.
- Q In fact, you did not even make a report of this, did you?
 A I didn't have time to make a report of it, sir.
- Q You didn't consider it of enough importance to go to a telephone and make a report of it then?
 A Upon my return to the range that evening, I had a telephone call waiting; that I would immediately call Lieutenant Lawson, the Battalion Adjutant, and I finally got hold of Lieutenant Lawson, at about 6:30 that evening, in his quarters, and at that time, he wanted to know what the score was on Lieutenant Hanold, because I believe he had met the colonel coming in at the gate, or something." (R 34-35)

DuBois stated further that he gave the accused an order in the morning when he came out of the pits, and one again at noon (R 35,36). As to the former order DuBois testified as follows:

"Well, I came down off the firing line, and believe first, I asked him what the devil he was doing out of the pits. I told him, 'You cannot leave the range,' or 'You cannot go down to Tokyo.' I told him, 'You're a certifying officer, and I have to have you here'."

DuBois also told accused that he would contact the battalion commander and see if he could be relieved from duty upon completion of firing. DuBois admitted he had changed his mind once that morning but he insisted that he was not "uncertain." According to DuBois, "The man had a reason to go, and I was trying to get him down there." He was trying to get accused to Tokyo if the battalion commander approved for he had no reason to doubt the existence of accused's orders at that time (R 36-37).

About 1230 or 1300 hours on 21 November 1949, accused accompanied Captain Birch from Camp Palmer to McKnight Barracks in Tokyo (R 39). Birch heard accused tell DuBois at lunch time that he was going on in, and that he would take his chances on a court-martial. On cross-examination Birch stated that this remark was made in a serious vein -- "not in an angry manner, but just in a normal tone of conversation * * * a resigned tone of conversation" (R 40). Birch left the accused at the barracks in Tokyo at 1400 hours, 21 November (R 41). About 1430 hours on 21 November Colonel Heyer saw the accused in the vicinity of the 7th Cavalry Command Post in Tokyo. The Command Post is approximately 23 miles from Camp Palmer (R 12).

First Lieutenant John L. Helms, regimental adjutant, 7th Cavalry, identified Defense Exhibit A as a regimental daily bulletin. Helms drafted paragraph 3 of this particular bulletin. It established a general policy of requiring written orders on the assignment of men from one organization to another. This was to correct a general practice of oral agreements between staff sections and commanding officers in regard to assignments of their men (R 41-43). Helms admitted that paragraph 3 of Defense Exhibit A stated "all Special Duty, TDY and DS assignments will be made in written orders only." He contended that the spirit of the paragraph had been followed, if not "the letter" (R 44,45). Helms knew that accused was to be separated and returned to the Zone of the Interior. Depending upon the circumstances it was logical to give a man permission to process before his formal orders were received (R 44-46). The message center log at regimental headquarters revealed that one copy of accused's orders returning him to the Zone of the Interior arrived at the message center at 1630 hours, 21 November 1949. This copy reached Helm's office at 0800 hours 22 November (R 43-44). Helms identified Prosecution Exhibit 3, an extract of division Special Orders 268, dated 19 November 1949, as a copy of the orders in question (R 47).

Paragraph 13 thereof in pertinent part states that the accused "is reld fr asgmt Hq & Hq Co 2nd Bn 7th Cav Regt (Inf), APO 201 Unit 4 and fr competitive tour AD w/Inf UP Rad W 94805 DA, 27 Sep 49, and asgd 2nd TM Port APO 503, for T to ZI for relief fr AD DP Sec 515 (d) * * * WP Yokohama, Japan as soon as orders have been recd rptg upon arrival to Trp Mv Br, Port T Div APO 503. * * * EDCMR 27 Nov 49" (Pros Ex 3).

4. For the defense.

After being apprised of his rights the accused elected to testify in his own behalf (R 49,50). He stated that about nine o'clock on the morning of 21 November 1949, he came out of the pits and telephoned the officers' personnel section at Camp Drake. He asked the sergeant in charge if his orders had been cut and sent to 7th Cavalry Regiment. The sergeant said he thought the orders had been issued and also said that it was SOP in the division that when a person received his orders, he could proceed to process (R 50). Accused then telephoned Sergeant Quinn of the S-1 section of 7th Cavalry, who informed him that his orders had not been received there. He then telephoned the division mimeograph section and was told their files indicated that his orders had been mimeographed. Upon further inquiry he learned that the distribution section had not received his orders. After having made these telephone calls the accused saw Lieutenant DuBois and told him he thought his "orders were at 7th Cavalry, that there was a mix-up somewhere along the line, and asked if he could be excused to go in." Prior to this, about the 17th, accused had been informed "by division" of his paragraph number, special orders number, the date that he would ship and the ship on which he would embark. It was with all this in mind that he approached DuBois (R 50,51).

During the course of the conversation, which was "friendly," DuBois told him that since he was certifying officer, he would have to wait until noon. Accused said "All right, I'll go in at noon" and DuBois replied that he could leave at noon on the ration truck. While accused was on the firing line DuBois asked Major Johnson to find out from Colonel Heyer whether accused could go in. The accused assumed or was told that the firing was over at noon. He was never told of "any other three men firing" (R 51,52). During the noon hour DuBois was called to the telephone on the 500 yard firing line. When he returned to the mess area he told the accused "he had heard that Colonel Heyer had given an order that I was not to return." DuBois commented, "I can't understand why this order came in." The accused finished his meal and upon seeing DuBois again, remarked "I think I'll go in. I don't see that there's anything wrong in it." He added jokingly, "I'll take my chances on a court-martial." If he had been thinking clearly at the time he would not have made this latter remark. DuBois then told him,

"If you go in, you go in 'on your own'; I'm not giving you an order to go in, and I'm not ordering you not to go in." DuBois also stated, "I don't think anything will come of it." (R 52) The accused returned to Tokyo with Captain Birch. He waited in the message center until five o'clock. The composite orders arrived, but his copies did not. The next morning, about 1030 hours, he received his orders at the message center (R 52).

Accused admitted that DuBois told him to stay until twelve o'clock. Accused did not leave until 12:15 or 12:30. He denied receiving a direct order from DuBois not to leave the camp after twelve o'clock (R 53).

On cross-examination the accused stated that DuBois "was lying" in his testimony concerning the order because of "absence of mind." "If it is permitted to read back Lieutenant DuBois' statement, you will find it filled with 'I don't know,' 'I'm not positive,' and 'Almost.'" (R 55) Accused heedlessly made the comment that he would take his chances on a court-martial. "At the time that I did say it, I thought that I was not violating a direct order, and that the order that was given, was given by an officer who was not my Commanding Officer, because I thought my orders were in." He had no reason to doubt that he was under the command of DuBois (R 56). But when he heard his orders were out he thought he was relieved from other assignments (R 58).

5. The accused is charged with a violation of the 64th Article of War in that, having received a lawful command from First Lieutenant Loren G. DuBois, his superior officer, "to remain at Camp Palmer," he did, at Camp Palmer, Honshu, Japan, on 21 November 1949, willfully disobey the same.

In order to sustain a conviction under this Article it is required to prove:

"(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the superior officer of the accused; and (c) that the accused willfully disobeyed the command. A command of a superior officer is presumed to be a lawful command." (MCM, 1949, par. 152b)

It is shown that when accused first approached Lieutenant DuBois on the morning of 21 November, and asked, in effect, if he could go to Tokyo, Lieutenant DuBois replied he did not care whether accused went or not. A short time later, Lieutenant DuBois reversed his decision and told accused he could not leave. The precise terms of this order are in dispute. Lieutenant DuBois testified on direct examination that

he told accused he could not go to Tokyo that day and to stay in the pits but that he (DuBois) would call Colonel Heyer and discuss the matter with him. On cross-examination, Lieutenant DuBois testified that he told accused he would have to stay until the firing was completed and he (DuBois) would contact Colonel Heyer as to accused's release thereafter. Accused, however, testified that Lieutenant DuBois told him only that he would have to stay until noon. The record shows that all personnel on the range had completed firing by noon but that three men who had failed to qualify were to fire again in the afternoon. Accused testified he thought the firing had been completed at noon.

After receiving a message from Colonel Heyer during the noon hour to the effect that accused could not go into Tokyo, DuBois "relayed" the message to accused. Whether Lieutenant DuBois gave a further order to accused at this time is also disputed. Lieutenant DuBois testified that when he advised accused of Colonel Heyer's decision, he (DuBois) gave accused an order. Lieutenant DuBois did not remember the exact words he used "other than that he told him he would stay at Camp Palmer." There was further conversation during the noon hour between Lieutenant DuBois and accused relative to his leaving. Lieutenant DuBois told accused "he would really be sticking his neck out" if he left the range. When asked, "Didn't you tell him that if he went in, he'd go 'on his own,' and that you wouldn't take the responsibility for it?" Lieutenant DuBois replied, "I don't believe so." He made a similar reply when asked, "Didn't you, in fact, tell him that you thought if he did go in, there wouldn't be anything come of it?" When questioned further, Lieutenant DuBois said he was "not sure" whether he made this statement. DuBois also stated that the accused "had a reason to go, and I was trying to get him down there." Concerning the content of this conversation accused testified that Lieutenant DuBois said, "If you go in, you go in 'on your own,' I'm not giving you an order to go in, and I'm not ordering you not to go in;" and that Lieutenant DuBois also said, "I don't think anything will come of it." In the course of the conversation accused said he would take his chances on a court-martial.

Under this state of the record we believe a serious question is raised whether Lieutenant DuBois commanded accused to remain at Camp Palmer as charged in the specification. We entertain no doubt that Colonel Heyer gave, substantially, such an order and that the order was communicated to accused by Lieutenant DuBois. But by repeating or relaying Colonel Heyer's order, Lieutenant DuBois did not necessarily make the order his own. Winthrop's Military Law and Precedents, at page 574, states:

"It may happen that an order is transmitted through several intermediate commanders, or other officers, to the individual intended to be reached: in such a case a failure to comply is a disobedience of the command of the superior from whom the mandate originally proceeded."

In passing on the order of a superior, an intermediate commander could make the order his own by the use of clear and unmistakable language indicating that he was placing his own authority behind the order. In such event a subordinate who willfully disobeyed the order would intentionally defy the authority of the intermediate commander as well as that of the superior. Where, however, the intermediate commander, is simply the agency through which the superior transmits his order, a violation of the order cannot be charged as a violation of the command of the intermediate.

In examining Lieutenant DuBois' testimony as to the nature of his conversation with accused it is readily apparent that Lieutenant DuBois was wholly indecisive in dealing with accused. Although insisting that both in the morning and at noon he gave accused an order to stay at Camp Palmer, he refused to deny that he told accused that if he left nothing would come of it. As stated in Winthrop (Military Law and Precedents, p. 574) " * * if an order be actually given, it is no less to be obeyed though expressed in a courteous instead of a peremptory form" (citing G.C.M.O. 46 of 1883). It is necessary, however, "that the substance amounts to a positive mandate" Without attempting to penalize an officer for civility in dealing with his subordinates it should be said that in giving an order the superior must not accompany it with language which emasculates it and thus would lead the subordinate to infer that he can disobey with impunity. We think that an "order" accompanied by a license to disobey is devoid of punitive sanctions and is, therefore, not an order. Confirming the impression given by Lieutenant DuBois' testimony that he was merely conveying Colonel Heyer's order and not giving an order of his own are certain undisputed facts. It is shown that around 1300 hours accused left the messing area in a jeep for the avowed purpose of returning to Tokyo. Although Lieutenant DuBois saw accused leave he took no action of any kind. Nor had he done anything about the matter by 1830 hours when he received a call from the battalion adjutant inquiring what accused was doing in Tokyo. This sequence of events lead to the conclusion that if accused had not come to Colonel Heyer's attention in Tokyo, Lieutenant DuBois would never have taken action against accused. Conceding that a valid order may be issued and, nevertheless, no punitive action taken against a violator of the order, the failure to take action is also susceptible of being construed as indicating that no order was in fact issued.

Equally significant is the undisputed evidence that accused had obeyed DuBois' orders throughout the week preceding the alleged disobedience and had remained, at Lieutenant DuBois' order, at Camp Palmer until noon on 21 November. If DuBois, in relaying Colonel Heyer's order to accused, had clearly stated that accused was not to leave and had not indicated his sympathy with accused's position, there is reason to believe that accused would have complied with DuBois' order.

The evidence developed in the examination of Lieutenant DuBois, the prosecution's sole witness on the question of whether he gave an order to accused, raises a grave doubt whether the prosecution has sustained the burden of proof on this essential element of the specification. This doubt is heightened by consideration of the testimony of the accused denying that Lieutenant DuBois had ordered him to stay at Camp Palmer. Although admitting that Lieutenant DuBois had given him an order of similar import in the morning, and that Lieutenant DuBois had conveyed Colonel Heyer's order to him at noon, accused asserted that his departure was preceded by a conversation in which Lieutenant DuBois in effect said he was not ordering accused to go or to stay but if accused went it was his own responsibility and adding that he (DuBois) did not think anything would come of accused's leaving. If this testimony is accepted it is apparent that any order issued by Lieutenant DuBois in the morning had been countermanded and was not in effect when accused departed. We perceive no reason for rejecting accused's testimony in this regard especially since Lieutenant DuBois refused to deny categorically the making of such a statement. The assertion of accused that he would take his chances on a court-martial clearly indicates that he was aware of the fact that he was disobeying an order by leaving Camp Palmer, but it sheds no light on the question of whose order he was disobeying. To us it appears more likely that in making the remark in DuBois' presence, he was referring to whatever orders Colonel Heyer may have given in the matter.

Under all the evidence in the case we are of the opinion that it is not established beyond a reasonable doubt that accused disobeyed the order of Lieutenant DuBois and hence the findings of guilty of the specification and the charge are not sustained. Insofar as the evidence shows that accused violated an order of Colonel Heyer there is a fatal variance between the allegations and the proof (CM 266655, Brown, 43 BR 265,266). As stated in CM 323728, Wester, 72 BR 383,384, "It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is in any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment."

6. The records of the Department of the Army show that accused is 27 years of age. From 26 October 1942 until 28 March 1943 he had service in the enlisted reserve corps. He served in the Army of the United States as an enlisted man from 29 March 1943 until 19 December 1945. He was commissioned a second lieutenant in the Army of the United States on 20 December 1945 and remained on active duty until 6 November 1946. His present tour of duty as a reserve officer began on 10 October 1948. He has been awarded the Asiatic-Pacific Medal, Good Conduct Medal, World War II Victory Medal, American Theater Ribbon and Japanese Occupation Medal.

The accused is a high school graduate and married. He attended Rutgers University and "Cawba College, South Carolina." His efficiency reports of record show three monthly ratings of superior and the most recent, an over-all rating of 060.

7. The court was legally constituted and had jurisdiction of the person and the offense. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Edmund J. Cannon, J.A.G.C.
Lewis F. Hull, J.A.G.C.
W. L. ..., J.A.G.C.

CSJAGH CM 339847

1st Ind

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

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

1. In the case of First Lieutenant John F. Hanold, Jr., O1339987, Headquarters and Headquarters Company, 2d Battalion, 7th Cavalry (Infantry), 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. Under the provisions of Article of War 50, the findings of guilty and sentence are hereby vacated.

2. When copies of the published order in the 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 339847)

1 Incl
Record of trial

E. M. DRANNON
Major General, USA
The Judge Advocate General

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

CSJAGH CM 339875

UNITED STATES)

v.)

Private ODIS F. BARNFIELD,
RA 18254114, and Private
WILLARD H. HALL, RA 16265166,
both of Company I, 26th
Infantry Regiment.)

1ST INFANTRY DIVISION)

) Trial by G.C.M., convened at Nurnberg,
) Germany, 13 December 1949. Barnfield:
) Dishonorable discharge, total forfeitures
) after promulgation, and confinement for
) life. United States Penitentiary,
) Leavenworth, Kansas. Hall: Dishonorable
) discharge, total forfeitures after pro-
) mulgation, and confinement for forty (40)
) years. United States Penitentiary, Terre
) Haute, Indiana.)

OPINION of the BOARD OF REVIEW
O'CONNOR, SHULL, and LYNCH
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldiers named above, and, as to the accused Barnfield submits this, its opinion, to the Judicial Council and The Judge Advocate General. (By separate holding the Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused Hall.)

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

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

Specification: In that Private Odis F Barnfield, Company "I" 26th Infantry Regiment and Private Willard H Hall, Company "I" 26th Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Nurnberg-Reichelsdorf Germany on or about 15 November 1949, with malice aforethought, willfully, feloniously and unlawfully kill Wilhelm Fehrle, a human being, by hitting him on the head with a pistol.

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

Specification 1: In that Private Odis F Barnfield, Company "I" 26th Infantry Regiment and Private Willard H Hall, Company

"I" 26th Infantry Regiment acting jointly and in pursuance of a common intent, did, at or near Creidlitz Germany on or about 15 November 1949, by force and violence and by putting him in fear, feloniously steal from the presence of Alfred Geisthard, an automobile, the property of the Firm Kurt Fischer, value of more than \$50.

Specification 2: In that Private Odis F Barnfield, Company "I" 26th Infantry Regiment and Private Willard H Hall, Company "I" 26th Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Nurnberg-Reichelsdorf Germany, on or about 15 November 1949, by force and violence and by putting him in fear, feloniously steal from the presence of Wilhelm Fehrle, a NSU Fiat Automobile, the property of Anton Stegmeier, value of more than \$50.

He pleaded not guilty to, and was found guilty of, the Charges and Specifications. Evidence of two previous convictions by courts-martial was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, 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 48.

3. Evidence.

a. For the prosecution.

At approximately eight o'clock on the morning of 15 November 1949, the accused Barnfield, with Private Willard H. Hall, his co-accused, and Private First Class Larry J. Bettencourt, approached Alfred Geisthard at the taxi stand at the entrance to the Coburg railroad station and engaged him to drive them to Creidlitz (R 9,10,23). The cab which Geisthard was driving was a 1939 Opel Cadet, four-door sedan, in good driving condition, owned by "The automobile rental service Kurt Fischer" (R 10,11). Geisthard identified Prosecution Exhibit 1 as a picture of the cab (R 11,16). En route to Creidlitz, Geisthard's passengers informed him that they wished to go to Ebersdorf, a town beyond Creidlitz (R 11). After passing through Creidlitz and getting on the road to Ebersdorf, one of the passengers asked Geisthard to stop the taxi to allow him to urinate (R 11,12). Geisthard stopped the taxi and the passenger alighted. When the passenger did not get back into the car, Geisthard turned to see where he was and observed that the man "had his hand in his right side jacket pocket and pushing it downward to the center showed the barrel of a revolver pointing upward" (R 12).

The passenger said to Geisthard, "Get out," and repeated the order a couple of times before Geisthard complied and walked to the front of the vehicle (R 12,13). One of the others got out of the taxi and "threatened" Geisthard. Meanwhile, the man with the pistol in his pocket said, "Your money." Geisthard responded that he had no money and opened both sides of his coat. One of the men put his hand in Geisthard's inside pocket and withdrew Geisthard's wallet. The man who had remained in the car had gotten behind the wheel and turned the car in the direction from which it had come. The other two got back into the car and the three left the scene in a hurry (R 13,14).

Bettencourt identified Hall as the person who had the driver stop the cab and who, acting "like he had a weapon," ordered the driver out of the taxi (R 23,24). The driver was joined in front of the taxi by Barnfield to whom the driver handed something (R 24,27). Hall and Barnfield rejoined Bettencourt in the taxi and the trio drove off without Geisthard (R 29).

At about 8:30 that morning Barnfield and his two companions returned to Coburg and to the house of Gerda and Frieda Jung. The three soldiers had been at the house earlier in the morning and had left stating they were going to pick up Bettencourt's car. On their return, Barnfield and Hall asked Gerda and Frieda to accompany them to Garmisch (R 31,32). The two girls, Barnfield, Hall, and Bettencourt then drove to Bamberg where Bettencourt left them (R 32,33). Gerda identified Prosecution Exhibit 1 as a picture of the car in which they rode (R 38). En route, Gerda observed that Barnfield had a pistol. After Bettencourt left, the remaining members of the group went on to Nurnberg where they abandoned the car since it had no more gas (R 33). They subsequently entered a cab, the driver of which was approximately 60 years of age, and were driven to Reichelsdorf where they arrived at about five o'clock in the afternoon (R 34,35,37). Gerda identified Prosecution Exhibit 4 as a picture of the taxi driver from Nurnberg (R 35,53). At Reichelsdorf, Gerda and Frieda left the cab. Barnfield and Hall remained in it stating that they were going back to Nurnberg in order to eat and would be back in fifteen minutes (R 34,35). Approximately fifteen minutes later, Barnfield and Hall returned and Hall was driving the taxi. When asked what happened to the taxi driver Barnfield said they had "put the pistol in front of his face and made him get out of the cab" (R 35,36). While the group was returning to Coburg Barnfield threw a pistol away (R 36).

Between 5:15 and 5:30 p.m., 15 November 1949, Gunda Koenig was pulling her "buggy" along Schalkhauserstrasse in Reichelsdorf (R 39). A car stopped approximately 60 meters ahead of her and two men emerged from the car, walked to the side of the road and sat down in the meadow adjacent to the road. Then they got up, hurriedly reentered the car,

and drove off (R 40). When Gunda reached the spot where the two men had entered the meadow she observed in the dusk what appeared to be a human being lying there. Reinforced by a male passerby, she approached the recumbent form and found that it was a man, sixty-three to sixty-five years of age, with white hair. The man was "seriously injured on the top of his skull and he was profusely bleeding from his skull, the blood running all over his face and all over his body." (R 41,42). Subsequently, the man was placed in Gunda's buggy and taken to the Police Station on the main street in Reichelsdorf (R 42,43). Gunda "hazily" recognized Prosecution Exhibit 4 as a picture of the injured man (R 43).

At 1759 hours, 15 November 1949, Paul Regensburger, a first aid man, went to police precinct 24 in Reichelsdorf and there observed Wilhelm Fehrle whom he had known for twenty years (R 44). Regensburger noticed that Fehrle had received very serious injuries to the skull; there were very severe lacerations and contusions on top of the skull. Fehrle's pulse was very faint, there was a cold sweat on his forehead and when Regensburger lifted Fehrle's eyelid he saw that the eye was "already half dead." Regensburger padded Fehrle's head and neck with cotton, lifted him onto a stretcher and into an ambulance, and took him to the Municipal hospital. Regensburger identified Prosecution Exhibit 4 as a picture of Fehrle (R 45).

Shortly before 2000 hours, Doctor Franz Ernst examined Fehrle and found "three injuries of the skull with lacerations of the skin and of the roof of the skull and injury to the brain in one place" (R 49,50). Doctor Ernst administered injections to promote heart action, removed several splinters of bone which had penetrated into the bone tissue, stopped a hemorrhage of a brain vessel, and sutured the brain and skull lacerations. The operation consumed approximately forty minutes and was performed by Doctor Ernst in the presence of Doctor Stickler, "The First Surgeon," and another surgeon (R 50). Following the operation, a plasma substitute and heart stimulants were administered to Fehrle. Fehrle died approximately 30 minutes after the completion of the operation (R 51). In Doctor Ernst's opinion the injuries sustained by Fehrle were caused by the application of a blunt force, such as a blackjack or a pistol, to the head (R 52). Doctor Ernst identified Prosecution Exhibit 5 as a picture of Fehrle's injuries and added that the picture was an accurate representation of the three cuts on Fehrle's head after the sutures, which completed the operation on Fehrle, had been applied (R 52,53).

Doctor Emanuel Eric Weinig performed an autopsy upon Fehrle and found that Fehrle died as a result of "a violent blunt force being applied to the brain." (R 55)

Anton Stegmeier identified Prosecution Exhibit 3 as a photograph of a cab owned by him (R 57). He purchased the car, a Fiat "eleven

hundred," new in 1941 and it was in good operating condition on 15 November 1949. Wilhelm Fehrle was its driver on the latter date. After 15 November, Steigmeier next saw his cab in Coburg, on 19 November, at which time the right side of the cab was damaged (R 58,59).

At 2400 hours, 16 November 1949, James E. McAfee, CID Agent, together with other CID agents, arrested Barnfield and Hall at Bamberg, Germany (R 59,60). They were handcuffed and taken to the 9th CID sub-station in Bamberg and interrogated (R 60,70). Prior to interrogating Barnfield, his handcuffs were removed and Captain William Merlo, the Chief Agent, read, and McAfee explained, the 24th Article of War to him (R 67,68,70). McAfee's explanation, as related by him, did not cover the entire article, but emphasized that Barnfield did not have to make a statement. The interrogation began at about 0120 hours and terminated at about 0200 hours, 17 November (R 68). McAfee was present during the entire interrogation but was absent from the room for an interval of three or four minutes while Barnfield's statement was being transcribed on the typewriter (R 70,71). During this absence Captain Merlo and Agents Browd and Kidd remained with Barnfield (R 71). No threats or promises were made by McAfee to Barnfield (R 68,69). McAfee identified Prosecution Exhibit 6 as the statement made by Barnfield and it was admitted in evidence without objection, to be considered against him only (R 61,72).

In substance, Barnfield stated that on 10 November 1949 he went "AWOL" from his company and, accompanied by Hall, went to Coburg where he and Hall "shacked up" with Frieda and Gerda Jung until 15 November. The day before the 15th, Hall had gone to Bamberg and returned with Bettencourt. On the 15th, Barnfield, Hall, and Bettencourt decided to go to Garmisch but lacked transportation. They engaged a taxi to take them to Creidlitz and then to Ebersdorf. Outside of Creidlitz, Hall pulled out a pistol and ordered the driver to stop the car and get out. After he complied with the order, Hall took the driver's wallet, and handed it to Barnfield who searched it before throwing it away. The three drove back to Coburg leaving the driver in the road. At Coburg they picked up the two girls and drove to Bamberg where Bettencourt left the group. The others proceeded to Nurnberg where they abandoned the taxi upon its running out of gas. In Nurnberg, Barnfield and Hall secured another taxi for themselves and the girls, and after riding awhile, left the girls at a guesthouse. Barnfield and Hall then told the driver to drive them back to Nurnberg. After proceeding toward Nurnberg Barnfield and Hall told the driver to return to the guesthouse. When they were a short distance from the guesthouse, Hall told the driver to stop as he wished to relieve himself. Hall "pulled" his pistol on the driver and ordered him from the car. After the driver and Hall left the car, Hall handed the pistol to Barnfield. Hall tried unsuccessfully to start the car and it was necessary to have the driver

start it. Barnfield handed the pistol back to Hall and when the driver started to reach for the glove compartment Hall beat the driver's hands with the pistol. Hall then handed the pistol back to Barnfield. When the driver got out of the car, Barnfield hit him twice on top of the head with the butt end of the pistol. Hall seized the driver and pulled him into a field adjoining the road. The man was groaning and so Barnfield went over to him and struck him again on the top of the head with the butt end of the pistol. Barnfield and Hall then took the taxi to the guesthouse where they picked up the girls. The girls did not wish to go on to Garmisch and so all returned to Coburg. En route, after running a road block, Barnfield threw away the pistol. After reaching the outskirts of Coburg they abandoned the taxi and walked on to the girls' house (Pros Ex 6).

A statement by Hall made under the same circumstances as that of Barnfield and of substantially identical content was admitted in evidence, without objection, to be considered solely as to Hall (R 61-66; Pros Ex 7).

b. Evidence for the defense.

Barnfield and Hall, after having been duly apprised of their rights, elected to remain silent, and no evidence was introduced by the defense (R 73,74).

4. Barnfield, and his co-accused, Hall, have been found guilty of two specifications of robbery in violation of Article of War 93 and one specification of murder, unpremeditated, in violation of Article of War 92. The offenses are alleged to have been committed jointly.

The uncontradicted evidence, together with the voluntary pretrial statements of the accused Barnfield and Hall (considered against their respective declarants), shows that on 15 November 1949 Barnfield, with Hall and Bettencourt, was visiting two German girls at Coburg. Barnfield and the others decided to go to Garmisch but lacked transportation. They engaged a taxicab operated by Alfred Geisthard and owned by "The automobile rental service Kurt Fischer." After being driven some distance out of Coburg, Geisthard was ejected from the cab at gunpoint by Hall. Barnfield obtained a wallet from Geisthard by the same show of force. Barnfield and his companions returned to Coburg, rejoined the two German girls, and the group embarked upon their journey. At Bamberg, Bettencourt left the party. At Nurnberg, the gasoline supply in the taxicab was exhausted and the cab was abandoned. Barnfield and Hall thereupon engaged another taxicab which in this instance was owned by Anton Stegmeier and driven by Wilhelm Fehrle. Barnfield and Hall had Fehrle take them out of town and the girls were left at a guesthouse which they passed. The two soldiers then told Fehrle to drive them to Nurnberg but on the way they ordered him to turn around and go back to the guesthouse. On

the way back Hall had Fehrle stop the cab, and brandishing a pistol, made him get out of the cab. It became necessary to have Fehrle start the motor, following which he was again ejected from the cab. Barnfield, who had secured the pistol from Hall, struck Fehrle over the head twice with the butt end. Hall dragged Fehrle into an adjacent field and Barnfield struck him again on the head with the pistol in order to stifle his groans. Fehrle died the same evening following an operation. The cause of his death was the application of "a violent blunt force" to his brain.

"Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (MCM, 1949, Par. 180f). Independent of the pretrial statements the uncontradicted evidence introduced as to the alleged robbery from Geisthard establishes every element of the offense within the definition set forth above and also the element of concert between Barnfield and Hall. Thus, it is shown that Geisthard was ejected from the taxi by Hall at gunpoint while Barnfield stood by and accepted from Hall the fruits of the violence exerted by Hall, thereby lending aid and encouragement to Hall in the robbery (CM 321915, McCarson, 70 BR 411,418-419).

With reference to the robbery and murder of Fehrle, the evidence independent of the pretrial statements shows that Barnfield and Hall, together with their female companions, engaged a taxi driven by Fehrle. A short time later the girls left the cab to be rejoined in the space of minutes by Barnfield and Hall who returned in the taxi without Fehrle. Almost simultaneously, Fehrle was found severely injured and unconscious, and a short time later died. This evidence clearly establishes the probability that the offenses charged, viz, the murder of Fehrle, and the robbery of his cab, were probably committed and justified the consideration by the court of the voluntary pretrial statements of Barnfield and Hall in which each admitted the commission of these offenses (MCM, 1949, Par. 127b, p.159). The evidence, together with the pretrial statements, thus shows that accused and Hall took from Fehrle by force and violence the taxicab which he was operating. It is further shown that in the course of the robbery Barnfield quite insensately struck Fehrle over the head twice with the butt end of a pistol, and as Fehrle lay moaning on the ground, brutally struck him a third time. These blows resulted in Fehrle's death.

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1949, Par. 179a). That there is no legal justification or excuse for Fehrle's killing requires no discussion. The malice aforethought which characterizes murder is established by Barnfield's intent to rob and by

his intent to inflict great bodily harm, which latter intent was evidenced by his calloused assault upon Fehrle. Hall's participation in the robbery which was the proximate cause of the murder, establishes the concert alleged between him and Barnfield (CM 334790, Cruz, 1 BR-JC 277,296-297).

5. The reviewing authority designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides, inter alia,

"If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, dismissal and confinement of officers, and the dismissal and confinement of cadets, the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War 48 (c) (2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

6. Barnfield is 19 years of age and single. He completed nine years of school and in civilian life was employed as an oil field rig worker. He enlisted on 30 March 1948 and has served in the European Theater since March 1949. His service has been characterized as "poor."

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused Barnfield 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, as to the accused Barnfield, A sentence to confinement at hard labor for life is authorized upon conviction of murder in violation of Article of War 92.

_____, J.A.G.C.
Lewis S. Phull, J.A.G.C.
J. W. Lynch, J.A.G.C.

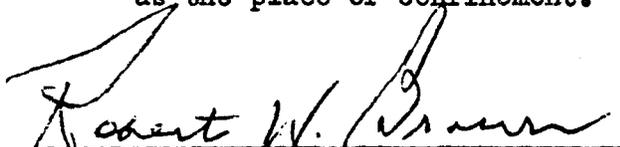
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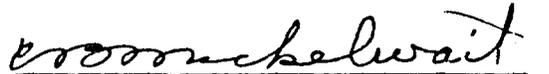
CM 339875

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Odis F. Barnfield,
RA 18254414, upon the concurrence of The Judge Advocate
General the sentence is confirmed and will be carried
into execution. A United States Penitentiary is designated
as the place of confinement.

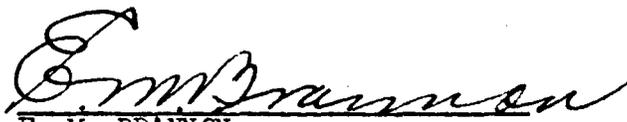

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

6 March 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

6 March 1950

(GCMO 16, March 16, 1950).

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

CSJAGK - CM 339910

UNITED STATES)

9TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at Fort Dix,
New Jersey, 31 October and 1 November
1949. Dismissal.

Captain THOMAS ANSON McABEE)
(O-451736), Headquarters, 9th)
Infantry Division.)

OPINION of the BOARD OF REVIEW
McAFEE, WOLF and BRACK
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following charges and specifications:

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

Specification: In that Captain Thomas A. McAbee, Headquarters, 9th Infantry Division, then of 91st Air Base Group, was, on or about 6 August 1949, found drunk in a semi-nude condition under dishonorable circumstances in the company of Sergeant Edward A. Carpenter in the said Captain Thomas A. McAbee's automobile, while parked on or near a public highway, to wit: Range Road, Fort Dix, New Jersey.

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

Specification: In that Captain Thomas A. McAbee, ***, was, on or about 6 August 1949, found drunk in a semi-nude condition under dishonorable circumstances in the company of Sergeant Edward A. Carpenter in the said Captain Thomas A. McAbee's automobile, while parked on or near a public highway, to wit: Range Road, Fort Dix, New Jersey.

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. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

Early in the morning on 6 August 1949, Sergeant First Class P. D. Jones and Private Newt Johnson, both of the 9th Military Police Company, were on routine motor patrol at Fort Dix, New Jersey. About 0300 hours, they noticed an automobile parked about 25 to 30 feet off Range Road, a public highway running through Fort Dix. Investigation revealed that the car was occupied by two supine individuals later identified as the accused and one Sergeant Edward A. Carpenter (R 19,22, Pros Ex 2).

The accused was attired in a civilian shirt, pulled up over his hips, shoes and socks. A pair of civilian trousers were draped over the back of the driver's seat. Sergeant Carpenter was dressed in complete uniform except for his cap. Accused was reclining in the front seat of the car with his head near the left door and his legs extended to the right under the glove compartment. Sergeant Carpenter lay with his head on accused's bare torso an inch or so from accused's penis with his hand "cupped" around that organ. Both apparently were asleep. A "peculiar sweetish" aroma emanated from the vehicle (R 18-21,22-24,43,60,139).

Captain J. D. Manning, the Provost Marshal duty officer, was called. Upon his arrival at Range Road, he surveyed the scene and thus described the ensuing action:

"*** I returned and tried to wake up the Sergeant. It was just about impossible to wake him up. I shook him vigorously there and he just seemed to mumble. I said to Nichols, 'Wake him up,' and I went around the other side and attempted to wake the other man up. I had to shake him pretty hard. He didn't seem to come to. I couldn't figure out what was wrong with him. Then, in a light feminine voice he said, 'Stop pushing me,' and Johnson was right opposite me and I said, 'Oh, we got one of those guys.'

* * *

"*** Nichols had the flashlight. He was on the other side shining it right into the car. I was on this side. I had him shine it on the person later identified as Captain McAbee. It was very easy to see it. Of course, we didn't know at that time it was an Army officer. He had a civilian shirt on.

"So I shook him again, realizing that he was awake. I believed he could hear me. I told him clearly who I was, that I was Captain Manning, Corps of Military Police, and that they were on a military reservation and that they were considered — that they would consider themselves under arrest and would come

with me to the MP Station. At that time the person later identified as Captain McAbee undoubtedly heard me, because then, in a natural voice, he said, 'I don't give a hell who you are. I just came in here to go to the toilet.'

"About that time we had the door open. I opened the door and when I did a pair of trousers fell out to the ground. I bent down and picked them up. They seemed to be rolled up. I picked them up and handed them to Johnson and said, 'Hold on to these pants,' and the man later identified as Captain McAbee said, 'I want to put my pants on.'

"I said, 'I'm sorry, you will have to come in the condition you are in now to the MP Station until we get this thing straightened out and identify you, and so forth,' and so from that point on the Captain and the Sergeant came with us with no further trouble. They did everything we told them to do.

"I explained to the Captain, 'Let's go along, now. I want you to get to the jeep -- I want you to go over to the jeep here and go to the Police Station and get this straightened out.' "
(R 55-59)

The accused, sans trousers, and Sergeant Carpenter were then taken to the police station where accused was identified and photographed (R 59-62,99; Pros Exs 3,4). They appeared to be either intoxicated or under the influence of drugs (R 45,81,138). Accused had the odor of alcohol on his breath and seemed to be suffering from a "hangover" (R 135).

Prior to the trial, the accused was examined by a psychiatrist with a view toward determining his mental condition. The doctor testified:

"A. That the accused prior to the alleged offense was sufficiently free from mental disease and defect as to be able to distinguish right from wrong and adhere to the right. Whereas, following the alcoholic spree in which he alleged to have indulged, it is doubtful that you can say the above applied. We felt he definitely had sufficient mental capacity to assist in his own defense and understand the charges placed against him. There are no indications that his physical or mental condition would result to an intolerable burden to the service.

"Q. And what was your diagnosis in the case?

"A. My diagnosis was that this man showed some emotional instability, somewhat, we could consider psychosexual conflict; that he had bright normal intelligence and that he was undergoing moderate anxiety.

"Q. And did you not find that he was suffering from a partial amnesia?

"A. Yes, we felt that he did have a partial amnesia.

"Q. *** And when you speak of partial amnesia will you please explain to the court exactly what you mean?

"A. The use of any intoxicant over a prolonged period of time benumbs the brain. Alcohol has an affinity for fatty tissue to bring its 'compo' to about 90 per cent by weight of fatty tissue. So alcohol has an affinity for nervous tissue in the brain, nerves in the brain. This man had sufficient alcohol to really numb his brain and to produce a state in which he was not in the full level of consciousness. He was not completely aware of all he did and that frequently results in amnesia afterwards. I think this man possibly had sufficient alcohol to not recall all the things that did happen to him.

"Q. Now, if the man had been administered drugs under such circumstances, what would have been his mental condition?

"A. Alcohol is a drug.

"Q. Well, narcotics.

"A. It would depend on the narcotic.

"Q. Would any narcotic produce the same effect mentally upon this man?

"A. Yes, sir." (R 182)

For the Defense

The accused, having been apprised of his rights as a witness by defense counsel and the law member, elected to be sworn as a witness in his own behalf. He testified that he was born in Texas and is 34 years of age. He left school at the age of 14 to work on a farm. In 1935 he enlisted in the Army and has been in the service ever since in both enlisted and commissioned status. In July 1949, he was assigned to McGuire Air Force Base, Fort Dix, New Jersey, as club officer. In this capacity he made an aerial trip on 5 August 1949 to Washington, D. C. for the purpose of restocking the club's supply of whiskey. His mission accomplished, he assisted in the unloading and storing of the whiskey and then at about 2130 hours indulged in one or two "double bourbons" with water. He then repaired to his quarters where he changed his uniform in favor of civilian shirt and trousers. Returning to the club, he consumed several more drinks of whiskey. He left the club some time after midnight intending to visit one or two "night clubs" near the post. In the words of the accused, the following then transpired:

"Q. Now, when you left the Officers' Club, what time was it?

"A. It was around 12:30, or maybe 12:45.

"Q. Now, at the time you left the Officers' Club what was your condition with respect to sobriety?

"A. I feel I was perfectly sober as far as sobriety goes.

"Q. What did you do after you left the Officers' Club?

"A. Well, I got in my car and backed out and started with the intention of going to my B.O.Q., and I recalled hearing some of the officers talk about a place called the 'Pig and Whistle' where they had a night show, or a floor show, and I just decided that I would go to this place I'd heard about outside of the Officers' Club and see if there was a show there and in case there wasn't I had planned to go over to the 'Pig and Whistle.'

"Q. Did you use your automobile?

"A. I did.

"Q. Where did you drive to?

"A. I drove to a place called 'Baloney John's.' I found out later that was the name of it.

"Q. Now, about what time did you arrive at 'Baloney John's' that night, if you recall?

"A. I don't recall the exact time.

"Q. Was it a few minutes after you had left the Officers' Club?

"A. Yes, that is right.

"Q. Now, what took place when you entered 'Baloney John's'?

"A. Well, I ordered a bourbon and water.

"Q. Was that a single or a double bourbon?

"A. That was a single.

"Q. Did you drink that drink?

"A. Not completely; no.

"Q. How is it that you did not finish that drink?

"A. Well, when they gave it to me I took a sip of it and I called the bartender over to the bar where I was standing and told him that I had ordered bourbon and water, and he says 'This is bourbon and water,' and I said 'It doesn't taste like any bourbon and water I have ever had.'

"Q. Now, just a moment, what did that taste like?

"A. First I thought it had some gin in it. I couldn't describe the taste of it, it had a peculiar taste.

"Q. Well, would you say it was a -- Just describe the taste as best as you can recall.

"A. Well

"Q. Was it bitter, sweet?

"A. I don't know. I would say it was more or less a bitter drink. I don't think I can give a true description of just how it did taste. I was

"Q. Did it taste anything like bourbon and water?

"A. No, it did not.

"Q. What did the bartender do when you protested to him?

"A. Well, he reached down and picked up a bottle from under the bar and sat it up and said 'There it is.' He put his finger on the label which said 'Bourbon.' I said, 'It may be so but it doesn't taste like that.'

"Q. Now, where did he get this bottle from?

"A. As far as I could determine he reached down underneath the bar in front of me and came up with it.

"Q. Now, did you drink anything more out of that drink?

"A. I took another sip, or two, trying to determine whether or not it was just my taste or something was really wrong with the drink. At the time I thought they had switched some other type of drink -- a cheaper drink possibly -- into the bottle that was marked 'Bourbon.'

*

*

*

"A. *** I was standing there and wondering whether I should order another drink or just give it up altogether. Then everything seemed a little hazy. I began to wander my eyes over the crowd. There seemed to be about -- oh, fifteen or twenty people in the place, they were gathered in groups of two, three or fours, and they looked a little hazy to me. And I decided then that I better get back out to my car and get to my B.O.Q. I wasn't feeling too good.

"Q. Well, now, when you say you weren't feeling too good, what was wrong?

"A. Well, I have been troubled with sinus off and on for -- since 1930, and with the pains that were shooting across my forehead I just thought it was another attack of my sinus and I went out to my car then.

"Q. All right. Did you get into your automobile?

"A. I did. I got in and rested my head over on the steering wheel on my arm.

"Q. Now, how long did you remain in your automobile?

"A. I must have dozed off. I'm not sure of how long I did stay there. Anyhow, when I did finally come around it seemed that I was feeling O.K. and I just thought that perhaps it was a dizzy spell or something that was caused from this sinus reaction. I couldn't imagine what was wrong so I felt that everything was O.K.

* * *

"A. *** When I felt I was feeling O.K. I decided to go over to the Pig and Whistle. ***

"Q. When you left the parking lot outside of Baloney John's to go to the Pig and Whistle, do you recall where you drove?

"A. Yes. I went back up the same road that I had come down when I arrived at this Baloney John's.

"Q. Do you remember any landmarks?

"A. Yes, there is a street light just up the road; it must be about a block away.

"Q. By a street light do you mean a traffic light?

"A. A traffic light, that's right.

"Q. Now, did you pass that traffic light?

"A. I did. I passed the traffic light going straight ahead instead of turning left to go back into McGuire.

"Q. Now, after you passed that traffic light, and when driving straight ahead, did anything unusual occur?

"A. Nothing particularly unusual. I saw someone in uniform in the beam of my headlights and I pulled up to this particular person and stopped and asked him if he could tell me how to get to the night club called the 'Pig and Whistle' and he said that he could; that he would like to go there himself, and I told him to hop in.

"Q. All right. What took place after the soldier got into the car?

"A. Well, he got in and said, 'Make a left turn right down there' he pointed straight ahead. It wasn't too far away until the road made a left turn to go back into Fort Dix.

"Q. Do you recall the condition of this soldier?

"A. I didn't pay any particular attention to his condition at the time. I noticed that he kept sitting over with his arm out the door.

* * *

"Q. All right. What took place after this?

"A. Well, we crossed Fort Dix. The main thing I remember there is that we hit a circle -- hit a traffic circle, and I told him to be sure and get me on the right road when we come out of this circle.

* * *

"A. Well, I drove for what seemed four or five minutes, it must have been two or three miles that I had driven and he hadn't said anything and I was wondering if he was paying any attention to where I was going. So I asked him if he was sure we were on the right road and by this time why he was laying with his head clear over on his arm and he said 'Yes, just keep going.'

* * *

"A. Well, I drove, I would say, another mile. I mean it seemed to be a very short time after that that I had to urinate. Well, I saw a small road that led off to the left of the highway and I pulled in to this side road and stopped.

* * *

"A. Well, as I recall I caught hold of the door and pushed it open; it seemed to come open O.K. but it hit a stop. Now, I had been in a little accident with my car not too long ago and had jimmed up that driver's door and at the time I didn't know just what had happened unless it was the hinges of this door that was fouled up.

"Q. All right. You say the door hit a stop. What happened then?

"A. I'm not positive. By this time I was beginning to feel awful hazy.

"Q. Now, had you noticed any reoccurrence of this headache that you mentioned previously?

"A. I did at that time because I recall that I was kept rubbing my head with my hand. It was getting quite terrific the sharp pain across my head over my eyes.

"Q. Do you recall anything after that time?

"A. Well, I do recall at this time that Sergeant Carpenter said something about, 'Well, come on and take me back.' I recall him making that statement but I just couldn't get my faculties together to respond to give him an answer or attempt to take him back, or anything.

"Q. What is the next thing that you recall?

"A. The next thing I recall was someone trying to make me get into a jeep.

"Q. How were you attired when this happened?

"A. I had just my shirt and shoes and my socks on.

"Q. Did you have your trousers on?

"A. I did not.

"Q. Did you get into that jeep?

"A. Yes, I got into the jeep.

"Q. And you sat there semi-nude in that jeep?

"A. That's right.

"Q. And where did they take you?

"A. They took me to the Military Police Station, Fort Dix."
(R 151-164)

Accused's nocturnal driving companion, Sergeant Carpenter, maintained that he had never known the accused before the incident. He did some drinking with some friends on the evening in question and had no recollection of what occurred after about 2300 hours until the morning of 6 August 1949 when he found himself together with the accused in "the MP Headquarters" (R 148-150).

Rebuttal

Mr. John E. Coughlan, Criminal Investigation Division Agent, Fort Dix, New Jersey, testified that he had been assigned in the Fort Dix area for over three years, that he had often visited the "night club" known as "Baloney John's," that the resort has a good local reputation, is frequented by Army personnel and their wives, and that no complaints had ever been registered against that "club" in his office (R 196,197).

4. Discussion

The accused was convicted of being found drunk under dishonorable circumstances in violation of Articles of War 95 and 96. The undisputed evidence shows that in the early morning hours on 6 August 1949 accused was found deshabelle reclining in his automobile. The car was parked in close proximity to a public highway. Accused was in a drunken stupor. A portion of his semi-nude body was in scandalous juxtaposition to the head of an enlisted man. Such conduct specifically has been held to be a violation of both the 95th and 96th Articles of War (CM 325313, Puckette, 74 BR 141).

Only two points brought out in the evidence merit discussion. The

first is the testimony of a psychiatrist to the effect that the accused was suffering from a "partial amnesia" at the time of the alleged offenses. At first blush it might appear from this evidence that the accused was without the mental capacity to comprehend the scope of his actions or was unable to distinguish right from wrong. However, it long has been held that voluntary intoxication not productive of an un-sound mind is no excuse for unlawful conduct and that a partial irresponsibility, or an impaired ability to adhere to the right is no defense to crime (CM 319168, Poe, 68 BR 141; CM 319287, Phinezy, 68 BR 221; CM 320805, Hamilton, 70 BR 191; CM 338934, Jones, 16 Jan 1950). The question of the degree of accused's intoxication is generally one of fact for the court. In the instant case the court by its findings determined that the accused's mental machinery was not so impaired at the time of the particular acts charged as to render him so unable to distinguish right from wrong as to vitiate criminal responsibility for his alleged offense (CM 319287, Phinezy; CM 338934, Jones, supra).

The second matter for discussion concerns the innuendo, nurtured by the defense throughout the trial, that the accused might have been the victim of a drug administered to him without his knowledge or consent. To support this theory accused testified that after midnight he had a drink at "Baloney John's" that had a "peculiar" taste. There is also testimony that there was a "peculiar sweetish" odor in accused's car when he was found. There is no substantial evidence, however, sufficient to raise an inference that any drug was or might have been administered to the accused. On the other hand, the evidence is undisputed that the accused had consumed a substantial quantity of whiskey immediately prior to the time he was found in a stupefied condition in his automobile at the time alleged. Testimony as to the difficulty in awakening him from his torpor, the aroma of alcohol exuding from him, and his actions of a person "suffering from a hangover" later in the day, when coupled with the accused's judicial admissions that he had been drinking whiskey for at least three hours on the night in question amply supports the findings beyond any reasonable doubt that accused was intoxicated as alleged. The nuances of accused's expressions of opinion which give rise to the ephemeral thought that he might unwittingly have been subjected to a dose of a narcotic are based on mere speculation, suspicion or surmise. Such is not evidence and was properly rejected by the court, particularly in view of the showing, though negative in nature, that the "night club" in question bore a good reputation (CM 277983, Robinson, 51 BR 281; CM 312356, Preater, 62 BR 135, 141).

5. Department of the Army records show that the accused is 34 years of age and married. He left school after completing the sixth grade and obtained employment as a farm hand. In 1935 he enlisted in the Army in which he has served ever since. In December 1941 he was commissioned a second lieutenant (AUS) and was promoted to first lieutenant and captain in April 1942 and December 1944, respectively. In

1945 he obtained credit for four years of high school from the United States Armed Forces Institute. He served in India for 15 months and is entitled to wear the American Defense, American Theater and Asiatic-Pacific ribbons. His efficiency ratings for his entire commissioned service are generally "Excellent." On 15 November 1948 he was selected for appointment as warrant officer (junior grade) in the Regular Army.

6. Consideration has been given to letters addressed to the Office of The Judge Advocate General from the accused and his wife dated 14 and 20 January and 8 February 1950, and an inclosure to the latter communication consisting of a congratulatory letter to accused from Major General Thomas B. Larkin dated 15 December 1948.

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. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of Article of War 96.

Carlos E. McAfee, J. A. G. C.
Samuel S. Lovep., J. A. G. C.
Joseph L. Brack, J. A. G. C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

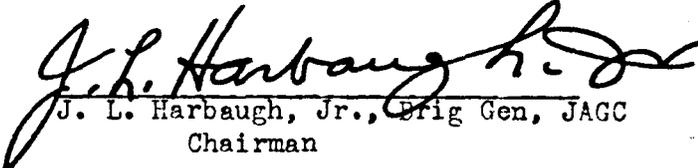
THE JUDICIAL COUNCIL

CM 339, 910

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

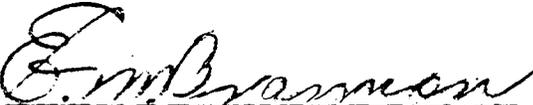
In the foregoing case of Captain Thomas Anson McAbee,
O-451736, Headquarters, 9th Infantry Division, upon the
concurrence of The Judge Advocate General the sentence is
confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGC C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

24 April 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

28 April 1950

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

CSJAGH CM 336419

UNITED STATES	)	UNITED STATES ARMY FORCES ANTILLES
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Brooke, Puerto Rico, 9,
Captain JESSE B. HALPRIN,	)	23,24,25,28,29 March, 1,2 April
0336044, Fort Buchanan General	)	1949. Dismissal, total for-
Depot, Fort Buchanan, Puerto	)	feitures after promulgation,
Rico.	)	and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
O'CONNOR, BERKOWITZ, and LYNCH
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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

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

Specification 1: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, did, at Fort Buchanan, Puerto Rico, on or about 24 September 1948, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Buchanan Exchange a certain check, in words and figures as follows:

THE ARMY NATIONAL BANK
of Fort Leavenworth, Kans.

Pay to the	Fort Leavenworth, Kans. 24 Sept. 1948
Order of	Fort Buchanan Exchange
	\$50.00
	Fifty and no
	Dollars
	100

/s/ JESSE B. HALPRIN
Captain, CMP, 0336044

and by means thereof did fraudulently obtain from the Fort Buchanan Exchange, Fifty Dollars (\$50.00), he, the said Captain Jesse B. Halprin, then well knowing that he did not have and not intending that he should have sufficient funds in the said Army National Bank of Fort Leavenworth, Kansas, for the payment of said check.

Specification 2: (Same as Specification 1).

Specification 3: (Same as Specification 1, except the date of the offense, "12 November 1948," and the date of the check, "12 November 1948.")

Specification 4: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, did, at Fort Buchanan, Puerto Rico, on or about 3 September 1948, wrongfully and unlawfully make and utter to Mrs. M. W. Cohn a certain check in words and figures as follows:

COLUMBUS, GA.	Sept 3	1948
THE FIRST NATIONAL BANK		
Pay to the		
Order of	Mrs. M. W. Cohn	\$50.00
Fifty and no		Dollars
<u>00</u>		
	/s/ JESSE B. HALPRIN	
	Capt, CMP, 0336044	

then well knowing that the said Mrs. M. W. Cohn, would further negotiate said check and that he, the said Captain Jesse B. Halprin, did not have, and not intending that he should have sufficient funds in the said The First National Bank, Columbus, Georgia, for the payment of said check.

Specification 5: (Same as Specification 4, except the date of the offense, "3 November 1948," and the date of the check, "Nov 3 1948").

Specification 6: (Same as Specification 1, except the date of the offense "23 November 1948," and except the date on the check "23 Nov 1948.")

Specification 7: (Same as Specification 1, except the date of the offense "29 November 1948" and the date of the check "29 Nov 1948.")

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

Specification: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, did, at Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, on or about 24 December 1948 desert the Service of the United States and did remain absent in desertion until he was apprehended at Isla Grande Airport, Santurce, Puerto Rico on or about 31 December 1948.

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

Specification 1: (Same as Specification 4, Charge I, except the date of the offense "3 December 1948" and the date of the check "Dec 3 1948").

Specification 2: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, did, at Santurce, Puerto Rico, on or about 22 December 1948, with intent to defraud, wrongfully and unlawfully make and utter to the New Yorker Hotel, a certain check in words and figures as follows:

No. 123

San Juan, P.R. 22 Dec 1948

THE NATIONAL CITY BANK OF NEW YORK 59-204
San Juan Branch

Pay to the Order of New Yorker \$20.00

Twenty & $\frac{00}{100}$ Dollars

s/ JESSE B. HALPRIN
Capt, CMP, O-336044

and by means thereof did fraudulently obtain from the New Yorker Hotel, twenty dollars (\$20.00), he the said Captain Jesse B. Halprin, then well knowing that he did not have and not intending that he should have sufficient funds in The National City Bank of New York, San Juan Branch, for the payment of said check.

Specification 3: (Same as Specification 2 except the place of the offense is San Juan, Puerto Rico, the date of the offense "23 December 1948," the recipient of the check "Gonzalez Padin Co. Inc., San Juan, Puerto Rico," the date of the check, "23 Dec 1948," the payee of the check "CASH," and the amount of the check and the amount obtained "\$30.00").

Specification 4: (Same as Specification 3 except the payee of the check "Gonzalez Padin Co." and the amount of the check and the amount obtained "\$12.50").

Specification 5: (Nolle Prosequi).

Specification 6: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, did, at Aguirre, Puerto Rico, on or about 27 December 1948, with intent to defraud, wrongfully and unlawfully make and issue to Aguirre Hotel, Aguirre, Puerto Rico, a certain check in words and figures as follows:

No. _____	San Juan, P. R.	Dec 27	1948
	THE NATIONAL CITY BANK OF NEW YORK	59-204	
	San Juan Branch		
Pay to the order of	Aguirre Hotel	\$8.	$\frac{55}{100}$
			Dollars
	Eight and $\frac{55}{100}$		
		s/ JESSE B. HALPRIN	
		Capt, CMP O-336044	

in payment of food and lodging to the value of eight dollars and fifty five cents (\$8.55) then well knowing that he did not have and not intending that he should have sufficient funds in The National City Bank of New York, San Juan Branch for the payment of said check.

Specification 7: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico did, on or about 31 December 1948, at San Juan, Puerto Rico, with wrongful intent to deceive, have in his possession a forged and counterfeit military pass, to wit, a purported certified true extract copy of Special Orders Number 129, Headquarters Fort Buchanan General Depot, Fort Buchanan, Puerto Rico dated 31 December 1948, purportedly granting to the said Captain Jesse B. Halprin fifteen days (15) ordinary leave with authority to visit the United States. (As amended, R 115)

ADDITIONAL CHARGE II: Violation of the 95th Article of War-

Specification 1: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, did, on or about 21 December 1948, at Fort Buchanan, Puerto Rico wrongfully, unlawfully and falsely make a certain instrument purporting to be a certified true extract copy of Special Orders Number 129, Headquarters Fort Buchanan General Depot, Fort Buchanan, Puerto Rico dated 31 December 1948, purportedly granting Captain Jesse B. Halprin fifteen days (15) ordinary leave with authority to visit the United States, then well knowing there were no such official Special Orders. (As amended, R 115)

Specification 2: In that Captain Jesse B. Halprin, Fort Buchanan General Depot, Fort Buchanan, Puerto Rico, having on or about 24 December 1948 rented a 1947 Ford Tudor Sedan from Antonio Sarmiento, Santurce, Puerto Rico, which vehicle was then and there entrusted to him by the said Antonio Sarmiento, did on or about 31 December 1948, wrongfully and dishonorably abandon said vehicle on a public street in Santurce, Puerto Rico without returning the said vehicle to the said lessor or informing him of its whereabouts.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Additional Charge II, except the words "on or about 21 December 1948, at Fort Buchanan," substituting therefor, respectively, the words "on or about 21 December 1948, at San Juan," of the excepted words, not guilty, of the substituted words guilty; and guilty of the other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows. Accused is a member of Headquarters, Fort Buchanan General Depot (R 107).

By deposition W. F. Pearce, Vice President and Trust Officer of the First National Bank, Columbus, Georgia, testified that he checked the official records on file in the bank pertaining to the account of

was for the exchange which cashed the check to deposit the check in the National City Bank of Bayamon to the account of "Antilles Central Exchange." Subsequently, if the check was returned, the account was debited and the check turned over to the Central Exchange Office. Otherwise the exchange which cashed the check would forward the check to the Central Exchange Office by mail, which, in turn, would forward it to the Army Exchange Service in New York which would then forward the check to the drawee bank through banking channels. In the event the check was returned for any reason it would eventually be returned to the Antilles Exchange Service whose account with the Army Exchange Service would be debited (R 48-49). Robert K. Jamison, Chief Accountant, Caribbean Army and Air Force Exchange, Antilles, testified that he maintained the records of the Antilles Exchange Service and that he had examined the records with reference to the checks designated as Prosecution Exhibits 2-9, inclusive, and found that the checks so designated were returned to the Antilles Exchange Service from either the National City Bank of Bayamon or from the Army Exchange Service in New York. The records showed that Prosecution Exhibits 2, 3, 5 and 6 were returned because of insufficient funds. The records did not disclose the reasons for the return of Prosecution Exhibits 4, 8 and 9, but did show that the account of the Antilles Exchange Service had been charged in the amount of the checks, and that all the checks (Pros Exs 2-9, incl) had been returned "for collection." (R 37-50) Checks returned to the Service for collection were not so returned solely by reason of insufficient funds (R 54). All the checks (Pros Exs 2-9 incl) were sent to the Post Commander, Fort Buchanan through command channels for collection, and the Exchange Service was subsequently reimbursed in full for the checks (R 52-57).

On cross-examination, Jamison identified Defense Exhibit A as the record which reflected that Prosecution Exhibit 3 was returned by reason of insufficient funds. Defense Exhibit A, a communication from the National City Bank of New York, Bayamon, P.R., recites that a check dated 11-3-48, drawn by accused upon the bank and payable to Mrs. M. W. Cohn in the amount of \$50.00 was returned because of "insufficient funds" (R 52,53).

On 22 December 1948, accused had an account in the National City Bank of New York, San Juan Branch, which was overdrawn in the amount of \$52.23 (R 74). Previously, on 13 December the bank had sent accused an advice of overdraft, to which accused objected by noting on the advice that his records showed a balance of \$41.25 (R 81,88).

Manuel Torres Alvarado, assistant manager of the Hotel New Yorker, identified Prosecution Exhibit 13 as a check which he cashed for accused on 22 December 1948. The check, which was made in Alvarado's presence by accused, was dated 22 December 1948, was drawn on the National City

Bank of New York, San Juan Branch, payable to "New Yorker" in the amount of \$20.00, and bore the signature of accused (R 67-69). The check was presented to the drawee bank for payment on 30 December and was dishonored because accused's account was overdrawn (R 75-77). After the check had been returned to the Hotel New Yorker, Alvarado was charged the amount of the check by the hotel owner (R 69-70). Alvarado was, however, subsequently reimbursed the amount of the check (R 71).

On 23 December 1948, two checks, identified as Prosecution Exhibits 14 and 15 were negotiated at the Gonzalez Padin Company, a department store. For one check, Prosecution Exhibit 14, which was payable to "cash," accused received the face amount of the check, \$30.00, and for the other check, which was payable to "Gonzalez Padin Co." in the amount of \$12.50, a toy. Both checks were dated 23 December 1948, were drawn on the National City Bank of New York, San Juan Branch, and bore the purported signature of accused. Both checks were presented to the drawee bank on 24 December and were dishonored because accused's account was overdrawn (R 78). Reimbursement was subsequently made for both checks (R 94,97).

A duly authenticated extract copy of the morning report of Headquarters and Headquarters Company, Fort Buchanan General Depot, designated as Prosecution Exhibit 18, was introduced in evidence without objection. It contained the following entry pertaining to accused: "24 December 1948 Halprin Jesse B (PM) 0336044 Capt Dy to AWOL as 0001." (R 109, Pros Ex 18).

On the date of the foregoing entry accused rented a car from Antonio Sarmiento who conducted a "Drive yourself" business at Santurce. Accused signed a rental agreement for the car but the period of the rental and the price therefor was not set, nor was a deposit required (R 99-100).

At about 1345 hours on 25 December 1948 accused appeared at the ticket office of Eastern Air Lines and tried to purchase a round trip ticket to Miami. The clerk on duty, Charles V. Hernandez, refused, however, to sell the ticket when it became apparent that accused intended to pay for the ticket by check. Accused showed Hernandez some papers which he asserted were leave papers but when Hernandez persisted in his refusal, accused left (R 137-138,142).

On the night of 25 December, accused obtained a room at the Central Aguirre Hotel. When he checked out of the hotel on 27 December he paid the hotel bill with a check dated 27 December, drawn upon the National City Bank of New York, payable to the Aguirre Hotel in the amount of \$8.55, and bearing his purported signature. Jose A. Rodriguez, manager of the Aguirre Hotel, identified Prosecution Exhibit 12 as the check given by accused (R 57-58). The check was presented to the drawee bank

on 10 January and was returned because of insufficient funds (R 78). Rodriguez had to pay the hotel cashier the amount of the check but was subsequently reimbursed (R 59,62).

Subsequently, on 31 December accused appeared at the Eastern Air Lines ticket office at Isla Grande Airport and purchased a one way ticket for Miami paying therefor \$64.00 in cash. It was 1355 hours and the plane was due to leave at 1415. Steven Fenosik, who sold accused the ticket, had seen him at the ticket office on 25 December at which time accused had a moustache which he did not have on the 31st. Accused registered, however, under his correct name (R 144-147). On information received from the airport by telephone, First Lieutenant William C. Gелlette, accompanied by Private First Class Diaz, went to the airport, apprehended accused aboard an Eastern Air Lines plane, and then drove him to the Antilles Provost Marshal's Office (R 148). Accused was attired in civilian clothing (R 133,151). Just before arriving at their destination, accused crumpled up a piece of paper and dropped it from the vehicle (R 149). Captain John F. Barlow had also driven to the airport to apprehend accused and arrived just as accused and Lieutenant Gелlette were leaving the field. Captain Barlow fell in behind them and observed accused when he dropped the piece of paper from the vehicle in which he was riding. Captain Barlow stopped his vehicle and retrieved the piece of paper which he examined thoroughly after arriving at the office. He identified Prosecution Exhibit 17 as the paper which accused had dropped (R 133-134). Prosecution Exhibit 17 is a typewritten, purported extract copy of Special Order 129, Headquarters Fort Buchanan General Depot. The date typed thereon, is December 21, 1948, but the figure "2" is over-written with an inked figure "3". The extract granted fifteen days ordinary leave to accused with authority to visit the United States. The extract further contained the command line "By order of Colonel Harris" and authentication by "L. A. Lugo, Major, AGD, Adjutant." Under the line "A true extract copy" was the signature "L. A. Lugo."

Major Luis A. Lugo testified that he was the depot adjutant, Fort Buchanan General Depot, and as such was the only person authorized to authenticate Special Orders. Upon being shown Prosecution Exhibit 17 he denied authenticating the special order of which Prosecution Exhibit 17 purported to be an extract and further denied that the written initials "L.A.L." on the extract and the written signature "L. A. Lugo," appearing below the line "a true extract copy", were written by him (R 107-109,118). He also testified that no special orders were published by Fort Buchanan General Depot on 31 December 1949 (R 107-109,117-119).

At about the end of December, 5 or 6 days after he had rented the car to accused, Sarmiento observed the car in front of the Grenada Hotel, a distance of about a mile from his place of business. On 3 January,

Sarmiento tried to call accused at the Provost Marshal's office to find out when the car would be returned. The same day Sarmiento was driving to the airport when he saw the car at the place he had previously seen it. At this time, an officer and a civilian were standing by the car and they turned it over to Sarmiento (R 104-105). Lieutenant Gелlette identified himself as the officer involved, and told of securing the keys to the car from the glove compartment where accused had informed him he had left them (R 175). Sarmiento admitted he had been paid for the use of the car, and that the car had not been damaged (R 103).

Jorge M. Morales, Agent, Criminal Investigation Division, testified that on 4 January 1949, he, together with another agent, Porrás, interviewed accused and received a statement from him. Prior to interrogating accused, Morales read and explained the 24th Article of War to him, and thereafter, no recourse was had to force, threats, or promises to induce accused to make the statement (R 156-158).

On cross-examination into the voluntary character of the statement Morales testified that the interview took place in the office of the Detention and Rehabilitation Center, Fort Buchanan. Agent Porrás informed accused that he and Morales were there to find out accused's activities during his absence. Accused's query as to what were the charges against him was unanswered since, at the time, there were no charges against him. Morales who had known accused and had worked with him for over seven months noticed that accused was very dejected and beaten down, his eyes bulgy; he had a "starry" look on his face, was very nervous and smoking all the time. Morales could tell that he was extremely worried. Two or three times accused requested a psychiatric examination and Morales believed that the requests were in order. Morales also stated that a few days prior to the interview with accused, he and Lieutenant Gелlette had seen accused at the hospital. Morales, however, did not know the length of accused's stay there (R 158-161).

Upon the resumption of examination by the prosecution Morales testified over objection that he checked the facts contained in the statement and "They tallied one hundred per cent." (R 162).

The law member, over objection by the defense, allowed Morales to testify concerning the contents of the statement made by accused. Morales explained that the questions which he and Porrás asked accused were not recorded but that the answers made by accused were recorded by him (Morales). The answers were recorded exactly as accused made them "with all the contradictions he says." Morales read the statement to the court as he recorded it (R 164-167).

In his statement to Morales accused admitted that he knew he had written a lot of "bum" checks since he absented himself from Fort Buchanan

on 22 December 1948 and had not made any deposits to his accounts at the National City Bank and Chase National Bank during his absence. He had received a "VOCO" from Colonel Goodwin on 22 December to be absent until 1300 hours 24 December 1948. He went to the office of Credito Y. Ahorro, Ponceno Bank, and attempted to borrow \$600.00 to cover his debts but was turned down. He then started drinking. On 23 December, he cashed a check at the New York Department Store for \$30.00 and a check in the same amount at Padin. He also cashed a check in an amount he did not recall at the New Yorker, although he knew he was overdrawn. When his "VOCO" expired he decided he wanted to commit suicide but was in doubt if his \$12,000 insurance policy covered suicide. On 27 December he made a check at Roosevelt Roads for \$30.00 and another at the Aguirre Hotel for \$8.55. On 31 December he cashed a check for \$100.00 at the National City Bank at Mayaguez. He thought that his pay check would come to the bank in time to cover the checks. He recalled that on 24 December 1948 he rented a car which he left near the Grenada Hotel on the day following. He stated that he boarded an airplane at Isla Grande on 31 December "so that the MP's could pick him up and take him to a psychiatrist." He also stated that he had shaved off his moustache so that he could not be recognized. With reference to a set of orders found in his belongings, accused stated: "I wrote those orders at the Normandie Hotel and with my own handwriting I made out all the words and figures in ink which appear therein but I never used them. I do not know why I had those orders on me." During the interrogation Morales showed accused Prosecution Exhibit 17 (R 165,168-169).

Morales admitted under defense examination that he had told the investigating officer, Major Putnam, that he, Morales, had gone to accused to obtain a statement, if possible (R 170-171).

b. For the defense.

Corporal Alejandro Figueroa testified that he had served under accused for about ten months. Prior to December 1948, accused, as company commander, was liked for his manner of treating the men. He was friendly and would receive suggestions from his men. On or about 23 December Figueroa was serving as Charge of Quarters and when accused came into the room where Figueroa was on duty Figueroa saluted him. Accused did not answer the salute but continued on into his office. Figueroa remarked to another soldier that there was something wrong with accused. A few minutes later Figueroa received a call from accused's wife who asked for accused and stated she could not get him on the phone. Figueroa went to accused's office, knocked on the door, but received no answer, and notified accused's wife of that fact. The following night Figueroa accompanied by other enlisted men visited the China Doll Night

Club in Santurce where Figueroa saw accused standing at the bar. Figueroa asked accused to return to camp with him. Accused assented, but excused himself and went to the men's room, and did not reappear. Figueroa denied that accused had been drinking but stated that he was smoking constantly (R 202-206).

Corporal Angel L. Santos testified that he had known accused for about nine months prior to December 1948 and had served under accused as duty "NCO." Prior to December 1948, accused was a good officer who was friendly and polite with the men. Santos observed a change in accused during December. He recounted the incident related by Figueroa involving the attempt by accused's wife to get in touch with accused. Santos added, however, that five minutes after Figueroa had knocked on accused's door accused emerged from his office holding his hands over his face. Santos addressed accused but received no reply. Then Santos and Figueroa followed accused in a jeep and saw him enter the service club. Further on, they saw accused's wife and took her to the service club but on arriving there, they could not find accused (R 208-210).

Master Sergeant George Hauser testified that at about 6:30 in the evening, 24 December 1948, shortly before closing time, accused came to the Golf Club and ordered a soft drink. Accused asked Hauser if the club was closing and upon receiving an affirmative reply, stated he would wait outside. When Hauser was locking the door to the club preparatory to leaving, he observed accused sitting on a bench to the rear of the caddy house. Hauser did not recall the substance of the conversation he had with accused that night but remembered that accused's speech was dull and listless and rambling. Most peculiar of all to Hauser was the circumstance that it was the first time he had seen accused at the golf club at that hour. Hauser did not believe that accused had been drinking (R 212-213).

Sergeant First Class Frank J. Sheehan testified that he had worked under accused since 1 August and found his relations with accused very congenial. In December Sheehan observed a change in accused in that he appeared moody, depressed and inattentive (R 215-216).

Mr. Milton H. Farber testified that as representative of the National Jewish Welfare Board his assistance was sought when accused got into trouble. With accused's permission he examined accused's account at the National City Bank and found that the bank had on fourteen occasions permitted accused's account to be overdrawn in order to honor checks which had been drawn by him. He identified Defense Exhibit G, a bank statement of the National City Bank of New York, San Juan, Puerto Rico, as one of the sheets he had seen. The statement covered the period from 4 August 1948 to 7 March 1949, inclusive, and showed a total of ten debit lines, one of which, the entry of 22 October, represented in fact

a reduction of the debit from \$3.56 to \$0.56 by virtue of a deposit of \$3.00, rather than an overdraft. Two of the ten alleged overdrafts, evidenced by the debit lines, occurred subsequent to the offenses charged and Mr. Farber testified that the remaining four overdrafts occurred still later. The statement otherwise shows that on October 1, accused had a balance of \$297.44 in his account and that on 14 October a check in the amount of \$300.00 was honored resulting in a debit of \$2.56. On 22 October the bank honored a check in the amount of \$1.00 increasing the debit to \$3.56, which was reduced to \$0.56 on the same day by a deposit of \$3.00. On 28 October the bank honored a check in the amount of \$5.37 increasing the debit to \$5.93. A deposit of \$350.25 on 1 November resulted in a comparatively substantial balance to accused and on 9 December he had a balance of \$29.87. Thereafter, checks presented in the amounts and on the dates following resulted in debits as set forth:

\$50.00		10 Dec	\$20.13
\$15.30		14 Dec	35.43
\$10.00	\$6.80	16 Dec	52.23
\$ 1.00		23 Dec	53.23

Accused's account thereafter did not show a balance favorable to him until 17 January. While trying to arrange to clear up accused's indebtedness, Mr. Farber asked the manager of the bank why, if accused had been accorded overdraft privileges in the past, they had discontinued the practice. From what Mr. Farber could gather from the reply the privilege was not continued because of some adverse publicity accused had received. Mr. Farber then arranged with the bank that half of accused's subsequent pay would go to the bank in a special account and the bank would carry accused on overdraft on the special account. By mistake, checks sent to the New Yorker, the Hotel Aguirre and to the Navy Ship Stores, to take care of prior indebtednesses were not marked "Special account" and hence were returned (R 218-229).

Mrs. Eleanor C. Halprin, accused's wife, testified that she estimated accused's income at about \$425.00 a month of which he gave her \$300.00. From the remainder, accused paid insurance premiums of \$27.00 a month, the telephone and club bills, \$27.00 a month for the maid, and \$50.00 a month to Mrs. Cohn (R 230-231).

While her husband was in the stockade, Mrs. Halprin had a visit from "Major Jaeger" who took her to the Red Cross where Mr. Roth gave him \$50.00 which Mrs. Halprin repaid. Mrs. Halprin was withdrawn as a witness and the remainder of her testimony was stipulated and shows that on a second visit Major Jaeger advised her to sell all the furniture possible and get all the money she could because there would not be

another penny coming to her. She did not request Major Jaeger to obtain transportation to the States for herself and her family. Major Jaeger told her she would have to go to work. She responded that she was unable to work because of a blood clot on her brain which paralyzed her right side. She realized almost \$1500.00 by selling some furniture and jewelry but did not use this to pay her husband's debts because she had been told she would need all the money she could raise (R 232). Her husband was a very considerate gentleman and a fine father. He had a half bottle of whiskey at home which had been untouched for six months. Accused did not have time to gamble (R 232).

Accused, after being apprised of his rights, elected to testify in his own behalf (R 233). In substance he stated he had 18 years active service in the Army, having initially enlisted in the Army as a private in 1926. During these 18 years of service he had never been court-martialed. Shortly before the war he went overseas and on 7 December 1941 became Provost Marshal of the Southwestern Pacific Area. He served in Australia and New Guinea and returned to the United States in 1944 (R 233-234).

With reference to the charges against him he claimed to 'have found * * a blank spot' in his mind in December. He had no memory of the incidents related in court by Corporals Figueroa and Santos and Sergeants Hauser and Sheehan. He started to find out about the blank spot after he was confined, when people started to tell him about things he did not recall (R 235,237). On 3 January, while he was in the stockade, Major Jaeger came to see him with a letter prepared for his signature requesting transportation to the States for his dependents. Major Jaeger assured accused that this was the desire of Mrs. Halprin. Accused did not see his wife until about a week later and then found out that she had told Major Jaeger she did not desire to return. Accused later told Major Jaeger that he felt he was being unnecessarily punished through his family (R 230).

He denied that he made a statement to CID agents (R 237). Collaterally, accused testified that because of various newspaper articles, radio broadcasts, and considerable discussion among military personnel concerning his absence, he made a request, through the investigating officer, to the appointing authority for a change of venue in the event of trial. He received no answer other than the trial (R 237).

Upon cross-examination accused testified that "most everything" in early December up to about the 8th or 9th was extremely vague. He remembered things vaguely "from" to? about the 8th or 9th but not events that occurred later. He did recall Morales reading to him the 24th Article of War and asking him for a statement. When, in response to accused's query, Morales replied that he did not know what charges

had been preferred against accused, accused responded that he could not make a statement if he did not know what he was going to be asked. Any statements subsequently made by accused during the interview were limited to the words "Yes and no." (R 238-239).

In response to questions by the court, accused denied any memory of the incident at the China Doll related by Figueroa, his visit to the Golf Club on or about Christmas Eve as related by Hauser, of any checks he may have written on 27 December 1948 and specifically the check to the Aguirre Hotel. He did, however, remember some of the incidents relating to the checks "in the states" (R 240-241).

Doctor Lurje, testified that he was a psychiatrist at the Hospital of Psychiatry in Rio Piedras. He had obtained his doctor's degree at the University of Freiburg in 1920 and had served as assistant psychiatrist at the University and at Berlin and Tuebingen. He practiced psychiatry in Germany from 1922 until 1935, and had appeared in the courts of Germany as an expert psychiatrist. He had examined accused on two occasions prior to trial and had made findings concerning accused. He explained that his findings were based upon what accused had told him and information obtained from accused's wife and the written statements of others. The information obtained showed that accused had been in the Army about 19 years and until the last few months there was nothing exceptional in his behavior. However, in the June prior to trial, his wife became ill and accused became burdened with heavy medical bills. In addition, accused's wife became unreasonable with reference to financial matters. She required accused to give his mother-in-law \$50.00 a month although she was living with them. The wife also required accused to send their daughter to an expensive technical school at San German although accused could not afford it. When accused saw he could not make ends meet he tried unsuccessfully to obtain financial assistance. Instead of seeking some other way out of his difficulties, accused reacted in a "typical hysterical way," and fled from reality. Accused's hysterical reaction was one designated "second e'tat." Doctor Lurje illustrated the meaning of this term as follows "* * * suddenly one person becomes another personality without connection with his former life and without connection with his other life. * *." Accused was in this state for approximately a week until he was apprehended (R 242-246). In response to a hypothetical question concerning the mental condition of a person who had an excellent record in the service for 18 years, who had a drastic change in behavior from a happy, congenial person to a kind of secluded person who would not talk to people, who for no apparent reason absented himself from his duties, and who now states that he does not recall any incidents which occurred during the absence nor the absence itself, Doctor Lurje testified:

"As I said before, when the witness says and he can't recall, it shows that he was in this second state, that he was not the normal person. He was another one, even if at that time he was Captain Halprin and not, as some examples of our literature changed the name, even when he was not the same Captain Halprin he was before and he is now." (R 246)

Concerning the ability of the hypothetical person during "that period of time" to distinguish right from wrong and to adhere to the right, Doctor Lurje testified:

"I may say, if you ask me this question, this Captain Halprin who lived only this moment and now again lives as Captain Halprin has nothing to do with the other personality so when he himself did things in this time, he acted not as himself but as a second person, as a second person who was not in a normal mental state and every person who is not in a normal mental state cannot distinguish between right and wrong."

That the hypothetical person appeared normal and that he wrote checks in his real name were consistent with the opinion previously expressed by the witness (R 243-247).

Upon cross-examination, Doctor Lurje testified that his two interviews with accused consumed a total of a little over an hour and a half (R 247). He explained that accused could not distinguish right from wrong when not in his normal personality, but he could not state whether the other personality could not distinguish right from wrong (R 249). In response to a hypothetical question as to the mental condition of a person who periodically writes bad checks but has no other outward appearances of disorder, and who then suffers remorse and makes restitution, the witness stated such a person would not be mentally defective in the absence of other symptoms (R 250).

Upon examination by the court, Doctor Lurje stated that accused presently possessed sufficient mental capacity to understand the pending proceedings and the charges against him and was mentally capable of intelligently cooperating in his defense (R 251).

There was admitted in evidence documentary evidence of superior performance of duty by accused both as an enlisted man and officer and commendations therefor, evidence of honorable discharges from three prior enlistments, and evidence which tended to show accused's intention to complete thirty years service in the Army; that accused on 27 December 1948, was relieved as Assistant Provost Marshal, Fort Buchanan; and evidence that during the Christmas Holidays a liberal pass policy was to be pursued in the Antilles Command (R 195-198; Pros Exs K to BB, incl).

Other documentary evidence introduced by the defense will be hereinafter set forth and considered.

c. Rebuttal for the prosecution.

Lieutenant Colonel David B. Goodwin testified that on the morning of 22 December at 8 or 9 o'clock accused appeared at his office seeking a "VOCO" for 36 hours for the purpose of going to town to raise some money. Upon receiving the permission of Colonel Harris, the commanding officer of Fort Buchanan, Colonel Goodwin granted the request. In the opinion of Colonel Goodwin, accused appeared to be normal but was concerned about raising the money (R 252).

First Lieutenant Fernando Acosta testified that he was the finance officer at Fort Buchanan and that the official records of his office of which he was custodian showed that on 15 December 1948 accused received partial pay in the amount of \$200.00 (R 253-255).

First Lieutenant Norman Alberstadt testified that he had studied medicine at the University of Pennsylvania receiving his degree in medicine in 1946 and that thereafter he had a year of specialized training in psychiatry. He also had a year of residency in the City Hospital in New York, and had been engaged in psychiatry in Puerto Rico since 1948. He was qualified by the Surgeon General as a psychiatrist and presently was the psychiatrist at Rodriguez General Hospital. He had examined accused during two periods when accused had been hospitalized. On the first occasion Lieutenant Alberstadt saw accused on 31 December for approximately three quarters of an hour. When accused was hospitalized subsequently, Lieutenant Alberstadt saw him every day (R 255-257). These latter interviews were quite lengthy. Concerning his findings Lieutenant Alberstadt testified:

"My conclusion is that his condition is such that he was able to, at the time of the offenses of which he is accused, the alleged offenses, he was able to distinguish from right and wrong, and able to adhere to the right and his mental status enables him to conduct his trial in his own defense adequately. I found evidence of some disturbance, neurotic disturbance. From the history that is definitely evident in the few days prior to his being absent from duty, judging from testimony that I had from some people I interviewed, but I did not have the impression that that disturbance was sufficient to warrant saying, sufficient to say that he was unable to distinguish from right and wrong and adhere to the right." (R 257)

In reaching the foregoing conclusion Lieutenant Alberstadt did not depend exclusively upon information furnished him by accused but also talked to others including Lieutenant Gелlette and Agent Morales. Based on his interviews with accused concerning the alleged amnesic episode, Lieutenant Alberstadt believed that accused "showed sufficient recollection of material matters? during that period for the witness to say that the accused was able to distinguish right from wrong and adhere to the right." (R 259). Concerning other periods Lieutenant Alberstadt qualified the foregoing assertion by stating:

"* * I think it is only fair, however, to impress upon you that the opinion does not have the validity of the opinion regarding the periods, that is, the period before his absence and the period while he was under my observation." (R 259)

The witness also testified that, in his opinion, accused at the time of trial, possessed sufficient mental capacity to understand the nature of the proceedings and the charges against him, and to cooperate intelligently in his own defense (R 260).

4. Accused has been found guilty of twelve offenses involving his making and uttering of checks without having sufficient funds in the banks on which drawn, for their payment (Specifications of Charge I, Specifications 1, 2, 3, 4 and 6, Additional Charge I). For convenience in our discussion we group the offenses according to the bank upon which the checks were drawn.

Five of the checks in issue were drawn upon the Army National Bank and were each payable to the Fort Buchanan Exchange in the amount of \$50.00. The checks were dated respectively 24 September 1948 (Spec 1, Charge I), 24 September 1948 (Spec 2, Charge I), 12 November 1948 (Spec 3, Charge I), 23 November 1948 (Spec 6, Charge I), and 29 November 1948 (Spec 7, Charge I). While there was no direct evidence that these checks were signed by accused, his signature appears on other checks in evidence which were stipulated to be drawn and signed by accused. There was thus before the court a specimen of accused's handwriting and by comparison therewith the court could find that the checks in issue were likewise signed by accused (CM 325112, Halbert, 74 BR 89). These checks were cashed at the Fort Buchanan Exchange on dates not disclosed by the record. Bank stamps on the two checks dated 24 September show that they were in banking channels on 18 October; the bank stamp on the 12 November check shows that it was in banking channels at least by 16 November; that the stamp on the check dated 23 November shows that it was in banking channels on 26 November; and by the same token the 29 November check was in banking channels on 3 December. In the absence of objection to their authenticity the bank stamps are

competent evidence of the facts bespoken by them (CM 335738, Carpenter, 18 May 1949)). In the absence of any showing to the contrary it is presumed that the checks were made on the dates reflected thereon (CM 332879, Boughman, 81 BR 223,232). The evidence thus shows that the 24 September checks were cashed at some time between that date and 18 October, the 12 November check was cashed at sometime between that date and 16 November and the other checks were cashed between the dates thereon and 3 December 1948. There was no direct evidence that these checks were presented to the bank upon which drawn, but the evidence which shows that the checks were in banking channels and were returned to the agent of the payee for collection is sufficient evidence of such presentation and dishonor (CM 274174, Reid, 47 BR 135,139; CM 318727, Hoffman, 68 BR 1,14). The evidence otherwise shows that from 24 September to 2 December, when accused's balance stood at zero, accused's account was insufficient to pay any of the checks in issue, and that no deposit had been made to accused's account after 11 August 1948. From these facts the court could infer that accused was aware of the debilitated status of his account in the Army National Bank and that he did not intend to cure it. Upon this latter inference, the court was justified in finding that the making and uttering of the checks under discussion was wrongful, unlawful and with intent to defraud (CM 284149, Brown, 55 BR 261,272; CM 294880, Rives, 58 BR 1,5). The evidence warrants the finding of guilty of Specifications 1, 2, 3, 6 and 7 of Charge I.

Accused made and issued to Mrs. M. W. Cohn three checks drawn upon the First National Bank of Columbus, Georgia, each payable to Mrs. Cohn in the amount of \$50.00. The checks were dated, respectively, 3 September 1948 (Spec 4, Charge I), 3 November 1948 (Spec 5, Charge I), and 3 December 1948 (Spec 1, Add Chg I). Mrs. Cohn cashed these checks at the Fort Buchanan Exchange on dates not disclosed by the record. The checks, unpaid, were subsequently received by the Antilles Exchange Service for the purpose of collecting their face amount from accused. After 12 August 1948, no deposits had been made to accused's account in the drawee bank and on and after 3 September 1948 the balance of the account never exceeded \$9.83. Except as to the check dated 3 September, there was no direct evidence that the checks in question were presented to and dishonored by the drawee bank. To the 3 September check was affixed the return slip of the drawee bank indicating that the check was returned by reason of "Not sufficient funds." This slip was competent evidence of the facts related therein and effectively showed presentment to and dishonor by the bank upon which drawn (Carpenter, *supra*). All the checks in issue, however, had bank stamps imprinted on the reverse side thereof which showed that the 3 September check was in banking channels on 26 October 1948, the 3 November check on 4 November 1948,

and the 3 December check on 10 December 1948, thereby establishing that each check was issued to and further negotiated by the payee between the date showing on the check and the date showing the check to be in banking channels. Evidence that the checks were in banking channels and were received back by the endorsee unpaid is sufficient to show presentment and dishonor (Reid, supra).

As to the three checks under discussion it is alleged that accused made and uttered them to Mrs. M. W. Cohn, knowing that the latter would further negotiate them, and that coincidentally accused did not have and did not intend to have sufficient funds on deposit in the drawee bank for payment thereof. The allegations state an offense in violation of Article of War 96 and are sustained by the evidence.

The other checks in issue in this case were drawn upon the National City Bank of New York, San Juan Branch. On 22 December 1948, accused's account in this bank was overdrawn in the amount of \$52.23. Nevertheless, in the period 22 December to 27 December, inclusive, accused uttered four checks drawn on this account totalling \$71.05 (Specs 2, 3, 4 and 6, Additional Charge I), and for three of the checks received a then present consideration, the fourth check being given in payment of a hotel bill. All the checks were presented at the drawee bank and dishonored, the last being presented on 10 January 1949. Evidence introduced by the defense shows that no deposits were made to the account in the period extending from 30 November 1948 to 17 January 1949. Otherwise, it is shown that a notice of overdraft was sent to accused on 13 December. Accused noted on the letter his objection thereto and returned it to the bank. Accused may, at the time he made objection to the bank's notice of overdraft, have been acting in good faith. His actions, however, in uttering checks drawn upon the bank, were taken with knowledge that the bank was not likely to honor his checks. His "failure to disclose this knowledge evidences an intent to deceive and defraud the person to whom the checks were negotiated" (CM 260755, McCormick, 40 BR 1,3-4). Three of the checks under consideration were given for a then present consideration, and this circumstance, with the other facts and circumstances pertinent to these checks, sustain the allegation of intent to defraud. Generally speaking, in cases where a check is given in payment of a past consideration an allegation of intent to defraud may not be sustained inasmuch as the recipient of the check has not been defrauded of anything of value. An exception to the latter rule is recognized in cases where a hotel receives a check in payment of a currently due hotel bill (CM 330282, Dodge, 78 BR 345; CM 332672, Hawkins, 81 BR 163,170-171).

The defense showed by cross-examination and otherwise that the National City Bank had in the past honored overdrafts of accused. Thus,

it is shown that during October 1948 the bank honored three checks which with an interim deposit of \$3.00 created a debit amounting to \$5.93, and that in December, prior and subsequent to its notice of overdraft the bank honored five checks which resulted in a debit of \$53.23. We are not of the opinion that by its conduct the bank extended "carte blanche" to accused to call upon it for any amount nor that by its conduct the bank led accused to such a conclusion. There is, of course, no evidence of the existence of any agreement by which the bank would honor accused's overdrafts in any amount.

The findings of guilty of Specifications 2, 3, 4 and 6 of Additional Charge I are warranted by the evidence.

Accused was found guilty of deserting the service of the United States on 24 December 1948 and remaining absent in desertion until he was apprehended on 31 December 1948. Accused's initial absence on the date alleged was established by an extract copy of the morning report of his organization. He was apprehended on 31 December 1948, at Isla Grande Airport on board a plane about to leave for the United States, with a one way ticket in his possession. It is obvious that the finding of guilty of desertion in this case does not and may not rest on the length of accused's unauthorized absence, but on other circumstances shown by the record of trial. Thus it is shown that he was in civilian clothing and his facial appearance had been altered by the removal of a formerly worn moustache. In addition, as has already been shown, he was leaving behind him numerous bad checks, and, as will hereinafter be shown, he was in possession of false leave orders. From these circumstances may be inferred the intent to desert. While other circumstances, the presence of accused's family in Puerto Rico, his prior attempt to secure two way passage to the United States, and while not expressed, the possible explanation of his trip to the United States being an attempt to secure money, militate against this conclusion, we do not find any reason for holding that the court incorrectly weighed the evidence (CM 328279, MacLeod, 77 BR 43).

Accused was found guilty of the false making on 21 December 1948 of an instrument purporting to be a certified true extract copy of Special Orders 129, Headquarters Fort Buchanan General Depot, Puerto Rico, dated 31 December 1948, granting accused fifteen days leave with authority to visit the United States; and of wrongfully possessing the same with intent to deceive, on 31 December 1948 (Spec 1, Additional Charge II; Spec 7, Additional Charge I). On arraignment the specifications alleged the date of the special orders as 21 December and, during the trial, over objection by the defense, the specifications were amended to allege the date of the special orders as 31 December 1948. Since the

defense was granted a continuance in order to prepare to meet the changed specifications we are unable to perceive any injury to accused's substantial rights by reason of such minor amendments.

The evidence shows that following his apprehension on 31 December 1948 accused, while being transported to the provost marshal's office, surreptitiously dropped a piece of paper from the vehicle in which he was riding. The paper was recovered and found to be the false certified true extract of the special orders alleged. The officer who purportedly authenticated the order extracted and certified the extract copy to be true, testified that he was the adjutant of the Headquarters which purportedly issued the order, that such an order had not been published and that, in fact, on the date of the false order no order had been published. He further testified that he had not authenticated such order, that he had not certified the extract, and that the signature, "L. A. Lugo" by which he purportedly certified the extract was not his. The evidence conclusively demonstrates that the order was falsely made and from accused's possession of the order and his pretrial statement acknowledging his authorship, the court could find that he had falsely made it. The accompanying circumstances which show that accused was absent without leave from his station and was attempting to go to the United States are sufficient to show that accused's possession of the false extract was with intent to deceive (CM 328246, Courage, 76 BR 349, 356). The finding of the court that the false order was made at San Juan, is not a substantial variance from the allegation that it was made at Fort Buchanan.

We also note with reference to the amendments to Specification 7, Additional Charge I, and Specification 1, Additional Charge II, that the evidence, viz, the false extract, tends to show that it was originally dated 21 December and then changed to 31 December. As amended, Specification 1, Additional Charge II, alleges that the false orders dated 31 December were made on 21 December. The pretrial statement of accused shows inferentially that he made the orders which in their present state were shown to him sometime between 22 December and 31 December. Under these circumstances it is logical to infer that when accused typed the orders he inadvertently dated them "21 December" and immediately corrected them to read "31 December." The evidence thus is susceptible to the inference that but one set of orders were made by accused and that he made them on or about 21 December as alleged.

Accused was also found guilty of wrongfully and dishonorably abandoning a motor vehicle which had been rented by him. The evidence in support thereof shows that on 24 December 1948, at Santurce, accused rented a car from Antonio Sarmiento. Accused signed a rental agreement but the period of the rental and the price were not set, and a deposit was not required. Five or six days later Sarmiento saw the vehicle

parked in front of the Grenada Hotel about a mile from his place of business and, subsequently, on 4 January, received possession of the car at the same place from Lieutenant Gелlette who had apprehended accused on 31 December. The car was undamaged and in the same condition it was in when rented. Accused by omitting to bring the car back to the person from whom he had rented it, viewed against the background of his desertion and attempted flight to the United States, and his failure to pay the rental until after his apprehension, in effect abandoned the car under the conditions alleged.

5. The defense objected to allowing Captain Barlow to testify on the ground that the investigating officer did not give the accused an opportunity to cross-examine Captain Barlow at the pretrial investigation. Voluminous testimony was adduced by the defense to prove its contention, and other testimony was introduced by the prosecution in contradiction. We do not deem it necessary to set forth the conflicting testimony. Assuming, however, that in fact accused was not allowed the privilege of cross-examining Captain Barlow at the pretrial investigation, we do not perceive that any injury was done his cause. We note that Captain Barlow's name was indorsed as a witness on the charge sheet, as First Lieutenant J. F. Barlow. (Note: The record demonstrates that he was since that time promoted to Captain). No claim of surprise was made by the defense, and in fact, Major Palerm, the regularly appointed defense counsel, who testified on the issue asked to be excused from answering the question of whether the defense was surprised by the testimony of Captain Barlow. If, in fact, the defense was surprised by the testimony of Captain Barlow a ready remedy was at hand, a request for a continuance to prepare for Captain Barlow's cross-examination. No such request was made. Under the circumstances, we perceive no valid reason why the court should have refused to allow Captain Barlow to testify.

6. Subsequent to his apprehension, accused was interrogated by two agents of the Criminal Investigation Division. At the inception of the interrogation, accused was apprised of his rights under Article of War 24 and thereafter no violence, threats, or promises were employed to induce him to speak. In response to questions, accused made a statement in narrative form which was taken down by one of the agents. This agent, in his testimony, read to the court that which he had recorded. While it would have been better practice to enter the agent's record of accused's statement in evidence as the written statement of accused, the latter's signature not being requisite to constitute his recorded statement as a writing (CM 323589, Ward, 72 BR 301,312), substantially the same result was obtained by reading the recorded statement to the court. In considering the competency of the statement we have to consider the testimony of

the "CID" agent, Morales, who recorded it, to the effect that when the statement was taken he was of the belief that accused was in need of psychiatric assistance. That accused was in an obviously distraught condition and in that sense was in need of psychiatric assistance would merely affect the weight to be accorded his statement and not the competency thereof (Morton v. United States, 147 F.2d 28,31). In his statement accused also admitted the passing of worthless checks other than those with which he was charged. Under the circumstances of this case where the fraudulent intent of accused was so much in issue such evidence was competent and did not affect adversely the competency of the statement (MCM, 1949, Par 125b).

7. In reality the statement of accused is important but for one reason. Dr. Lurje, a psychiatrist who testified for the defense, expressed the opinion that as to the offenses committed by accused in close proximity and coincidental to the time of his unauthorized absence, he was unable to distinguish right from wrong. Dr. Lurje's opinion was admittedly based upon what he was told by accused and others viewed against the background of accused's past creditable behavior, and necessarily included accused's account of an amnesic episode during December. If the information furnished Dr. Lurje by accused with reference to his amnesic episode was incorrect, Doctor Lurje's opinion as to accused's competency carries no weight. In view of accused's detailed account of his December offenses as disclosed by his pretrial statement in which he made no allusion to an amnesic episode, we, as evidently did the court, are entitled to reject Dr. Lurje's opinion, based as it was upon erroneous premises. Under these circumstances the court could consider that there was nothing in the record to overcome the presumption of sanity.

Dehors the record, the Board of Review has been in the receipt of information that the medical officer who testified that accused was sane was approximately a month after the trial, found to be incompetent. Implicit in what we have heretofore said is the conclusion that the court's finding that accused was sane, was not based in any degree upon this medical officer's testimony since there was no evidence in the record pointing to a contrary conclusion. In the interest of justice, however, accused has been given a post trial psychiatric examination by a Board of Medical Officers at the Walter Reed General Hospital, and the report of the Board based upon that examination states as follows concerning the mental capacity of accused:

"Since admission to this hospital, patient has shown no evidence of psychosis, has adjusted well to ward routine, and shows no evidence that he experiences hallucinations or delusions. He has had no previous episodes of amnesia, nor has he reacted to stress in such a manner in the past. He does not show insight into the cause of his reported amnesia. It was the impression of the examining psychiatrist that the patient at no time in his life had shown evidence of psychosis or neurosis."

The report concludes that accused was sane at the time of the offenses and is presently sane.

8. It has also been asserted by the defense that a member of the Staff of the reviewing authority intruded upon the court while it was in closed session deliberating upon the findings. This assertion is apparently based upon affidavits submitted by accused and his individual defense counsel. Accused's affidavit states that at 1050 hours, 2 April 1949, while the court was in closed session deliberating on the findings "Major W. T. McAninch, Assistant G-2, USARF Antilles, entered the courtroom and spoke to the court." Thereafter at 1100 hours, a five minute recess was taken during which "the Major * * talked to the members of the court * *." Accused disavowed knowledge of the content of the conversations. The affidavit of the individual defense counsel merely recites that the court recessed from 11:00 a.m. to 11:05 a.m. "at which time an officer came into the Courtroom and approached and talked to one of the members of the Court." The content of the conversation is not disclosed. Affidavits of the President and Law member of the court, another member, and the court stenographer, pertinent to the incident subject of the affidavits of accused and his counsel, have been submitted to the Board of Review. Their tenor is to the effect that at about 1100 hours, 2 April 1949, Major W. T. McAninch, Assistant G-2, arrived at the court-martial room at Fort Brooke, Puerto Rico, and requested to see Major Juan Vazquez, a member of the court, in regard to a classified radiogram. The court thereupon reopened and then recessed for the purpose of allowing Major McAninch and Major Vazquez to confer. With reference thereto, Major Vazquez' affidavit states:

"* *, and the said discussion concerned a proper reply to an official radiogram, the subject of which concerned a planned maneuver, and that the subject radiogram is still classified; that the subject radiogram called for an immediate reply; and that Col Allen, then Chief of the G-2 Section, was not available and that the said Major Vazquez was familiar with the matter discussed in the radiogram.

"* * That nothing in the conversation which took place between Major McAninch and Major Vazquez in any way or manner referred to Captain Jesse B. Halprin or any element or thing in connection with the matter before the court."

The affidavits further claim that at the time of the conference neither the accused nor his counsel raised any question or objection concerning the propriety of the recess.

There is nothing in the affidavits of accused or his counsel which contradict the substance of the incident as set forth in the affidavits of the court personnel and we find no impropriety which even remotely affects the fair and impartial character of the trial or the independence of the court, and nothing which supports the implied inferences in the defense affidavits.

9. There was received in evidence upon proffer by the defense, a letter dated 10 December 1948 to the Commanding Officer, Fort Buchanan General Depot, who was accused's commanding officer and who subsequently became the accuser in the case, forwarding five checks purportedly drawn by accused which had been returned unpaid by the bank upon which they were drawn. The letter directed that accused make immediate reimbursement for the checks, and that the checks be not returned to accused but be retained as evidence in support of charges. The final paragraph states:

"3. Appropriate charges will be preferred against Captain Halprin after consulting with the Assistant Antilles Judge Advocate, this Headquarters."

The letter closed with the command line "By command of Brigadier General Sibert," and was signed "Joseph W. St. John, 1st Lt Inf Actg Asst Adj Gen."

Other letters to the Commanding Officer, Fort Buchanan General Depot, with reference to the same subject matter were also received in evidence. These, however, did not direct that charges be preferred.

The case was referred to trial by command of General Sibert, and the action in the case was signed by General Sibert. It is contended on the basis of the letter set forth above that General Sibert, the convening authority, was the accuser in fact, and that, therefore, the court was without jurisdiction. We do not agree that the convening authority in this case was the accuser in fact. The test to be applied to determine the issue is set forth in MCM, 1949, Par 5, as follows:

"Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. * * Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. For example, a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases." (MCM, 1949, Par 5a)

The record in this case is devoid of any suggestion that the convening authority had any personal feeling or interest in the matters which were the subjects of the Charges, nor is there any evidence that he

personally had any knowledge of the matters. While it is true that the letter which directed that charges be preferred did not preface this direction with a direction to investigate the alleged offenses, such prefatory direction must be inferred. Any person who becomes the accuser in a case, except in a situation not pertinent here, must take oath that he has investigated the matters set forth in the Specifications and that the same are true to the best of his knowledge and belief, as was done here, or that he has the same belief based upon personal knowledge. We also note the subject letter directs that appropriate charges be preferred. We should judge that if it were determined by the person to whom the direction was given that charges were not appropriate they would not be preferred. We further consider that as used here the word "appropriate" fully covers the elision of the direction to investigate. We are of the opinion that the action of the convening authority in this case, presuming that he had personal knowledge of the action taken in his name, was in the strict line of his duty and does not render him the accuser. No claim is made and no evidence is submitted that the convening authority had any personal animus in the matter, and in the absence thereof we find no merit to the claim that the convening authority was the accuser in fact (CM 199465, Lichtenberger, 4 BR 81,83).

We find nothing in this record which impels us to a conclusion that the convening authority, presuming that he had knowledge of the matters to be charged, acted as prosecutor or accuser.

10. Accused is 42 years of age, married, and has two adopted daughters. He completed one year of high school and in civilian life was variously employed as a window trimmer, the operator of a window cleaning business, and as a policeman. He had enlisted service from 1926 to 1937. In 1935 accused was commissioned as Second Lieutenant, Infantry, ORC. He was called to active duty in August 1941, and shortly after his recall was promoted to First Lieutenant. He was subsequently promoted to Captain and on 10 July 1947 was appointed Major in the Officers' Reserve Corps. He had foreign service in the Pacific Theatre from November 1941 to March 1944. His current tour in Puerto Rico extends from March 1948. His overall efficiency ratings are excellent, and he has received numerous letters of commendation from superior officers.

11. The court was legally constituted and had jurisdiction of the person of the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to dismissal is mandatory upon conviction of violations of

Article of War 95 and a sentence to dismissal, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year, is authorized upon conviction of violations of Articles of War 58 and 96.

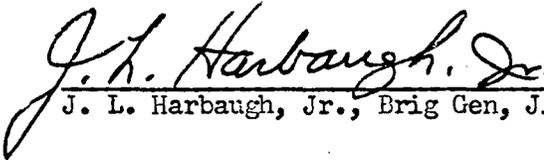
Robert J. Olenow, J.A.G.C.
Charles J. Berkowitz, J.A.G.C.
John Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Shaw, Harbaugh, and Brown
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Jesse B. Halprin,
O-336044, Fort Buchanan General Depot, Fort Buchanan, Puerto
Rico, upon the concurrence of The Judge Advocate General the
sentence is confirmed and will be carried into execution.
The United States Disciplinary Barracks or one of its
branches is designated as the place of confinement.


J. L. Harbaugh, Jr., Brig Gen, JAGC


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
Chairman

30 January 1950

I concur in the foregoing action.


E. L. BRANNON
Major General, USA
The Judge Advocate General

(GCMO 2, February 10, 1950).

30 Jan. 1950

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

CSJAGK - CM 337082

UNITED STATES)

7TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at Sapporo,
Hokkaido, Japan, 19-26 April 1949.
EACH: Death.

Recruit VIRGIL L. AIKINS (RA
37894501), Company A, 187th
Glider Infantry Regiment, and
Corporal HAROLD F. SEEVERS (RA
45030260), Company B, 187th
Glider Infantry Regiment.)

OPINION of the BOARD OF REVIEW
McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.
2. The accused were tried upon the following charges and specifications:

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

Specification: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Takeo Shimo, a human being, by shooting him with a pistol.

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

Specification 1: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with intent to do him bodily harm, commit an assault upon Shigeru Sasaki, by pointing at his body, and by shooting at him with, a dangerous weapon, to wit: a pistol.

Specification 2: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F. Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with intent to do him bodily harm, commit an assault upon Shizuo Takahashi by pointing at his chest a dangerous weapon, to wit: a pistol.

Specification 3: In that Recruit Virgil L. Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did at Sapporo, Japan, on or about 25 November 1948, with intent to do him bodily harm, commit an assault upon Masamitsu Yagihashi by pointing at him, and by shooting at him with, a dangerous weapon, to wit: a pistol.

Specification 4: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with intent to do him bodily harm, commit an assault upon Shinji Sugawara by striking him on the head with a dangerous weapon, to wit: a pistol.

Specification 5: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with intent to commit a felony, viz: robbery, commit an assault upon Kishimoto Sabuō by feloniously and unlawfully striking him on the head with a blunt unknown instrument.

Specification 6: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, by force and violence and by putting him in fear, feloniously steal from the person of Hjime Furuta, 230 Japanese Yen, value about One Dollar (\$1.00), a wallet and a watch, both of some value, the property of the said Hjime Furuta.

Specification 7: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly

and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, by force and violence and by putting him in fear, feloniously steal from the person of Junichiro Samejima, 640 Japanese Yen, value about Two Dollars (\$2.00), the property of the said Junichiro Samejima.

Specification 8: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with intent to do him bodily harm, commit an assault upon Kiyoshi Hasegawa, by feloniously and unlawfully knocking him off a bicycle, and striking him about the body with fists and a pistol.

Specification 9: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, by force and violence and by putting him in fear, feloniously steal from the person of Mitsuo Ogata, 650 Japanese Yen, value about Two Dollars (\$2.00), the property of the said Mitsuo Ogata.

Specification 10: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Sapporo, Japan, on or about 25 November 1948, with intent to commit a felony, viz: robbery, commit an assault upon Zenkichi Kurokawa, by feloniously and unlawfully shooting him in the right eye with a pistol.

Specification 11: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of a common intent, did at Sapporo, Japan, on or about 25 November 1948, by force and violence and by putting him in fear, feloniously steal from the person of Takeshi Hongo, a cigarette lighter of some value, the property of the said Takeshi Hongo.

Specification 12: (Found not guilty upon motion of defense).

ADDITIONAL CHARGES

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

Specification: In that Recruit Virgil L Aikins, Company A,

187th Glider Infantry Regiment, and Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, acting jointly and in pursuance of common intent, did, at Sapporo, Japan, on or about 25 November 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill Munetake Mizoe, a human being, by striking him on the head with a blunt unknown instrument.

AS TO THE ACCUSED AIKINS ONLY

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

Specification 1: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, having been duly placed in confinement in Camp Crawford Stockade, on or about 9 February 1949, did, at Camp Crawford, Japan, on or about 9 March 1949, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Recruit Virgil L Aikins, Company A, 187th Glider Infantry Regiment, having been duly placed in confinement in the Post Stockade, Camp Crawford, Japan, on or about 9 February 1949, did, at Camp Crawford, Japan, on or about 28 March 1949, escape from said confinement before he was set at liberty by proper authority.

AS TO THE ACCUSED SEEVERS ONLY

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

Specification: In that Corporal Harold F Seevers, Company B, 187th Glider Infantry Regiment, having been duly placed in confinement in the Post Stockade, Camp Crawford, Japan, on or about 19 January 1949, did, at Camp Crawford, Japan, on or about 25 March 1949, escape from said confinement before he was set at liberty by proper authority.

Each accused pleaded not guilty to all charges and specifications. They were found not guilty (upon motion of the defense) of Specification 12 of Charge II, and guilty of all other charges and specifications. No evidence of any previous conviction was introduced as to either accused. Each accused was sentenced to be put to death in such manner as proper authority might direct. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

In the interest of brevity and continuity, only the pertinent competent evidence is summarized herein, chronologically, and the specifications are grouped to conform with the chain of events. A map of the City of Sapporo was introduced into evidence as Prosecution Exhibit 7 and all witnesses referred to this map in pointing out the areas wherein the various incidents occurred.

As to the Specification, Charge I and Specifications 1 through 4,
Charge II

At a few minutes before seven o'clock on the evening of 25 November 1948, Takeo Shimo, Shigeru Sasaki, Shizuo Takahashi, Masamitsu Yagihashi and Shinji Sugawara, employees of the Japanese Forestry Bureau, had just completed the task of towing a stalled truck to the Bureau garage at North 1, West 11, in Sapporo, Hokkaido, Japan (R 46,49; Pros Exs 5,7). Sasaki, who had been riding in the towed truck, alighted on the right hand side to assist in pushing the truck into the garage. At this point, an American soldier about six feet tall pointed a pistol at Sasaki's chest at a distance of about three feet. Sasaki raised his hands and backed toward the lead truck calling to Yagihashi, its driver, who was seated in the cab. The soldier pointed the pistol at Yagihashi, who climbed out of the truck on the side opposite the soldier (R 65). Sasaki and Yagihashi, being frightened, both ran from the trucks toward the entrance of the Forestry Bureau. As they did so, two shots were fired (R 46,51,66; Pros Exs 7,8). When they reached the door of a building two more shots were heard (R 66).

Meanwhile, Takahashi, who had been riding in the towed truck with Shimo and Sasaki, stepped down from the left side of the truck. A soldier, about five feet seven inches in height, spoke to him in English. The soldier then drew a pistol and pressed it against Takahashi's chest. Takahashi raised his hands and began to back away. As he did this, two pistol shots were heard coming from the vicinity of the lead truck. Takahashi bent low and ran for the garage. Two more shots were fired as he ran (R 71-79; Pros Exs 7,8).

These kaleidoscopic events were observed by Sugawara who had been riding in the tow truck with Yagihashi. When the truck stopped, Sugawara went to the rear to disengage the "towing wire." While thus employed, he noticed Yagihashi, Takahashi and Sasaki running; a tall soldier in pursuit, firing a pistol. Sugawara also started to flee, but the soldier, who was about six feet two inches in height and resembled accused Aikins, "stuck a pistol" at his chest. (Accused Aikins is six feet, one and one-half inches tall.) (R 84, 92; Def Ex A). As he raised his hands, the soldier struck him on the head with the pistol. Sugawara fell to the ground. The soldier then fired the pistol again. Though hors de combat, Sugawara was able to see the ensuing action at the truck in the rear. Takeo Shimo

was attempting to get out of the cab of the towed truck. A "smaller soldier" standing near seized Shimo by the arm as he succeeded in reaching the ground. Another shot was fired, this one so close to Sugawara's head that it temporarily deafened him. Sugawara, still prostrate, covered his head. Presently silence momentarily reigned in the darkening night. Sugawara called to Shimo, but received no answer. He arose and saw Shimo near the rear truck, on the ground in a "squatting position." A pool of blood was forming around his knees (R 83-95). The area again became a scene of activity; military and Japanese policemen arrived and one by one the frightened Forestry Bureau men came back to their trucks. Each saw Shimo, apparently dead, squatting on the ground in a pool of blood (R 53,62,63,74,75; Pros Exs 5a,b,c,d,6).

A death certificate issued by Dr. Nobuyuki Narasaki, Municipal Hospital, Sapporo, Hokkaido, Japan, dated 26 November 1948, states among other things that Takeo Shimo died about 1900 hours, 25 November 1948; cause of death: wound on head (brain) (R 36,39; Pros Ex 2).

An autopsy performed on 27 November 1948 upon the body of Takeo Shimo revealed:

"Deductions:

"The deceased was almost normal and there were no pathological findings of direct cause of death in the internal viscera and in the vessels of brain. Without question, bruises of small brain accompanied by comminuted basal fractures due to the shot was the cause of death. The shot was found in the skin near the exit hole of the back of the head. ***

"Cause of Death:

"The bruises of small brain due to the shot which was found in the skin of the head near the exit hole." (R 43-45; Pros Exs 3,4.)

As to Specification 5, Charge II

At a quarter after seven o'clock on the evening of 25 November 1948, Dr. Kishimoto Saburo left his laboratory in the Hokkaido Imperial University grounds, Sapporo, Japan, and proceeded toward the University library. Near the library, which is about one-half a mile from the Forestry Bureau by the most direct route, an American soldier, about five feet five inches tall, approached him, saying, "match, match." As the soldier drew close he pointed a pistol at the Doctor and asked for money. Doctor Saburo immediately raised his hands, at which time a tall soldier seized him from the rear. The soldiers took his wallet and watch and asked him for his fountain pen. When no pen was forthcoming, the tall soldier began to beat the Doctor with "an instrument resembling a steel rod about a foot in length." With the third blow, Doctor Saburo lost consciousness. Due

to this beating, the Doctor lost the sight of one eye and all olfactory powers (R 104-109; Pros Ex 7).

As to Specification 6, Charge II

Hajime Furuta, a student at Hokkaido University, was walking toward the University tea room on the campus grounds about seven thirty p.m., 25 November 1948. He was accosted by one tall and one short American soldier with pistols who said, "okane" (money). Afraid of being shot, Furuta handed the soldiers his wallet which contained about 230 yen. Meanwhile the tall soldier got behind him and covered his eyes with his hands. They then said "tokei" (watch). Furuta unstrapped his wrist watch and upon turning it over was told "hayaku" (hurry). Furuta started to leave the scene, but stopped when his assailants left in the opposite direction. He followed their footsteps in the snow from the University grounds to North 9, West 6, Sapporo (R 118-124; Pros Ex 7).

As to Specification 7, Charge II

Student Junichiro Samejima approached the "front entrance" of Hokkaido University about seven-thirty on the evening of 25 November 1948, on his way to class. (This entrance is one city block to the east of where Furuta had traced his attacker's footprints.) As Samejima passed through the entrance, two American soldiers approached him carrying pistols. "One soldier was tall and the other was short." In the words of Samejima, the following then transpired:

"A The shorter soldier was on the right side in front of me about two meters away. The tall soldier was on my left front approximately two meters away. First he stated yen in Japanese. When I heard them say yen, it came to my mind that they wanted money. As I inserted my hands into my pocket the tall soldier got in the back of me and with his left hand covered my eyes. Then the tall soldier who was in the back of me pressed the pistol against my head. With his hands still around my eyes, I felt myself being turned around and with a backward motion I was dragged back of the signboard.

* * *

The signboard is located near the front entrance of the University approximately ten meters in from the main entrance on the left hand side as you enter the University grounds. Then they conversed to me in Japanese. They stated, mo sukoshi [a little more]. Since I had given them what I had when they had first accosted me and asked for yen, I answered, no more.

* * *

Since the tall one was holding his hands over my eyes, I think it was the shorter soldier who started searching my pockets.

"Q What did the soldier take?

A My memo pad, my personal seal equipment, my name card
 purse, comb, glasses and magazine.

* * *
 When they first accosted me and asked me for yen, they took my
 money.

* * *
 Six hundred and forty yen.

* * *
 After a while they asked me for my watch. I answered, I have
 no. Then this tall soldier who had his hands over my eyes
 and his pistol pressed against my head removed his pistol from
 my head and started hitting me with the pistol.

* * *
 I remember being hit about five times. *** on my forehead and
 my head. *** After I fell on the ground one of the soldiers
 rolled me around with his feet *** Then after a little while
 they left. *** I saw them leaving the University grounds through
 the front entrance. *** I got up *** and went into the guardhouse
 *** since I *** saw that I had some wound I went over to the
 medical science building. I saw Mizoe and Kishimoto being carried
 over to the hospital on pieces of board" (R 124-128; Pros Ex 7).

As to Specification 8, Charge II

Some minutes before 8 p.m. on 25 November 1948, Carpenter Kiyoshi
 Hasegawa was riding home from his mill on his bicycle. At North 6, West 1,
 Sapporo, two soldiers approached, saying, "moshi, moshi" (hello). Hasegawa
 stopped; the soldiers seized the bicycle. He saw that each soldier had
 a pistol, and, being afraid, began to run. As he started, he sustained a
 blow on the chest. Nevertheless, in his fear, he managed to escape to a
 point about thirty meters away, where he was caught and subjected to a
 pistol whipping by the soldiers. "One soldier was about six feet in
 height *** the other about five feet six or seven" (R 139-141, Pros Ex 7).

As to Specification 9, Charge II

Mitsuo Ogata, "inspector of communications," and Miss Kimi Nishimura,
 a public health nurse, were walking to the Sapporo railroad station about
 eight o'clock on the evening of 25 November 1948. Two American soldiers,
 one of whom was tall, the other short, approached them, saying, "chotto
 matte" (just a minute). As the couple stopped, the soldiers drew quite
 close; the tall one pointed a pistol at them and said, "money, money."
 Kimi ran away. The short soldier "pressed something" against Ogata's
 spine. The tall soldier then held his pistol against Ogata's temple and
 tried to cover his victim's eyes with his hands. Ogata took out his money,
 about 650 yen, and handed it to the short soldier. The latter then
 searched him, saying, "watch." Finding nothing more, the soldiers pushed
 Ogata and said, "aruke" (walk). When Ogata merely backed away (being too
 frightened to run) the soldiers stamped their feet, saying "hayaku, hayaku"

(hurry, hurry). Ogata "made an about face and ran."

Meanwhile Kimi had stopped her flight by hiding in a nearby house. She saw the soldiers leave the scene of the holdup walking east. She lost sight of them as they rounded the corner at North 7, West 1, about two blocks from the railroad station and one block from the spot where Hasegawa was attacked (R 131-139; Pros Ex 7).

As to Specification 10, Charge II

En route to his home, Zenkichi Kurokawa was proceeding north on east 4th in Sapporo, Japan, about eight fifteen p.m., 25 November 1948. At North 7, East 4, two American soldiers approached him asking for money. One soldier was tall, the other short; Kurokawa "froze in [his] tracks." For a few fleeting moments no one moved. Then "the shorter of the two men drew a pistol from his left side *** pointing at me, he fired. *** The shot pierced my right eye and came out through the temple of my right side of my face *** I ran away with my right hand covered over my right eye ***". Kurokawa pointed out accused SeEVERS as resembling "the man who assailed me on that night." The man was about five feet six inches in height (R 142-147; Pros Ex 7).

As to Specification 11, Charge II

About eight thirty p.m., 25 November 1948, Takeshi Hongo was riding his bicycle at North 10, East 2, in Sapporo. A tall and a short American soldier suddenly approached him. The short soldier seized Hongo from the rear pulling him from his bicycle. Struggling, the pair fell to the ground; the soldier achieving a "scissor-lock" with his legs around Hongo's stomach. The tall soldier then pointed a pistol at Hongo and he "heard two clicks from the pistol." Being "in fear for [his] life," Hongo capitulated. He stood up and with his hands raised submitted to a search of his person, at pistol point, by both soldiers. When they had difficulty extracting a cigarette lighter from his pocket, Hongo assisted them. The soldiers kept asking for money, and Hongo, who had no money, tried to explain that fact. Finally the short soldier, who had been prodding his victim with a pistol, struck him on the head with the pistol and kicked him. Hongo fled. A cigarette lighter was identified in court by Hongo as one which he had owned for over a year and on which he had scratched his initials with a knife. This was the lighter taken from Hongo by the two soldiers on 25 November 1948 (R 147-155; Pros Exs 7,12).

As to the Specification, Additional Charge I

Yutaka Toyoguchi, an employee of Hokkaido University at Sapporo, Japan, finished his evening meal on 25 November 1948 and started back to his duties at the school. About seven fifteen he was proceeding along a back lane at the rubbish dump in the University grounds about a block from North 7, West 11, and almost a quarter of a mile southwest of the place where Dr. Saburo was then being assaulted.

He noticed a man lying on the ground. Thinking the man was drunk, Toyoguchi "yelled" at him. The man merely groaned. Toyoguchi notified a nearby policeman who ascertained that the man was unconscious, had blood about his head, and, from papers about his person, tentatively identified him as Munetake Mizoe. School roommates of Mizoe were contacted and they, together with Toyoguchi and the policeman carried Mizoe to the University hospital and left him under the care of Doctor Yanagi (R 101-104; Pros Ex 7).

Dr. Shiroji Hishiyama of Hokkaido University hospital ministered to Munetake Mizoe at intervals from about eight p.m., 25 November 1948 until Mizoe's demise at three p.m., 27 November 1948. He issued a death certificate giving the cause of death - "brain wound" (R 95-99; Pros. Ex 9).

An autopsy performed on 29 November 1948 upon the body of Munetake Mizoe showed:

"Deductions:

"*** The deceased was apparently normal and the internal viscera proved practically neutral. The vessels in the brain showed neither a slightest evidence of arterio-sclerosis nor smallest aneurisms. So, no doubt, the brain bruises on the left hemisphere was the cause of death. ***

"Cause of Death:

"Brain bruise due to blows from blunt and hard instrument. ***".

In the opinion of Dr. Watanabe, who performed the autopsy, the assailant of Mizoe was a tall person, as the wounds inflicted on the victim were located in the center of the top of his head (R 99-101; Pros Ex 11).

As to all the foregoing charges and specifications

At some time between eight thirty and nine o'clock in the evening of 25 November 1948, Aikins and SeEVERS, the accused, called at the house of Toshiko Sakuma, North 18, West 5, Sapporo, Japan. Toshiko, a native of Japan, considered herself to be the wife of Aikins. The two accused visited with Toshiko and her father, Akira Sakuma, and then left the house at about nine thirty (R 162,188,197,199; Pros Ex 7). During this brief sojourn at the Sakuma menage, accused SeEVERS gave Akira a cigarette lighter which resembled Prosecution Exhibit 12. Akira later gave this lighter to a friend named Myodo (R 199,202).

On 25 or 26 November 1948, Kenichi Myodo was the recipient of a gift from his friend, Akira Sakuma. This present was the cigarette lighter marked Prosecution Exhibit 12 (R 202-204).

Toshio Nakamura, while walking in the Hokkaido University grounds, Sapporo, at about noon on 26 November 1948, observed a discoloration in the snow. The discoloration appeared to consist of blood stains and was located at about the spot where Dr. Kishimoto Saburo had been attacked the night before. Near the stains, Nakamura found a spring and a spring plug for a pistol. He turned these items over to the Japanese police (R 155-160; Pros Ex 7; Pros Exs 13,15).

Two days after Aikins' and Seevers' visit at her home, Toshiko Sakuma found two pistols similar to U.S. Army pistols, on a ledge over a stairway in the house. She had seen a weapon resembling these pistols about two months before when Aikins had brought it to the house. Remembering "the incident on the 25th of November" and "because it might cause trouble to the family," Toshiko asked her mother "to throw away the pistols" (R 189-196; Pros Exs 14,16).

Early on the morning of 28 or 29 November 1948, Hana Sakuma, mother of Toshiko Sakuma, took two pistols from her house, at her daughter's request, and threw them in a river near her home. The exact spot where the weapons landed in the water was about five blocks due west of the house. At a later date Hana showed Criminal Investigation Department agents this location and told them what she had done. The pistols were similar to Prosecution Exhibits 14 and 16 (R 206-209; Pros Ex 7).

On 18 January 1949, Criminal Investigation Department agents and Japanese policemen dragged the area of the river where Hana Sakuma indicated she had thrown two pistols. They found two U.S. Army pistols in the bed of the river, one of which had two rounds in the magazine, but was lacking a spring and spring plug (R 210-219; Pros Exs 14,16,17).

Over objection by the defense, sworn statements of each accused were admitted into evidence (Pros Exs 1,18). The law member instructed the court to consider each statement only as to the accused who made it. These statements read:

"I, Seevers, Harold F., RA 45030260, Cpl
(Name) (Serial Number) (Grade)

"B" Co. 187th G.I.R.A.P.C. 468, after having the 24th Article of
(Organization)

War read to me, and after being told that it is not necessary for me to answer any questions that might tend to incriminate me, and that any statement made by me may be used against me, make the following statement:

"On or about the 25th of November 1948 I went to the E.M. club at Sapporo approximately 14.15 hours. I was in the company of Aikins, Sprau, and several other friends. Before coming to Sapporo I had

been drinking Jappeneese nikki whiskey and smoking maraihauna ciggarettes. While we was there a drinking at the club Aikins suggested we go out and hold up some Japeneese for some money. At first I said know as I wanted to go and see my girl but I was also becoming aggresive from the smoking and the drinking. At approxmatly 18.00 hours we left the club and started toward my girls home. Somewhere in the vicinity of the 161st Station hospital and my girls house Aikins persuaded me to help hold up a couple of Japanese trucks parked along the road. I can vaguely remember that we approached some Japeneese and attempted to hold them up. I heard about four (4) pistol shots which Aiken fired so I fired once. We ran away from there. But I do not remember which direction we went. But I do know that we were in or near somebodies house. And a dog on a chain got tangled around my legs and I was trying to get loose and the pistol went off. Then when I did get loose I heard Aikens gun go off at least once. Then we hurried from that vicinity. I can remember that we were in something that resembled a park area. And I know that we committed 3 or 4 assaults in that area. I admit that I removed money and other items from different mens pockets, and I am sure that all during the night I only struck one man with my pistol. Somewhere in that park area the spring, and barrel bushing plug was lost during Aikens assault on one man. We swiched guns and I was trying to fix it. I retained the broken weapon till we returned to his girls house. After leaving the park area, we continued on for several blocks and started another series of assaults. I remember a man and a woman being stopped by us. And I also remember that the woman turned and ran away. At another time we approached a man and I know that Aikins fired at him as I still retain broken gun. As for the other assaults I can not recall the details. I know that Aikins dropped his O.D. cap at one point. We were work- ing back towards Aikins girl friends house. At the house I started to somber up a little bit and we stayed there about a half hour. We left the pistols at the house and returned to the R.T.O. separately and I saw him about the time I was getting on the train. I deny that we pointed our pistols at a Japanese policeman that night. I deny that Aikens and myself held up a Japanese man on the 26th of November 1928. I do not know if Aikens was in town with some one else on that night. I received my pistol approximately in October from Sprau. I know nothing about the bridge shooting on 31st July 1949. However Aikens once told me that he intended to get even with that man that arrested his girl. And he once told me that he shot at what he thought was a Jap policeman. After the Thanksgiving Day affair I encouraged my girl friend to visit Aikens girl friend and agree on an alibi for Aikins and myself. Outside of that my girl friend knew nothing about the shooting and didn't relize what she was protecting me for. Aikens told me that the pistols we used on the night of the 25th of November had been disposed of in

the University grounds in a pool of water by the old woman at his house. For sometime after the 25th of November Aikins and I often discussed what we had done and I felt that we shoudn't have done what we did, and it has preyed on my mind since then and I knew that we would be caught.

"This statement consisting of (3) three pages has been made voluntarily by me in my own handwriting. I have received no promise or reward or freedom from punishment. This statement is true and correct to the best of my knowledge and all errors have been corrected an initialed by me.

Witness: E. W. Matteson
SA 19th CID
J. C. O'Leary
S/A 19th CID

Harold F. Seevers

"Sworn to and subscribed before me, this 18th day of January 1948, at APO 7, Sapporo, Hokkaido.

Harold E. Duffy
1st Lt Sapporo Area
6th CIC District
Summary Court Officer"

"I, Virgil L. Aikins, 37894501, Ret, Co. A, 187 Gir, APO
(Name) (Serial Number) (Grade) (Organization)
468, after having the 24th Article of War read to me, and after being told that it is not necessary for me to answer any question that might tend to incriminate me, and that any statement made by me may be used against me, make the following statement:

"On the date of Nov. 25, 1948 I was at the Sapporo E. M. Club with Seevers and a couple of other fellows. We were all drinking beer all that afternoon until about 7 o'clock at which time Seevers and I decided to go and get some money. (But which one of us who first mentioned that idea I could not say!) We then left the E.M. Club walked back of Grant Hotel about $1\frac{1}{2}$ blocks west where we came up to a couple of trucks, there was about three or four Japanese men standing and sitting in the trucks Seevers went behind the truck and I walked up to the front and chased one fellow into the driveway and at which time Seevers shot one fellow behind the truck and I started to shoot at the one Japanese who was running up the driveway, we then ran for about $1\frac{1}{2}$ blocks past that point where the trucks were parked. We then turned right and walked about $1/2$ block where we turned into another driveway where we then shot the dog which came out and started to barking and then continued on past the railroad tracks into the University ground where we assaulted another Japanese we then moved on through the ground toward Main

Street where the streetcar tracks ran. Just before the track we come up on another fellow. I got the strangle hold on him before he could yell or make any noise. Seevers then search him and then he hit him once across the side of the head. I then let him go, he fell to the ground and started to get up again so I then hit him again, he fell down and didn't move so I and Seevers drug him off the road about twenty feet. We then continued across the streetcar track until we came to a small alley where there was a girl and boy walking. I start toward him and Seevers said to let them go, but I continued toward them. I caught the boy and let the girl run away. I don't remember if I hit him or not, but we continued on until we come to a small canal where we turned right. Another Japanese was coming along on a bicycle. Seevers swung at him and missed, I then upset him and bicycle he got up and ran away. So I then joined Seevers who was about thirty yards ahead of me. We turned left when we come to the railroad tracks and followed them for about one block where we assaulted another Japanese.

"We then continued north for one block and then turned north-east for one more block where we met another fellow while I was holding him another Japanese came out of a house about three or four doors away. Seevers then stopped him. He started to back away so Seevers shot him and he turned and told me to turn loose of the one I was holding. I turned him loose and was about two feet away from him when Seevers then shot him. I and Seevers turned and started toward my girl's house when along came another Japanese on a bicycle who Seevers caught ahold of. They both fell with the bicycle on top of them. I was trying to get my gun in working order. I can't remember if we hit him or not. Me and Seevers then continued on to my girl's house we then left the guns at the house. Seevers was wearing a parka and I was wearing a field jacket.

"Seevers left his parka at the house because it had blood on it. On the 27th day of Nov. 1948 I told the M.P.s that I had a parka at the house and I clamed it was mine and took it back to camp and returned it two Seevers at B. Company. This statement consisting of four pages has been made by me voluntarily without promise of reward or freedom from punishment all errors and corrections have been initialed by me.

Virgil L. Aikins

"Sworn to and subscribed before me, this 7th day of Feb 1949,
at Sapporo Hokkaido Japan.

Clyde W. Hoff
1st Lt INF
Summary Court

WITNESS:

J. C. O'Leary
Agent 19th C.I.D."

As to Specifications 1 and 2, Additional Charge II

On 9 February 1949, accused Aikins was duly confined in the Post Stockade at Camp Crawford, Japan. He was missing from roll call on 9 March 1949, and could not be found in the stockade when a search for him was made. Later the same day, he was returned to confinement at the Post Stockade.

Aikins was again found to be missing upon a check of prisoners after the evening meal on 28 March 1949. He was reconfined at the Camp Crawford Post Stockade the next day (R 311-320; Pros Exs 24,25).

As to the Specification, Additional Charge III

Accused Seevers was confined in the Camp Crawford, Japan, Post Stockade on 19 January 1949. He was missing from roll call on 25 March 1949 and could not be found until he was reconfined in the stockade on 27 March 1949 (R 22,26,29,35,314-320; Pros Exs 19,24).

For the Defense

After explanation of their rights as witnesses by defense counsel and the law member, the accused elected to remain silent.

No evidence was introduced by the defense on the merits of the case.

4. Special Matters

Unsworn Charges

The original charge sheet dated 8 March 1949 incorporates joint Charge I and its specification, joint Charge II and its specifications, additional joint Charge I and its specification, and Additional Charge II, Specification 1, as to accused Aikins only. The accuser signed and swore to the charges and specifications on 8 March 1949. The two additional charges and specifications are typewritten on a plain sheet of paper, which is stapled to the DA AGO Form 115 (1 Dec 47) containing the original charges and specifications, the signature of the accuser, and the jurat. The specification of Additional Charge I alleges an offense committed on 25 November 1948, but Specification 1 of Additional Charge II alleges an offense committed on 9 March 1949, the day after the original charges were preferred. It immediately becomes obvious that Additional Charge I and its specification and Additional Charge II, Specification 1, both written on the extra sheet of paper, were inserted into the Charge Sheet after it had been executed. It follows, therefore, that the latter charges were neither signed nor sworn to.

Paragraph 1, Article of War 70 (10 U.S.C.A., Sec 1542) provides:

"Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief."

Article of War 46(a) of the amended Articles of War, effective 1 February 1949 (10 U.S.C.A., Sec 1517) contains verbatim the provision enunciated above.

Paragraphs 31 of the Manual for Courts-Martial U.S. Army, 1928, and the Manual for Courts-Martial U.S. Army, 1949, each contain the following:

"Charges need not be sworn to if the person signing them believes the accused to be innocent but deems trial advisable in the interest of the service or for protection of the accused ***. In no case, however, should an accused be tried on unsworn charges over his objection."

It has long been held by the Boards of Review and The Judge Advocate General that trial of an accused upon unsigned or unsworn charges is an error procedural in nature and one which does not affect the jurisdiction of the court. In CM 310246, Simpson, 61 BR 225, the Board of Review said:

"*** Although Article of War 70 provides that Charges and Specifications must be signed under oath by a person subject to military law, nevertheless, it is established by opinions of The Judge Advocate General that the failure of the accuser to sign or swear to charges is procedural only and does not affect the jurisdiction of the court or render the trial void, at least in the absence of timely objection raised by accused (CM 172002, Nickerson; CM 220625, Gentry; CM 288951, Burton)."

This holding is buttressed by the view taken by the United States Supreme Court in Humphrey, Warden v. Smith, 336 U.S. 695 (1949). In that case the matter for primary consideration was whether or not a failure to comply with the pre-trial investigation provisions of Article of War 70 would be such an error as to deprive a court-martial of jurisdiction. In discussing the point, however, the court embraced the entire Article. The court said:

"We do not think that the pre-trial investigation procedure required by Article 70 can properly be construed as an indispensable prerequisite to exercise of Army general court-martial jurisdiction."

The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to an accused. Its language is clearly such that a defendant could object to trial in the absence of the required investigation. In that event the court-martial could itself postpone trial pending the investigation. And the military reviewing authorities could consider the same contention, reversing a court-martial conviction where failure to comply with Article 70 has substantially injured an accused. But we are not persuaded that Congress intended to make otherwise valid court-martial judgments wholly void because pre-trial investigations fall short of the standards prescribed by Article 70. That Congress has not required analogous pre-trial procedure for Navy courts-martial is an indication that the investigatory plan was not intended to be exalted to the jurisdictional level.

"Nothing in the legislative history of the Article supports the contention that Congress intended that a conviction after a fair trial should be nullified because of the manner in which an investigation was conducted prior to the filing of charges. Its original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.

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"We hold that a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. It is contended that this interpretation of Article 70 renders it meaningless, practically making it a dead letter. This contention must rest on the premise that the Army will comply with the 70th Article of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article 70 pre-trial procedure. We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War. It was the Army itself that initiated the pre-trial investigation procedure and recommended congressional enactment of Article 70. A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials."
(Underscoring supplied.)

In the instant case, the charges under discussion were formally investigated on 14 and 17 March 1949. The accused were apprised of

the charges, were present during interrogation of witnesses, and were represented at their request by Master Sergeant H. G. Johnson, member of the bar of the State of Georgia. On 19 April 1949, accused went to trial on the same charges and specifications and entered pleas to the general issue, upon arraignment. The accused were vigorously defended by able legal counsel (M/Sgt H. G. Johnson, as special defense counsel) throughout the trial. No objection was presented to the unsigned, unsworn charges, nor was the point raised when counsel for each accused filed a brief and made oral arguments before the Board of Review. Under the circumstances, the error did not injuriously affect the substantial rights of the accused (CM 310246, Simpson, supra).

Jurisdiction

At the time of arraignment of each accused the defense made a motion in bar of trial as to Charges I and II, Additional Charge I, and all specifications thereunder (R 6). Following the introduction of evidence by the defense, and after hearing extended argument by both sides, the court denied the motion (R 6-16; Def Exs A,B). The defense predicated its motion on the theory that the court was without jurisdiction to try the accused for the offenses stated in its motion because each of them had been discharged from the Army subsequent to the commission of the said offenses and prior to arrest or prosecution therefor. In urging denial of the defense motion the prosecution contended that courts-martial retain jurisdiction to try soldiers for offenses committed during a prior enlistment from which they were discharged when such discharge is effected for the convenience of the Government and the succeeding enlistment continues without interruption in service or without physical separation from the service under the discharge.

In view of the import of the court's ruling denying the motion, which we consider was proper for reasons hereinafter stated, a brief review of the issues presented and the law applicable thereto is deemed advisable.

The facts relevant to the motion are not in dispute. The evidence in Defense Exhibits A and B shows that each accused enlisted originally for a term of 36 months. Aikins' term commenced on 21 February 1946 and in due course would have expired on 20 February 1949. Seevers' term commenced on 30 January 1946 and in due course would have expired on 29 January 1949. Apparently both accused desired to remain in the military service after expiration of their term of enlistment and, accordingly, and pursuant to Army Regulations prescribed in such cases, their current enlistments were terminated on 20 December 1948, a date prior to the regular expiration of their respective terms of enlistment, in order to accomplish such reenlistments. In conformity with Army Regulations 615-365, WD AGO Form 53 of 1 July 1947, titled, "Enlisted Record and Report of Separation Honorable Discharge" was

executed as required for each accused. These instruments (Def Exs A and B) contain certain statistical data pertaining to the military status, history and pay of each accused. Among other things this data shows clearly that the reason for the instant discharges was convenience of the Government to afford each accused an opportunity to reenlist in the Regular Army under the authority provided in Army Regulations 615-365, and that each accused reenlisted accordingly on 21 December 1948 at Camp Crawford, Japan, and that each accused received the monetary benefits, except travel allowances, which accrue to such enlistees under Army Regulations. Since both accused were in Japan at the time of discharge and since neither accused received any travel allowance at that time it would appear that their continued service in the Army, without interruption by physical separation, was contemplated upon discharge and reenlistment as effected.

Counsel for the accused, in his argument on the motion, relied on the case of United States ex rel. Hirschberg v. Cooke, 336 U.S. 210 (1949); 8 Bull, JAG 5. In that case, a habeas corpus proceeding, the evidence showed that -

"In 1942 the petitioner was serving a second enlistment in the Navy. Upon the surrender of the United States Forces on Corregidor petitioner became a war prisoner of Japan. After liberation in September, 1945, petitioner was brought back to the United States and hospitalized. He was restored to duty in January, 1946. March 26, 1946, he was granted an honorable discharge because of expiration of his prior enlistment. The next day he re-enlisted, obligating himself to serve four years 'subject to such laws, regulations, and articles for the government of the Navy as are or shall be established by the Congress or other competent authority ...'

"About a year later, petitioner was served with charges directing his trial by a general court-martial of the Navy. The specifications included charges that during his prior enlistment the petitioner had maltreated two other naval enlisted men who were also Japanese prisoners of war and who were members of groups of prisoners working under petitioner's charge. Petitioner filed a plea in bar of the trial, one ground being that the court-martial was without jurisdiction to try him for alleged offenses committed during a prior enlistment at the end of which he had received an honorable discharge. His plea was overruled. He was acquitted on some specifications but was convicted on others that charged maltreatment. His sentence was ten months confinement, reduction from chief signalman to apprentice seaman, and dishonorable discharge from the Navy.

"Petitioner then brought this habeas corpus proceeding in a federal district court charging that the court-martial judgment

was void because of want of statutory power to convict him for an offense committed, if at all, during his prior enlistment. ***" (Underscoring supplied.)

The court said:

"Aside from naval regulations to which reference will later be made, court-martial authority to try and to punish petitioner for his prior enlistment conduct primarily depends on the language in Article 8 (Second) of the Articles for the Government of the Navy (34 U.S.C. Sec. 1200, Art 8), which particularly provides that 'such punishment as a court-martial may adjudge may be inflicted on any person in the Navy ... guilty of ... maltreatment of, any person subject to his orders ...'. The Government contends that this language given its literal meaning authorized the court-martial to try and to punish petitioner for conduct during a prior enlistment. It is pointed out that petitioner was 'in the Navy' when the offense was committed and when he was tried; this language it is argued brings his case under the Article. In aid of this interpretation the Government emphasizes that during the whole period of time involved, petitioner was continuously 'in the Navy' except for an interval of a few hours between his honorable discharge and his re-enlistment. This latter circumstance we think cannot justify the statutory interpretation urged. For if that interpretation is correct, court-martial jurisdiction would be satisfied if a sailor was merely 'in the Navy' when the offense was committed and when brought before the court-martial, regardless of the duration of any interim period out of the naval service, provided the prosecution was not barred by the two-year limitation period provided by 34 U.S. C. sec 1200, Art. 61.

"The concessions made by the Government in urging such a literal construction of this Article expose the whimsical and uncertain nature of the distinctions that would mark the boundaries of court-martial powers. It is conceded that had petitioner not reenlisted in the Navy after his 1946 discharge, no Navy court-martial could have tried him for offenses committed during his prior naval service. Thus, under the construction here urged, naval court-martial jurisdiction for a prior enlistment offense is made wholly to depend on whether the naval offender either voluntarily re-enters the Navy or is drafted into its service. And punishment of the gravest nature might be imposed on a naval volunteer or draftee which no court-martial could have imposed but for such a voluntary or forced entry into the Navy. For under this interpretation had the same naval offender re-entered his country's service by way of the Army rather than the Navy, either by choice or by accident of draft assignment, no court-martial, either Navy or Army, could have punished him. Jurisdiction to punish rarely, if ever, rests upon such

illogical and fortuitous contingencies. We therefore must look beyond the literal language of the Article, ambiguous at best, in order to determine whether this court-martial acted within its power. See Runkle v. United States, 122 U.S. 543, 555, 556; Ex parte Reed, 100 U.S. 13, 23.

"While not itself determinative of the question here, 34 U. S.C. sec. 1200, Art 14 (Eleventh), has greatly influenced the Army and Navy in determining their court-martial jurisdiction to try service personnel for offenses committed in prior enlistments. That Article provides that where any person previously discharged or dismissed from the Navy has 'while in the naval service' been guilty of certain types of fraud against the Government, such person 'shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.'

"Article 14 (Eleventh) stems from an Act of Congress passed in 1863, particularly designed to punish frauds against the military branches of the Government in connection with the procurement of supplies for war activities. 12 Stat. 696. That the attention of the 1863 Congress was directly focused upon the powers that could and should be vested in courts-martial is made clear by the debates and by the fact that Congress deleted from the bill as proposed specific provisions which would have made civilian government contractors subject to trial before military and naval courts-martial. Cong. Globe, 37th Cong., 3d Sess. 952-958 (1863), and Appendix to Cong. Globe, 37th Cong., 3d Sess. 199 (1863). See Ex parte Henderson, 11 Fed. Cas. 1067, No. 6,349 (C.C.D. Ky. 1878). And see United States ex rel. Marcus v. Hess, 317 U.S. 537, 539-545. But after elimination of certain provisions which would further have expanded court-martial jurisdiction, Congress left in the bill sec. 3, now Naval Article 14 (Eleventh), which makes naval personnel guilty of service frauds subject to court-martial after discharge or dismissal. The same 1863 provision has also been made applicable to Army personnel by Article of War 94, 10 U.S.C. Sec 1566.

"Congress in this 1863 Act plainly recognized that there was a significant difference between court-martial power to try men in the service and to try former servicemen after their discharge. The Government correctly argues that the attention of the 1863 Congress was not focused on the precise question, namely, the extent of a military court's statutory power to punish a man presently 'in the service' for an offense committed in a prior enlistment period from which he has been discharged. But the fact remains that the 1863 Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service. Acting

on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there defined - frauds against the Government. Since the 1863 Act, Congress has not passed any measure that directly expanded court-martial powers over discharged servicemen, whether they re-enlisted or not.

"Obviously Article 8 (Second), which subjects to court-martial jurisdiction persons 'in the Navy,' supports an argument that petitioner was subject to trial by this court-martial. It is equally obvious that the language of Article 8 (Second) particularly in view of Article 14 (Eleventh) supports an argument that this court-martial could not try petitioner for an offense committed prior to his honorable discharge. Under these circumstances the manner in which court-martial jurisdiction has long been exercised by the Army and Navy is entitled to great weight in interpreting the Articles.

"The question of the jurisdiction of a naval court-martial over discharged personnel was submitted by the Secretary of the Navy to the Attorney General in 1919. The precise question of whether re-onlistment could revise jurisdiction of a military court was not considered, but as to the power of military courts over discharged personnel in general the Attorney General reached the conclusion that a person discharged from the Navy before proceedings were instituted against him 'for violations of the Articles Governing the Navy, excepting article 14' could not 'thereafter be brought to trial ... for such violations, though committed while he was in the service.' 31 Op. Atty. Gen. 521,529. This conclusion of the Attorney General relied on statements of the Judge Advocate Generals of the Army and Navy that their offices had 'from the beginning and uniformly held that a person separated from the service ceases to be amenable' to military and naval jurisdiction. Previous to the Attorney General's 1919 opinion neither the Navy nor Army had ever claimed court-martial power to try their personnel for offenses committed prior to an honorable discharge where proceedings had not been instituted before discharge. See Winthrop, Military Law and Precedents 93 (2d ed. 1920). The Government concedes that the Army has always so construed its court-martial jurisdiction whenever the question arose. And the Government concedes that the Navy also followed this view of its jurisdiction until 1932. Many holdings and opinions of Army and Navy authorities are cited to support these concessions. ***

"Accepting as we do the long-standing Army and Navy interpretation of the Articles previously referred to, an interpretation which necessarily would deny jurisdiction to the court-martial here, there remains the contention that the Navy has by a recent congressionally authorized regulation acquired such jurisdiction for its courts-martial. 34 U.S.C. sec. 591 authorizes the Secretary of the Navy, with the approval of the President, to adopt

and alter regulations and orders for control of the Navy.

"The Government claims that a regulation adopted pursuant to this authority has been promulgated, and that it vested the necessary power in this court-martial to try petitioner. This authorized regulation, it is contended, had the force of law, *Ex parte Reed*, 100 U.S. 13,22, and consequently supplants the prior statutes which, as interpreted, had denied the jurisdiction here asserted. There has been considerable argument as to whether the language of the Navy regulation was sufficiently precise to endow it with the force of law. Passing over this argument, however, we are not able to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U.S.C. sec. 591 as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. United States v. Symonds, 120 U.S. 46, 49-50.

"The regulation stands no better if it be considered merely as an evidence of a revised naval interpretation of the Article. This revised naval interpretation was given in 1932. Before that time, both Army and Navy had for more than half a century acted on the implicit assumption that discharged servicemen, whether re-enlisted or not, were no longer subject to court-martial power. The Attorney General of the United States had proceeded on the same assumption. And see United States v. Kelly, 15 Wall. 34,36. Under these circumstances, little weight can be given to the 1932 separate effort of the Navy to change the long-accepted understanding of its statutory court-martial power. For should this belated naval interpretation be accepted as correct, there would be left outstanding an Army interpretation of its statutory court-martial powers directly opposed to that of the Navy. Since the Army and Navy court-martial powers depend on substantially the same statutory foundations, the opposing interpretations cannot both be right, unless it be assumed that Congress has left each free to determine its own court-martial boundaries. We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed forces."

As previously indicated, counsel for accused contended that the principles enunciated by the Supreme Court in the preceding case are equally applicable to the circumstances of the instant case. It should be noted, however, that while the court in that case adopted the long-standing interpretation of the Articles of War by the Army and Navy as the basis for its decision, namely, "'*** that a person separated from the service ceases to be amenable' to military and naval jurisdiction," the pertinent facts of that case and the general rule applied upon which that decision was predicated are readily distinguishable from the facts and rule generally

applied by the Army under circumstances presented in this case. The distinguishable feature between these two cases on the facts is that in the Hirschberg case, supra, the discharge became effective after the accused's term of enlistment had expired and the discharge was not effected in order to accomplish his re-enlistment. In the instant case the discharges were accomplished prior to expiration of each accused's term of enlistment and they were obviously predicated upon re-enlistment in the Regular Army prior to the regular expiration of their term of enlistment.

While the rule stated in the Hirschberg case, supra, applies in situations where the soldier's term of enlistment has expired or where he has been separated from the service and a hiatus occurred between his discharge and subsequent re-enlistment, no such rule has been adhered to by The Judge Advocate General of the Army in cases where soldiers are discharged prior to the expiration of their terms of service for the convenience of the Government, either for purposes of re-enlistment or acceptance of a commission. Indeed, the exact opposite is true. In CM 212084, Johnson, 10 BR 213, 1 Bull. JAG 13, the accused was tried and convicted of a larceny in violation of Article of War 93.

"3. Following the arraignment of the accused, defense counsel entered a plea in bar of trial on the ground that the court had no jurisdiction over the case for the reason that the accused had been discharged for the convenience of the Government and reenlisted for a term of three years on a date intervening between the date of the commission of the alleged offense and the date of trial. ***"

The Board of Review said:

"5. The only question requiring consideration is the special plea filed by the defense before pleading to the general issue. While the plea entered was described as a plea in bar, the Board feels that it was in fact a plea to the jurisdiction. In this respect it appears from the evidence adduced at the trial that the accused, while serving a period of enlistment normally expiring in October, 1941, secured an honorable discharge from the service, dated April 28, 1939, for the convenience of the Government under the provisions of section X, AR 615-360, April 4, 1935, in order that he might attend the Cooks and Bakers School. Immediately following the accomplishment of the papers of discharge from the service, which was after the date of the alleged offense and before the date of trial, the accused reenlisted for a period of three years. The certificate of discharge was delivered to him after his reenlistment in accordance with the Army regulations above referred to, which read in part as follows:

'*** When an enlisted man is discharged for the convenience of the Government for the purpose of re-enlisting, the discharge certificate and final statements will not be delivered to him until reenlistment has been accomplished.'

Defense counsel contends that his service having been terminated by discharge he was not thereafter amenable to general courts-martial for trial for any offense committed by him prior to such a discharge and therefore the court was without jurisdiction to proceed with the case.

"6. With respect to the general rule relating to the termination of court-martial jurisdiction of persons subject to military law, paragraph 10 of the Manual for Courts-Martial, 1928, provides:

'The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service.'

Certain exceptions to the rule are thereafter set forth which are not applicable to the instant case.

"In Dig. Ops. JAG 1912, pages 514-515, there appear under 'Discipline', VIII I 1 and VIII I 1 a, two digested opinions which support the rule set forth in The Manual for Courts-Martial that an officer or soldier ceases to be amenable to the military jurisdiction for offenses committed by him while in the military service after he has been separated therefrom by discharge. In a case considered by The Judge Advocate General as recently as 1932, it was held:

'*** That it is well settled that a court martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by A.W. 94, committed in a prior enlistment at the expiration of which he was discharged. ***C.M. 19917 (1932).'
(Sec. 1436, Ops. JAG 1912-30, Supp. VII.)

"In Winthrop's Military Law and Precedents, page 93, discussing jurisdiction of courts-martial after a second appointment or enlistment of an officer or soldier once dismissed or discharged, the opinion is given that -

'*** in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary

deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. ***.'

The learned author goes on to state that a subsequent reappointment or reenlistment into the Army does not revive the jurisdiction for past offenses.

"It would appear from the above citations at first blush that in the instant case the accused, not having been brought to trial for an offense committed prior to his discharge from his first enlistment, the court-martial was without jurisdiction to try him at all, as the second enlistment would not operate to revive jurisdiction. However, a close examination of the digested opinions of The Judge Advocate General and other authorities hereinafter referred to indicates that the mere discharge from the service does not operate to sever jurisdiction provided there is no interruption in the service and that no moment exists during which the accused is not subject to military jurisdiction and control. Where the discharge operates to terminate the service of the soldier and remand him to civilian life, then and in that case only does the discharge from the service operate to terminate jurisdiction over accused. The criterion is not the mere fact of discharge but the termination of military service. In the cases referred to above digested in the opinions of The Judge Advocate General, 1912, the termination of jurisdiction by discharge exists, in the language of the opinion, where the soldier 'has thus become a civilian' and has 'left the Army'. In Winthrop on Military Law and Precedents, page 89, in discussing the beginning and end of the personal amenability of military persons, the following appears:

'*** In other words, the general rule is that military persons - officers and enlisted men - are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become civil persons, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community.'

"In a case where an emergency officer following the termination of the World War was discharged from his emergency commission and immediately thereafter accepted a commission in the Regular Army, following which he was tried by general court-martial for an offense committed prior to such discharge, The Judge Advocate General held that:

'*** Under the circumstances under which this discharge was executed, it can not be said that accused's

military status terminated, and it follows that the rule that a person once discharged can not be tried by courts-martial for offenses committed prior to his discharge, except for violations of A.W. 94, does not apply. ***.' (Sec. 1435 (5), Dig. Ops. JAG 1912-30, p. 713.)

"The Judge Advocate General also held in 1935 in the case of Second Lieutenant Henry A. Sebastian, 16th Infantry, that the court-martial had jurisdiction over him for an offense alleged to have been committed while a cadet, as his acceptance of a commission did not terminate his military service but merely changed his status from that of a cadet to that of a commissioned officer (CM 203457). To like effect is a holding by The Judge Advocate General with respect to trial of a commissioned officer for an offense committed by him when an enlisted man, reported in Opinions of The Judge Advocate General, 1918, pages 644-646.

"In keeping with the principle above enunciated, the Comptroller General has held that a discharge and reenlistment, whether for the convenience of the soldier or of the Government, does not entitle the soldier to travel pay under the act of September 22, 1922, as such soldier is not 'discharged from the Army' within the meaning of that act (Ryan, C.G., A-10856, Sept. 11, 1925; McCarl, C.G., A-16151, June 25, 1927).

"7. In view of the foregoing, the Board of Review concludes that a discharge as such does not necessarily terminate jurisdiction over an accused for an offense committed by him prior thereto unless following such discharge there has been a complete release from the military service and return to the status of a civilian. In the instant case there was no such complete release from military jurisdiction as the certificate of discharge was not delivered to the accused until after his reenlistment for the convenience of the Government and, therefore, there being no hiatus in his military status, his military service was continuous and uninterrupted from the date of the commission of the offense alleged until the date of trial."

* In the case under consideration, the accused were members of the Regular Army occupation forces in Japan. Accused Aikins had two months more to serve on his existing enlistment and accused Seevers, six weeks. Each was honorably discharged on 20 December 1948, "convenience of the Government, AR 615-365" and re-enlisted, in Japan, 21 December 1948. Army Regulations 615-365 (27 October 1948) provide, among other things, that commanders have authority -

"*** To permit immediate reenlistment in the Regular Army for 3 years or more as authorized, of individuals currently serving in the Regular Army, who apply for and are qualified

for such reenlistment:

- (1) At any time during the last 90 days of a current enlistment. ***

Individuals being discharged from their present enlisted status as provided above will be reenlisted on the day following discharge. The discharge certificate will not be delivered to the individual until after reenlistment is effected. ***"

There being a presumption of regularity in the conduct of government affairs, it is a fair assumption that whatever type of discharge certificate were issued to the accused they were not delivered to them until after their re-enlistments were effected (CM 320957, Boone, 70 BR 223). Since the accused re-enlisted prior to the expiration of their terms of service and since they were not physically separated from the service prior to re-enlistment their discharges, under such circumstances, did not constitute a complete release from the military service. Thus, there was no break or hiatus in their military status and their military service was continuous and uninterrupted from the date of the commission of the offenses in question until the date of trial. It follows, therefore, that the accused were subject to the jurisdiction of courts-martial and that the ruling of the court denying the motion in bar of trial was proper (CM 212084, Johnson, supra).

Even had there been an hiatus in the military status of the accused (as, for example, their terms of service expiring prior to initiation of charges or arrest), a general court-martial would have had jurisdiction under the facts of this case. During the few hours in which there could possibly have been a break in the military service of the accused, they were physically present with Army occupation forces on the Island of Hokkaido, Japan. Article of War 2 (10 U.S.C.A., Sec 1473) provides:

"Persons subject to military law ***

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States ***"

That the accused would be "persons subject to military law" within the purview of Article of War 2(d), as persons accompanying the armies of the United States without the territorial jurisdiction of the United States, is without question. The Federal courts have uniformly so held in similar cases. In Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948), a habeas corpus proceeding, petitioner Grewe had been a civilian employee of the United States occupation forces in Germany. While so employed, he committed certain offenses in violation of Articles of War 93 and 96. Subsequently he was tried and convicted of these offenses by court-martial. Petitioner claimed that prior to his trial he was discharged from his position with the Army and contended that he was

therefore no longer subject to military law. In discharging the writ the court said:

"From the record it is somewhat uncertain whether or when petitioner's employment had been terminated. At the trial petitioner testified that his contract of employment was for a period of one year, with option to cancel upon 30 days' notice, which option he alleges to have exercised on June 26, 1946. But assuming his employment had terminated, petitioner was not free to come and go as he pleased. He was not allowed to merge with the population of Germany. He was there only with the consent of the theater commander. Germany had no courts functioning where he could be tried for any offense he might commit.

"Upon oral argument, in response to a question by the court, petitioner's counsel stated that in his opinion petitioner was not subject to any authority. In other words, petitioner could with impunity have caused confusion and great damage, and even endangered the lives of members of our armed forces. Such would be a situation which, in my opinion, Congress sought to avoid when it enacted Article 2(d).

"When the offenses of which petitioner was convicted were committed he was a person 'serving with' the Army. At the time of his arrest he was living in the Army controlled compound in an allocated building. At the time of his court-martial he was at least 'accompanying' the Army of the United States. ***"

And so, also, in Perlstein v. United States, 151 F. 2d 167 (CCA3, 1945):

"*** petitioner was employed by a corporation which was engaged in salvage operations in the harbor at Massawa, Eritrea, under a contract with the United States Army. Petitioner's duty did not require him to actually assist in the salvage operations, but he had the job of caring for air conditioning and refrigeration to ease the living conditions of other employees. Petitioner had been discharged and was awaiting transportation home. He was alleged to have stolen some jewelry on the day he was to board ship provided by the Army for his return to the United States. The theft had been discovered after he left Massawa. He was apprehended in Egypt where he was tried by court-martial. In spite of the fact that petitioner's arrest and his trial by court-martial both occurred after he had been discharged, the court held that he was a person subject to military law, being a person accompanying the Army of the United States in the field in time of war."

There is still another basis for jurisdiction of a general court-martial to try the accused, found under the provisions of Article of War 12, which provides in pertinent part:

"General courts-martial shall have the power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of War is subject to trial by military tribunals ***." (Underscoring supplied.)

Article of War 12 must be construed in accordance with Article of War 15 which provides:

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect to offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."

Explanation of the legislative intent with respect to the jurisdiction of military tribunals (including courts-martial) may be found in General Crowder's testimony before the Senate Military Affairs Committee with respect to Article of War 15 in 1916. He stated:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commissions. A military commission is our common law-war court. It has no statutory existence, though it is recognized by statute law. As long as the article embraced them in the designation 'persons subject to military law' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court martial (ARTS 12, 13, and 14), it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced ***. It just saves the war courts the jurisdiction they now have and makes concurrent a jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. ***" (Senate Report No. 130, 64th Cong., 1st Sess., p. 40).

It is apparent from the foregoing that general courts-martial have concurrent jurisdiction with military commissions to try not only persons subject to military law, but "any other person who by the law of war is subject to trial by military tribunals."

Military tribunals are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, either by civilians or military persons, in an enemy country during its occupation by our

armies and while it remains under military government (Dig Op JAG 1912, p 1067). These two classes of offenses are:

1. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are closed or their function suspended, cannot be taken cognizance of by the ordinary civil tribunals. A military commission may thus act as a substitute for the regular criminal judicature (Dig Op JAG 1912, p 1067; *Dow v. Johnson*, 100 U.S. 158). Such jurisdiction is implied from the occupant's duty under international law to take "all measures in his power to restore and insure, as far as possible, public order and safety" (Article 43, Hague Regulations, Annex to Hague Convention No. IV of 18 October 1907; FM 27-10, Rules of Land Warfare, par 282).

2. Violation of the laws of War (*Ex parte Quirin et al*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1 (1946); Dig Op JAG 1912, p 1067). Crimes committed against the civilian population such as arson, murder, assaults, highway robbery, larceny, burglary, fraud, forgery, and rape, which are made punishable by the penal codes of all civilized nations, when committed by soldiers of a belligerent, are considered to be violations of the laws of war (FM 27-10, par 355; Dig Op JAG 1912, p 1071).

United States military tribunals have jurisdiction over American nationals in occupied Japan as a substitute for the criminal jurisdiction of local courts (CM 318380, *Yabusaki*, 67 BR 265, 272; 6 Bull JAG 117). Chapter XXVI of The Criminal Code of Japan makes punishable each crime alleged in the present case. There is authority indicating that soldiers of an occupying power in occupied enemy territory are not subject to the jurisdiction of the local criminal law (*Coleman v. Tennessee*, 97 U.S. 509 (1878); *Garner, International Law and the World War*, Vol II, p 477). The accused here were soldiers at the time of the commission of the offenses alleged and also were soldiers (because of their reenlistment) at the time of trial. However, the Board finds it unnecessary to pass upon the point, inasmuch as the crimes here charged (murder, robbery and assault) are, under the circumstances shown, violations of the laws of war. Under the classes of offenses over which military tribunals have jurisdiction, discussed above, a military commission would have jurisdiction over the offenses alleged in the instant case and while it might not have jurisdiction over the accused under Classification 1, above, the military commission would have jurisdiction under Classification 2, violations of the laws of war. It follows, ipso facto, that if a military commission would have jurisdiction over the offenses and the accused, so also would a general court-martial (Article of War 12, 10 U.S.C.A., Sec 1483; CM 318380, *Yabusaki*, supra; *In re Bush*, 84 F. Supp 873 (D.C. 1949); CM 302791, *Kaukoreit*, 59 BR 7, 5 Bull JAG 264).

Testimony of Toshiko Sakuma

When Toshiko Sakuma was called as a prosecution witness, the defense

objected to any testimony being elicited from the witness as she "is the common law wife of *** the Accused Aikins." For the limited purpose of testifying as to his marital status, accused Aikins was sworn as a witness. He admitted that even after official inquiry he had not requested approval of the purported marriage by military authorities, nor had he been a party to any civil or religious marriage form or rite. He stated, however, that he and Toshiko considered themselves to be husband and wife, that they held themselves out to the community as such, that they had lived together for over a year, that he contributed to her support, that people in the community recognized them as husband and wife, and that a child born of the union had been registered in the name of Aikins. Other competent proof was then adduced by the defense which tended to show that there was a valid common law marriage between accused Aikins and Toshiko Sakuma (R 164-176).

The court overruled the objection and permitted Toshiko to testify.

Paragraph 133d, Manual for Courts-Martial, U.S. Army, 1949, provides in relevant part:

"*** Although husband and wife are competent witnesses against each other, the general rule is that either spouse may assert a claim of privilege against the use of one of them as a witness against the other ***"

Where recognized, common law marriages have the same validity as ceremonial marriages (Boyd v. United States, 8 F. 2d 779 (W.D. N.Y. 1925)). It follows, corollarily, that any rights acquired by a spouse because of the marital relationship would be the same in each case.

If, in fact, a legally valid subsisting marriage exists between accused Aikins and the witness, Toshiko, the court erred in permitting her to testify against him over his objection.

In attempting to show that the "marriage" was invalid, the prosecution called Muroya Keiichi, a Japanese judge, to explain the laws of Japan relating to marriage. Over objection by the defense, Judge Keiichi testified, in substance, that in Japan, in order to consummate a valid marriage, the parties must register their agreement to marry with local government officials. This completes the marriage, a ceremony not being necessary. He further testified that common law marriages, although recognized in other countries, are not recognized in Japan (R 179-186). However, under questioning by the law member, the judge clouded the issue as follows:

"A In Japan, a marriage is recognized if it is registered and ceremony is not necessary. However, in the case of a foreigner and a Japanese getting married it differs. If the foreigner, foreign individual was to become naturalized into a

Japanese, then he would be allowed to register in the Japanese so called Koseki register. However, if he does not become naturalized, he cannot enter the Japanese Koseki register and, therefore, registration will not be permitted.

"Q Then is it impossible to effect or close a marriage between a foreigner and a Japanese under Japanese law?

"A That is correct. It would be impossible since the foreigner would have to become naturalized in order to be registered in the Japanese koseki.

"Q Then, is it impossible for an American soldier to marry a Japanese girl under the Japanese law?

"A It would be impossible for an American soldier to marry a Japanese girl under the present Japanese law unless one of them became naturalized to the other. Although I have stated thus so far, after the termination of the war many new special ordinances have come out and it would be better for me to study the matter over. However, relying on the present Japanese Civil Code, what I have stated thus far holds true.

"Q As you interpret the Japanese law then, is this correct, that if the marriage is to be under Japanese law they must, both parties must be Japanese citizens. However, if it is a marriage performed under another country's law the Japanese Government will recognize it if that other country recognized it as a marriage under its law?

"A If the male is a foreigner, the marriage laws concerning them would go under the jurisdiction of the foreigner's country's law. However, if the male is Japanese, then they would both come under the Japanese law." (R 181-182) (Underscoring supplied.)

From the foregoing, it might appear that the law governing the marriage would be that of the State of South Dakota, that state being the residence of accused Aikins. In South Dakota common-law marriages are recognized (SDC 65.0103; Svendson v. Svendson, 37 S.D. 353).

In determining the validity of Aikin's "marriage," two problems are presented:

1. What law applies to the relationship in the instant case, and
2. What does that law provide?

A review of authorities reveals that the validity of a marriage is determined generally by the law of the place where it was contracted; if valid there,

it will be held valid everywhere, and, conversely, if invalid by the *lex loci contractus*, it will be held invalid wherever the question may arise (55 C.J.S. 811; *Loughran v. Loughran et al, Trustees*, 292 U.S. 216 (1933); *Rhodes v. Rhodes*, 96 F. 2d 715 (C.C.A.D.C. 1938).

In the case of *Toshiko Inaba v. Nagle*, 36 F. 2d 481 (C.C.A. 9th 1929), a United States citizen had married a Japanese in Japan. Relative to the marriage, the court said:

"*** The marriage was contracted in accordance with the laws of Japan, and of course the laws of that country are controlling ***" (underscoring supplied).

We may thus conclude that the law of Japan is controlling as to the validity of the marriage contract purportedly entered into in Japan by the accused Aikins.

Our next consideration is an inquiry into the correct and applicable provisions of the Japanese law. One way of proving foreign laws is by the testimony of a person who is familiar with them through education or experience. Such a person may testify as to the content and interpretation of the foreign law in question (MCM, 1949, par 133b). In view of the contradictory testimony of Judge Keiichi as to the provisions of the law of Japan, and the fact that regardless of that testimony the court could and must (in view of its ruling on the objection) have taken judicial notice of the laws in effect in a country occupied by armed forces of the United States, the Board of Review also will disregard the judge's testimony and turn to the existing published laws of Japan of which the Board may, and does, take judicial notice (MCM, 1949, par 133b; CM 316886, *Chaffin*, 66 BR 101, and cases therein cited).

Paragraph 775, Book IV, of the Civil Code of Japan, 16 July 1898, as amended by Law No. 222 of 1947 (par 739, Book IV, No. 5 Codes and Statutes of Japan) provides:

"A marriage becomes effective by notification thereof in accordance with the provisions of the Family Registration Law ***."

Article 74, Section VI, of the Family Registration law provides:

"A person who wishes to effect marriage shall state the following particulars in the written notification and give the notification to that effect:

1. The surname assumed by husband and wife;
2. Other matters as specified by ordinance."

Ordinance No. 94, Family Registration Law Enforcement Regulations, provides in pertinent part:

"Article 51. Documents relating to a person who does not have Japanese nationality, which are accepted by the town, city or village mayor of the area in which that person happens to be present, must be transmitted to the city, town or village mayor of the area in which such person maintains a place of residence.

"The provisions of the preceding article shall apply, with necessary modifications, to the documents received by or transmitted to a town, city or village mayor with respect to a matter relating to a person who does not have Japanese nationality.

"Article 56. The matters referred to in Item 2 of Article 74 of the Family Registration Law are provided as follows:

1. If either of the parties does not have Japanese nationality, statement to that effect;
2. The name of the prefecture within which the parties were born (if the place of birth is in a foreign country, the name of that country);
3. If a marriage ceremony was held, the date and location of the ceremony and the professions and domiciles of the parties at that time, as well as the period of time during which such parties have resided continuously at such domiciles;
4. If the marriage is not the first marriage of either party, then the manner and number of times of dissolution of all former marriages, and the time of dissolution of the last preceding marriage;
5. The education level of the parties;
6. The full names and places of family registry records of the parents of the parties, as well as the designation of the prefecture in which they were born (if the place of birth is a foreign country, the name of that country);
7. If either of the parties is an adopted child, full names and the place of family registry records of the parents by adoption."

Article 742, Book IV, of the Civil Code of Japan (1947) (amending without change Article 778, Book IV, of the Civil Code of Japan (1898)) provides in relevant part:

"A marriage is void *** in the following cases:

*** Where the parties do not make notification of the marriage ***."

From a study of the foregoing, it becomes apparent that the only way for any person, foreign or native, to contract a valid marriage in Japan is to register or "make notification" thereof as required by Japanese law. If such notification is not made, the marriage is void. The Supreme Commander for the Allied Powers recognized this fact in a letter dated 23 May 1946 addressed to the Imperial Japanese Government (Scapin 1316-A), in which he said:

"In order to provide a procedure for the marriage of United States personnel in Japan in accordance with the Japanese Civil Code, the Imperial Japanese Government is directed to:

a. Instruct the Kucho of Nakka-Ku, Yokohama to contact the Yokohama Branch, Diplomatic Section, American Consulate Building, Yokohama to arrange a mutually satisfactory, mechanical procedure for the registration of marriages of American citizens.

b. Instruct the Kucho of Nakka-Ku, Yokohama to furnish translations, or make its own translations of any necessary documents in connection with the registration of Marriage of American Citizens."

Personnel of the United States Armed Forces in Japan were apprised of this view by publication of Circular 86, Far East Command (13 August 1947), which provides, inter alia:

"Marriage in Japan is merely an agreement between participants and under Japanese law neither a license nor a ceremony is required for its completion. It becomes legally effective upon notification by the participants to the Japanese registrar. Arrangements have been made for United States citizens to obtain certificates of marriage through the Yokohama Branch Office of the Diplomatic Section, Supreme Commander for the Allied Powers. The certificate is documentary evidence of the witnessing of the compliance with Japanese law and it cannot be issued through correspondence. All military personnel and War Department civilians contemplating marriage in Japan must consult the Diplomatic Section. Communications should be addressed as follows:

Yokohama Branch
Diplomatic Section
American Consulate Building
o/o Headquarters, Eighth Army
APO 343."

Since the evidence shows that accused Aikins not only did not comply, but made no attempt to comply with the requisites of the laws and ordinances pertaining to marriage, the Board concludes that a valid marriage of

Aikins and Toshiko did not exist and that therefore Toshiko Sakuma was a competent witness against him in the instant case.

Admissibility of Confessions

Accused SeEVERS

The defense objected to the admission in evidence of a pre-trial sworn statement of accused SeEVERS on the ground that it was obtained before the accused had been warned of his rights under Article of War 24 and also that the statement was improperly induced by promises of leniency and the giving of inducements. This statement is a confession.

For the limited purpose of testifying as to the involuntary nature of the confession, accused SeEVERS was sworn as a witness. He testified in substance that he was awakened in his barracks early in the morning on 18 January 1949 by agents of the Criminal Investigation Division who took him to an interrogation room for a while and then committed him to the local jail. A few hours later, these men told him that they "had been out hunting for guns," and "they'll pray for you at Sugamo prison *** your mother will be praying for you." That afternoon he was again taken to the interrogation room and the 24th Article of War was read to him. The agents questioned him at length. During the questioning the agents gave him "cigarettes, hamburgers, whiskey and coke." He became confused because of lack of sleep and the effects of the whiskey. When Agent Matteson told him that "it would help me a lot in the trial if I made a statement and wrote it down," he then wrote a confession as dictated by Matteson.

Rebutting this testimony of the accused is the testimony of three Army officers and three Criminal Investigation Division agents including Agent Matteson, which summarized shows that accused was warned of his rights several times by several individuals, that no threats or promises were made to him, and that he executed the sworn confession voluntarily (R 22-26, 27-34, 217-265).

The court ruled that the confession was voluntary and admissible in evidence and the Board of Review is unable to find any cogent reason for disagreement with that decision.

Accused Aikins

The defense objected to the admission in evidence of the confession of accused Aikins on the ground of improper inducement, in that a Criminal Investigation Division agent told the accused that if he made a statement it would help him. No evidence was offered in support of the objection.

The Board can find no evidence in the record which warrants the conclusion advanced by the defense. There is ample competent proof in the record, however, which shows that accused accomplished his statement freely and voluntarily.

Regarding both confessions, the court inquired at length into the circumstances surrounding their execution, and having done so, determined that upon all the evidence, the statements of the accused were of a voluntary nature. The court's decision as to the voluntary character of confessions should not be disturbed upon appellate review except in cases where there is no reasonable basis in the evidence for its action. There is ample evidence in this case to support the court's conclusions (CM 330203, Inman, 78 BR 306).

5. Discussion

Regarding all Original Charges and Specifications

On Thanksgiving night, 1948, the City of Sapporo, Hokkaido, Japan, was the scene of a series of vicious, brutal assaults, robberies and killings. Two American soldiers, armed with pistols, ran amok, leaving in their wake a number of hapless victims of assorted crimes. These victims were a cross-section of Japanese society: Professional men, laborers, artisans, students and office workers.

The record shows that just before seven o'clock that evening, five laborers were attacked at the Forestry Bureau by two soldiers with blazing guns. When the soldiers left, Takeo Shimo was dead from a bullet wound. About fifteen minutes later, and about three-quarters of a mile away (as traversed by the accused between the two points) on the Hokkaido University campus, Doctor Kishimoto Saburo was beaten by two soldiers "with an instrument resembling a steel rod," to such a degree that he lost the sight of one eye. Still later, Hajime Furuta, a University student, was robbed of his watch and money by two American soldiers. Minutes after this incident, two American soldiers with pistols robbed and beat another student, Junichiro Samejima, who was on his way to class at the University.

About twenty minutes had passed when Kiyoshi Hasegawa, a carpenter, homeward bound, was seized and beaten with pistols by two soldiers and within five minutes Inspector Mitsuo Ogata was robbed by two soldiers with pistols at a spot just two blocks away.

Five blocks to the east of the latter incident and fifteen minutes later, Zenkichi Kurokawa's right eye was shot out by two American soldiers. After another fifteen minute interval, two soldiers with pistols robbed and beat another Japanese named Takoshi Hongo. The fruit of this holdup was a cigarette lighter.

Within half an hour of the time this last crime was committed, the accused (one of whom is short, the other tall, and both of whom are American soldiers) entered the home of Toshiko Sakuma, accused Aikins' "girl friend." While there, accused SeEVERS gave the cigarette lighter (which had been taken from Hongo a few minutes before by two American soldiers) to Akira Sakuma, Toshiko's father.

Two days thereafter, two pistols were found in the Sakuma house and were promptly thrown in the river by Toshiko's mother.

During the trial none of the victims of these crimes could identify the accused as their attackers. All were positive, however, that their assailants were American soldiers and that one was tall and one was short. Sugawara and Kurokawa testified that the accused "resembled" their assaulters.

Each of the accused made a pre-trial statement. These statements were admitted in evidence and the court was cautioned to consider each one only as to the accused who executed it. Both of the accused admit in their statements that they conspired to hold up some Japanese for money. They also admit committing a series of shootings, assaults and robberies, which coincide with the crimes described by the prosecution witnesses in point of time, place and method of commission, starting with the affair at the Forestry Bureau and continuing with each succeeding crime until they disposed of their pistols at the house of Aikins' paramour. These sanguinary tales, coupled with the almost identical description of the culprits by each living victim, the weapons used, the similarity of conduct in each incident and the gift of the stolen cigarette lighter at the end of the fearful tour, form a pattern so complete as to leave no doubt but that the accused were the perpetrators of each of the acts charged (CM 330963, Armistead, 79 BR 201,230).

(In further discussion of the original charges and specifications, the specifications are grouped as to type of crime alleged.)

Murder (Specification of Charge I)

The accused were charged with and convicted of the premeditated murder of one Takeo Shimo on 25 November 1948 at Sapporo, Japan.

"Murder is the unlawful killing of a human being with malice aforethought. *** Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take the life of anyone. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must

have previously existed. It is sufficient that it exist at the time the act is committed. *** Murder does not require premeditation, but if premeditated it is a more serious offense and may be punished by death. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design." (MCM 1949, par 179a.)

The evidence shows beyond reasonable doubt that the accused killed Shimo at the time and place alleged. The brutality of the unprovoked attack shows unmistakably that the vicious conduct flowed from evil hearts bent on mischief whether that mischief was the assaulting of Japanese people or the theft of their property or both. The law presumes malice from such cruel and deliberate acts manifesting an utter disregard for human life (CM 330963, Armistead, supra). That chagrin at having their intended victims at the Forestry Bureau scatter to safety impelled a specific intent in the accused to fire pistols at their hapless prey regardless of any consequences of these acts is so apparent that we are forced to the conclusion that the homicide was premeditated (CM 336706, Pomada, 11 July 1949).

The evidence is not clear as to which of the accused fired the fatal shot. This does not vitiate the culpability of either of them. The guiding principle concerning this proposition is stated thus:

"If a number of persons conspire together to do an unlawful act, and death happen from anything done in the prosecution of the design, it is murder in all who take part in the transaction. *** More especially will the death be murder, if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life *** (CM 314404, O'Neal, 64 BR 137,143, and cases therein cited)."

Robbery (Specifications 6,7,9,11, Charge II)

Accused also were jointly convicted of four separate robberies. Robbery is defined as "*** the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (MCM, 1949, par 180f). The evidence is compelling that two American soldiers, acting in concert, took property from the four persons named in Specifications 6,7,9 and 11 of Charge II in the manner and at the times and places alleged. From the

testimony of the victims and the confessions of the accused the court found that the accused were the individuals who committed these offenses. The Board of Review concludes that such findings are amply sustained by the evidence.

Assault with intent to do bodily harm with a dangerous weapon or commit a felony (Specifications 1,2,3,4,5,8 and 10, Charge II)

An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. To prove such assaults as are alleged in this case, it must be shown (a) that the accused assaulted a certain person as alleged or with a certain weapon or instrument; and (b) facts and circumstances indicating the existence at the time of the assault of the specific intent of the accused to commit a felony as alleged or facts and circumstances indicating that the weapon or instrument was used in a manner likely to produce death or great bodily harm (MCM 1949, par. 180k, 1). Each of the specifications now under discussion properly alleges an assault, either with intent to commit a felony, or with intent to do bodily harm with a dangerous weapon. The uncontroverted evidence shows that the accused jointly assaulted the seven different people named in the specifications at the times and places and in the manner alleged. The court properly could reach no other conclusion but that of the guilt of the accused on these charges.

Regarding all Additional Charges and Specifications

Additional Charge I and its Specification

Both accused stand convicted of the murder of one Munetake Mizoe. The only direct evidence adduced pertaining to this alleged offense shows that at about seven fifteen o'clock on the evening of 25 November 1948 Mizoe was found unconscious at a rubbish dump in a back lane on the grounds of Hokkaido University. He was hospitalized and died two days later from a "brain wound" which, in the opinion of the doctor who performed the autopsy, may have been criminally inflicted. There is no showing that anyone saw Mizoe attacked, nor is there any evidence as to the time he incurred the injury, nor is it shown by any competent evidence that the "brain wound" was the result of a criminal act. Furthermore, there is no showing that either accused was ever at the scene where Mizoe was found nor is there anything of probative value in the confession of each accused to connect either of them with the instant offense. It remains to be determined, therefore, whether the evidence surrounding the proof of all other offenses of which the accused were convicted furnishes, circumstantially, sufficient evidence from which it could be legally inferred that the injury incurred by Mizoe, and from which he died, was inflicted by the accused.

In considering the movements of the accused between 7:00 and 7:15 o'clock on the evening in question the evidence shows that at seven o'clock the accused attempted to hold up a group of Japanese at the

Forestry Bureau and in so doing committed the four assaults and the murder alleged in Specifications 1 through 4, Charge II, and in the Specification of Charge I, respectively, at a point which is approximately one-third of a mile from the scene where Mizoe was found unconscious. Fifteen minutes later (7:15 p.m.), which was approximately the same time that Mizoe was discovered, the accused were shown to be on the Hokkaido University grounds assaulting and robbing Dr. Saburo (Spec 5, Chg. II), at a point approximately one-quarter of a mile from the scene where Mizoe was found. The evidence also shows that the accused left the Forestry Bureau and traveled in a westerly direction where they encountered a dog on a chain. Considering the route thus taken by accused they necessarily traveled at least three-fourths of a mile in reaching the scene of the assault upon Doctor Saburo. The maps of the City of Sapporo, introduced by the prosecution and on which the prosecution witnesses marked the various locations where the alleged offenses were committed, present a general pattern of the probable routes of travel followed by the accused in the course of their brutal assaults. Except for the accused's account of their travel as given in their confessions there is no evidence to show what route they followed or whether they passed the rubbish dump where Mizoe was found, and their account does not indicate that they were at or in close proximity to that location. In their confession they trace their steps from the point of the initial assaults westward to a Japanese house where the accused Seever became entangled in a dog chain and thence northeast across some railroad tracks until they entered a "park area" (the grounds of Hokkaido University) where the assault on Dr. Saburo took place. By charting the route so described on the above-mentioned maps, vague as it is, we find it impossible to determine, with any degree of certainty, what route was followed by the accused from the Japanese house to the Hokkaido University grounds. It is obvious from a study of the maps that the accused could have followed any number of routes thereto, one of which could have passed the point where Mizoe was found. A conclusion that under these circumstances the accused had taken the route along which Mizoe was found, thus giving rise to the inference that the accused, in view of their general criminal conduct that evening, inflicted the injury from which he died, would necessarily be based on mere speculation, suspicion and surmise (CM 277983, Robinson, 51 BR 282; CM 312356, Preater, 62 BR 141, and cases therein cited). In the absence of any substantial incriminating evidence connecting the accused to the instant offense we approach the conclusion that the record of trial does not legally support the inference that the accused murdered Mizoe as charged.

Although the injured Mizoe was found at seven fifteen p.m., there is no evidence which tends to show when he incurred his injuries or to show how long he may have lain unconscious at the rubbish dump. To logicize upon all the evidence, we find the accused committing crimes at seven o'clock in one place, traveling thence on foot in various directions, being impeded by a dog and a chain, crossing a canal and railroad tracks, all in darkness with snow underfoot; and then committing an assault, where a

pistol was broken, all within about fifteen minutes and at a place three-quarters of a mile away from the starting point. Under the circumstances, it is doubtful that accused would have had the time or opportunity to stop and assault yet another victim. These facts do not exclude every reasonable hypothesis except that of the guilt of the accused.

It is significant that in their confessions the accused corroborate all the evidence adduced by the prosecution in support of the charges except as to an assault or other incident at the place where the injured Mizoe was found. They do not mention any such an incident.

"*** Where the prosecution relies solely on accused's admissions or confessions to connect him with the commission of a crime it is bound by accused's statements considered in their whole effect and the jury is not at liberty to reject or disbelieve the self-serving statements while accepting the disserving statements therein unless there is other evidence in the case tending to render the self-serving statements questionable, doubtful or inconsistent. ***" (CM 319168, Poe, 68 BR 141,166, and cases therein cited; CM 324924, De Gonia, 73 BR 409).

A study of the statements of the accused reveals that each accused admits committing certain crimes charged at places one quarter to one half a mile from the area where Mizoe was injured. The statements also show that the accused went directly from a Japanese house west of the Forestry Bureau to a "park area" where Dr. Saburo was assaulted. We cannot, by any stretch of connotation or hyperbole, connect a "park area" with the "rubbish dump" near which Mizoe was found. In view of the foregoing, the Board is constrained to hold that the record of trial is legally insufficient to support the findings as to Additional Charge I and its specification.

Additional Charges II and III and Specifications thereunder

Each accused was convicted by the court of certain escapes from confinement. Competent evidence shows that accused were properly confined, and that each escaped from such confinement without proper release as alleged. The proof sustains the findings of the court.

6. On behalf of the accused Aikins, Mr. Lee Cope, Attorney at Law, appeared before the Board of Review, made oral argument and filed a brief. Mr. C. William O'Neill, attorney for accused Seevers, also appeared before the Board and presented oral argument. The Board has carefully considered all points covered in the brief and arguments.

7. Department of the Army records show that accused Aikins is twenty-two years of age, was inducted into the Army on 19 February 1946 and has served in the Army continuously since that date.

Department of the Army records also show that accused Seevers is twenty-two years of age, was inducted into the Army on 28 January 1946, and has served in the Army continuously since that date.

8. The court was legally constituted and had jurisdiction over the persons 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 insufficient to support the findings of guilty of the Specification of Additional Charge I and Additional Charge I, legally sufficient to support the findings of guilty of all other charges and specifications and the sentences and to warrant confirmation thereof. A sentence to death or imprisonment for life is mandatory upon conviction of premeditated murder in violation of Article of War 92.

Carlos E. McAfee, J.A.G.C.

Joseph T. Brack, J.A.G.C.

Roger W. Durrier, J.A.G.C.

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

CSJAGU CM 337089

UNITED STATES

7th INFANTRY DIVISION

v.

Recruit VIRGIL L. AIKINS,
RA 37894501, Company A, 187th
Glider Infantry Regiment, and
Corporal HAROLD F. SEEVERS, RA
45030260, Company B, 187th
Glider Infantry Regiment

Trial by G.C.M., convened at
Sapporo, Hokkaido, Japan,
19-26 April 1949. Each: Death

- - - - -
Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps
- - - - -

1. Pursuant to Article of War 50d(1) the record of trial by general court-martial and the opinion of the Board of Review in the case of the soldiers named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon common trial by general court-martial both accused pleaded not guilty to, and were found guilty of, the following offenses, alleged to have been committed jointly at Sapporo, Japan, on or about 25 November 1948: the premeditated murders of Takeo Shimo (Specification, Charge I) and Munetake Mizoe (Specification, Additional Charge I), both in violation of Article of War 92; robberies of Hijime Furuta, Junichiro Samejima, Mitsuo Ogata and Takeshi Hongo (Specifications 6, 7, 9 and 11, Charge II); assaults with intent to rob upon Kishimoto Saburo and Zenkichi Kurokawa (Specifications 5 and 10, Charge II); assaults with intent to do bodily harm with a dangerous weapon, a pistol, upon Shigeru Sasaki, Shizuo Takahashi, Masamitsu Yagihashi and Shinji Sugawara (Specifications 1, 2, 3, and 4, Charge II) and assault with intent to do bodily harm upon Kiyoshi Kasegawa (Specification 8, Charge II), all in violation of Article of War 93.

Both accused also pleaded not guilty to, and were found guilty of, individual escapes from confinement at Camp Crawford, Japan, as follows: Aikins on or about 9 March and 28 March 1949 (Specifications 1 and 2, Additional Charge II), and Seevers on or about 25 March 1949 (Specification, Additional Charge III), all in violation of Article of War 69.

No evidence of any previous convictions was introduced as to either accused. Each accused was sentenced to be put to death in such manner as proper authority might direct, all the members of the court present at the time the vote was taken concurring in the sentences. The reviewing authority

approved the sentences and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Additional Charge I and its Specification (joint premeditated murder of Munetake Mizoe) and legally sufficient to support the findings of guilty of all other charges and specifications and the sentences and to warrant confirmation thereof.

3. Evidence.

The evidence is reviewed at length in the opinion of the Board of Review. In support of Charges I and II and their specifications, it shows in summary that just before 7 o'clock on Thanksgiving night, 25 November 1948, an American soldier about six feet tall and a soldier who spoke English, about five feet seven inches tall, both armed with pistols, accosted a group of employees of the Japanese Forestry Bureau. (The record shows that Aikins is six feet, one and one-half inches tall, and one witness testified that Seevers resembles his assailant, who was about five feet, six inches in height.) The five Japanese in the group, which included the deceased, Takeo Shimo, were engaged in towing a disabled truck. The taller soldier pointed his pistol at Sasaki and Yagihashi, and the shorter soldier pressed his pistol against Takahashi. When the three fled in fright, the tall soldier pursued, firing his pistol. At least four shots were fired during the attack. Apprehensive of the obvious danger, Sugawara tried to escape, but the tall assailant struck him on the head with his pistol and fired it again.

Left alone in the cab of the towed truck by Sasaki and Takahashi, the deceased attempted to leave, but the smaller soldier seized him as he reached the ground, and another shot was fired. Shortly thereafter the deceased was found squatting in a pool of blood near the disabled truck. He died within a short time from bruises of the small brain accompanied by comminuted basal fractures, caused by a shot in the head.

At 7:15 o'clock on the same evening, near the Hokkaido Imperial University Library, about a half a mile from the Forestry Bureau, a short American soldier pointed his pistol at Dr. Kishimoto Saburo and demanded money. A tall soldier seized the doctor from behind and the two soldiers took his wallet and watch. Upon his failure to produce a fountain pen when requested, the tall one beat him with his pistol, causing him to lose the sight of one eye and all olfactory powers.

Between 7:10 and 7:30 p.m., on the Hokkaido University Campus, one tall and one short American soldier accosted Hajime Furuta with pistols. On their demand, he handed them his wallet containing about 230 yen. The tall soldier covered Furuta's eyes from behind and the victim was forced to surrender his watch to his assailants.

About 7:30 p.m., two American soldiers, one tall, one short, approached Junichiro Samejima, as he passed through the entrance to the University, and asked him for money. He gave them 640 yen, but they demanded more. The shorter soldier searched Samejima's pockets and removed some personal articles. When the victim failed to produce a watch, the taller soldier beat him on the head with his pistol.

Two soldiers, one about six feet and the other about five feet seven inches in height, stopped Kiyoshi Hasegawa on his bicycle in the city of Sapporo shortly before 8 p.m. Although a blow on the chest failed to frustrate his attempt to escape at first, the soldiers quickly caught him and subjected him to a pistol beating.

Around 8 p.m., a tall American soldier pointed his pistol at Mitsuo Ogata and Miss Kimi Nishimura, who were en route to the Sapporo railroad station, and demanded money. Kimi fled, but this soldier and a short American soldier held their pistols against Ogata, who surrendered 650 yen to the short one.

About 8:15 p.m. two American soldiers, one tall and one short, seeking money, stopped Zenkichi Kurokawa on a city street, and the shorter soldier proceeded to shoot him through the right eye with his pistol.

Finally, around 8:30 p.m., on another street, a short American soldier pulled Takeshi Hongo from his bicycle and locked his legs around the victim's stomach. Covering Hongo with their pistols, this soldier and a tall American soldier took a cigarette lighter from his pocket. When Hongo tried to explain that he had no money, the short soldier struck him on the head with his pistol.

The evidence in support of Additional Charge I and its Specification is substantially as follows: At about 7:15 p.m. on 25 November 1948, Yutaka Tyoguchi discovered a man lying in a back lane by the rubbish dump in the Hokkaido University grounds, almost a quarter of a mile southwest of the scene of the assault upon Dr. Kishimoto Saburo. Toyoguchi called to the man but he merely groaned and made no reply. The man, identified as Munetake Mizoe, was found to be unconscious and was removed to the University hospital, where he was committed to the care of a physician. Medical testimony showed that Mizoe had received a brain injury, due to strong external pressure. As a result of the injury, Mizoe died at 3 p.m. on 27 November 1948. An autopsy, performed two days later by a Japanese physician, showed that the cause of death was brain bruise on the left hemisphere due to blows from a blunt, hard instrument. The physician testified that Mizoe's assailant must have been tall by Japanese standards, as the wounds were in the center of the top of the head.

With respect to the foregoing charges and specifications, the record further shows that between 8:30 and 9 o'clock on the evening of 25 November, the two accused visited the home of Aikins' girl friend, Toshiko Sakuma, and Seevers gave her father a cigarette lighter similar to that taken from Hongo. On the following day a pistol spring and spring plug were found at the scene of the attack upon Dr. Saburo. On 27 November, Toshiko discovered in her house two pistols, similar to those of the United States Army and to a weapon which Aikins previously had brought to her house. A day or so later, at Toshiko's request, her mother threw the two pistols in the river from where they were later recovered by Criminal Investigation Division agents. One of the pistols so recovered lacked a spring and spring plug.

Over objections by the defense that they were involuntary, and after testimony on the issue, including that of Seevers, discussed under paragraph 4 below, pretrial sworn statements by each accused were admitted in evidence against their respective makers.

In his statement, dated 18 January 1949, Seevers said he had been drinking Japanese "nikki" whiskey and smoking marihuana cigarettes on 25 November 1948. While they were drinking at the enlisted men's club at Sapporo, Aikins suggested that they hold up some Japanese for money. Seevers at first declined, but as he was becoming aggressive, set out with his companion. He vaguely remembered an attempt to hold up some Japanese in trucks, during which Aikins fired four shots and Seevers one. They fled from the scene to a house where "a dog on a chain got tangled around" Seevers' legs. His pistol and later Aikins' pistol went off again. They proceeded on to a "park area" where they committed three or four assaults. Seevers removed money and other items from men's pockets but struck only one man with his pistol. The spring and barrel bushing plug of his pistol were lost somewhere in the "park area" during one of Aikins' assaults. The two switched guns and Seevers retained the "broken" weapon. They continued on for several blocks and committed another series of assaults. Aikins fired at one man. They left the pistols at the home of Aikins' girl friend.

In his statement, dated 7 February 1949, Aikins declared that after drinking beer with Seevers and others all afternoon until 7 p.m. on 25 November 1948, Seevers and he "decided to go and get some money". He could not say whose idea it was. They came upon three or four Japanese in trucks. Seevers went "behind the truck" and Aikins went "up to the front and chased one fellow". Seevers shot one of the Japanese and Aikins "started to shoot" at another who was fleeing. They proceeded on to where they shot a barking dog and then past the railroad tracks into the "University ground," where they assaulted another Japanese. They moved on through the "ground" toward Main Street, where they came upon a man on whom Aikins "got the strangle hold." Seevers searched him and both accused hit him. Since he did not move, they dragged him some twenty feet off the road. Continuing across the streetcar tracks, they met a

boy and a girl. Aikins "caught" the boy. Near a small canal, Seevers swung at a Japanese on a bicycle and missed him, so Aikins upset him. They turned left and followed the railroad tracks for about a block and assaulted another Japanese. After they had gone one block north and another northeast, Seevers shot two Japanese men. Seevers next caught hold of a Japanese on a bicycle and the two fell, with the bicycle on top of them. The accused left their pistols at Aikins' girl friend's house.

The evidence in support of Additional Charges II and III and their Specifications shows substantially that Aikins was duly confined in the Post Stockade at Camp Crawford, Japan, on 9 February 1949 and was missing on 9 March, on which date he was later returned to confinement. He was again missing on 28 March and was reconfinned the next day. Seevers was duly confined in the same place on 19 January 1949 and was missing on 25 March. He was reconfinned on 27 March.

The defense introduced no evidence on the merits.

4. Discussion.

Unsworn charges. - The Judicial Council concurs with the Board of Review in its opinion that the pretrial procedural error in the failure to sign and swear to Additional Charge I and its Specification, and Additional Charge II and Specification 1 thereof, in the absence of objection by either accused, did not injuriously affect their substantial rights (CM 310246, Simpson, 61 BR 225, 227; see Humphrey, Warden v. Smith, 336 U.S. 695 (1949)).

Jurisdiction.- The Council is likewise in accord with the opinion of the Board of Review that the general court-martial had jurisdiction to try the accused for the offenses charged against them. The continuity of their military service from the time of the alleged offenses to the time of trial was not interrupted by their intervening discharge for the convenience of the Government in order to reenlist and their reenlistment, both accomplished prior to the expiration of their original enlistment terms (CM 212084, Johnson, 10 BR 213, 217, 1 Bull. JAG 13). The case of the instant accused is clearly distinguishable from United States ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949), wherein the petitioner's discharge became effective after the expiration of his term of enlistment and was not for the purpose of reenlistment. Moreover, even assuming arguendo that there was a momentary hiatus in their military service, it is implicit in this case that the accused were, during such hiatus, persons accompanying the armies without the territorial jurisdiction of the United States and thus subject to military law under Article of War 2d (Grewe v. France, 75 F. Supp. 433 (DC ED Wis, 1948); Perlstein v. United States, 151 F. 2d 167 (CCA 3, 1945) cert. dism. 328 U.S. 822 (1945)). When, as in this case, the soldier's

discharge from the military service does not interrupt his status as a person subject to military law, the discharge does not terminate court-martial jurisdiction over him for offenses committed prior thereto (MCM 1949, par 10, p. 10). Finally, the murders, robberies and aggravated assaults allegedly committed by the accused, soldiers of a power in hostile occupation, upon inhabitants of the occupied territory, were violations of the laws of war, and their perpetrators were by the law of war subject to trial by military tribunals and thus by general court-martial (AW 12; CM 318380, Yabusaki, 67 BR 265, 6 Bull. JAG 117; CM 302791, Kaukoreit, 59 BR 7, 5 Bull. JAG 264). No question as to jurisdiction to try the accused for their escapes from confinement is presented, as these offenses were committed during their current enlistments.

Testimony of Toshiko Sakuma. - The Council is in agreement with the conclusion of the Board of Review that under the applicable Japanese law no valid marriage existed between Toshiko Sakuma and Aikins, and that therefore she was a competent witness against him and her testimony was properly received.

Admissibility of Confessions.

a. Seevers. - Over objection by the defense that it was involuntary, Seevers' pretrial sworn confession was admitted in evidence (Pros Ex 1; R 264). Seevers took the stand for the limited purpose of testifying in support of the objection (R 247-248). He testified in substance that Criminal Investigation Division Agent Matteson and another agent picked him up about midnight on 17 January 1949 when he was in bed. Without having been warned as to his rights under the 24th Article of War, he was questioned at the Grand Hotel in Sapporo until 3 or 4 a.m. on 18 January. He was then taken to the Military Police Station and allowed to sleep for about an hour on a bench in a cold cell (R 249, 255). Between 10 a.m. and noon, Agents Spradlin and Holder visited Seevers' cell. Spradlin said they had been out hunting for guns and "They'll pray for you at Sugamo Prison * * * your mother will be praying for you." A few questions were asked at this time (R 249), but Seevers was not warned of his rights. From between 1 and 2 p.m. to 5 p.m. on the same day, he was questioned by the agents in the Criminal Investigation Division room in the Grand Hotel. At this time he was read the 24th Article of War, but it was not explained to him, and even at the time of the trial he did not fully understand it. Matteson told him he would be brought back after chow and "kept until I made a statement and it would help me." (R 250-251).

After the evening meal, Seevers was brought back to the hotel room, questioned by Matteson and another agent and shown a map indicating "incidents that I was supposed to participate in." He was not warned or reminded of his rights prior to this questioning, which lasted about an hour and a half. The agents gave him unsolicited cigarettes, hamburgers, whiskey and coke (R 250-251, 255). He was told that if he made a statement and wrote it down, "it would help me a lot in the trial if it ever come to

trial." He was not warned of his rights just prior to making the statement and the only reason he made it was that the agent told him he would stay there until he did. Matteson directed him to write whatever he told him to and "it would help me in the end if I ever got court-martialed." He did not tell Matteson what should go into the statement (R 255). Matteson dictated the statement to Seevers, whose condition at the time was "sort of hazy," confused, scared and tired from lack of sleep. He did not realize what he was writing (R 251, 255). He was not told about the first part of the form on the statement concerning the 24th Article of War, and paid no attention to it (R 253). He was heckled considerably by the agents in the hotel room (R 257).

On the following day (19 January) Spradlin told Seevers that he (Seevers) "would make a tour" (R 251). Spradlin said: "You and I and CID Agent O'Leary will go around to the scene to the incidents and you will go with us and see if you can recollect any of those places." Seevers had no choice in the matter of making the tour. "They was the boss." (R 252).

Criminal Investigation Agent Herbert F. Spradlin, called by the defense, testified that his first contact with Seevers was between 1 and 3 a.m., 18 January 1949, at the Grand Hotel, Sapporo. Prior to questioning Seevers, Spradlin first asked him if he knew his rights under the 24th Article of War, to which Seevers replied that he did. Spradlin proceeded to read and explain the Article to him, with particular stress on incrimination and degradation. He told Seevers that he did not have to make any statement that would degrade him or "make him seem less in the eyes of his fellow man" or any statement whatsoever, but that if he did make one, it could be used for or against him in a court-martial (R 242-243). Agents Ellsworth W. Matteson and John C. O'Leary both testified for the prosecution that this initial questioning lasted only about a half an hour (R 221, 224, 238). O'Leary and Spradlin testified that during the interrogation no promises were made to Seevers (R 239, 244) and he was not offered whiskey. According to O'Leary, Seevers may have been offered coffee, coca-cola or cigarettes and, as a normal procedure, sandwiches. He was not told that if he "came clean" he would be better off (R 225, 239, 241). Spradlin did not offer him beer, coffee, coca-cola, cigarettes or food. Seevers made a statement at that time, which was not recorded, to Spradlin's knowledge (R 244).

After Seevers' confinement in the Military Police Station sometime after 2 a.m., following the initial questioning, neither O'Leary nor Spradlin, nor to their knowledge any other agent, visited him (R 241, 244, 246). All three agents denied that Seevers was told they would pray for him. O'Leary and Spradlin denied heckling him (R 225, 241, 246). According to Matteson and O'Leary, his confinement was merely for the purpose of holding him pending investigation (R 226, 239).

Matteson and Spradlin testified that Seevers returned to the Criminal Investigation Division room in the Grand Hotel around 3 p.m., 18 January (R 224, 245). Spradlin showed Seevers a statement made by his girl friend and later he was questioned further (R 232, 244-245). Spradlin reminded and again warned him of his rights under the 24th Article of War (R 220,

232, 245) Matteson testified that after Seevers was questioned for about a half an hour he decided to make a written statement. Prior to writing it, he voluntarily gave Matteson the information contained in the statement (R 222, 224). Matteson stated that he also warned Seevers of his rights (R 223-224, 240), and that Seevers quite understood that any statement he made would probably be used against him in a court-martial (R 223). No undue influence was exerted to force Seevers to make a statement, nor was he offered any reward or promised any immunity (R 220, 232).

Seevers did not make his statement immediately following the questioning on the afternoon of 18 January. Although, according to Matteson, he may have begun writing it about 4:30 p.M. (R 224), O'Leary and Spradlin testified that he indicated that after his evening meal he would tell the agents everything that had happened on the night of 25 November 1948. Immediately after supper Seevers returned and, after Spradlin again warned him of his rights, he was further questioned for about an hour or an hour and a half (R 238, 240, 245). After the reading and explanation of his rights, Seevers stated, in response to a question, that he understood them (R 223, 239). During the two periods of questioning, Matteson gave him cigarettes, and possibly offered him coca-cola and coffee, but no beer or whiskey (R 222). Seevers wrote the statement in longhand himself, without the help of Matteson or the other agents (R 223, 227).

Matteson positively and categorically denied that he dictated the statement to Seevers or told him what to include in it, or even suggested any phrases to him, but admitted that he might have suggested that he use the (enlisted men's) club as a starting point (R 263-264). When Seevers came to him just before making the statement, he showed no signs of mistreatment. He was sober and there was no smell of liquor on his breath (R 226). Matteson himself administered a final warning to Seevers, just before he made the statement, that he did not have to make a statement, and that if he did, it might be used against him (R 220, 227). Matteson and O'Leary testified that the statement was entirely voluntary (R 220, 232). According to Matteson, Seevers was quite anxious to make it (R 220).

Captain Harold E. Duffy testified that at about 11:35 p.m. on 18 January, Matteson and O'Leary brought Seevers, who was not handcuffed, to him. Duffy asked Seevers if he had been read and understood the 24th Article of War, to which he replied in the affirmative (R 258, 260-261). Duffy then read to him the introductory paragraph of the statement regarding his rights under the 24th Article of War (R 258-259). After taking the oath Seevers did not object or hesitate when, at about 11:55 p.m., he signed the statement. He was neat, clean and well shaven at the time, and did not appear to be tired. "He seemed rather calm and collected." Duffy did not smell liquor on his breath and believed him sober (R 260-261).

Immediately after the making of the statement, according to O'Leary, Spradlin asked Seevers if he would accompany them the following day, 19 January, and point out the scenes of the incidents in question (R 240).

Spradlin testified, however, that the request was not made until he (Spradlin) made it on the afternoon of the 19th (R 246). They were looking at a map of the territory covered by the incidents and Spradlin asked Seevers if he would accompany him and O'Leary over the route and see if he could recall any of them. Seevers agreed to accompany them. Spradlin did not tell him that he did not have to go if he did not want to, but did not promise or offer any benefit if he would go, nor was he required to coerce Seevers into agreeing (R 247). O'Leary testified that Seevers was not questioned at all or advised of his rights immediately prior to the tour. They may have given him "a cigarette or so." The reason they did not advise him that he did not have to make the tour, was that they believed that this was understood when he was advised of his rights prior to making his statement (R 235-237).

O'Leary testified that on the afternoon of the 19th, he, Spradlin and a Japanese policeman accompanied Seevers on a tour of the territory covered by the incidents, and Seevers was asked to point out the places where they had occurred. It was "strictly voluntary" on Seevers' part (R 233, 235). At no time during the tour did O'Leary advise him that anything he might say would be held against him. When they arrived at the various scenes of the incidents, the agents did not identify them as such to Seevers (R 236).

After the law member overruled the defense objection to evidence of this tour on the ground that Seevers' statements in connection therewith were involuntary (R 264), O'Leary was permitted to testify as to the details of the tour and Seevers' pretrial corroboration en route of certain statements in his confession (R 265-267).

Two officers of Seevers' company, First Lieutenants Lynn C. Shelton and Harold F. Lacouture, testified in effect that at about 6 p.m. on 19 January, Spradlin and O'Leary returned Seevers to the company and turned over his sworn statement to them (R 22, 27). When they read it they were surprised that a corporal with Seevers' good record was in trouble (R 23, 28). Without warning him of his rights because, as his company officers, they were interested in his welfare and in protecting him, they showed him the statement and asked him if he had been coerced or intimidated into making it. Seevers replied in the negative and stated that it was voluntary on his part. His response to inquiries as to its truth was in the affirmative (R 23, 24, 28). Lieutenant Lacouture testified that these statements were made in the presence of the agents. Seevers at first stated he attempted suicide, but later, realizing that the Criminal Investigation Division people were friendly - "good Joes" -, he told them the story (R 28, 30). Seevers also stated that the incidents referred to in the statement were "kind of hazy to him" and were written "as best he can remember". (R 31)

It thus appears that Seevers' testimony as to the manner in which his statement was obtained was rebutted by the testimony of the three agents, one of whom testified for the defense, and the three Army officers. The three agents were in substantial agreement on matters relating to the vital issue of the voluntariness of Seevers' statement. The disagreement among them as to whether Seevers commenced writing the statement in the afternoon or evening of 18 January and whether Spradlin requested him on the 18th or 19th to go on the tour, does not affect materially the force of their testimony on that issue.

The defense argued emphatically that testimony as to the tour and Seevers' statements during its course was inadmissible because he was not again warned of his rights under the 24th Article of War just prior to the tour. The law member admitted the testimony on the ground that the evidence showed Seevers had been adequately advised as to his rights on the preceding day, permitting the reasonable inference that he was still aware of them (R 237-238). The Council is of the opinion that the law member's ruling was proper. Prosecution witnesses established that Seevers was advised of his rights under the Article on three separate occasions on the day preceding the tour, that on the first occasion the Article was explained as well as read to him, and that on the third occasion, just prior to making his statement, he indicated that he understood those rights. There is no evidence in the record suggesting that the advice to Seevers was not broad enough to encompass all types of statements, and the inference is clear that it was. Moreover, the prosecution's evidence shows affirmatively that Seevers' participation in the tour was voluntary. A proper warning of rights under the 24th Article of War may be deemed to continue effective for a reasonable time, in the absence of subsequent circumstances tending to neutralize its effect. That the warning was not given immediately prior to the statements does not affect their admissibility (CM 230070, Henry, 17 BR 291, 296; CM 282058, Owens, 54 BR 305, 316). The same reasoning applies to Seevers' statements to his company officers, on the day following the warnings as to his rights, to the effect that his confession was the truth, voluntarily told.

The Council is of the opinion that the court's resolution against Seevers of the conflict in evidence as to the voluntariness of his confession and of his statements in connection with the tour, is fully justified by the record and should not be disturbed.

b. Aikins. - The defense also objected to the admission in evidence of Aikins' pretrial sworn confession (Pros Ex 18) on the ground of improper inducement by a Criminal Investigation Division agent. The defense called no witnesses in support of its objection but subjected the prosecution's witnesses to vigorous cross-examination.

In support of the admissibility of this confession it was shown that Agents Matteson and Spradlin met Aikins at Yokohama, the port to which he had been returned from the United States, on 5 February 1949. He was escorted to Sapporo where he arrived on the morning of 7 February. Prior

to reaching Sapporo, Matteson and Spradlin did not interrogate Aikins concerning the offenses here involved because they feared that he might attempt to escape if the charges against him were brought to his attention (R 278, 280-281).

The interrogation which led to Aikins' confession began at about 0900 or 1000 hours on 7 February in a room of the Grand Hotel in the presence of Agents O'Leary, Spradlin and Matteson (R 270, 272, 276, 278, 281). After Aikins arrived at the hotel room, Agent Spradlin read Article of War 24 to him and explained that he did not have to make any statement whatsoever and that any statement he made could be used against him. Aikins acknowledged that he understood his rights (R 271, 276, 279). Both O'Leary and Spradlin testified that no one exerted any undue influence to obtain the confession or offered Aikins any reward or promise of immunity in their presence (R 270, 271, 276-277). O'Leary testified that no one commented to Aikins that a statement would help him (R 271). Spradlin, however, testified that he left the room at various times after Aikins began to write his confession (R 277), and Matteson, who conducted the interrogation (R 272, 277), acknowledged that he may have been alone with Aikins for a short time (R 280). After Spradlin had warned Aikins of his rights under Article of War 24, Matteson read him the confession prepared by SeEVERS and the statement obtained from Toshiko Sakuma (R 282). This discussion lasted a relatively short time, during the course of which Matteson asked Aikins if he would make a sworn statement. He advised Aikins that he was not required to make a sworn statement and that any sworn statement could be used against him (R 281-282). Anything less than a sworn statement, in Matteson's opinion, was merely an "interview" (R 285). The record shows the following colloquy with respect to the circumstances preceding the accused's statement:

"Q Did you show the accused Aikins any statements made by other people prior to his making his statement?

A We did not show him a statement but I distinctly remember that I read SeEVERS statement to him.

"Q Did you show him or read him any other statements?

A I think I read him his girl friend's statement too.

* * *

"Q Did you or Agent Spradlin in your presence or anyone else in your presence tell the accused that he might as well go ahead and make his statement, we have sufficient goods on you?

A No, I hardly think we did that.

"Q Did you use any other inuendos or words similar to that?

A I may have suggested to Aikins that he make a statement for the purpose of clarifying his position. I may have said something along that line.

"Q Did you or anyone in your presence tell the accused Aikins that if he made a statement things would be lighter on him?

A No, I'm sure we didn't say anything like that.

"Q Did you tell him that any statement that he might make would help him in any way?

A I think we explained, I did. I'm quite sure that I explained it would clarify his position if he would state what his role in it was.

"Q That if he made a statement to clarify his role, it would help?

A We had two statements against him right there and it would be to his benefit to clarify his position." (R 282)

Aikins then agreed to make a sworn statement and proceeded to reduce it to writing (R 277, 278, 281). His first efforts did not satisfy Matteson and the latter prevailed upon him to begin again (R 281, 282, 283). Late that afternoon Aikins was brought before First Lieutenant Clyde W. Hoff for the purpose of swearing to the statement. Lieutenant Hoff asked him whether the 24th Article of War had been read and explained to him. Aikins replied in the affirmative; nevertheless Hoff again read and explained the Article. Aikins then signed the statement freely, voluntarily and without undue influence or offer of immunity (R 288).

The only circumstance shown by the record which raises any issue as to the voluntary character of Aikins' confession is contained in Matteson's testimony.

Matteson's misinformed advice regarding sworn statements, tending to create the impression that only a sworn statement could be used as evidence against Aikins, is not considered prejudicial because before Aikins was first interrogated he was properly warned by Spradlin and further because Aikins' statement was in fact sworn. Consequently it cannot be said that he made his confession under any misapprehension that it could not be used against him.

Of more serious consequence is the question of possible intimation by Matteson that the making of a statement might be of some benefit to the accused.

It appears uncontradicted that Matteson told Aikins that a statement by him would clarify his role in the events narrated by Seever's in the latter's confession. It is not clear whether he told Aikins that such clarification would be of benefit to him, or whether he was merely arguing with the defense counsel and stating his personal opinion. In view of the

denial by O'Leary and Spradlin that any offer of reward or promise of immunity had been extended to the accused, and O'Leary's testimony that no reference to any beneficial effect was made, the court was warranted in assuming that Matteson did not expressly advert to any benefit accruing to the accused in return for making a confession.

In a post-trial brief, Counsel for Aikins relies on Bram v. United States, 168 U.S. 532 (1897) and the cases therein cited, which intimate that an inducement of any benefit, no matter how slight, is sufficient to render a confession involuntary.

In the Bram case there was no showing that the accused had been warned of his rights against self-incrimination. While under arrest for murder, stripped and in irons, he was brought before a police official of Halifax, Nova Scotia, whose testimony reflects the following:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many other on board the ship think, that Brown is the murderer; but I don't know anything about it.' * * * There was nothing further said on that occasion." (p. 539)

The court quoted with approval the rule stated in 3 Russell on Crimes (6th Ed.) 478:

"But a confession, in order to be admissible, must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." (pp. 542-543)

The Supreme Court in a divided opinion held Bram's equivocal admission to be inadmissible as a coerced confession.

The Bram case was expressly followed in Purpura v. United States (CCA 4, 1919), 262 Fed 473. Although often cited by federal courts, the Bram case has frequently been distinguished (Martin v. United States, 166 F. 2d 76 (CCA 4, 1948); United States v. Lonardo, 67 F. 2d 883 (CCA 2, 1933), wherein the court pointed out that the Supreme Court thought enough of the circumstance that Bram had been stripped to mention it in italics; Davis v. United States (CCA 9, 1929), 32 F. 2d. 860).

Whatever may be the rule of the Bram case, the rule prescribed for the administration of military justice is that promulgated by the President pursuant to Article of War 38 in the Manual for Courts-Martial, 1949. Therein it is provided:

"A confession is not admissible in evidence unless it is affirmatively shown that it was voluntary. * * * No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion or unlawful influence in obtaining a confession or admission are:

* * *

"5. Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused." (MCM 1949, par 127a) (Underscoring supplied.)

The foregoing is a reaffirmation of a discussion in somewhat greater detail contained in the Manual for Courts-Martial, 1928, wherein it was stated:

"Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; causal remarks or indefinite expressions need not be regarded as having inspired hope or fear; * * *" (MCM 1928, par 114a)

In applying the foregoing rule the Board of Review has held that a statement to accused persons that things would be easier for them if they would tell everything rendered their statements inadmissible (CM 261242, Willis, 40 BR 163; CM 284729, Peschiera, 55 BR 409; CM 298315, Stevens, 58 BR 277; CM 307004, Butters, 60 BR 1; CM 325329, Holland, 74 BR 147). On the other hand in CM 333181, Davis, 81 BR 311, 324, the Board of Review held that an accused, charged with larceny in conjunction with certain Koreans, who made a confession after having been told that his accomplices were communist agents and that he should clear himself of complicity in a subversive plot, did not make an involuntary confession. The Board stated:

"In the first place accused was not threatened or compelled to make a statement in order to avoid prosecution for disloyalty * * * Similarly there is no evidence of bargaining."

In CM 248793 Beyer, 50 BR 21, the Board of Review considered the admissibility of a confession obtained from an accused who, after being apprised of his rights under Article of War 24, was admonished:

"You might as well tell the truth because you are going to be tried and accused of this crime, along with several others. You helped kill this man so you had better tell the truth. You are going to be court-martialed and the guilty man is going to suffer for this crime. If you are trying to protect somebody else you had better stop it and give us all the information you can. We are not going to fool around here with you. We mean business. If you are protecting anybody you had better start protecting yourself. You have been accused by your comrades. They have told us you did this." (pp 46-47)

The Board commented:

"Although Captain Maffitt employed an ill-advised manner in his pre-trial investigation, he did not physically abuse the accused, unreasonably confine or restrain them, threaten them with punishment, or hold out to them any hope of reward." (p. 47)

Applying the test governing the admissibility of confessions in trials by courts-martial, the question in the instant case is whether an expression by a Criminal Investigation Division agent, to a person fully cognizant of his rights under Article of War 24, that a statement would clarify his role in a series of murders, robberies, and aggravated assaults, amounts to a promise of such a substantial benefit as to be likely to induce an involuntary confession.

In the opinion of the Council, the question cannot properly be answered in the affirmative. Aikins had been read the statements of Seevers and Toshiko, both of which incriminated him. The remark of the agent added nothing new; he merely called attention to a fact which must have been clearly evident to Aikins from the reading of the statements. In our opinion, the record shows affirmatively that Aikins' confession was voluntary and properly admitted in evidence.

Murder of Takeo Shimo. - The evidence establishes beyond question that pursuant to a preconcerted plan to rob Japanese at pistol point the two accused set upon a group of Japanese, which included the deceased, Takeo Shimo, and attempted to execute their felonious purpose. The accused's assaults upon three of the group caused them to flee for safety. Aikins struck a fourth victim on the head with his pistol. At least six shots were fired by one or the other of the accused up to this point. When the deceased dismounted from the cab of the truck in an attempt to escape the scene, Seevers seized him. Another shot was fired and Shimo was killed.

Murder is the unlawful killing of a human being with malice aforethought. Malice may consist of an intention to cause death or grievous bodily harm. A murder is not premeditated unless the thought of taking life was consciously conceived and the act causing death was intended. Premeditation involves the formation of a specific intention to kill someone and consideration of the act intended. The deliberation or design imported by premeditation may be brief so long as it is substantial (MCM 1949, par. 179a, p. 231). If one forming an intent to kill pauses even momentarily and considers the intended act, he deliberates. The fact of deliberation, not the length of time it continues, is important (Fisher v. United States, 328 U.S. 463 (1946)). Not even minutes need elapse, for deliberation may be instantaneous (Aldridge v. United States, 47 F. 2d 407, 408 (CADC, 1931), rev. on another ground, 283 U.S. 308 (1931); Bostic v. United States, 94 F. 2d 636, 638 (CADC, 1937), cert. den. 303 U.S. 635 (1938)).

The whole pattern of the two accused's attack on the group bespeaks malice and it is obvious that there was a substantial period of deliberation between Shimo's leaving the truck and the fatal shot. The deliberate purpose of the shooting was either to prevent the victims' escape, or to wreak revenge upon them for their frustration of the robbery conspiracy, or both. Such a design clearly meets the tests both of malice and of premeditation. It matters not which accused shot Shimo, as the other accused, in aiding and abetting the actor in the execution of the common felonious design, was, under the settled rule, equally guilty with him as principal (18 U.S.C. 2; CM 314404, O'Neal, 64 BR 137, 142, 143). The Council is unable to avoid the conclusion that each accused was fully and convincingly proven guilty of the premeditated murder of Takeo Shimo, as alleged in the Specification of Charge I.

Robberies, Aggravated Assaults and Escapes from Confinement. - The evidence leaves no doubt that the two accused committed the robberies alleged in Specifications 6, 7, 9 and 11 of Charge II, the assaults with intent to rob alleged in Specifications 5 and 10 of Charge II, the assaults with intent to do bodily harm with a dangerous weapon, a pistol, alleged in Specifications 1, 2, 3 and 4 of Charge II, and the assault with intent to do bodily harm alleged in Specification 8 of Charge II (MCM 1949, pars. 180f, k, l and m). The evidence also clearly establishes the two escapes from confinement alleged against Aikins in Specifications 1 and 2 of Additional Charge II and the escape alleged against Seevers in the Specification of Additional Charge III (Ibid., par. 157b).

Murder of Munetake Mizoe. - The evidence with respect to the murder of Mizoe, alleged in the Specification of Additional Charge I, shows that the deceased was found in an unconscious state in a back lane by the rubbish dump on the grounds of Hokkaido University about the time when, according to the record, the accused were assaulting Dr. Kishimoto Saburo, nearly a quarter of a mile away. Following hospitalization, Mizoe died two days later from a brain wound which could have resulted from criminal violence. No witness saw him assaulted. The record, including the accused's confessions, is devoid of evidence that either accused was ever at or in the immediate vicinity of the place where the deceased was found. According to Seevers' confession, he lost the spring and barrel bushing plug of his pistol at some point in the "park area." A pistol spring and spring plug were found, however, near the scene of the assault upon Dr. Saburo, a quarter of a mile from where the deceased was discovered. Any inference of identity between the "park area" and the rubbish dump is thus highly unreasonable. The accused's confessions corroborate the remaining prosecution's evidence with respect to the shooting of Shimo and the various robberies and assaults alleged in the Specifications of Charge II. It is difficult, if not impossible, however, to glean from the confessions any indication of an assault at or reasonably near the spot where Mizoe was found.

The evidence is purely circumstantial as to whether Mizoe died as a result of a criminal assault, and if he did, as to the connection of either accused with the assault.

In CM 333525, Abston, 1 BR-JC 9, 51, 52, the record also presented the question of the cause of death, and, if it was murder, of the identity of the murderer. The Judicial Council thus stated the generally accepted rule as to the sufficiency of circumstantial evidence:

"The findings of guilty cannot be sustained unless there be in the evidence a showing of facts and circumstances which are not only consistent with an answer in the affirmative under each of these issues, but which are also inconsistent with any reasonable hypothesis other than that the crime alleged was committed, and that this accused committed it.

The burden of proof in each instance is on the prosecution. It is not incumbent on the defense to supply the answer to either of these questions or to supply solutions. That the theories of the prosecution may be reasonable, and that their rejection may leave the death unexplained, or leave a crime unsolved, cannot shift the burden or dispense with the necessity of proof. Nothing short of a showing by competent evidence of facts and circumstances which, of their own force, exclude any reasonable inferences other than that the deceased in this case was killed at the hands of another, as alleged, and that such other was this accused can meet the requirements of proof."

The evidence adduced in support of the instant murder charge, upon close examination, fails to exclude two reasonable alternative hypotheses: (1) that Mizoe met his death through accident and not as a result of foul play; and (2) that he was criminally assaulted by a person or persons other than the accused. The evidence leaves the Council in substantial doubt as to whether Mizoe was the victim of a crime at all and, if he was, whether either of the accused committed it. The Council therefore concurs in the opinion of the Board of Review that the evidence is legally insufficient to support the findings of guilty of Additional Charge I and its Specification.

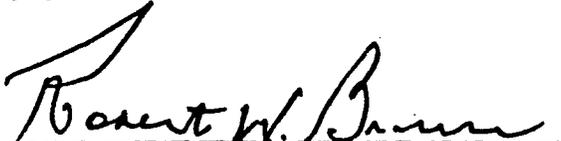
5. The Judicial Council has considered carefully the arguments of counsel on behalf of both accused.

6. Data as to the accused.

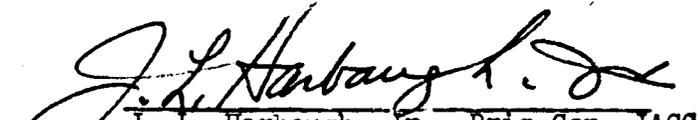
Each accused is twenty-two years of age. Aikins was inducted into the Army on 19 February 1946 and Seevers on 28 January 1946. Each has served in the Army continuously since the date of his induction.

7. The court was legally constituted and had jurisdiction of each accused and the offenses alleged. Except for the findings of guilty of Additional Charge I and its Specification, no errors injuriously affecting the substantial rights of either accused were committed during the trial. The Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Additional Charge I and its Specification, and legally sufficient to support the findings of guilty of all other charges and specifications, and to support the sentences and to warrant their confirmation. In view of the youth and prior good record of the accused and of all the circumstances, including the legal insufficiency of the record of trial to support the findings of guilty of one of the two charges of murder, the Judicial Council recommends that the sentence as to each accused be commuted to

dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for the term of the accused's natural life. A sentence to death or life imprisonment is mandatory upon a conviction of premeditated murder in violation of Article of War 92.


 Robert W. Brown, Brig Gen, JAGC


 C. B. Mickelwait, Brig Gen, JAGC


 J. L. Harbaugh, Jr., Brig Gen, JAGC
 Chairman

(GCMO 27, April 25, 1950).

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

Board of Review

CM 337951

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Karlsruhe, Germany, 18, 19 and
20 July 1949. LAWRENCE: Dishonorable
discharge, total forfeitures after
promulgation and confinement for
ten (10) years. SMITH: Dishonorable
discharge, total forfeitures after
promulgation and confinement for
twenty (20) years. EACH: Disciplinary
Barracks.

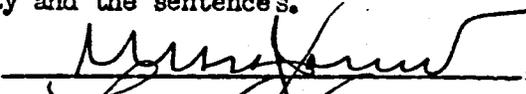
Recruit WILLIS H. LAWRENCE
(RA 14292304) and Recruit
PERLEY W. SMITH (RA 31511753),
both of 552nd Antiaircraft
Artillery Gun Battalion.)

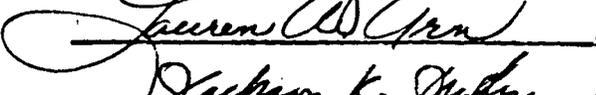
HOLDING by the BOARD OF REVIEW

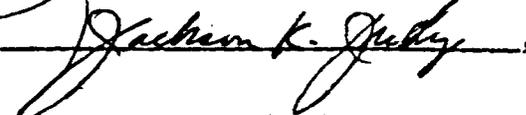
JONES, ARN and JUDY

Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldiers named above has
been examined and is held by the Board of Review to be legally sufficient
to support the findings of guilty and the sentences.


_____, J.A.G.C.


_____, J.A.G.C.


_____, J.A.G.C.

CSJAGE CM 337951

1st Ind

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

TO: Chairman, the Judicial Council, Office of The Judge Advocate General

In the foregoing case of Recruits Willis H. Lawrence (RA 14292304)
and Perley W. Smith (RA 31511753), both of 552d Antiaircraft Artillery Gun
Battalion, The Judge Advocate General has not concurred in the holding by
the Board of Review that the record of trial is legally sufficient to

support the findings of guilty and the sentence. Pursuant to Article of War 50e(2) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.



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

1 Incl
Record of trial

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

JAGU CM 337951

20 April 1950

UNITED STATES

1st INFANTRY DIVISION

v.

Recruits WILLIS H. LAWRENCE,
RA 14292304, and PERLEY W.
SMITH, RA 31511753, both of
Headquarters Battery, 552d
Antiaircraft Artillery Gun
Battalion

Trial by G.C.M., convened at Karlsruhe,
Germany, 18, 19 and 20 July 1949.

LAWRENCE: Dishonorable discharge,
total forfeitures after promulgation,
and confinement for ten years.

SMITH: Dishonorable discharge, total
forfeitures after promulgation, and
confinement for twenty years.

EACH: Disciplinary Barracks.

Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

1. Pursuant to Article of War 50e(2) the record of trial in the case of the soldiers named above and the holding by the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon common trial by general court-martial each accused pleaded not guilty to, and was found guilty of, the unpremeditated murder, in conjunction with his co-accused, of Hans Zizler, by striking him in the face with his fists causing him to fall and by kicking him in the head, at Baden-Baden, Germany, on or about 5 June 1949, in violation of Article of War 92. Evidence of one previous conviction by summary court-martial was introduced as to each accused. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for thirty years. The reviewing authority approved the sentences, but reduced the period of confinement to ten years in the case of Lawrence and twenty years in the case of Smith, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement of each accused, and withheld the order directing the execution of each sentence, pursuant to Article of War 50e.

The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentences. The Judge Advocate General has not concurred in the Board's holding and has transmitted the same and the record of trial to the Judicial Council for appropriate action.

3. Evidence.

a. For the Prosecution. -- The undisputed evidence shows that Hens Zizler, a German national, single, forty-seven years of age, about five feet four inches in height, with dark hair and of medium build (R 16, 20, 72-74, 80, 91, 110; Pros. Exs. 2, 5, 5-9), met his death sometime before midnight on Sunday, 5 June 1949, a short distance inside an alley or courtyard off Rettigstrasse in the city of Baden-Baden, French Zone of Occupation, Germany (R 15-16, 67-68, 77, 81; Pros. Ex. 1). The testimony of a doctor who examined him about midnight established that the deceased had been the victim of very excessive force with a blunt instrument (R 68). An autopsy dated 7 June described his face as a "shapeless, bloody, squashed mass" and concluded that the cause of death was extensive smashing of the skull, plus contusion of the brain (R 74-75, 80, 84; Pros. Exs. 5, 6, 8, 9).

It is not controverted that the above described fatal injuries were the result of kicks inflicted at the scene between about 11:30 and 11:40 p.m. on 5 June by two soldiers whose identity is in dispute, as hereinafter discussed (R 39-47, 51-55, 169-170, 241-246). The deceased was clad in a dark suit, light colored trench coat and ankle boots and had been carrying a brown brief case, which was found near his body (R 17, 19-21, 40, 47, 58, 80, 81, 111-113; Pros. Exs. 4, 5, 6). There was testimony that at least two buttons on his trousers were opened, but the witnesses differed as to whether the top button was closed or opened (R 60, 84). There was blood on the ground as far as three or four meters from the scene, and on the wall blood was spread over an area about one and a half meters high and over a meter wide (R 61, 81-82).

Early in the evening on 6 June, during the course of investigating the case, Criminal Investigation Division Agent Edward W. Hyde, in the presence of Captain Frank M. Hines, Serious Incident Investigating Officer, searched the accused's foot-lockers and wall lockers with their consent. He discovered a pair of olive drab trousers, with a number of red stains on the lower right leg, wrapped in brown paper in the bottom of the accused Lawrence's wall locker, and a pair of olive drab trousers, with a great many red stains on both legs, in a brown paper bag or brown paper in the bottom of Smith's wall locker (R 116-119, 137, 139, 159, 175, 176; Pros. Exs. 14, 15). Smith showed the agent his service shoes, which disclosed red stains on the insteps of both shoes (R 117, 119-120, 159, 177; Pros. Ex. 16). The witness did not notice any stains around the seams of Lawrence's shoes, but they had been recently scrubbed and polished (R 158, 258). Testimony of a Criminal Investigation Laboratory chemist showed that the stains on Lawrence's trouser leg were human blood of Group O. Those on Smith's trousers and shoes were also human blood and demonstrated an "anti-A factor," indicating that the blood could belong to Group B or O. Group O is common among human beings to the extent of fifty per cent, Group A forty-two per cent, and Group B ten per cent. It was possible that the blood on Lawrence's trouser leg came from a different source from that on Smith's trousers and shoes, but it was

also possible that the blood on all the articles came from the same person (R 174-176, 178-179). No analysis was made of the blood of the deceased (R 179). (The accused Smith testified that he believed his own blood was Type A (R 235)). It was stipulated that Prosecution Exhibit 1, showing the location of various places referred to in the testimony, was a correct sketch of a portion of Baden-Baden (R 15-16).

The primary issue of fact is the identity of the two accused as the soldiers who kicked Hans Zizler to death. The evidence for the prosecution on this issue follows.

Helmut Vix, a night porter at the Hotel Badischer Hof in Baden-Baden, identified the accused and testified that they arrived at the hotel sometime after 8 p.m. on 3 June 1949 (Friday), bearing bottles of beer, coca-cola and cognac, and engaged a room (R 22-23, 24-28, 157, Pros. Exs. 1, 17). Between 11 and 11:30 p.m., and probably between 11:15 and 11:20 p.m. on 5 June, the accused left the hotel (R 23, 24, 27). The taller of the two, who wore a mustache (Smith testified that he had a mustache at the time (R 183)), told the witness in broken German he had a headache, was going to the Goldenes Kreuz and would return "right after" (R 23-24, 29). (The Goldenes Kreuz is on Luisenstrasse about a hundred meters south of the entrance to Rettigstrasse (Pros. Ex. 1)). Thereafter the witness and a German policeman discovered empty beer, coca-cola and cognac bottles in the room which the accused had occupied. He could not say whether either accused had left the hotel earlier in the evening, but they could have done so without his knowledge (R 24-25). He did not notice whether they had stripes on their sleeves and did not know where they went when they left, which was the last time he saw them in the hotel, although he was on duty until 8 a.m., 6 June (R 27-29).

Paul Bayer, German policeman, testified that around 11:30 p.m. 5 June, he saw two American soldiers, each wearing a light khaki uniform and service cap "like the color (khaki) of the shirt the Major is wearing here," and a dark-haired civilian wearing a light colored coat and carrying a brief case, near the Optik Ryser (photography shop) on Sophienstrasse in the vicinity of Leopoldsplatz, Baden-Baden (R 30-33, 35-38; Pros. Ex. 1). The illumination was good at this point and the witness testified that the civilian was the same person as that portrayed in the photographs of the deceased (R 31, 33; Pros. Exs. 2, 3). He was unable, however, to identify the accused as the soldiers he saw with the civilian (R 32-33). The witness believed he saw two or three "service grades" on the lower left sleeve of one of the soldiers but was not positive. Although at an interrogation at 5 a.m. on 6 June he stated he saw two or three stripes on the sleeve of one of the blouses, upon reflection he concluded he might have been mistaken and realized he should not make a statement about which he was not sure (R 36-37). One of the soldiers gave the civilian a cigarette and lit it and the three continued walking (northeast) toward Leopoldsplatz, about ten meters away. At the intersection they turned (right) into Lichtentalerstrasse (toward Rettigstrasse) (R 31, 34).

Jacques Delville, sixteen-year-old student, of French nationality, testified that while in bed in a room at the extreme right (east) of his third-floor apartment at Rettigstrasse 6 about 11:30 p.m. on 5 June, he was aroused by the noise of a fight outside. Looking out his window (which afforded a diagonal view of the courtyard or alley across the street (north) from the apartment (R 49-50; Pros. Ex. 1)), he saw a soldier crossing the "passage" (alley). Beside him was a man wearing a white coat and another man was following. After the three "entered into the shadow," the man with the white coat fell down and the other two kicked him with their feet (R 39-40, 43, 44, 241). The soldier in the shadow kicked the man "pretty hard" without stopping. "He went back with his body against the garage door and then he reached out with his foot and kicked the foot very strongly ahead" (R 41, 242). He "supported himself with his back against the garage door and gave him a violent kick with his foot. * * * He moved forwards and then back again while he went out for another kick." When his back struck the garage door, it produced considerable noise (R 242).

The other soldier, "half in the shadow and half in the light," also kicked the victim, and from time to time turned around and looked out into the street towards Lichtentalerstrasse (R 42, 244). This other soldier was wearing a "khaki" uniform and cap. The witness testified he did not see any item of the trial judge advocate's uniform which he would refer to as "khaki" (R 42). Recalled by the prosecution later in the trial, the witness testified the soldiers were wearing the same type of coat as the trial judge advocate - "dark khaki" - and "a flat cap" of the same color as the uniform (shade 33), to which the witness referred as "khaki" (R 62-63, 65). He could distinguish the color of the soldiers' uniforms very well when they passed under the lamp post (R 64). During the recess between the witness's two appearances in court, the trial judge advocate asked him what sort of khaki he had seen and told him he had testified that the cap and uniform he observed were of light khaki and that he "would come in later in order to clarify" his testimony. The witness denied having testified that the khaki he saw was the color of the trial judge advocate's shirt (R 65).

When people passed by on Rettigstrasse, the two soldiers stopped kicking the man and stood with their backs against the door of a garage about one foot inside the courtyard, at the left (R 40, 243, 244). Thereafter the soldier in the shadow kicked the victim, who was lying on the ground, on the head with his heel four to six times. "They were very violent hits." Once the witness heard the soldier's shoe miss the face of the victim and hit the ground. The witness demonstrated the kicking by using a perpendicular stomping motion. He did not observe the prostrate victim making any movement, defensive or otherwise. The victim moaned at every blow he received. The two soldiers then disappeared until they came out of the dead-end street, walking "pretty fast" with their hands in their pockets (R 42-43, 245-246).

Although the witness had endeavored at Karlsruhe to identify the accused as the two soldiers he had seen, he could not recognize them. Some reflection from a nearby street gas lamp "about medium strength of

illumination" was cast on the scene, but it was not until they passed straight under this light on Rettigstrasse that he could see clearly that they were soldiers. He could see "part of the profile" but not their faces, as they were too far away (R 44-45).

Hans Wick testified that he was pushing his motorcycle up Rettigstrasse between 11:30 and 11:40 p.m. and when he reached his house at No. 6 he glanced over and saw silhouettes, heard a noise "as if somebody was kicking a sack" and saw something light lying on the ground. He continued on his way and had just joined his son (Rolf) at a window in their second-floor apartment, facing directly on the dark courtyard, when he looked out and noticed two soldiers come out of the courtyard and run down the street (R 45-46, 49, 51). With two Frenchmen he proceeded to the courtyard where they saw the victim on the ground. Police and a doctor were summoned to the scene (R 47-48, 49). It was fairly dark in the courtyard and the witness' eyesight was poor at night (R 51). He was unable to identify the accused as the two soldiers he saw. In the past there had been frequent fights in the alley which opened into a French mess where frequently too much liquor was consumed. Since a change in the management of the mess, however, there had been no fights (R 52-53). The soldiers had on visor caps of a type worn only by American and British soldiers and never by French soldiers (R 55).

Elfriede Scholz testified that she was a saleslady of German nationality (R 93). On Saturday evening, 4 June, she sat at a table with the accused in the Goldenes Kreuz coffee house. The smaller one she knew as "Willi" (R 95-96). They said they "would go to sleep at the Badischer Hof" (R 102). The next night, Sunday, 5 June, between 11:30 p.m. and midnight, while standing in front of a book shop at Leopoldsplatz (near the intersection of Gernsbacherstrasse), she saw two American soldiers (R 94), whom she positively recognized and identified as the two accused. One had a dark mustache and the other was slightly smaller but stouter. They were about seven meters from her and she could see their faces. They were walking hurriedly from Lichtentalerstrasse (north) toward Leopoldsplatz. (Rettigstrasse turns east off Lichtentalerstrasse at a point south of Leopoldsplatz (Pros. Ex. 1)). One soldier was about to go (northwest) to Langestrasse and the other was about to go to Luisenstrasse (a parallel street southwest of Langestrasse) (R 95-97). After some hesitation, they proceeded (northwest) along Luisenstrasse (R 97-98). The witness then went to the corner of Rettigstrasse where she saw a French officer stopping two policemen, and proceeded on to where she saw "the dead man" (R 93-99).

At a pretrial interrogation in Baden-Baden the witness stated she could not identify the accused. The reason for her statement was that, because she had to swear, she was afraid and thought it would serve her better if she said she didn't know them. Her statement that she could not recognize the accused was not the truth (R 99 - 101). On cross-examination the witness admitted having stated untruthfully at the interrogation: "I have seen them on Saturday, but I cannot swear whether or not they were the same soldiers I have seen on Sunday. There are quite a lot of U.S. soldiers in Baden-Baden" (R 100-101).

Karl Vogel, taxi driver, testified that about 12:20 a.m. on 6 June, at the Baden-Baden railroad station (apparently about fourteen hundred meters from the scene of the fight (Pros. Ex. 1)), the two accused asked him his price to take them to Knielingen. He requested fifty marks and then recognized the accused Smith as the person he had taken from the Holland Hotel to the Karlsruhe station three weeks before. At that time Smith had ten dollars and would not pay the witness fifty marks. Consequently the witness told them on 6 June that he would not take them unless he was paid in marks, and in no event would he take Smith (R 103-104, 106). When the witness returned from a trip about ten minutes later, he saw the accused in Max Weiner's cab in which they rode toward town (R 105-106). The accused were wearing the same color uniform then as in court (shade 33, olive drab), with "visored" caps (R 107).

Max Weiner, taxi driver, testified that about midnight on 5 June he drove two American soldiers from the railroad station in Baden-Baden first to the Hotel Runkewitz, where he dropped off a man and woman who were also passengers, then to his apartment, where he refueled his cab with wood, and finally to the main entrance to the kaserne at Knielingen. The entire 37-kilometer trip consumed about an hour and twenty or thirty minutes and they arrived at the kaserne about 1:40 or 1:45 a.m. on 6 June. The witness switched on the taxi light, but one of the accused told him to switch it off (R 107-109).

Over objection by the defense that they were involuntary, testimony as to certain pretrial admissions by both accused was admitted (R 122-124, 153-154). The circumstances attending the making of the admissions are discussed in paragraph 4 below. Agent Hyde testified that, at his request on 8 June, Lawrence agreed to retrace his activities in Baden-Baden on the night of 5 June from the time he left the hotel, "as well as he could remember" (R 123-130). Hyde testified that Lawrence retraced the route and stated that "they" left the hotel, walked south on Langestrass, stopped at the Krokodil Bar for a drink, continued on and stopped in another bar one or two blocks north of Gernsbacherstrasse. (At this point the law member directed the witness to limit his testimony to what Lawrence said he himself did (R 155, 156)). At Gernsbacherstrasse, Lawrence said, he turned right, crossed Leopoldsplatz and went down Sophienstrasse, where he met an unknown male German. Thereafter he returned to Leopoldsplatz, turned and walked south again to Rettigstrasse, where he turned left. When Lawrence reached the alley he pointed to a spot about five feet inside and said that was where the fight had taken place and where the man "they" were fighting was lying when "they" left. (The law member again cautioned the witness not to testify what Lawrence said about anyone else). The witness did not suggest turning off Sophienstrasse and was positive Lawrence took him to the scene. Lawrence said he walked further into the alley, but as there was no exit, retraced his steps into Rettigstrasse and returned to the hotel via Luisenstrasse. He stated he then went to the "bahnhof" (station) and took a taxi back to the barracks at Knielingen (R 156, 158).

With respect to the time element, Lawrence stated "they" left the hotel about 9 or 10 p.m. and arrived at the alley probably about 11 or

11:30, at which time the fight took place (R 158).

On the evening of 6 June, Hyde asked Smith "how he got the stains on his trousers and shoes" (R 121). Smith replied in substance that he had been in a fight in Baden-Baden the night before and must have got the blood on his trousers during that fight. (The law member instructed the court that this evidence was to be considered only against Smith) (R 126-127). On 8 June, Smith attempted to retrace his route of the 5th. He told Hyde that he left the Badischer Hof about 10 p.m. and "they" went south down Langestrasse, took a streetcar, jumped off after one or two blocks, continued along the street to where he met the unknown German and "they" then proceeded to Gernsbacherstrasse. Smith stated he was not too sure where he had gone from there. It was dark at the time and he did not recognize it at noontime. Hyde told him to look around and see if he could recognize anything. They crossed from the southwest to the north corner of Gernsbacherstrasse. Smith said "he didn't think that was the way they had gone" and it did not look familiar to him. He may have walked a few steps into Gernsbacherstrasse. Thereafter Smith led the way southwest to Leopoldsplatz (R 236-237, 239). He said he thought "they" had been there Sunday night but was not sure. He failed to see anything familiar and that was as far as he could go. Hyde said, "Come on down to Lichten-talerstrasse and see if you can recognize anything there." Brought there, he said he did not recognize it. Hyde "brought him into the alley and asked him if that could be the place where the fight took place and he said it could be but he did not recognize it." Smith said there had been a light around the corner from where the fight had taken place, and he had the impression it was out farther into the street than the building light, "but this could be the place. He wasn't sure." Hyde denied that Smith said to him, "I don't think this was the place" (R 238-239). Smith said he went thirty to fifty feet farther into the alley, found he could not get out, turned around and left by the way he had entered (R 259).

According to the testimony of Captain Hine., who was present on Smith's tour of his route, as they approached Gernsbacherstrasse Smith said "he wasn't sure but thought it was to the left; and as we went into the left a few feet he stated, no, this wasn't it." The witness's recollection was that "we suggested that we try the other way, and we came back down toward Leopoldsplatz where Smith * * * stated, I believe, that nothing looked familiar." Smith made no request to look around further in the alley at Gernsbacherstrasse (R 247-248).

b. For the defense. --The law member sustained the prosecution's objection to the admission of evidence of the conviction of the deceased by the Landgericht (Court of Justice of the Land) of the offense of "offer to homosexual lewdness" (R 161-162; Def. Exs. A for id., B for id.).

Georg Loba, criminal police secretary, testified that he received information as to the age, appearance, and description of the two American soldiers concerned from statements of witnesses, including Scholz. He

later received a report that a fight involving American soldiers had taken place on 5 June both inside and in front of the Cafe Krokodil (on Langestrasse, north of Gernsbacherstrasse (Pros. Ex. 1)) (R 162-163).

Erich Bauer, police sergeant, testified that while on Sophienstrasse south of the Optik Ryser at 12:50 or 12:55 a.m. on 6 June, he observed a "uniformed person," accompanied by two women, running at some distance away from him over a bridge. Thereafter an American soldier, who was "bleeding under the nose," passed him, apparently in pursuit of the others (R 164-165).

Josef Koepfler, bartender at the Hotel Badischer Hof, testified that on the evening of 4 June he saw the accused at the hotel bar with a Frenchman and two women. The accused were slightly intoxicated and each drank three or four sidecars and gin fizzes. Between 2:30 and 3:30 p.m. on Sunday, 5 June, each of the accused drank about eight or nine sidecars, quietly paid their bill and left. They returned to the bar about 9 or 9:30 p.m. and remained until 11 or 11:15 (R 165-166). During this period each of them drank about four sidecars and four gin fizzes and the one with the mustache (Smith) smashed two glasses "just for fun," even though other guests were present. They were fairly heavily intoxicated - about fifty per cent - and their eyes were glassy, but they could still walk (R 167-168).

Rolf Wick, student, Rettigstrasse 6, testified that at about 11:30 p.m. on 5 June, pursuant to his sister's report that there was fighting in the street, he looked out the window of his second-floor room, right opposite the courtyard. He saw nothing in the courtyard, but a soldier stepped out of the darkness into the light shining at its entrance below the window and looked down the street. There was a scratching noise "as if someone was being stepped upon or beaten up," but he could not see what was taking place in the courtyard because it was dark there (R 168-171).

Karl Hauser, criminal police assistant and former witness for the prosecution, testified that Drachengaesschen, a street off Gernsbacherstrasse, about three hundred meters from the Langestrasse corner, was about three meters wide and forty meters long (R 251-252). On cross-examination the prosecution brought out that the witness received no report of an assault occurring in Drachengaesschen from 8 a.m. 5 June to 8 a.m. 6 June. If there had been such a report he would have known about it, unless the fight were "something of a very minor extent" (R 253).

Otto Rosenthal, police sergeant, testified that Drachengaesschen was three to four hundred meters from the corner of Langestrasse and about one and a half meters wide and fifty meters long (R 254-255). There were steps across the end, but it was not a dead-end street for pedestrians (R 257). The houses were about fifteen meters high, and the walls were made of plaster-covered tiles (R 256).

The accused's rights were explained to them and Lawrence elected to remain silent on the merits (R 181, 236).

The accused Smith testified on behalf of himself and Lawrence substantially as follows: On 5 June he wore a mustache, which was later removed in accordance with guardhouse policy. On that day he was registered in the Badischer Hof Hotel and arose about noon. After breakfast he went with Lawrence to the bar, where each of them consumed about eight or nine sidecars and possibly three or four gin fizzes. After several drinks of cognac and beer in their room, they went to supper at the hotel about 8 p.m., leaving the dining room about 9 p.m. (R 182-184). Then they spent about forty-five minutes in the hotel bar drinking about four or five gin fizzes and sidecars apiece. They paid their bill, left and road on a streetcar on Langestrass for two blocks to the Kokodil Bar, where they drank more gin fizzes and sidecars for possibly thirty minutes (R 185, 198, 200, 202, 203).

"At that point things were becoming quite hazy." As Smith remembers, he and Lawrence went south on Langestrass to a small French bar where they consumed several drinks of cognac and brandy. After possibly fifteen or twenty minutes, they went out on Langestrass. While they were discussing where they should go next, a male civilian stopped them and asked where they were intending to go. They replied they were going to the Goldenes Kreuz and he said he knew of a much better place, where he offered to lead them. As Smith remembered, the German was in "some dark attire with a suit jacket and pants" (R 186, 204), and was about twenty-five to thirty years old. Smith did not believe the photograph of the deceased (Pros. Ex. 3) was a picture of this man, as the latter was much leaner and looked somewhat younger. Smith did not believe the man was carrying anything. Their conversation took place sometime between 10:30 and 11 p.m. (R 187, 188, 222). Smith did not offer the German a cigarette (R 205).

Lawrence thought it would be all right for Smith to go with the man and he would go to the Goldenes Kreuz and see if he could locate the two women they had been with the previous evening. The three thereupon proceeded south on Langestrass to the corner of Gernsbacherstrass, where Smith and the German turned left and Lawrence dropped behind, out of sight. Smith believed Lawrence had gone to the Goldenes Kreuz (R 188, 205, 227-228).

The German and Smith continued walking for about two to five minutes, when the former turned left into an alley. Several feet inside, Smith halted him and asked him "where he was leading us," meaning "the German and myself." The alley was very dark and there was no noise. Smith was suspicious and did not know why the German had led him there. The alley was ten or twelve feet wide, or less, and seemed about thirty or forty feet long. It seemed to be between two buildings and there was no light in it at any point. The nearest light was ten or twenty yards from the alley entrance. Smith did not believe the alley on Rettigstrass was the one he was in on 5 June, because the former was L-shaped, seemed much

wider, and seemed much lighter because the buildings were not so high as those he had remembered. On Saturday, 16 July, he led the way to an alley which closely resembled the one where the fight occurred. It did not show on Prosecution Exhibit 1 because it was farther up Gernsbacherstrasse (R 188-190, 205, 210, 224, 233). He admitted saying on 8 June that there was a very slight possibility that Rettigstrasse might be the place where the fight occurred (R 211, 223).

About ten or fifteen feet inside the alley, Smith asked the German "what kind of a deal he was trying to pull." Smith had a substantial sum of money and did not want to lose it. The German cursed at him and struck at him, but Smith blocked the blow. Smith, who was very much surprised (R 190), then knocked the German down and he scrambled back to his feet. They exchanged blows and Smith knocked him down again. Then the German tackled him around the ankles and Smith tried to kick him off, because he was in danger of being knocked down. He kicked at him with his foot possibly three or four times to get him to release his ankles. He succeeded in freeing his right leg and kicked him, with the bottom of his shoe, just hard enough to dislodge the German and did nothing else. Once Smith was off balance and fell against the brick wall of the alley (R 190-191, 211-213, 226, 231, 234). The German released his legs, fell back against the wall of the building, grabbed his head and stomach, more or less curled up, and lay moaning against the side of the building (R 191-192). The fight took place about 11 p.m. (R 193).

At this point Smith turned around to see if anyone else was there and saw Lawrence standing a few feet behind him. Lawrence did not touch the man. Smith and the German were in the alley about two to five minutes. Smith accounted for the stains on Lawrence's trousers "by the fact that Lawrence must have come close enough to me while I was engaged in the fight with the German to have contacted either myself, or when I swung my feet perhaps I got some blood on him then." He might have been to the side of Smith, or possibly the blood came from Smith's knuckles or by rubbing against Smith's leg while walking or in the taxi. Smith had blood on his own trousers because the German was holding close to him around the ankles and was bleeding when Smith knocked him down the second time (R 191-192, 219, 225, 226-231, 235). Smith knew there was blood around the German's mouth and nose because he had blood all over his knuckles from hitting the German (R 193). The bloodstains on the back of his trousers probably came from his wiping his hands there (R 233).

The two accused went forward possibly ten or twenty feet into the alley. "Not observing anything," they retraced their steps past the groaning German and, just after 11:15 by Smith's watch, returned to the hotel where Lawrence went up to the room. Thereafter the porter, Helmut Vix, came down (R 193, 198, 203, 213-214, 217, 224, 229, 230). The accused proceeded to the Bahnhof where they remained for about twenty minutes or more. A taxi driver refused to take them to Knielingen and drove away with two other passengers. After a price discussion, another taxi driver drove the accused to the Hotel Runkewitz, where a man and woman who had accompanied them got out of the cab. The driver accepted

ten dollars from Smith and some marks from Lawrence, continued on with them to a place in Baden-Baden where he refueled, and then proceeded to the kaserne at Knielingen, where they arrived shortly after 1 a.m. on 6 June. Both Smith and Lawrence were wearing olive drab uniforms (R 194-195, 217-218).

Smith gave as his reason for testifying, that he wanted to bring out that he did not believe he had anything to do with the Hans Zizler incident. He believed he had a fight with another man, who was the aggressor, and that he struck back in self-defense. Lawrence did not touch the German with whom Smith fought and "did not get any blood on himself through any purpose or use of his feet or hands in the fight * * *." Smith, although under the influence of alcohol at the time, still remembered some of the pertinent facts and was convinced that neither of them was guilty (R 196). The reason he did not report the incident was that he believed he was merely protecting himself and had nothing to hide (R 235).

Smith felt that Vogel, the taxi driver, was lying. He denied that Vogel had picked him up about three weeks before the night of the incident, although Smith was in Baden-Baden then (R 197-198, 201). Koepfler, the bartender, a defense witness, was mistaken in his testimony that the accused were in the hotel bar from 9:45 to 11 or 11:15 p.m. (R 200). It was possible that he told Koepfler he was going to the Goldenes Kreuz when they left around 11:30 (R 201-202).

Smith believed Elfrieda Scholz was deliberately lying. She and her girl friend had accompanied the accused to the Badischer Hof sometime after 10:30 p.m. on 4 June. He believed that when the girls left at 4 o'clock the next morning, Scholz shared some animosity with her girl friend against the accused. Smith could not state beyond a shadow of a doubt that he was not on Leopoldsplatz about midnight on 5 June (R 215-216).

Smith was going to send his trousers, which were found in his wall locker, to the cleaners on cleaning day. He normally wrapped his dry cleaning in brown paper (R 225). He admitted answering Hyde's question as to the stains on his trousers by saying he believed that they were blood and that he got them from a fight with a German civilian in Baden-Baden (R 219).

On 8 June, when retracing his route, Smith stated he believed that on 5 June they turned left up Gernsbacherstrasse. On the 8th he went twenty to fifty yards up that street. Hyde then led him down to Rettigstrasse, where Smith stopped and said he did not believe that was the way. Hyde told him to continue up Rettigstrasse, but Smith said he did not believe that was the place (R 221).

c. For the court. - Recalled as a witness for the court, Smith testified that his only reaction when the German, who was somewhat taller and huskier than he, suddenly swung at him, was to defend himself. He was afraid, especially when the German got back up. Lawrence did not come to Smith's assistance any way (R 249).

4. Discussion.

Pretrial admissions of accused.

a. Lawrence.- Agent Hyde testified that about 6 p.m. on 6 June in Lawrence's quarters, in the presence of Captain Hines, Lawrence was told that they wished to search his lockers. Lawrence consented and the search resulted in the discovery of his bloodstained trousers (R 117-118, 139; Pros. Ex. 14). About 6:15 p.m. Hyde warned him that he did not have to answer any questions or say anything that might incriminate him, and that if he did answer or make any statement, it might be used against him in case of court-martial. Lawrence stated that he understood his rights. Hyde proceeded to ask him a few questions for five or ten minutes. Captain Hines brought Lawrence, who was not confined, to Hyde's office about 8:30 p.m. About 10:30 or 11 Hyde read and explained the 24th Article of War to Lawrence and thereafter interrogated him for between an hour and a half and two hours. Lawrence left at 12:30 a.m. on 7 June (R 127, 128, 131, 132, 140). Hyde denied having used coercion, threats or promises on Lawrence (R 129-130, 138-139). He admitted, however, that at the outset he did not explain to Lawrence the general nature of his investigation, but believed Lawrence was so informed by the nature of the questions. Although Lawrence later stated he would not make a written statement and desired not to answer some individual questions, he did not state at this time, so far as Hyde remembered, that he did not desire to make any statement. Hyde continued to question him "on other matters. If he did not answer one question I went on to another" (R 131-132).

Captain Hines corroborated Hyde generally (R 132-138), except that he testified the interrogation of Lawrence began about 11:30 p.m. and continued about an hour and a half. Hyde stated to Lawrence that he need not make any sworn or unsworn statement. When asked if he desired to make a statement, Lawrence replied in the negative. When Hyde received no answer to a question, "he might have rephrased his questions several times." Hyde did not state expressly to Lawrence that a verbal statement could be used against him, but he did read the 24th Article of War to Lawrence and did explain his rights to him (R 133-135). Hines could not remember the exact phraseology of Hyde's explanation to Lawrence of his rights. He was sure Lawrence stated he did not want to make a sworn or unsworn statement, but was not sure whether this referred to a written statement only or to any statement. Lawrence did not object to answering questions (R 135-136, 137). No threats or promises were made to Lawrence (R 138).

Hyde testified that on 8 June in Baden-Baden, he warned Lawrence, who was under guard, that "he still had the same rights under the 24th A.W." before asking him to retrace his activities of the night of 5 June (R 128, 155). Lawrence apparently knew what Hyde wanted. No bodily harm was inflicted upon him in Hyde's presence (R 129-130). Both Hyde and Captain Hines questioned him, but no threats or promises were made to him (R 139). As to

the tour itself, Hyde did not personally suggest turning off Sophienstrasse. He was positive that Lawrence took him to the scene of the killing (R 158). Captain Hines testified he went on the tour with Lawrence at Hyde's request to see that Lawrence's rights were protected and also in his capacity as Serious Incident Investigating Officer (R 137). Lawrence did not object to retracing his path of 5 June (R 138).

After an explanation of Lawrence's rights in the premises, his counsel stated he desired to take the stand "with reference to the voluntary nature of the statement" of 6 June 1949 (R 140-141). Lawrence testified on direct examination that he was questioned by Agent Hyde in the "C.I.D." office from about 11 p.m. on 6 June to 2 o'clock the next morning in the presence of Captain Hines, Provost Officer of the "552d," Lawrence's battalion. Hyde read "a few points" from the 24th Article of War, but made no statement as to the nature of the investigation. Hyde asked him if he wanted to make any sworn or unsworn statements and Lawrence said no, but Hyde continued asking questions, some of which Lawrence answered at the start. Hyde would ask the same questions possibly two or three times. Lawrence's understanding with reference to answering these questions was that if he did not want to make "any sworn or unsworn statements," anything he said would not be held against him in case of court-martial. He did not know that the statements he made to Hyde could be brought before the court, "because the way he explained it, the only thing that could be used would be sworn or unsworn statements or written statements." Hyde did not say anything about verbal statements (R 142-143).

On cross-examination, Lawrence testified that when he saw Hyde on 6 June he knew he was with the "C.I.D." but did not know why he was questioning him (R 143). He could not tell from the questions what the investigation was about (R 147). Hyde did not warn him of his rights in the barracks. The first warning, given at Hyde's office in Karlsruhe, was "if I wanted to make a sworn or unsworn statement anything I said could be used against me." In the course of the lengthy cross-examination by the prosecution the following colloquies occurred:

"Q Was it because of that you thought you could answer questions and they could not be used against you?

A He kept on asking me.

"Q If you didn't think the answers could be used against you what objection did you have of answering any questions?

A I wanted to get out of there. He kept me from 8 o'clock to 2. I was tired, sleepy and nervous. (R 144)

* *
"Q You say you didn't want to answer some questions?

A Yes.

"Q Why not?

A I didn't.

"Q Why not?

A I didn't think it was necessary to answer them.

"Q Isn't it true you didn't want to answer those questions because you thought the answers might hurt you?

A No.

"Q Why didn't you want to answer?

A He said I didn't have to answer any questions. Some of them I didn't want to answer.

"Q You knew you didn't have to answer questions if you didn't want to?

A I understood anything I said couldn't be used against me in court, but some of the questions I didn't want to answer.

"Q Why not?

A I didn't want to.

"Q Why didn't you want to? You decided you wanted to answer certain questions and others you didn't want to answer?

A A few of the questions I didn't want to answer. Some of them he kept putting back to me. I figured the only way I could get out was to answer some of them.

"Q You didn't have any objection to answering them, did you?

A No, sir. Some of them I said I'd rather not answer. He kept on.

"Q Why didn't you want to answer them?

A I just didn't want to.

"Q You mean you were afraid the answers might hurt you?

A No, I didn't want to answer the question. I didn't know what it was all about why he was questioning me. (R 144-145)

* * *

"Q Do you remember Hyde saying to you after you made certain answers, 'There is no point in lying. You don't have to answer if you don't want to, but if you do, tell the truth.' Do you remember Hyde telling you that?

A No, sir, I don't. (R 145)

* * *

"Q He asked you if you wanted to make an oral statement?

A He didn't say anything about that. He asked me if I wanted to make a sworn or unsworn statement and I said no; he asked me if I wanted to make a written statement and I said no. (R 146)

* * *

"Q Did he say, 'I want to ask you some questions'?

A Yes.

"Q And then he asked you some questions?

A Yes, sir.

"Q And you answered the questions?

A Not the first time, but he asked me two or three times.

"Q Why didn't you answer them the first time?

A I didn't want to.

"Q You didn't want to because you thought it would hurt you?

A I didn't know what the question was all about. (R 146-147)

* * *

"Q The questions he asked you were addressed to a certain time and place, were they not?

"LM: I don't think he has to answer that.

"Q I don't quite understand your method of deciding which questions you would answer and which questions you would not answer. Try to clarify that for me, please.

A Some of them I wanted to answer and some I didn't because I didn't know what the investigation was about. I wanted to find out what it was all about. (R 147)

* * *

"Q Why did you answer any questions at all for then?

A Because I wanted to get back so I could go to bed.

"Q Why didn't you answer all the questions so that you could get out to bed that much faster?

A Because I didn't want to. (R 149)

* * *

"Q After Hyde finished with you and sent you back home, you thought nothing you said could be used against you?

A That is right.

"Q As far as you were concerned you hadn't said anything to Hyde on 6 June that could hurt you?

A That is right. I didn't think anything was mentioned could be brought into court because it wasn't written down and signed, anything I said.

"Q On 6 June, is that right?

A That is right.

"Q As far as you were concerned, on 6 June up to that moment you had not said anything that could be used in court against you?

A That is right.

"Q You weren't afraid anything you said on 6 June could be used against you?

A No, because I didn't think it could be used against me. (R 149-150)

* * *

"Q You now want the court to understand that you believed that nothing you had told Hyde on the 6th could be used against you at any time after the 6th, is that right?

A That is right.

"Q It would not be used in any way to hurt you?

A The way I understood it.

"Q Therefore you were not afraid of anything you said on the 6th?

A I didn't think anything we talked about could be brought up in court in case there was a court." (R 151)

Hyde did not inflict any physical harm on Lawrence, but kept him "down there from 8 to 2 in the morning." Hyde "didn't talk loud or nothing" (R 148).

Examined by the court, Lawrence insisted that Hyde read only certain parts of the 24th Article of War to him and did not explain it to him clearly. He admitted that no one mistreated him or made any threats or promises to him (R 151-152). He also insisted that his understanding was that only "a sworn or unsworn statement or a written statement" could be held against him and that he therefore refused to make such a statement (R 153).

The defense objected to the admission of testimony as to Lawrence's statements made in connection with retracing his route on 8 June on the ground they were involuntary due to coercion and lack of proper explanation of his rights on 6 June (R 153-154).

The first question arises out of Lawrence's testimony that although Agent Hyde read parts of the 24th Article of War to him prior to the interrogation which began about 11 p.m. on 6 June, Hyde did not inform him of the nature of the investigation, and Lawrence did not know what the investigation was about.

Article of War 24 provides in part, in effect, that no statement, admission, or confession, in the obtaining of which coercion or unlawful influence has been used in any manner whatsoever by any person, shall be received in evidence by any court-martial. The last sentence of the Article provides:

"It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

Although the record is silent as to what statements Lawrence made to Hyde on 6 June as a result of the interrogation, it may be inferred that they were in the nature of admissions concerning Lawrence's connection with the incidents of 5 June, since they led Hyde on 8 June to request Lawrence to retrace his route of the 5th. The record shows that during this tour Lawrence made certain highly damaging admissions. If Lawrence was not adequately warned of his rights under the Article on 6 June, this would tend to show that his admissions on 8 June were involuntary (Cf CM 330238, Pursley, 78 BR 319, 324). According to Hyde and Captain Hines, on 6 June, the former advised Lawrence that he did not have to answer any questions or say anything that might incriminate him and that if he did answer or make any statement it might be used against him in case of court-martial. The warning was general in terms and not limited to any particular

offense with which Lawrence might be charged. In other words, Lawrence was advised that he could refuse to answer any and all questions. The Judicial Council is of the opinion that under these circumstances there was substantial compliance with Article of War 24.

The next question is whether the cross-examination of Lawrence on the matter of Hyde's warning, and Lawrence's understanding thereof, respecting the type of statements which could be used against him in the event of a court-martial, constituted prejudicial error. On direct examination Lawrence testified in effect that he understood from Hyde's warning that verbal statements could not be used against him, but nevertheless he refused to answer some questions. In the course of cross-examining Lawrence on this point, the trial judge advocate asked him three times in substance whether his reasons for not answering certain questions verbally was because he feared his answers would "hurt" him and also whether he thought he had said anything that could "hurt" him. Lawrence explained that he did not want to answer certain questions because he did not know what the investigation or questions were about, and answered other questions because he was tired and wanted to go to bed.

The general rules governing the scope of cross-examination are as follows:

"Cross-examination * * * should, in general, be limited to the issue concerning which the witness had testified on direct examination and to the question of his credibility. Cross-examination is necessarily exploratory and full latitude should be allowed the cross-examiner. The extent of cross-examination with respect to a legitimate subject of inquiry is, however, within the sound discretion of the court. * * *

"No obligation is imposed upon the court to protect a witness, whatever his office, rank, grade, or station in life, from being discredited upon cross-examination, short of military disrespect or an attempted invasion of his right not to incriminate himself or an attempt to degrade him in connection with immaterial matters.

"* * * a greater latitude may properly be allowed in his an accused's cross-examination than in that of other witnesses. * * * If an accused testifies on direct examination only as to the involuntary nature of his confession or admission, the cross-examination must be limited to that issue and his credibility. On cross-examination on this issue he may not be required to state whether his confession or admission was true or false."
(Underscoring supplied) (MCM 1949, par 135b, pages 177-178)

"An accused has the right to testify concerning the involuntary nature of his confession or admission without subjecting himself to cross-examination upon other issues in the case or upon the truth or falsity of the confession or admission."
(Ibid., par 127a, p 150)

In fairness to the accused it may be assumed that the word "hurt" was interpreted by the members of the court, as well as by Lawrence himself, as the substantial equivalent of "incriminate." Inasmuch as Lawrence took the stand for the limited purpose of testifying regarding the circumstances surrounding his interrogation of 6 June, the questions of the trial judge advocate might have constituted prejudicial error unless Lawrence in his testimony on direct examination had opened the door to such cross-examination (AW 24; CM 333793, Robinson, 1 BR-JC 67, 71-72, and authorities there cited). The Judicial Council, however, is of the opinion that Lawrence did open the door, thereby making proper the questions of the trial judge advocate. These questions clearly related to the issue raised by Lawrence on his direct examination and to his credibility. Since Lawrence did answer some questions orally and refused to answer others, a doubt immediately arose as to his professed understanding that verbal statements could not be used against him in case of a court-martial. In an attempt to resolve this doubt and to discredit Lawrence's claim that he was misled as to his true rights by Hyde and was thus improperly warned, the prosecution sought to show that Lawrence did in fact understand that he need not answer any questions or make statements of any nature, verbal or otherwise, and did in fact understand and fear that verbal answers and statements might be used as evidence against him in a trial by court-martial, and thus might "hurt" or incriminate him. Particularly was this effort justified in view of the unconvincing nature of Lawrence's professed reasons for answering certain questions and failing to answer others. To hold otherwise would be to limit unduly the right of cross-examination (see CM ETO 13125, King, 26 BR (ETO) 133, 142-145, citing *Alford v. United States* (1931), 282 U.S. 687; *Branch v. United States* (CADC, 1948), 171 F. 2d 337; *Mintz v. Premier Cab Ass'n., Inc.* (CADC, 1942), 127 F.2d. 744, 745).

The third question arises out of the defense counsel's argument that coercion was employed against Lawrence in that he was subjected to continuous questioning on 6 June until late at night. Hyde testified he questioned Lawrence for from an hour and a half to two hours commencing at 10:30 or 11 p.m. and that Lawrence left at 12:30 or 1 a.m. Captain Hines testified the interrogation began about 11:30 p.m. and continued for about an hour and a half. Hyde denied having used coercion, threats or promises on Lawrence and Captain Hines testified Lawrence did not object to answering questions. Lawrence testified that Hyde kept him "down there from 8 to 2 in the morning," but admitted that no one mistreated him or made any threats or promises to him. The court was warranted in believing he had been adequately warned of his rights. In view of all these circumstances, the Council is of the opinion that the record supports the conclusion that Lawrence was not subjected to coercion at the hands of Hyde or Captain Hines.

With respect to Lawrence's retracing on 8 June of his path of 5 June, Hyde testified he warned Lawrence on 8 June, before asking him to go on the tour, that he still had the same rights under the 24th Article of War. Hyde also denied the use of threats or promises or that he suggested the route, and testified he was positive Lawrence took him to the scene of the killing. Captain Hines testified Lawrence did not object to retracing his path. The Council is of the opinion that the record contains no indication that the admissions by Lawrence on 8 June 1949 were involuntary, but on the contrary

contains substantial evidence of their voluntariness and the propriety of the admission of testimony with respect thereto.

b. Smith. - Agent Hyde testified that about 6:30 p.m. on 6 June in Smith's quarters in the presence of Captain Hines, he told Smith he would like to search his lockers. Smith was not informed of the reason for the search but consented to it. The result was the discovery of his bloodstained trousers and shoes (R 117-120, 139; Pros. Exs. 15, 16). Prior to questioning Smith thereafter, Hyde informed him he did not have to make any statement that would incriminate him, but that if he did say anything or answer any questions they could be used against him in the event of court-martial. He explained to Smith the meaning of the word "incriminating." Smith stated that he understood his rights. Hyde said he had a question he wanted to ask him and Smith said, "Go ahead." Hyde then elicited Smith's explanation of how he got the stains on his trousers and shoes, as above related. He inflicted no bodily harm on Smith nor did he threaten him or promise him anything. Smith was not deprived of any necessities of life. Hyde did not inform Smith of the nature of the investigation or of any offense he was supposed to have committed. Nor did he actually read the 24th Article of War to him (R 120-122, 124). Smith made his statement voluntarily (R 259).

With respect to Smith's retracing of his route of 5 June, Hyde testified that he again warned Smith of his rights under the 24th Article of War at Baden-Baden on 8 June and that his statements at that time were made voluntarily (R 258-259). When they arrived at Gernsbacherstrasse, Smith stated he was not too sure where he went from there and Hyde told him to look around and see if he could recognize anything. Smith led the way from there southwest to Leopoldsplatz. When Smith failed to see anything familiar there, Hyde suggested that he proceed down to Lichtentalerstrasse and see if he could recognize anything. Hyde then "brought him into the alley and asked him if that could be the place where the fight took place," to which Smith replied that it could be but he could not recognize it. Hyde repeated this question so that Smith would continue to look around and possibly recognize some landmark and be able to identify the place as the scene of the fight (R 237-239). Captain Hines testified that Smith proceeded toward Leopoldsplatz at their suggestion (R 247-248).

The defense objected to the admission of testimony as to any statements made to Hyde by Smith on the ground that Smith was not properly informed as to the nature of the offense with which he was charged and concerning which he was being interrogated (R 122-124). After an explanation of his rights as to testifying on the issue of voluntariness of his statements, Smith elected to remain silent (R 125). In the course of his testimony on the merits, however, Smith admitted that the first time he saw Hyde at about 6:30 p.m. on 6 June, he believed Hyde warned him of his rights and he understood that he did not have to answer any questions if he did not so desire. He had no idea, however, of Hyde's purpose in questioning him. In his office later, Hyde again warned him of his rights and asked him detailed questions about the fight. Smith still did not know the subject of the interrogation but he had an idea

"that it could be for an assault charge." He admitted that he understood he did not have to answer any questions if he did not so desire, and that he answered the questions voluntarily (R 219-220). On 8 June, Hyde led him to Leopoldsplatz from Gernsbacherstrasse and also led him down Lichten-talerstrasse to Rettigstrasse and told him to continue up that street (R 221). Hyde's testimony demonstrated that although he did not inform Smith of the nature of his investigation or of any offense he was supposed to have committed, he did adequately warn him of his rights under the 24th Article of War both on 6 June prior to eliciting his admission concerning getting blood on his trousers during a fight, and on 8 June prior to Smith's attempt to retrace his path of 5 June, that no physical harm, coercion, threats or promises were used on Smith, and that his statements on both dates were voluntary.

It appears from the testimony of both Captain Hines and Smith that the continuation of the route from Gernsbacherstrasse to Leopoldsplatz on 8 June was at Hyde's suggestion. Hyde testified that Smith led the way as far as Leppöldsplatz. But both Hyde and Smith testified that it was at Hyde's suggestion that Smith proceeded from Leopoldsplatz to the alley on Rettigstrasse where the killing had occurred. Smith, however, admitted in his testimony that he was warned of his rights on 6 June. Even assuming that Hyde led the party in its movements from Gernsbacherstrasse on, such fact, viewed against the background of the prior warnings to Smith, does not indicate that Smith's statements during the course of the tour were involuntary. Hyde testified he was merely endeavoring to enable Smith to find a familiar landmark to aid his failing memory. Under the circumstances, Hyde's actions were not calculated to induce involuntary admissions by Smith. They merely bore on the weight which the court might choose to attach to Smith's statement that there was a possibility that the alley in Rettigstrasse was the scene of the fight. In the opinion of the Council, the testimony as to Smith's admissions was properly admitted for what it was worth.

Admission of bloodstained trousers and shoes.—Counsel have argued, both orally and in a brief filed on behalf of the accused Smith, that the admission in evidence of the bloodstained trousers of both accused and the bloodstained shoes of the accused Smith (Pros. Exs. 14, 15, 16) constituted prejudicial error because no connection was shown between the stains and the deceased and therefore the sole purpose of the evidence was to inflame the minds of the court members. They urge that the failure of the prosecution to introduce evidence of the deceased's blood type leaves a fatal gap in its case and requires the inference that such evidence would have shown that the blood on the accused's clothing and shoes could not have come from the deceased. Counsel cite in support of their views Kemp v. Government of Canal Zone (CCA 5, 1948), 167 F. 2d 938 and Lowrey v. United States (CCA 8, 1942), 128 F. 2d 477.

The Kemp case merely holds it is competent to show by blood tests that the victim's blood was type A while the defendant's blood was type O and that fresh blood spots of both types were found on the defendant's

clothing shortly after the fatal stabbing. The case does not hold that blood on the clothing of the accused must be proven to be of the same type as that of the victim in order to be admissible.

The Lowrey case holds that failure to elicit from a Government witness a denial of certain defense testimony which if true would have required suppression of the Government's evidence, justified the inference that the Government witness's testimony if presented would have been unfavorable to the prosecution. The case does not hold that the mere failure of the Government to introduce certain evidence requires an inference that such evidence if presented would have been unfavorable to its case.

As a general rule, bloodstained clothing of the accused is admissible in evidence in a homicide case, provided its identity and unchanged condition are first established (*Morton v. United States* (CADC, 1945), 147 F. 2d 28, cert. den., 324 U.S. 875; *State v. Ilgenfritz* (1915), 262 Mo. 615, 173 S. W. 1041, 1044; *State v. McAnarney* (1905), 70 Kan. 679, 79 P. 137; ? *Wharton's Criminal Evidence* (11th Ed.), sec 998, pages 1756-1759, and authorities there cited). Bloodstained clothing has frequently been admitted in court-martial homicide trials without a showing that the blood was of the same type as that of the victim and such admission has been upheld (e.g., CM 335138, *Bright*, 3 BR-JC 281, 305).

In the opinion of the Judicial Council, the admission of the evidence concerning the bloodstains on the clothing of the accused was not error, there being no showing that evidence favorable to the defense was suppressed. The failure of the prosecution to prove the blood type of the victim affects the weight of the evidence regarding the bloodstains and not its admissibility.

Rejection of evidence of deceased's homosexual propensities. - The law member refused to permit the defense to introduce evidence of the deceased's reputation and of a conviction of the deceased of making an offer of "homosexual lewdness." The general rule in homicide cases is that ordinarily the character and reputation of the deceased is not in issue and proof thereof is inadmissible. Moral degeneracy of the victim is, in general, no excuse for killing (*Webster v. State* (1922), 207 Ala. 668, 93 So. 545; 26 Am. Jur., sec 343, p 388; CM ETO 2007, *Harris*, 6 BR (ETO) 105, 121). Exceptions to the rule are recognized, however, where self-defense or killing in hot blood induced by adequate provocation is in issue. In such cases evidence of the deceased's violent and bloodthirsty character on the one hand, or of his moral degeneracy on the other, may be admissible, depending upon the circumstances (*Webster v. State*, supra; *Melton v. State* (1904), 47 Tex. Crim. Rep. 451, 83 S. W. 822; *Orange v. State* (1904), 47 Tex. Crim. Rep. 337, 83 S. W. 385; *Jones v. State* (1897), 38 Tex. Crim. Rep. 87, 40 S. W. 807, 41 S. W. 638; 26 Am. Jur., op cit; I *Wigmore on Evidence* (3d Ed.), sec 63, p 472).

The accused Smith raised the issue of self-defense. While the deceased's homosexual tendencies, as shown by the proffered evidence, would not have justified killing him and hence were not material to that issue, the inference

therefrom that the deceased might have made an indecent proposal to Smith might appropriately have been considered by the court as an extenuating circumstance. Any error in the rejection of the evidence, however, could have been prejudicial only respecting the sentences, not the convictions, and its effect was removed by the action of the reviewing authority in substantially reducing the accused's sentences (Cf. CM 281037, Gibson, 54 BR 37, 42).

Miscellaneous errors in procedure.—The Council has given full consideration to counsel's contentions with respect to other errors committed by the law member in the course of the trial. Our conclusion is that such of his rulings and actions as may have been erroneous were in no way prejudicial to the substantial rights of either of the accused.

Evidence of Identity. —The prosecution's evidence shows that the two accused, dressed in olive drab uniforms, left the Badischer Hof Hotel around 11:15 on 5 June 1949. Smith announced upon leaving that he was going to the Goldenes Kreuz. About 11:30 p.m., the policeman, Bayer, saw two American soldiers with the deceased near Leopoldsplatz. Bayer's testimony that the soldiers were clad in light khaki was a circumstance to be weighed by the court, which could well conclude that because of the time of night and quality of light the witness may have mistaken the precise shade of the uniforms. His testimony as to the possibility of stripes on one soldier's left sleeve is inconclusive at best.

The credibility of Elfriede Scholz's identification of the two accused as the American soldiers she saw at Leopoldsplatz between 11:30 p.m. and midnight on 5 June was a matter for the court's determination. Her explanation of her failure to identify the accused before trial as due to fear was not so improbable as to render it unworthy of belief. Even if she were a prostitute, that in no way disqualified her or made her an incompetent witness. Unchastity or lewdness does not of itself raise a presumption of untruthfulness so as to make the witness unworthy of belief. (CM 336206, Pomoda, 3 BR-JC 209, 216, 218, and authorities there cited). In the opinion of the Council the court was justified in believing Scholz's positive identification under oath in open court.

Jacques Delville, a French national, testified that at about 11:30 p.m. he saw two soldiers kicking a prostrate man wearing a white coat in the courtyard in Rettigstrasse where the deceased was found. One of the soldiers also acted as a lookout. Delville's credibility on the question of the color of the soldiers' uniforms, whether light khaki or shade 23, again, was for the court's determination. We find no reason to disturb the court's apparent conclusion that his correction of his testimony to indicate that the soldiers were wearing what he called "dark khaki," was in good faith. Hans Wick corroborated Delville's testimony, and connected it with the deceased.

The testimony of the taxi drivers, Vogel and Weiner, establishes that the two accused were at the station around 12:20 a.m. on 6 June and rode to the kasernat Kneilingen, where they arrived about 1:40 or 1:45 a.m.

The prosecution's evidence that there was human blood on the trousers of both the accused and on Smith's shoes on the day following the killing is undisputed.

Lawrence voluntarily retraced his route of 5 June three days thereafter and pointed out the alley off Rettigstrasse as the scene of the fight and the place where the man "they" were fighting was lying when "they" left. This admission was not admissible in evidence against Smith (MCM 1949, pars. 76, 127b, pages 73, 160; CM 334978, Canta, 1 BR-JC 387, 389; CM 325056 Balucanag, 74 BR 67, 70), but it was admissible and highly damaging evidence against Lawrence, its maker. Smith's voluntary admissions established that he was involved in a fight with a German civilian in an alley somewhere in the general vicinity of the scene of the killing and at about the time thereof. His statement that the alley off Rettigstrasse might have been the one is inconclusive, but is a circumstance to be considered.

The defense evidence, at most, raised factual issues for the court's determination. Loba testified that he received a report of a fight involving American soldiers at the Cafe Krokodil on the night in question. Bauer testified that at about 12:50 or 12:55 a.m. on 6 June he saw on Sophienstrasse a soldier accompanied by two women apparently pursued by a second soldier with a bleeding nose. The testimony of Koepler, the bartender, tends to establish that the accused were drunk and also corroborates the prosecution's evidence by placing them in the Badischer Hof from 9:30 to 11 or 11:15 p.m. on 5 June. Rolf Wick's testimony was intended to impeach Delville's statement that he could see the color of the soldiers' uniforms. Whether it had that effect, again, was for the court's determination. The testimony did corroborate Delville as to there having been a fight in the courtyard.

Hauser, as a defense witness, proved valuable for the prosecution in his testimony that, as criminal police assistant, he received no report of an assault in the vicinity of the area where Smith claimed the fight had taken place. Rosenthal testified about physical features of that area.

Smith's testimony corroborates the essential fact that he was in a fight with a German civilian, during which he kicked the civilian in the head, got blood on his clothes and left the moaning civilian on the ground. His story differs only in certain details from the fight proven by the prosecution. Smith's German wore a dark coat, was carrying nothing and was about twenty-five or thirty years old. The deceased was wearing a white coat, carried a brief case, and was about forty-seven years old. Smith insisted the scene was in an alley off a street to the north of the Rettigstrasse alley where the deceased was found. Smith's alley was

narrower and darker than the one on Rettigstrasse and was not L-shaped like that one. Smith's fight took place about 11 p.m.; the prosecution's between 11:30 and 12.

Smith's attempted exculpation of Lawrence conflicts with Lawrence's own pretrial statement. Smith's explanation of the blood on Lawrence's trouser leg is far from convincing, as is his story that he was obliged to kick the prostrate German in the head in self-defense. Delville testified unequivocally that one soldier kicked the motionless civilian viciously and the other also kicked him and acted as lookout.

Smith's version of the trip back to Kneilingen is in substantial accord with the prosecution's testimony except for the time, again about three-quarters of an hour earlier than the prosecution's version.

On the whole record, the Council is of the opinion that the circumstances do not permit of the reasonable hypothesis that Smith's fight and that described by the prosecution's witnesses were not one and the same. The court was at liberty to accept and reject such portions of Smith's testimony as it chose, and the Council is unwilling to say that the court was wrong in its conclusion of Smith's identity as the deceased's chief assailant. As to Lawrence's participation as an aider and abettor and consequent guilt as a principal, the court could reasonably believe his pretrial admissions and the other prosecution evidence in preference to Smith's testimony.

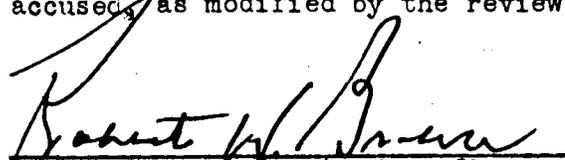
The vicious assault upon the deceased by kicking him in the face, not once but many times, resulting in the spreading of his blood over a wide area, as well as in his death, is clearly sufficient to show malice aforethought (CM 334570, Morales, 1 BR-JC 197, 207, 209). There is no evidence of heat of passion. Evidence of motive for the assault, though unsatisfactory in this case, is not essential (Ibid). The court was not required to believe Smith's testimony that he acted in self-defense. Nor was it required to believe that this was a case of mortal combat, instantaneously arising upon serious provocation. The sustained character of the attack upon the defenseless victim belies its justification as a defensive measure and indicates that the mortal "combat" was a one-sided affair. The Council is of the opinion that the evidence supports the findings of guilty of unpremeditated murder.

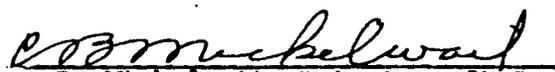
Effectiveness of the accused's defense.—Counsel argued during the appellate review of the case that Smith was denied the effective assistance of counsel at the trial. Each of the grounds raised has been carefully considered by the Judicial Council, which is unable to agree with the contentions. The defense counsel at the trial was a major in the Judge Advocate General's Corps, admitted to law practice in the State of Iowa and the District of Columbia. Both the defense counsel and the assistant defense counsel were introduced at the trial by the accused. The fact

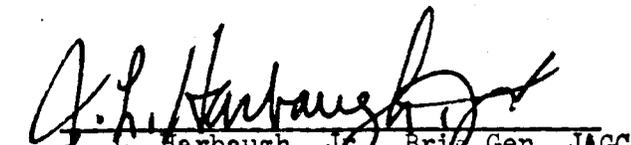
that counsel on appeal do not agree with the tactics employed at the trial affords no ground for invalidating the proceedings (Cf CM 320618, Gardner, 70 BR 71, 74-79).

5. Data as to the accused. -- The accused Lawrence is nineteen years of age. He began his current term of service on 7 July 1948 and had no prior service. The accused Smith is twenty-three years of age. He began his current term of service on 19 November 1947 and had prior service from 20 September 1946 to 14 June 1947.

6. The court was legally constituted and had jurisdiction of each accused and the offenses alleged. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused, as modified by the reviewing authority.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

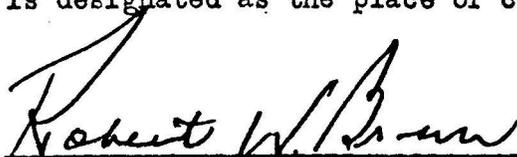
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 337,951

THE JUDICIAL COUNCIL

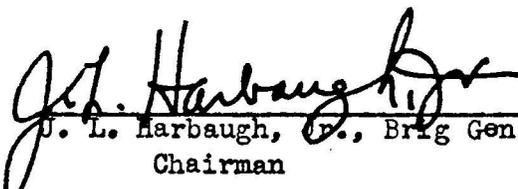
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit Willis H. Lawrence,
RA 14292304, and Recruit Perley W. Smith, RA 31511753, both
of Headquarters Battery, 552d Antiaircraft Artillery Gun
Battalion, upon the concurrence of The Judge Advocate General
the sentence as to each accused as modified by the reviewing
authority is confirmed and will be carried into execution.
The United States Disciplinary Barracks or one of its branches
is designated as the place of confinement of each accused.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

20 April 1950


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

15 May 1950

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

CSJAGG - CM 338753

UNITED STATES)

v.)

Private First Class WILSON
HICKS (RA 34419557),
Company C, 373rd Infantry
Battalion.)

WETZLAR MILITARY POST

Trial by G.C.M., convened at
Wetzlar, Germany, 27-28
September 1949. Dishonorable
discharge, total forfeitures
after promulgation and confine-
ment for five (5) years.
Penitentiary.

HOLDING by the BOARD OF REVIEW
SEARLES, SHULL and CHAMBERS
Officers of the Judge Advocate General's Corps

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, under the provisions of Article of War 50g.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Wilson Hicks, Company C 373rd Infantry Battalion (Separate), did, at Verdun Kaserne, Giessen, Germany, on or about 29 August 1949, with malice aforethought, willfully, feloniously, and unlawfully kill Private Willie Springs, a human being, by cutting him with a knife.

The accused pleaded not guilty to the Charge and Specification. He was found guilty of the specification, except the words "malice aforethought", not guilty of the charge, but guilty of a violation of the 93rd Article of War. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for five (5) years. The reviewing authority approved the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of the Army may direct, as the place of confinement. Pursuant to Article of War 50g the order directing execution of the sentence was withheld.

3. Evidence for the Prosecution.

Fraulein Happel testified that on the evening of 29 August 1949 she went with deceased, who was her "boy friend", to the taxi stand on the edge

of camp. While the deceased Springs was talking to the taxi driver she and Douglas, a friend of the deceased, were sitting in the taxi stand. The accused Hicks approached them and courteously asked to talk with Fraulein Happel. She and the accused stepped outside of the taxi stand and conversed. The accused then slapped her because she had failed to meet him the night before. Deceased thereupon approached the two and struck the accused. The accused started backing up with deceased and Douglas following him. He tripped over the chain fence near the taxi stand, fell and dropped his glasses. Deceased and Douglas then jumped on him. The accused got up and ran toward his barracks with deceased and Douglas in pursuit. The accused did not have a knife in his hand at the time he was conversing with the witness, but she saw a small pocket knife with a blade approximately one and one-half to two inches long in the accused's hand at the time he fell over the chain fence. She did not see anything in deceased's or Douglas' hands. Deceased and Douglas had their backs to her when pursuing the accused. During the fight deceased had his back to her but she did see Douglas' face. He appeared quite angry. Both deceased and Douglas were drunk (R 18-24).

Corporal George R. Price, testified that he is a member of the same company as the accused. He was present at the taxi stand the night of 29 August 1949 at which time the accused approached Fraulein Happel who was seated with Douglas in the taxi stand at the edge of camp. Also present at the inception of the fight was Corporal Stevens. The testimony of Price corroborates that of Fraulein Happel concerning the slapping of the latter by the accused and the initial assault upon the accused. As the accused was backing up both deceased and Douglas were approaching him and the accused fell over the knee high chain fence adjacent to the taxi stand, dropped his glasses and while "scrambling" for them deceased and Douglas started "kicking and fighting" the accused. When the accused arose he began to run toward his barracks with deceased and Douglas pursuing him. They were constantly upon him during the pursuit from the taxi stand to the barracks. He again fell as he tripped over a chair near the guard-house. The accused arose, continued running down the walkway and at the corner of "C" Company barracks, fell again. He got up and ran around the corner of the building at which time Price lost sight of him and his pursuers (R. 24-25). When Price got to the street in front of the barracks he saw the deceased standing in the street with his hand on one of his sides. There was blood on the ground "and all throughout the street." There was no blood on deceased's trousers (R. 34). This witness testified as follows:

"Q Did you see any knives?

A I did see a knife when he fell over here by the taxi stand but who had the knife I don't know." (R. 25).

* * * *

"Q Were you in a position to see knives if the other people had them?

A I think so. I was rather close. First I was trying to break the fight up. Then the knife came that close to me and I got out of the way." (R. 26).

On cross-examination he testified:

"Q Now did you happen to notice the hands of Douglas and Springs?

A I saw one's, Douglas or Springs, I don't know exactly which it was.

Q Where was it?

A His hand was in his pocket in this fashion.

Q That is when they were coming up on Hicks, is that right?

A That is correct.

Q At this time did you see anything in Hicks' hand?

A No, sir.

Q Were you in a position to have seen anything in Hicks' hand?

A I think I was, sir.

Q And, I believe you testified then Hicks continued backing up and these two were approaching him?

A That's right.

Q Were they approaching him in a friendly manner?

A I couldn't say it was friendly, sir.

Q Did you hear Springs or Douglas make any remarks as they approached Hicks?

A Such remarks that they would get him or 'I will get him', but I don't know who said it. I know 'get him' was in the phrase.

Q But you don't know who said it?

A No.

Q But it was Douglas or Springs?

A Yes.

Q And Douglas had his hand in his pocket?

A One of the two.

Q Hicks continued to back up, is that right?

A That is right.

Q And he falls over a chain, is that right?

A Yes, sir.

Q And when he tripped did he fall completely to the ground?

A Yes, sir.

Q What happened when he fell?

A Both of the two men rushed on him and began kicking and fighting him, etc, and he was scrambling and I ran up there and was trying to break them apart.

Q Yes. I believe you said when you got up there that that was the time you saw a knife in somebody's hand.

A That is correct, sir.

Q Did that knife come close to you?

A Yes, sir, right by my sleeve.

Q Where was Hicks at this time?

A He was on the ground.

Q And Douglas and Springs were standing up?

A Yes, they were standing over him.

Q And that is when the knife went by your left sleeve?

A That's right.

Q Hicks was on the ground?

A That's right.

* * * * *

Q He was scrambling around?

A Trying to find his glasses and scrambling for his glasses and trying to push the two men away with his other hand.

Q Then what did Hicks do?

A When he got up on his feet he began to run.

Q Before that, Price, did you go up there with the intention of trying to separate the men and take them off Hicks?

A I went with the intention of trying to break up the quarrel.

Q Why didn't you?

A Because of the knife, sir. I don't think anybody likes a knife.

Q And Hicks finally made it to his feet?

A Yes, sir.

Q During the time he was backing up from the taxi stand and fell over the chain did you see Hicks strike at either of these two men?

A No, sir, I didn't. He was backing up.

Q Was Hicks in a hurry?

A Yes, he was in a hurry. He was running, sir.

* * * * *

Q When Hicks fell over the chain what happened?

A The two men crowded and rushed at him and beat him until he got on his feet to run.

Q Did both of them crowd him?

A Yes, they were both running fast to him. I couldn't say if both were there at that moment or not but he only fell a few minutes, or seconds.

Q He didn't stop and try to resist them?

A No, sir." (R. 27-30).

Private First Class Leonard H. Stevens, a member of accused's company, knows the accused and Price, the previous witness. On 29 August 1949, at about 2245 hours Stevens was at the taxi stand at the edge of camp speaking to Price. He saw Douglas sitting in the taxi stand and heard parts of the conversation between the accused and a girl just outside the taxi stand. Shortly after that he heard some scuffling and Hicks "tripped over a chain in front of me." At no time did this witness see any knives, but would have been able to see knives in peoples hands "when they first started out. That is the only time I got a close look at them." Accused got up after he fell over the chain near the taxi stand and ran toward the barracks with deceased and Douglas chasing him. The accused during his flight fell five different times (R. 46, 49). The deceased caught up with accused each time he fell. Douglas was right behind the deceased. Both Price and Stevens followed deceased and Douglas as they chased the accused. Stevens lost sight of the trio for about "two or three seconds" when they turned the corner of the barracks. Price stopped at the guard-house but this witness kept on running (R. 47). It was dark but the

artificial light at the taxi stand, gate, guardhouse and near the billets, was good. The incidents related occurred between 2230 and 2330 (R. 48). Stevens was about five feet from the accused when the latter first fell and Douglas and deceased were standing over him. The second time the accused fell Stevens was within ten feet of him and the accused was always using his hands to get up off the ground. Stevens was approximately six feet from the accused when he fell for the third time and the next time was approximately fifteen feet from him. The accused at no time struck at or approached deceased or Douglas (R. 46, 47). He always appeared as if he were trying to get away from a fight. "He was retreating, sir, getting away." (R. 47). When Stevens got around the corner of the barracks First Sergeant Stubblefield was on the sidewalk in front of the barracks telling the men to go away, "Then all of a sudden this other fellow -- I don't know what happened to him -- him and Hicks was scuffling like --, I told you I didn't see very much -- Hicks went into the barracks after Sergeant Stubblefield said, 'Go away', and this other fellow said, 'I am cut!'" (R. 44). Deceased said "I am cut." About twenty minutes later the ambulance arrived. The scuffling was going on in front of the door of the barracks. Deceased was on the ground when the ambulance arrived and the accused was in the building (R. 51). Stevens was recalled by the court after the defense had rested and testified as follows:

"Q. One man was constantly upon Hicks?

A. Yes sir.

Q. What was he doing with his arms?

A. Hicks?

Q. No, the man constantly on Hicks?

A. It looked like he was trying to hit him or catch him or something.

Q. With a downward motion or an upward motion, or a jabbing motion.

A. I couldn't quite say that; I didn't see them impact very much. Every time Hicks was running and tripped this other fellow, he would try and get at Hicks and Hicks would get up.

Q. When you saw Hicks and Sergeant Stubblefield and Springs in front of the barracks door was Hicks standing or lying on his back?

A. He was on his back.

Q. He was lying on his back?

A. Yes, for about two seconds, there was a split action.

Q. He didn't lie there long?

A. No, he got up. In other words in front of the building there is a step where you have to step up, he must have tripped on that.

* * * *

Q. He was lying on his back?

A. Yes, trying to get up.

* * * *

Q. Did you see Hicks running to the doorway?

A. As he turned the corner it looked like he was stumbling in the doorway and Sergeant Stubblefield was there, both the men.

Q. What do you mean both?

A. Hicks and the fellow Springs.

Q. Was there a third man there at that time?

A. Douglas, I don't know; it seemed to me he was on the side of Springs, running by him like he usually does in the chase.

Q. Was he on the right or left side of Springs?

A. I couldn't say; he was in back of him when he turned the corner. When I saw him again he was holding Springs." (R. 99-100).

Corporal Freddie Y. Batham at about 2245 hours 29 August 1949 had just passed through the main gate of the camp en route to his billet when he noticed two soldiers behind him, one of whom fell over a chain outside the Kaserne. He did not recognize that person. The man who fell got up and started running into the Kaserne. Batham did not see any knives but saw a "shiny object" in "the soldier's hand." He could not state what it was as he was a good distance away and did not notice closely but it was in the hands of the "fellow that was being chased." The shiny object was approximately as long as "this pen." (R. 52-55).

On cross-examination this witness testified:

"Q You said you saw something which might have been a handle.

Theoretically it might have been a handle that you saw.

Can you say with any degree of definiteness what it was?

A Not directly.

Q Now, as to the other two men. Did you observe them intentionally?

A Not very close.

Q Not very closely. Is it not true that either of the other two men, or both of them, might have had a shiny object in his hand?

A I don't know if the first man had a shiny object in his hand, but it is possible.

Q In other words you cannot say they were without shiny objects.

A I cannot." (R 56).

One of the guards shouted "break it up" but the two men kept on chasing the other one (R. 56).

Private Herman Douglas, 595th Transportation Truck Company, corroborated the testimony of Fraulein Happel and Corporal Price up to the time the accused first fell over the chain fence at the taxi stand, except that Douglas stated that the accused first had a knife in his hand at the time the latter slapped Fraulein Happel. If Fraulein Happel said differently she is wrong. Douglas further testified that the accused wore glasses and at the time the accused was backing away from deceased at the taxi stand the accused had a knife in his hand. Douglas was behind deceased. When asked whether deceased had a knife Douglas stated "I didn't see it." Douglas testified he had no knife. The accused had a small knife with a blade about one and one-half to two inches long which Douglas saw when the accused first walked up to Fraulein Happel and again when the accused backed up. Douglas just watched the altercation between deceased and the accused at the taxi stand. The accused did not make any thrusts toward deceased. Douglas did not see deceased reach into his pocket. Deceased chased the accused from the taxi stand toward the barracks and around the corner of the barracks, after which they were out of sight of this witness. Douglas did not follow deceased and the accused closely. Deceased ran and Douglas "walked on". (R. 57-64). After defense had rested the court recalled Douglas who testified that at no time did he catch up with the deceased and the accused. When Douglas came around the corner of the barracks no one was there but deceased. Douglas saw no one standing in front of the door of the barracks, except the deceased who was bent over and who put his hand across the witness' shoulder and asked him to take deceased to the dispensary as the latter was cut. Neither the accused nor the first sergeant were there at that time. Douglas was walking at all times "just an ordinary walk" and did not see any scuffle around the barracks door. (R. 96-98).

Private Roosevelt Smith, a member of the same organization as the accused, testified that he knows the accused and that about 2245 hours

29 August 1949, the accused ran into the barracks building of "C" Company, 373rd Infantry, just as the witness got to the top of the stairs leading from the cellar. The first sergeant was standing in the doorway at the time. The accused grabbed the first sergeant by the arm and stated that two men were trying to kill him (R. 74). At that time "the two men started coming closer." The steps to the cellar are inside the barracks about three feet from the door. Smith "went back downstairs" because the accused was coming in so fast "I jumped back downstairs." A few minutes later Smith returned and saw the accused on the ground and two men were kicking and hitting him (R. 74). He testified:

"Q. The next time you saw those two men Hicks was on the ground and these two men were at him and one was on top of him?

A. Hicks was between the garbage can and the chain; one was on one side of him and one in front of him.

Q. One was kicking and one was hitting?

A. Yes.

Q. You saw no knives?

A. No.

Q. Did you see any knife in the hand of Hicks?

A. No.

Q. See any knife at all?

A. No." (R. 77).

The accused tried to get up. "He had one hand on the garbage can." (R. 77). Upon being recalled by the court after the defense had rested, Smith testified that subsequent to the fight the accused again ran into the building. Smith reiterated that at no time did he see anyone with a knife. He stated that the accused "hollered, 'these two men are trying to kill me'." (R. 103).

Sergeant Alfred L. Metoyer, Sr., a member of accused's company, testified that about 2330 hours 29 August 1949, he noticed a crowd in front of the barracks and found a man lying on the opposite side of the street and administered first aid to him "until the medics arrived." The wounded man had a cut "about as long as a man's three fingers across" from which the blood was "gushing." This witness found a small piece of bandage on top of the cut when he arrived and "pushed it down in the hole to stop the bleeding." The man was unconscious (R. 65-66).

The prosecution introduced additional evidence to the effect that the area was thoroughly searched between 0145 hours and 0300 hours

30 December and that no knife or sharp object which might have accidentally inflicted the wound was found in the vicinity. Photographs of the body of deceased were admitted in evidence, together with a photograph of the blood-spotted area immediately in front of the entrance to "C" Company barracks (R. 81, 82; Pros. Exs. 4-7).

Master Sergeant Carl H. Brown, Sr., a CID agent, testified that he interviewed the accused during the early morning hours of 30 August. The accused was first advised of his rights under the 24th Article of War. Brown noticed that the accused's left trouser leg had a snag above the knee and that the trousers were dirty. The accused admitted the clothing was the same he had worn earlier that day and on the previous evening. He changed his clothing in Brown's presence and gave his trousers and shirt to Brown. Brown noticed no "lacerations of the shirt or trousers other than the snag in the knee." Accused's body bore no marks except a small bruise on the left knee slightly below the knee-cap. When asked if he had been out that evening accused answered "No" and when asked if he knew anything of the incident involving a man who had been carried to the hospital that night as the result of "a fracas in front of the barracks, he said that he knew nothing of the circumstances. In order to make us believe that he insisted on taking a polygraphic examination." The outer clothing taken from the accused was admitted in evidence (R. 68-70; Pros. Ex. 8).

Private Willie Springs, at 2310 hours, on 29 August 1949, was brought by ambulance to the 57th Field Hospital, Giessen, Germany. The ambulance driver removed Springs' clothes. The shirt was cut and there was blood on it at the time. The trousers were also cut (R. 38; Pros. Exs. 2 and 3). Springs was examined by Captain Polcyn, M.C., 2nd Hospital Unit, 57th Field Hospital, who made the diagnosis:

- "1. Wound, lacerated, left inguinal region.
2. Wound, lacerated left greater saphenous vein.
3. Anoxemia, secondary to diagnosis 2."

Springs died as the result of said injuries at 0015 hours 30 August 1949 (R. 9).

4. Evidence for the Defense.

Master Sergeant Stubblefield testified that he is First Sergeant of Company "C", 373rd Infantry and that at approximately 2245 hours, 29 August 1949, he was standing at the entrance to the "billets" of Company "C" at which time he saw two men pursuing the accused toward Company "C" barracks. Each of these two men had a knife in his hand and each was striking at the accused. The accused had nothing in his hands (R. 86, 88, 92, 94). As the accused approached he shouted to Sergeant Stubblefield that the men were trying to "cut him or kill him." When the accused came closer to the building entrance he fell over the chain fence and the

deceased "jumped on Hicks with the knife in his hand." Deceased "was on him. Like two men wrestling ... Hicks was lying on his back pushing back with his knees and hands in that manner (indicating an attempt to rise from the ground)." Douglas was standing at the right of the accused with a knife in his right hand and kicking the accused. Douglas was at deceased's left (R. 86-89). The witness testified:

"Q. What were you doing while this was going on?

A. I yelled 'Break it up' and I moved over closer to try to get between the fellows to pull one of the guys off Hicks, but the man Springs was standing with a knife in his hand so I just yelled 'Break it up' several times; that is all I did. I went to the Orderly Room and called the guardhouse for the officer of the day or the sergeant of the guard to come over to give me some assistance and then I came back out of the orderly room.

Q. Before Hicks fell to the ground was he, at any time, in the entrance way to Company C, 373rd?

A. I do not remember Hicks going in the building." (R. 89).

* * * *

"Q. What happened after you saw Hicks on the ground and these two soldiers, Springs and Douglas assaulting him with a knife in their hands, what happened then?

A. All I saw was Hicks pushed the man off as if trying to fight him off, trying to get up.

Q. Did he succeed in getting up?

A. This man hesitated for half a second.

Q. What man?

A. This man that was injured. He got up and walked off.

Q. He walked off?

A. Yes.

Q. What did Hicks do?

A. Hicks got up.

Q. Where did he go?

A. I ordered him to his barracks to go to bed.

Q. Did you see anything in his hand at that time?

A. No.

- Q. What did the other two men do, Douglas, if you remember?
A. By this time Douglas had walked up the street, maybe ten or fifteen feet from the scene.
- Q. From you?
A. Yes sir.
- Q. Was he with Springs at that time?
A. No.
- Q. Then what happened?
A. Springs walked on up the street and this man Douglas waited for him and they stood there saying something, I don't know what they said. I saw him do this.
- Q. You saw Springs do what?
A. I saw Springs get up; he moved; he walked slightly out into the street back on the curb; by that time he met this man Douglas; then it just seemed like blood just fell out of somewhere. I ran up and I said this man is injured, we will have to get him to the dispensary right away. This man Douglas started to the dispensary with him and got to the far side near the curb of the street and that is where Springs went down and then I went to the orderly room to call the ambulance and had the first aid man come over to try and stop the man from bleeding." (R. 89-90).

On cross-examination Sergeant Stubblefield testified:

- "Q. How close were they when you saw them later on when Hicks was on the ground?
A. They were walking and almost got to me.
- Q. Running or walking?
A. They were running. When I first saw them they were cutting at Hicks, when they got closer to the other end of the building they came to a fast walk and Hicks continued to run and he stumbled back over the chain. This man who was injured jumped on him with a knife in his hand. This other man, Douglas, was standing to Hicks's right and was standing there with a knife in his hand.
- Q. Hicks was trying to get the knife away from these men?
A. Yes, that is the way it appeared to me.

Q. And these man looked like they were going to kill him?

A. That is the way it looked to me.

Q. Where did it look like Hicks was going?

A. Trying to go away." (R. 91-92).

This witness said nothing to the sergeant of the guard about the accused being involved in the incident (R. 93). He does not know what became of the knives (R. 94).

The accuser, who was also the accused's commanding officer, and the supervisory officer of the mess hall where the accused was assigned for duty, appeared as character witnesses for the accused. They testified that the accused was peaceful and that his reputation for truth and veracity was good. The commanding officer would like to have him back in the company if cleared of the charges (R. 82-85).

5. The accused was charged under Article of War 92 with unpremeditated murder and was found not guilty under Article 92 but guilty of voluntary manslaughter in violation of Article of War 93 by reason of the exception of the words "malice aforethought." After such exception there remained the words "willfully, feloniously and unlawfully," which charges the accused with voluntary manslaughter. In view of the holding of the Board it is not deemed necessary to further distinguish voluntary from involuntary manslaughter or discuss other lesser included offenses. Voluntary manslaughter is homicide intentionally caused and possesses all of the elements of murder unpremeditated except that of malice aforethought (CM 329585, Rogers, 78 BR 107; MCM, 1949, par. 180a).

Under the findings of guilty and the sentence adjudged by the court the prosecution was required to prove beyond a reasonable doubt that: (a) the accused unlawfully killed Private Willie Springs by cutting him with a knife as alleged; and (b) facts and circumstances as alleged indicating that the homicide amounted in law to voluntary manslaughter (MCM, 1949, par. 180a).

It is the view of the Board that the prosecution did not prove beyond a reasonable doubt that the accused inflicted the injury which resulted in the death of the accused's assailant. For this reason it is unnecessary to consider or discuss the law of self-defense.

It is the prerogative and the duty of the Board to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence the Board may arrive at conclusions

different from those of the court and reviewing authority notwithstanding the fact that their conclusions might otherwise be justified legally by the evidence appearing in the record of trial. The Board must itself be convinced of the accused's guilt beyond a reasonable doubt in order to conclude that the record of trial is legally sufficient to sustain the findings of guilty and the sentence adjudged (AW 50g; CM 335070, Brown, 2 BR-JC 39, 45).

The evidence is sufficient to support the inference that deceased received a mortal wound during the brawl in front of "C" Company barracks and that he died as the direct and proximate result thereof. There is no direct evidence that the accused inflicted the injury upon deceased. The findings of guilty must, therefore, be supported by circumstantial evidence sufficient to create an inference that the accused was the perpetrator of the mortal blow. Such inference must be sufficient to overcome the presumption of the accused's innocence.

"The rule as to reasonable doubt extends to every element of the offense. If, in a trial for assault with intent to kill, a reasonable doubt exists as to such intent, the accused can not properly be convicted as charged, although he might be convicted of the lesser included offense of assault. Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to that element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

* * * *

"A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inferences drawn from them." (MCM, 1949, par. 78a; underscoring supplied).

The inference, if any, that the accused possessed a knife at the time of the affray in front of "C" Company barracks must necessarily be based upon the testimony of deceased's "girl friend" and Douglas, his companion. Their testimony, if believed, merely proves the accused had a small pocket knife in his hand when at the taxi stand at the inception of the assault upon the accused. This testimony is contradicted by other prosecution witnesses who saw no knife in accused's possession at that time or subsequently. Prosecution witness Price related circumstances giving rise to the inference that deceased or Douglas

possessed a knife with which they were assaulting the accused during their pursuit of him, and during the entire fracas. The accused fell five times during his flight from deceased and Douglas. At the times he fell he was searching with one hand for his glasses and attempting to ward off the blows of his assailants with the other or was using both hands for assistance in arising so that he might elude his pursuers. The strong inference from this prosecution evidence is that the accused did not possess a knife or other weapon during his flight or when being attacked in front of "C" Company barracks. Such inference further supports the presumption of the accused's innocence. The inference, if any, generated by prosecution's evidence of the circumstances themselves, that accused inflicted the mortal blow causing the demise of deceased, is too weak to overcome the presumption of innocence and the inferences warranted by the circumstances disclosed in the evidence for the prosecution which fortify that presumption. Testimony of prosecution witnesses is that the accused at no time struck at or approached the deceased or Douglas.

Giving full credence to all the evidence, testimonial and otherwise, adduced by the prosecution, together with whatever evidence adduced by defense might be considered favorable to the prosecution's case, we find a failure to prove beyond a reasonable doubt that the demise of the deceased was caused by the accused.

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.

J. L. Charles, JAGC
Lewis F. Thull, JAGC
Lawrence L. Chandler, JAGC

CSJAGQ - CM 338753

1st Ind

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

TO: Commanding Officer, Wetzlar Military Post, APO 169,
c/o Postmaster, New York, New York

1. In the case of Private First Class Wilson Hicks (RA 34419557), Company C, 373rd Infantry Battalion, 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. Under the provisions of Article of War 50a(3), this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. When copies of the published order in the 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 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 338753).



E. M. BRANNON
Major General, USA
The Judge Advocate General

1 Incl
R/T

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

CSJAGV Sp CM 375

ZONE COMMAND AUSTRIA

U N I T E D S T A T E S)	Trial by Sp CM, convened at
)	Camp McCauley, Austria, 17-23
)	June 1949. Bad conduct
v.)	discharge (suspended) and
Recruit FRANK TURNER, JR.)	confinement for six (6)
(RA 6967706), Service)	months. Disciplinary
Company, 350th Infantry,)	Barracks.
Camp McCauley, Austria.)	

HOLDING by the BOARD OF REVIEW
GUILMOND, BISANT and LAURITSEN
Officers of the Judge Advocate General's Corps

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, under the provisions of Article of War 50g.
2. The accused was tried upon three Charges and Specifications, for absence without proper leave from about 0615, 11 May 1949 to about 1500, 26 May 1949, in violation of Article of War 61, for wrongfully taking without the consent of the owner and with the intent temporarily to deprive the owner of his property, a pair of paratroop jump boots, value \$10.86, in violation of Article of War 96, and breach of arrest on 5 June 1949, in violation of Article of War 69. He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction was introduced. He was sentenced to be discharged the service with a bad conduct discharge and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47(d). The officer exercising general court-martial jurisdiction, the Commanding General, Zone Command Austria, on 23 July 1949, approved the sentence and ordered it executed, but suspended the execution of the bad conduct discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. The result of the trial was promulgated in Special Court-Martial Orders Number 31, Headquarters, Zone Command Austria, APO 174, dated 23 July 1949.

3. The only question presented by the record of trial relates to Charge II and the Specification thereunder reading as follows:

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

Specification: In that Recruit Frank Turner Jr., Service Company, 350th Infantry, did, at Camp McCauley, Austria,

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on or about 9 May 1949, with intent to deprive the owner temporarily of his property, wrongfully and without the consent of the owner take a certain pair of Paratroopers jump boots, value \$10.86, property of the late Cpl Wallace W Zapalac.

From both the pleading and the evidence it is clear that Corporal Zapalac was dead at the time of the commission, by the accused, of the offense alleged in the foregoing Charge II and its Specification.

4. The question of alleging ownership of property, in a larceny indictment in civil practice, in a decedent's estate is the subject of an annotation in L.R.A. 1916E at page 785, wherein it is stated in pertinent part:

"Where property of a decedent's estate is the subject of larceny, the property cannot be laid in an indictment or information for the larceny in the estate of the deceased, nor in the deceased." (Underscoring supplied).

Cited as authority for the proposition that ownership of property in a larceny case cannot be laid in a deceased person are the cases of State v. Davis (1815) 4 N.C. (2 Car. Law Repos.) 291, and United States v. Mason, Fed. Case #15,738; 2 Cranch C.C. 410, decided in 1823 by the Circuit Court of the United States, May Term 1823 at Alexandria, wherein the court stated that a dead man cannot have goods and chattels, and therefore an indictment charging the stealing of goods and chattels of one deceased cannot be supported.

52 Corpus Juris Secundum, Larceny, Section 99, pages 916, 917 discusses the proposition in the following language:

"Decedent's Property. * * * Where an indictment charges larceny of the property of a named person, the fact that the evidence shows that such person was dead when the indictment was returned does not constitute a fatal variance where the person was alive at the time of the commission of the offense; but it has been held that, if the proof shows that the alleged owner died shortly before or after the theft and before the indictment was found, there is a fatal variance, as a dead man could not have goods and chattels." (Citing: Lawson v. State (1943) 68 Ga. App. 830; 24 S.E. (2d) 326).

And in 32 American Jurisprudence, Larceny, Section 113, at page 1025, 1026, it is stated:

"* * * The particular ownership of the property is charged in the indictment not to give character to the act of taking, but merely by way of description of the particular offense. It

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does not fall within the definition and is not of the essence of the crime. * * *

"* * * However, on the theory that death terminates ownership, an indictment or information is, except where authorized by statute, not good if it lays the ownership of the thing stolen in a deceased person or his estate, rather than in the personal representative or other proper person,* * *."

The Georgia court stated in part in Lawson v. State supra:

"Thus we think under the general rule in larceny cases where, as in the instant case, the evidence authorized a finding either that the money was stolen from Eaton a few minutes before his death or a few minutes after his death, and the indictment was not found until two months thereafter, and the allegation in the indictment was that the property stolen was the property of Eaton, and the evidence showed that at the time of the finding of the indictment Eaton was dead, there was a fatal variance between the allegata and probata for the reason stated in United States v. Mason, supra, 'that a dead man could not have goods and chattels; and that, therefore, the indictment could not be supported.'"

It is observed that in 32 American Jurisprudence supra, it is stated that particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense and that the question of ownership does not fall within the definition and is not of the essence of the crime. In accord with this view it was said in McKee v. State (Ga., 1946), 37 S.E. (2d) 700, 703:

"* * *

"* * * As we have pointed out, ownership is not an element of the offense of larceny, but its allegation is required so that the defendant may have notice of what he will be called on to meet at his trial, may be placed in a position to properly plead a prior conviction or acquittal should a second prosecution be instituted, and to negate his ownership of the property alleged to have been stolen.* * *."

In CM 319591, Pogue, 68 B.R. 385, 393, the Board of Review stated in part:

"* * * Also, the alleged owner in an embezzlement specification need not be a legal entity (CM 301840, Clarke, 24 B.R.(ETO) 203, 210; CM 272588, McGovern, 46 B.R. 305, 310; CM 276298, McNeil, 48 B.R. 287, 299)."

CSJAGV Sp CM 375

And in CM 325523, Hanni, 74 B.R. 285, 303, it is said:

"* * *

"* * * The allegation of ownership has only to do with the identification of the property made the subject of the larceny or embezzlement charge, the pleadings and proof being sufficient in this respect if it is shown that the alleged owner had the merest and most temporary form of special interest in the property in question (CM 319858, Correlle, and cases there cited)."

A case dealing with the embezzlement of company funds (CM 202366, Fox, 6 B.R. 129, 141) contains this observation by the Board of Review:

"The specification is inartificially drawn, since it places the title to the money embezzled in the 'company fund'. However, whether or not this term be technically accurate, there is no reason to suppose that accused was misled or left in ignorance of the offense with which he was charged, and the inaccuracy mentioned may be passed under the 37th Article of War as harmless."

The case closest in point to the case under consideration is believed to be that of CM 301840, Clarke, 24 B.R. (ETO) 203, 210 wherein it is stated in pertinent part:

"5.a. At the outset it is to be noted that ownership was alleged and proved in officers missing in action. This was tantamount to alleging ownership in them, if living, and if dead, their successors in ownership. A specification 'does not need to possess the technical nicety of indictments at common law' (7 Ops. Atty Gen. 604). Ownership may be alleged as unknown in larceny (2 Wharton's Criminal Law (12th Ed, 1932, sec. 1190, p. 1503); so also in embezzlement (Ibid, sec. 1293, p. 1603). Even had there been no allegations of ownership, the remaining allegations were 'in sufficient detail to enable accused to prepare his defense and to avoid the risk of being charged with the same offenses at a later date' (CM ETO 850, Elkins)."
(Underscoring supplied).

It appears from the foregoing that military jurisprudence has not insisted upon the technical nicety of statutory and common law pleading, particularly with respect to allegations of ownership in larceny and embezzlement specifications.

However, in this case the specification does not allege a larceny but instead the wrongful taking, without the consent of the owner and

CSJAGV Sp CM 375

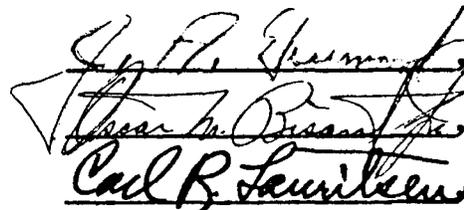
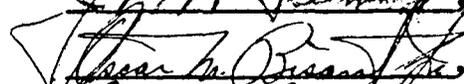
with the intent to deprive the owner temporarily of his property.

In military law this offense is a lesser included offense of larceny (par. 180g, p. 241, MCM, 1949). While the Board of Review is of the opinion that better pleading, both in cases of larceny under Article of War 93 and wrongful taking under Article of War 96, would indicate that ownership of a decedent's property should be alleged as "property of the estate of" or laid in the representatives of the estate of the decedent, or in the decedent's successor or successors in ownership, it is the further opinion of the Board of Review that Charge II and the Specification thereunder in this case does not fail to state an offense. It is manifest that consent of the owner was not and could not have been given to the accused in this case, and that the temporary deprivation of the property was a deprivation running to the decedent's successor or successors in ownership.

The Board of Review has also considered that the paratroop jump boots mentioned in Specification II and its Charge could very likely have been issue property with special ownership only in the accused. Aside from the fact that Government ownership was neither pleaded nor proved, it is not believed, assuming that the boots were the property of the United States, that this fact is material to the issues here.

5. Consequently, on the theory that the allegation of ownership is merely by way of description of the particular offense charged and is not of the essence of the crime of larceny (the offense alleged in Charge II and its Specification being admittedly a lesser included offense of larceny), and that the offense has been described in Charge II and its Specification with sufficient particularity to permit the accused to plead a prior conviction should a second prosecution be instituted, and on the reasoning expressed in CM 202366, Fox, and CM 301840, Clarke, the Board of Review is of the opinion that the Specification of Charge II in this case properly alleges an offense and that there has been no fatal variance in the allegation of ownership of the property mentioned therein as being the "property of the late Corporal Wallace W. Zapalac."

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

 J.A.G.C.
 J.A.G.C.
Carl R. Lauritzen J.A.G.C.

CSJAGV Sp CM 375

1st Ind.

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

To: Commanding General, Zone Command Austria, APO 174, c/o Postmaster,
New York, New York

In the case of Recruit Frank Turner, Jr. (RA 6967706), Service Company, 350th Infantry, Camp McCauley, Austria, attention is invited to the foregoing authenticated copy of the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

FOR THE JUDGE ADVOCATE GENERAL:



WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

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

CSJAGI SP CM 765

UNITED STATES)

v.)

Recruit GEORGE L. MASON
(RA 37295972), Company K,
351st Infantry.)

TRIESTE UNITED STATES TROOPS

Trial by SP. C. M., convened at
Opicina, Free Territory of Trieste,
9 and 13 September 1949. Bad
Conduct Discharge, forfeiture of
fifty dollars (\$50.00) pay per month
for six (6) months and confinement
for six (6) months. The TRUST
Stockade.)

HOLDING by the BOARD OF REVIEW
HILL, JOSEPH and SPRINGSTON
Officers of the Judge Advocate General's Corps

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 under the provisions of Article of War 50g.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Recruit George L Mason, Company K, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 0100 hours 25 August 1949 have in his possession and use, a certain instrument purporting to be his official pass, knowing the same to be not his own.

Specification 2: In that Recruit George L Mason, Company K, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 25 August 1949 wrongfully strike Baccia Lucio a V.G. Policeman in the face with his fist.

He pleaded not guilty to the Charge and both Specifications. He was found guilty of the Charge and Specification 1 thereunder and guilty of Specification 2 except the words, "25 August," substituting therefore, respectively, the words, "16 August," of the excepted words, Not Guilty, of the substituted words, Guilty.

CSJAGI SP·CM 765

Evidence of one previous conviction was introduced. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit fifty dollars pay per month for six months, and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47(d). The officer exercising general court-martial jurisdiction, the Commanding General, Trieste United States Troops, APO 209, U. S. Army, approved the sentence, designated the TRUST Stockade and Training Center as the place of confinement, and forwarded the record of trial for action under Article of War 50g.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 2 of the Charge and the Charge. The only questions requiring consideration are whether it is legally sufficient to support the finding of guilty of Specification 1 and the sentence.

4. It is well settled that every specification, in order to support a finding of guilty of a crime, must set forth an offense and that where the act or acts alleged in the specification do not describe an offense, per se, words of criminality must be used such as "wrongfully," "unlawfully" or "without authority." (CM 316886, Chaffin, 66 BR 97; CM 319573, O'Brien, 68 BR 381; CM 325541, Morgan, 75 BR 409). In the instant case, the alleged possession and use of the pass are not accompanied by words descriptive of criminality nor by words from which criminality may be "reasonably implied" (see par 87b, p 92, MCM, 1949). There is no allegation that the possession or use was wrongful, unlawful or unauthorized, or that there was any intent to defraud or deceive. The imagination need not be greatly taxed in order to discover situations in which the acts alleged would not be criminal. In CM Morgan, supra, it was held that:

"* * * it is not sufficient that a criminal pleading may or may not state an offense, according to whatever interpretation the beholder may choose to place upon it. It must, in order legally to support a conviction of crime, unfailingly and unequivocally set forth an offense, without regard to whatever proof may appear in the record, and cannot, in any manner, be open to an interpretation that it may decry acts which are not subject to a criminal penalty." * * *

The Board is compelled to conclude that in the absence of words importing an act of criminality, as is in the case here, the finding of guilty as to Specification 1 of the Charge may not be sustained, irrespective of the proof offered, as held in the Chaffin case. "Such allegations, if omitted, may not be supplied by the proof" (VI Bull. JAG 177; CM 318596, Volante, 67 BR 363, 364).

CSJAGI SP CM 765

The maximum sentence which may be supported by the finding of guilty of Specification 2 is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

5. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support the findings of guilty of Specification 2 and of the Charge, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six (6) months and forfeiture of fifty dollars pay per month for six (6) months.

C. P. Hill, J. A. G. C.

R. H. Joseph, J. A. G. C.

George B. Springston, J. A. G. C.

CSJAGE SP CM 765

1st Ind

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

TO: Chairman, the Judicial Council, Office of The Judge Advocate General

In the foregoing case of Recruit George L. Mason (RA 37295972), Company K, 351st Infantry, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support the findings of guilty of Specification 2 and of the Charge, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six (6) months and forfeiture of fifty dollars (\$50.00) pay per month for six (6) months. Pursuant to Article of War 50e(4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl
Record of trial



FRANKLIN P. SHAW
Major General, USA
The Assistant Judge Advocate General

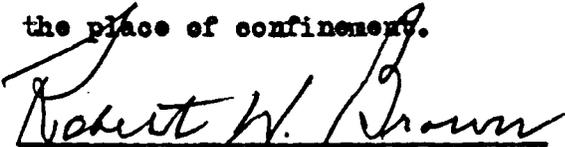
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

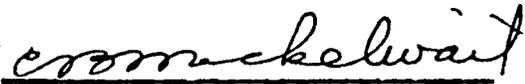
THE JUDICIAL COUNCIL

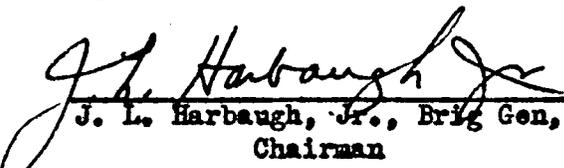
SP CM 765

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit George L. Mason, RA 37295972, Company K, 351st Infantry, upon the concurrence of The Judge Advocate General, the finding of guilty of Specification 1 of the Charge is disapproved. Only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of Fifty Dollars (\$50.00) pay per month for six months is confirmed and will be carried into execution. An appropriate guardhouse is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

17 February 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

17 February 1950

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

CSJAGQ SP CM 928

UNITED STATES)

v.)

Recruit WILLARD C. BASSO
(RA 13280866), Head-
quarters Section, 2118th
Area Service Unit, Camp
Campbell, Kentucky.)

CAMP CAMPBELL

Trial by SP CM, convened at
Camp Campbell, Kentucky, 6
October 1949. Bad conduct
discharge, forfeiture \$50 per
month for six (6) months and
confinement for six (6) months.
Camp Stockade.

HOLDING by the BOARD OF REVIEW
SEARLES, CHAMBERS and HUNTER
Officers of The Judge Advocate General's Corps

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 under the provisions of Article of War 50e.

2. The accused was tried by special court-martial convened by the Commanding Officer, Headquarters, 76th Heavy Tank Battalion, Camp Campbell, Kentucky, on 6 October 1949, upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Willard C. Basso, Headquarters Section, 2118th Area Service Unit, Camp Campbell, Kentucky (then a member of Company M 3d Battalion, 506th Airborne Infantry Regiment, Camp Breckinridge, Kentucky) did, at Camp Breckinridge, Kentucky, on or about 1 December 1948, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Hopkinsville, Kentucky, on or about 10 August 1949.

The accused pleaded not guilty to the specification of the charge and the charge. He was found guilty of the specification, except the words "did, at Camp Breckinridge, Kentucky, on or about 1 December 1948, desert the service of the United States, and did remain absent in desertion", and substituting therefor, respectively, the words "did, at Camp Breckinridge, Kentucky, on or about 1 December 1948, absent himself

without leave from the service of the United States, and did remain absent without leave", of the excepted words not guilty, of the substituted words, guilty. He was found not guilty of the charge, but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as the reviewing authority may direct for six months. The convening authority approved only so much of the sentence as provides for a bad conduct discharge, confinement at hard labor for six months, and forfeiture of \$50 per month for six months, and forwarded the record of trial for action under Article of War 47d. The reviewing authority approved only so much of the sentence as adjudges a bad conduct discharge, forfeiture of \$50 pay per month for six months, and confinement at hard labor for six months. The Camp Stockade, Camp Campbell, Kentucky, was designated as the place of confinement, and the record of trial was forwarded for action under Article of War 50e.

3. The only question presented by the record is whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat. 627), had the power to adjudge a bad conduct discharge for an unauthorized absence (AW 61) commencing prior to 1 February 1949 and terminating more than sixty days thereafter.

4. It has been held by the Judicial Council (SP CM 9, McNeely, 2 BR-JC 363, 8 Bull JAG 115) that a special court-martial does not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949.

The unauthorized absence of the accused commenced prior to 1 February 1949 and continued for a period in excess of sixty days subsequent thereto. If the offense is a continuing offense, the unauthorized absence having continued more than sixty days subsequent to 1 February 1949, the special court-martial which tried the accused legally could have adjudged a bad conduct discharge (par 117g, MCM, 1949; AW 13). If the offense is not a continuing offense it follows that the special court-martial exceeded its power in adjudging a bad conduct discharge.

Paragraph 67, page 62, Manual for Courts-Martial, U. S. Army, 1949, provides:

"*** Absence without leave (A. W. 61) and desertion (A. W. 58) are not continuing offenses for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses were committed in time of war. For these purposes the offenses are committed, respectively, on the date the person * * * so absents himself or deserts."

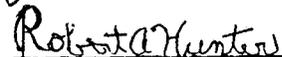
The Board in a recent case (SP CM 102, Dillenbeck, 8 Bull JAG 115) held:

"To say that an offense is not continuing in so far as the statute of limitations is concerned, but is continuing in so far as authorizing the imposition of an additional penalty by a court not hitherto authorized to impose it because it extends beyond the date of the law granting such authority, although in both instances commencing on the same date, is sheer sophistry. It is, consequently, the opinion of the Board of Review that absence without leave is not a continuing offense in so far as to legalize a bad conduct discharge adjudged by a special court martial where the offense had its inception prior to 1 February 1949 and continuing for more than sixty days after that date."

It is now well settled that absence without leave and desertion are not continuing offenses for the purpose of determining whether a special court-martial has the power to adjudge a bad conduct discharge (SP CM 519, Garza, October 1949; SP CM 751, Ellis, November 1949; SP CM 938 Cordova, November 1949).

On the basis of the holdings in the above cited cases the Board holds that the special court-martial in the instant case was without power to adjudge a bad conduct discharge.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50.00 pay per month for six months.

 J.A.G.C.
 J.A.G.C.
 J.A.G.C.

CSJAGQ - SP CM 928

1st Ind

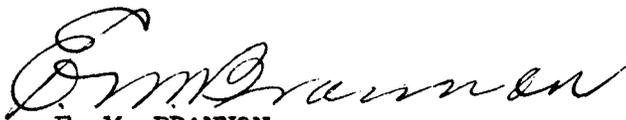
JAGO, Dept of the Army, Wash 25, D. C.

TO: Commanding General, Camp Campbell, Camp Campbell, Kentucky

1. In the case of Recruit Willard C. Basso (RA 13280866), Headquarters Section, 2118th Area Service Unit, Camp Campbell, Kentucky, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50.00 pay per month for six months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of \$50 pay per month for six months. Under Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with this holding.

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 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:

(SP CM 928).



E. M. BRANNON
Major General, USA
The Judge Advocate General

1 Incl
Record of Trial

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

CSJAGQ - SP CM 1144

U N I T E D S T A T E S

v.

Recruit LLOYD C. KELLEY
(RA 17254085), Battery B,
5th Antiaircraft Artillery
Automatic Weapons
Battalion (Mobile), Fort
Bliss, Texas.

AAA AND GUIDED MISSILE CENTER

Trial by SP CM, convened at Fort
Bliss, Texas, 29 November 1949.
Bad conduct discharge, for-
feiture \$50 per month for three
(3) months and confinement for
three (3) months. Post Stockade.

HOLDING by the BOARD OF REVIEW
SEARLES, CHURCHWELL and CHAMBERS
Officers of the Judge Advocate General's Corps

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, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Lloyd C. Kelley, Battery "B"
5th Antiaircraft Artillery Automatic Weapons Battalion
did, at Fort Bliss, Texas on or about 2 May 1949, desert
the service of the United States, and did remain absent
in desertion until he was returned to military control
at Kansas City, Missouri, on or about 8 October 1949.

The accused pleaded not guilty to the specification and charge, and was found guilty of the specification only as to absence without leave and not guilty of the charge under the 58th Article of War, but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars of his pay per month for three months and to be confined at hard labor at such place as proper authority may direct for three months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47(d). The reviewing authority approved the sentence, designated the Post Stockade, Fort Bliss, Texas, as the place of confinement and forwarded the record of trial pursuant to Article of War 50e.

3. The only question to be determined is the legal sufficiency of the record of trial to support the findings of guilty and the sentence in view of the cross-examination of the accused with respect to the offense itself, he not having testified on direct examination concerning the offense but only as to the poor health of his grandmother and his concern therefor.

4. The record of trial shows that the accused after being informed of his rights relative to testifying in his own behalf, was sworn and testified on direct examination as follows:

"DIRECT EXAMINATION

"Questions by defense:

A Recruit Kelley, are your mother and father living?

A No, sir.

Q I believe you told me previously that they were killed.

PROSECUTION: Objection. This is not proper.

DEFENSE: The defense agrees and will withdraw that question.

Questions by defense continue:

Q Under what circumstances were your mother and father killed?

A In a tornado, sir.

Q In what year?

A 1942, sir.

Q Approximately how old were you at that time?

A Around 13 or 14, sir.

Q Do you have any sisters or brothers living?

A No, sir.

Q When your mother and father were killed, what was your disposition? Did you go to live with a relative?

A Yes, sir, I went to live with my grandmother.

Q To the best of your knowledge, what health has your grandmother been in the last six months? Has she been in poor health?

A Yes, sir.

Q Have you on any occasion worried about the welfare of your grandmother?

A Yes, sir." (R 37-38).

Thereafter, on cross-examination by the prosecution, the following took place:

* * * * *

Q Kelly, you stated that your grandmother was in bad health, is that correct?

A Yes.

Q Did you visit your grandmother between May 2 and October 8?

DEFENSE: Objection. That testimony would tend to incriminate the witness. The defense feels as though he should not be required to answer this question.

PROSECUTION: On page 177 of the Manual, it says: 'The accused cannot avail himself of the privilege against self-incrimination, to escape proper cross-examination concerning an offense about which he has testified.'

PRESIDENT: Subject to objection by any member of the court, the objection is overruled.

Questions by the prosecution continue:

Q Did you visit your grandmother from 2 May to 8 October 1949?

A Yes, sir.

Q Were you there constantly?

A You mean all the time, sir?

Q Yes, or tell me how long you were with her.

A Practically all the time, sir.

Q Where does your grandmother live?

A In Loring, Missouri. *****" (R. 41-42).

Paragraph 135b, page 178, Manual for Courts-Martial, 1949, provides:

"***** If an accused testifies on direct examination only as to matters in extenuation and having no bearing on the issue of his guilt or innocence of any offense for which he is being tried, as when he testifies as to incidents and duration of his military service or as to his family responsibilities and difficulties, he may not be cross-examined on the issue of his guilt or innocence and his cross-examination must be so limited. *****"

It is well settled that an accused may testify under oath for a limited purpose without being subjected to examination on the merits of the case and that it is fatal error to refuse that privilege even though the guilt of the accused is established by independent compelling evidence (CM 275738, Kidder, 48 BR 145; CM 326450, Baez, 75 BR 231, 6 Bull JAG 289; CM 330132, Trease, 78 BR 267; CM 331360 Teaff, 80 BR 29).

The only exception to the foregoing rule is when the accused has pleaded guilty or the cross-examination pertains to facts relevant to his credibility as a witness (CM 310076, Peterson, 61 BR 177).

Although the witness did not take the stand expressly for a limited purpose the Board of Review in CM 330132, Trease, 78 BR 267, 272, held:

"The Board of Review is of the opinion, however, that such a distinction as would require a statement of limitation of examination is of no consequence. Only when an accused takes the witness stand and testifies in denial or explanation of any offense, may his cross-examination cover the whole subject of his guilt or innocence of any offense charged (par. 121b, MCM, 1928), and, as has been stated, invocation of the rule is not dependent upon a previous representation that the examination would be confined to a limited purpose, but in our view, must be determined solely upon the scope of the direct examination, without reference, however, to other rules touching credibility.

* * * * *

"***** The legal right of an accused to remain silent upon the issue of his guilt is of such a vital and fundamental character, that no trial by court-martial in which this right is violated can be judicially deemed to have been a fair trial. It follows that the action of the court, in compelling accused to testify on the issue of his guilt, constituted substantial error which cannot be considered as falling within the class of non-prejudicial error covered by the 37th Article of War."

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

CSJAGU SP CM 1144

9 March 1950

U N I T E D S T A T E S

AAA AND GUIDED MISSILE CENTER

v.

Recruit LLOYD C. KELLEY,
RA 17254085, Battery B,
5th Antiaircraft Artillery
Automatic Weapons Battalion
(Mobile), Fort Bliss, Texas

Trial by SP CM, convened at Fort
Bliss, Texas, 29 November 1949.
Bad conduct discharge, forfeiture
\$50 per month for three (3) months
and confinement for three (3)
months. Post Stockade.

Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of the Judge Advocate General's Corps

1. The record of trial and the holding by the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council pursuant to Article of War 50e(4). The Judicial Council submits this its opinion to The Judge Advocate General.

2. The accused was brought to trial before a Special Court-Martial for desertion, in violation of Article of War 58. He was found guilty of absence without leave from about 2 May 1949 to about 8 October 1949, in violation of Article of War 61. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars of his pay per month for three months and to be confined at hard labor for three months. The sentence was approved by the convening authority, who pursuant to Article of War 47d, forwarded the record of trial to the General Court-Martial authority. The latter authority approved the sentence, but pursuant to Article of War 50e, the order directing the execution of the sentence was withheld.

3. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence on the ground that inasmuch as the accused did not testify on direct examination concerning the offense with which he was charged, his cross-examination concerning his visit to his grandmother's home during his unauthorized absence and its location, constituted fatal error which could not be passed under the provisions of Article of War 37.

4. The pertinent testimony of the accused is set out in the holding of the Board of Review and will not be repeated here. Suffice it to say that accused elected to take the stand as a witness in his own behalf without limitation and testified on direct examination that his father and mother were killed when he was thirteen or fourteen years old and that thereafter he went to live with his grandmother. During the last six months his grandmother had been in poor health and upon occasions he had been worried about her welfare. On cross-examination over objection by the defense counsel the accused admitted he visited his grandmother at Loring, Missouri, during most of the period between 2 May and 8 October 1949 and that Loring was about forty miles from Springfield, Missouri, the place where he enlisted.

Just before the accused took the stand a defense witness, Private Claude M. Buckner, testified that on or about 1 May 1949 the accused had told him that his grandmother was sick and that he intended to go home but would be back within two weeks. The announced purpose of this testimony was to prove that the accused did not intend to desert (R 30).

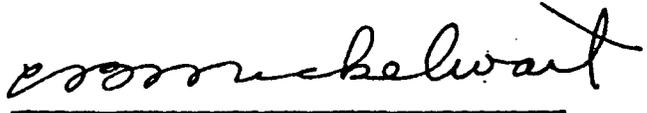
When an accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. On the other hand if an accused testifies on direct examination only as to matters in extenuation and having no bearing on the issue of his guilt or innocence of any offense for which he is being tried, as when he testifies as to the incidents and duration of his military service or as to his family responsibilities and difficulties, he may not be cross-examined on the issue of his guilt or innocence and his cross-examination must be so limited (MCM 49, par 135b, pl77, 178).

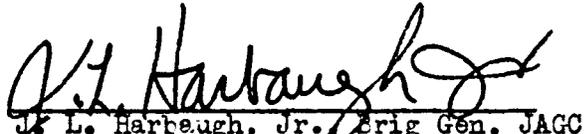
The president of the court permitted the cross-examination of the accused on the ground that the accused's testimony regarding the illness of his grandmother was in explanation of his offense (R 40). The Judicial Council is of the opinion that there is merit in the position taken by the court. The testimony of accused in the light of the testimony of the preceding defense witness, Buckner, explains the reason for the unauthorized absence of the accused, to wit, the illness of his grandmother.

To hold that the cross-examination of the accused was error, it would be necessary to find not only that accused's direct testimony of the illness of his grandmother was merely in extenuation but also that such testimony had no bearing on the issue of his innocence or guilt of the offense charged. Such a holding would in effect ignore the theory of the defense that accused temporarily absented himself because of the illness of his grandmother. The statements of accused on direct examination corroborate the testimony of Buckner that the accused did not intend to desert. This was one of the main issues of the offense charged. Thus, it cannot be said that accused's testimony on direct examination was merely in extenuation without any bearing on his innocence or guilt of desertion. Accordingly, the Judicial Council is of the view that the cross-examination of the accused did not constitute error.

5. For the reasons stated the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr. Brig Gen, JAGC
Chairman

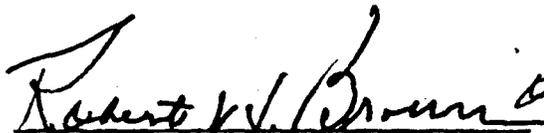
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

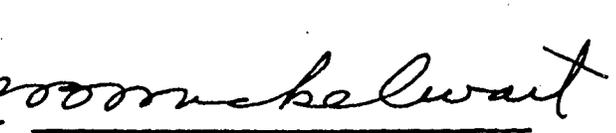
THE JUDICIAL COUNCIL

SP CM 1144

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit Lloyd C. Kelley,
RA 17254085, Battery B, 5th Antiaircraft Artillery Automatic
Weapons Battalion (Mobile), Fort Bliss, Texas, upon the
concurrence of The Judge Advocate General the sentence is
confirmed and will be carried into execution. An appropriate
guardhouse is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

9 March 1950

I concur in the foregoing action.


E. M. BRANNON
Major General, USA
The Judge Advocate General

10 March 1950

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

CSJAGN-SpCM 1213

7 FEB 1950

UNITED STATES)

v.)

Recruit LAWRENCE HOLLINGS, JR.)
(RA 12257611), Company C,)
365th Infantry Regiment.)

9TH INFANTRY DIVISION

Trial by Sp. c. m., convened at
Fort Dix, New Jersey, 17 and 23
November 1949. Bad conduct dis-
charge, forfeiture of \$50.00 per
month for six (6) months and con-
finement for six (6) months. Post
Stockade.

HOLDING by the BOARD OF REVIEW
YOUNG, LIVINGTON and TAYLOR
Officers of the Judge Advocate General's Corps

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 under the provisions of Article of War 50g.

2. Before a special court-martial convened by the Commanding General, 9th Infantry Division, Fort Dix, New Jersey, on 17 November 1949, the accused was arraigned and pleaded not guilty to two Specifications of absence without leave from about 5 July 1949 to about 30 August 1949 and from about 5 September 1949 to about 28 October 1949, in violation of Article of War 61. Shortly after the commencement of its case the prosecution, for the purpose of obtaining additional evidence, requested and was granted a continuance, the court to meet at the call of the president (R. 8). Thereafter the court reconvened, pursuant to adjournment, on 23 November 1949, the accused not being present. The prosecution introduced documentary proof to the effect that the accused was absent without leave from his organization as of 0500 hours 21 November 1949 (Pros. Ex. 4). The court proceeded with trial and the accused was found guilty of both Specifications and the Charge, and was sentenced to be discharged from the service with a bad conduct discharge, to be confined at hard labor at such place as the reviewing authority might direct for six months and to forfeit \$50.00 per month for six months. The reviewing authority approved the sentence,

designated the Post Stockade, Fort Dix, New Jersey, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The evidence adduced at the trial is legally sufficient to support the findings of guilty and the sentence. The only question for consideration is whether the absence of the accused, which was prima facie voluntary, terminated the court's jurisdiction to proceed with the trial of the accused.

4. The Manual for Courts-Martial, 1949, provides in pertinent part:

"The presence of the accused throughout the proceedings in open court is, unless otherwise stated, essential. See 10 (Effect of Escape), and 83 (Revision)" (par. 55, p. 51).

Paragraph 10, page 10 (supra), provides:

"The escape of the accused after arraignment and during trial does not terminate the jurisdiction of the court, which may proceed with the trial notwithstanding his absence."

Since the Manual makes no express provision as to the effect of absence without leave of the accused after arraignment and during trial we must necessarily answer such question in determining the jurisdiction of the court.

In CM 209900, Benjamin, 9 BR 149, the Board of Review pointed out that the reason for the rule on escape was, to quote Winthrop, page 393:

"The court, having once duly assumed jurisdiction of the offence and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath."

The Board of Review in the Benjamin case cited Diaz v. United States, 223 U.S. 442, 455, which states the rule as follows:

"* * * But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but,

on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."

The Diaz case furnished the foundation for Rule 43, Rules of Criminal Procedure for the District Courts of the United States (post).

The Benjamin case, which held, on the facts, that the action of the court in proceeding with the trial in the absence of the accused injuriously affected his substantial rights because he had not waived his right to be present, is clearly distinguishable from the instant case. The president of the court in the Benjamin case, upon the court sustaining a plea in bar of trial, announced in the presence of the accused that the case was dismissed. Thereupon the accused was released from confinement and on the following day absented himself without leave. The Board of Review was of the opinion that the principles of waiver could apply only where a person intentionally surrendered a right with knowledge that the right existed and could be exercised. Since the accused could not be charged with actual or presumptive knowledge that his trial would continue, no waiver had occurred. On the other hand, in the instant case, the action of the court in continuing for an indefinite period was, as also stated in the Benjamin case, "* * * the usual one in which adjournment for further evidence or similar interruption of the trial leaves no uncertainty as to future trial and compels an inference of knowledge that the trial will be resumed."

The Board of Review in CM 325056, Balucanag, 74 BR 67, 73, held that hearsay did not gain substantive effect merely because the accused failed to object to its reception in evidence. The Board stated, however, that the right of confrontation may be waived or, more properly speaking, forfeited, by an act of accused, such as where, after arraignment and during trial, the case not being a capital one, he voluntarily absents himself while being aware that his trial is about to continue (citing the 1928 Manual and the Benjamin and Diaz cases).

Finally, Rule 43, Rules of Criminal Procedure for the District Courts of the United States, (act of 29 June 1940, c. 445, 54 Stat. 688, 18 U.S.C. 3434), provides in part:

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after

the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

The essential question in every case where an accused voluntarily absents himself during trial is whether it is reasonable to conclude that he was aware that the trial had not terminated and was to resume and continue through findings and, if appropriate, sentence. The fact that the adjournment was for an indefinite period is merely one factor to be considered in determining this essential question. Where, as here, the express purpose of the adjournment was to afford an opportunity to secure additional evidence, it is thoroughly reasonable to charge the accused with knowledge that the court would reconvene at some time after the evidence was obtained and the president notified, for the very purpose of receiving the evidence and completing the trial.

In view of the foregoing it appears that the provision of the Manual relating to "escape" should be given the construction which will make it most logical and effective to fulfill the results intended. In so doing we construe "escape" for the purpose used herein, as including voluntary absence without leave. Any other construction virtually would require the responsible Commanding Officer to confine all accused persons between sessions of the trial.

5. For the reasons stated, the Board of Review holds that the absence of the accused did not terminate the court's jurisdiction to proceed with the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence.

Chas. L. Young, J. A. G. C.
W. J. [unclear], J. A. G. C.
John F. Taylor, J. A. G. C.

CSJAGN-SpCM 1213

1st Ind

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

TO: Commanding General, 9th Infantry Division, Fort Dix, New Jersey.

1. In the foregoing case of Recruit Lawrence Hollings, Jr. (RA 12257611), Company C, 365th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now 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:

(SpCM 1213).

FOR THE JUDGE ADVOCATE GENERAL:



WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

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