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GENERAL
OF THE ARMY

BOARD OF
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HOLDINGS
OPINIONS
REVIEWS

VOL. 8

1951

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

JAGK - CM 341028

17 APR 1950

UNITED STATES v. Private RAYMOND PICKENS (RA 18260451), Battery "B", 76th Antiaircraft Artillery Automatic Weapons Battalion (Self Propelled), APO 713.	YOKOHAMA COMMAND Trial by G.C.M., convened at Yokohama, Honshu, Japan, 10 March 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for fifty (50) years. A Federal Institution.

REVIEW by the BOARD OF REVIEW
McAFEE, WOLF and BRACK
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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Raymond Pickens, Battery B, 76th Antiaircraft Artillery Automatic Weapon Battalion (Self-Propelled), did at Ebina, Japan on or about 23 November 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Ko Kamiyo, alias Sachiko, alias Toyoko, a human being, by striking her on the head with a rock.

He pleaded guilty to the specification, except the words "with malice aforethought, willfully, deliberately," "and with premeditation", substituting therefor, between the words "Feloniously, unlawfully" the word "and", not guilty of the 92d Article of War but guilty of the 93d Article of War. He was found guilty of the charge and specification, except the words "and with premeditation." Evidence of one previous conviction 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 fifty years. The reviewing authority approved the sentence and designated a penitentiary, reformatory or other such institution as the place of confinement and directed that the prisoner be committed to the custody of the Attorney General or his designated representative for classification,

treatment and service of sentence of this confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. Evidence

a. For the Prosecution

It was stipulated by and between the prosecution, the defense and the accused that the person known as "Ko Kamiyo is also known as Sachiko and Toyoko" (R 19).

Two Japanese nationals, Fumiye Iida and Kimi Inouye testified that they had known Ko Kamiyo, alias Sachiko, alias Toyoko (deceased), for about one month prior to 23 November 1949. Fumiye Iida last saw Sachiko alive at witness' home at about 7:00 p.m. on 23 November 1949, and both she and Kimi Inouye saw the lifeless body of Sachiko at about 10:00 a.m. on 24 November 1949 lying in a "large hole" in a field located about a three-minute walking distance from the Ebina Railroad Station. Both witnesses identified Prosecution Exhibit 1 (photograph of a woman's body lying in a gully) as an exact representation of Sachiko's body as it appeared when they first saw it on the morning of 24 November 1949 (R 19-22, 23-24).

Benjamin S. Williams, identification chief of the 44th Criminal Investigation Division, APO 503, photographed the scene pictured in Prosecution Exhibit 1 at Ebina, Honshu, Japan, at about 4:00 p.m. on 24 November 1949 and he testified that it is an exact representation of the body of a Japanese girl as it looked at the time the picture was taken. He also photographed the scene pictured in Prosecution Exhibit 2, which is a close-up view of the same girl taken at the same time and place and it is an exact representation of the upper portion of the body as it looked at the time the picture was taken. Both exhibits were received in evidence over objection by the defense (R 18, 28-29).

Dr. Yasuo Fujii, coroner for the Yokohama District Court, performed an autopsy on a female corpse which he first saw at about 4:30 p.m. on 24 November 1949, lying in a gully of a field near the Ebina Railroad Station. He identified Prosecution Exhibit 1 as a correct representation of the body when he first saw it. He directed the removal of the corpse to a house in the vicinity where he performed the autopsy. His autopsy revealed that the head and face of the corpse were stained with blood and mud. Her face was severely swollen and there were bruises on her skull and face. A contusion about four centimeters in length was found on the front of the skull. Both eyes were swollen to a great extent and the skin was purple in color. The right cheek had many contusions and was also swollen. The mouth was swollen and the front and right lower jaw were fractured. The lower front teeth were broken and found in the mouth and blood was also found inside the mouth. The right ear was swollen and contained blood. A contusion was detected behind the right ear. A subcutaneous wound about eight centimeters in length and three centimeters in width was found on the left shoulder and there were

subcutaneous injuries and abrasions on the right and left shins. Internally, the autopsy revealed three fractures on the base bone of the skull behind the eye sockets and the connective tissues around the eye sockets were "pushed back" toward the brain. The cerebrum and cerebellum were "wrapped with a bloody gelatin substance" and there was also a contusion of the brain on her left frontal skull. This injury was caused by an outside force being applied to this location. In the opinion of the witness the wounds described could be said to be fatal, that they were caused by a hard blunt object, and that a person receiving head injuries of this type could not have lived for over a half hour (R 10-18).

Private Obbie Hayes, a friend of the accused, met the accused on 7 December 1949 at the "76th Club" in Zama. Concerning this meeting the witness testified:

> "A I was sitting at a table and Pickens came up to the table. We started talking. I think Pickens asked me to borrow a hundred yen and I loaned it to him. I knew he had been in jail and I asked him about the murder, and he told me he did it. And I asked him why, and he said because she was going to turn him in about some sheets or something like that.
>
> * * *
>
> "Q Did he say how he killed her?
> "A Yes, sir.
>
> "Q Tell the court what he said.
> "A He told me he knocked her in the head with a rock.
>
> "Q Did he say where it took place?
> "A No, sir. I knew where it was because I had heard about it before.
>
> * * *
>
> "Q Did he volunteer this information to you that he killed Sachiko?
> "A I asked him.
>
> "Q All right. You asked him, didn't you?
> "A Yes, sir.
>
> "Q And he told you, is that right?
> "A Yes, sir." (R 24-25,26)

On the afternoon of 24 November 1949, Agent James A. Henson of the 44th Criminal Investigation Division was directed to investigate an incident at Ebina, Honshu, Japan. Upon his arrival at Ebina, he saw

a Japanese female lying on her back in a gully and a soldier's garrison cap lying on the ground near the body. The cap bore the serial number "B-0973" on the inside lining. The cap belonged to Private Luther Burton, a member of the accused's organization. After giving the accused due warning of his rights under the 24th Article of War, Agent Henson interrogated the accused concerning this cap and the accused admitted he had worn a cap belonging to Burton on 23 November 1949. When the accused was asked how the cap could have been found at Ebina, he replied that he did not know but stated that he had lost the cap at the 76th AAA Battalion Enlisted Men's Club (R 31-34). On 16 December 1949, Agent Henson again interviewed the accused, and after again informing him of his rights under Article of War 24, he told the accused that he had received information of a conversation that he (accused) had with Private Obbie Hayes and that he (Henson) thought the accused had done something wrong (R 35-36). The accused then made an oral statement to Agent Henson. Agent Henson testified:

"*** Pickens said, 'My mother didn't raise me to kill anybody', and then he proceeded to tell me how he met this girl who had been known as Sachiko who lived in Ebina; that he met the girl somewhere around 21 or 2130 hours.

"Q On what date?

"A On the 23d of November 1949.

"Q And where?

"A Near--or between Sobudai-Mae Railroad Station and the main gate leading into the 76th and the 933d area.

"Q Now, is that what he told you?

"A Yes, sir.

"Q Go ahead. Continue, please.

"A I asked him if the girl stopped him or did he stop the girl. He stated he stopped the girl and they both proceeded to walk up the road towards Sobudai-Mae Railroad Station. Upon arriving at Sobudai-Mae Railroad Station they waited for a train. At that time I asked him where the train was going. The train was going to Ebina. He said he rode that train from Sobudai-Mae to Ebina with this girl that we call Sachiko. Upon arriving at Ebina, he stated that they got off the train and walked into the station. The girl passed between the gate where the man received the tickets. He followed her. At the side entrance to the station he stated that he and the girl had a conversation at which time the girl told him that she did not wish him to go to her home. He stated that he told her that he was going to her home. At that point the girl walked off some distance from the station and stopped, turned around, and looked back at him. It was then he left the station and caught up with this girl, Sachiko. Then they

proceeded down a road that leads from Ebina Railroad Station toward a hill. As they reached the bottom of the hill they started another conversation which, I understood him to say, was a small argument.

"Q (By TJA) Did he say what the argument was about?
"A He said they argued, the argument was built around an incident that took place around September or October in reference to a sheet and a ten-dollar bill in military payment certificates, and they were also arguing about the fact that she didn't want him to go to her home.

"Q Did he say what the story was in reference to the sheet and the military payment certificates he mentioned?
"A. Not at the time that he made that confession he didn't.

"Q Go ahead. What else did he have to say?
"A He said that after arguing a short time they started up the hill. Upon reaching the top of the hill this girl told him that she was going to tell the MPs about him taking the sheet and the ten dollars. He said they argued for a short time there and he became angry and struck the girl on the side of the face with his hand. Then he struck her again with his fist. He didn't realize how many times he struck her but he finally struck her on the head with a rock, causing the girl to fall to the ground. He says he picked the girl up and carried her down in a gully or ravine that was on the side of the road and left her there. I asked him at that point, 'Did you drop the cap when you took the girl into the gully?' He said, 'I believe I did.' I also asked him, 'Did you think or know the girl was dead when you left her there?' He said he didn't know. I also asked him if he intended to kill the girl. He said he did not. I asked him if he had anything more to say. He said no. I asked him when did he find out the girl was dead. He said on the 24th of November when he saw me in the Provost Marshal's Office at Zama." (R 36-37)

At about 1:30 p.m. on 17 December 1949, the accused made a sworn written statement which was admitted in evidence, without objection, as Prosecution Exhibit 3 (R 37-39). In this statement the accused detailed his activities substantially as follows:

He is 17 years old and his mother and three brothers are living. In the latter part of 1948 he met Sachiko at a house of prostitution where she was employed. In September or October 1949 he went to her house and observed two sheets which he recognized as GI sheets and which "Mama-san" admitted to be GI sheets. He took these sheets and used them on his bed. Sometime after 9:00 p.m., 23 November 1949,

when he was coming from the club, he met Sachiko at Zama near the camp. On inquiry, Sachiko said she was going home to Ebina. He rode the train with her to Ebina and they did not argue until they reached the Ebina Station at 10:00 p.m. On reaching the Ebina Station, Sachiko said he could not come to her house and mentioned her boy friend named Lee. Sachiko walked away from him and he stayed at the station but joined her when she waited for him near the station. They started walking in the rain and did not argue again until they came to the hill. At that time, Sachiko said she was going to tell the MP's that he took the sheets and ten dollars in military payment certificates. They started to fight on the hill and he hit her with his hand, his fist, and finally hit her on the head with a rock. Sachiko fell and he picked her up and started to carry her down into a hole. He slipped and dropped Sachiko but picked her up again and took her into the hole. He lost a hat that belonged to Luther Burton when he was laying Sachiko's body down. He told Agent Henson that he lost his raincoat and hat to escape responsibility for hitting Sachiko. He did not think Sachiko was dead when he left her. When it was over he returned to the Ebina Station and took a train back to camp. He did not think to return to pick up his hat as he had been drinking a bit. On 7 December he was at the club drinking and Obbie Hayes said to him, "Pickens, I know you killed that girl down in Ebina." He, the accused, replied, "I don't think I killed her," and when Hayes said, "Well, she is dead," the accused replied, "Maybe I killed her then. I hit her with a rock."

Agent Henson again saw the accused on the 18th of December on which occasion the accused agreed to go to Ebina (R 39). On the 19th of December the accused, accompanied by Agents Henson, Spriggs and Lenhart and Lieutenant Groty, proceeded to Ebina. Before this trip the accused was told he did not have to go to Ebina unless he wanted to and that he could not be forced to do anything unless he wanted to (R 40). Agent Henson testified that at Ebina the accused reenacted his actions on the night of 23 November 1949. He began by pointing out where he got off the train and ended at the place where he left the body of Sachiko. In reenacting the events of the night in question the accused stated that after leaving the station Sachiko slipped and fell. He helped her up and shortly thereafter he slipped and fell. Upon arising he picked up a rock which was about the size of a softball. The body of Sachiko was found in a ravine at a distance of between 400 and 450 yards from the Ebina Station. The place where the accused stated he picked up the rock was about 200 yards from the Ebina Station. The place the accused indicated he struck the deceased was between 200 and 250 yards from where he obtained the rock. Blood stains were found on the road where the accused stated he struck the deceased. A garrison cap was found at the point where the accused indicated he left Sachiko's body. Her body was actually found about 15 feet from the cap. The cap was about 15 feet from the road. The ravine was bordered by three roads and the body could be seen from any point on the roads. The accused cooperated with

the Criminal Investigation Division agents but continually denied that he intended to kill Sachiko (R 40-49).

b. For the Defense

The accused, having been duly warned of his rights as a witness, elected to take the stand and testified substantially as follows:

He is 17 years old and was 16 when he entered the Army. He met Sachiko in the latter part of 1949 at a house of prostitution in which she was working and that he had had intercourse with her on one occasion. He visited her home in September or October 1949 and observed two GI sheets and some military currency. He took these sheets and used them on his bunk. He met Sachiko after he left the 76th Club on the evening of 23 November 1949. He had been drinking beer and Japanese wine and whiskey. He "wasn't exactly too drunk" but was "pretty high". He went to the railroad station with Sachiko and they took a train to the Ebina Station. They did not talk until they left the train at Ebina and Sachiko told him he was not going home with her. Sachiko then walked off and left him. After walking a good distance, Sachiko turned around and looked back at him and he walked toward her. She waited until he arrived. They then walked together in the rain. Sachiko slipped and he picked her up and they continued to walk until he slipped. Upon getting up he picked up a rock about the size of a softball. It was after this that Sachiko told him she was going to inform the MPs about the sheets and he struck her once with his hand, and once with his fist. Sachiko repeated she was going to tell the MPs, and losing his head he hit her with the rock. He was angry and just lost his head and struck her. This incident occurred about 100 yards distant from the place where he had picked up the rock. He did not intend to hit Sachiko with the rock when he picked it up. When Sachiko fell after being hit with the rock he picked her up and started to carry her down a little gully so as to get her out of the way of vehicles and prevent her from being run over. While doing this he slipped and she fell out of his arms. When he finally laid her down she was breathing. He told Private Obbie Hayes that he "hit the girl with a brick" but he "didn't intend to kill her" (R 53-62).

It was duly stipulated that if Private Vernell B. Wilkins, of Battery "B", 76th AAA Gun Battalion, were present, he would testify substantially as follows: "That he knows the accused Private Raymond Pickens and is a pretty good friend of his; that he has been with him on numerous occasions and the accused has exhibited a violent temper over trivial matters" (R 62).

First Sergeant James E. McRay testified substantially as follows:

He is the accused's first sergeant and was formerly the accused's platoon sergeant. He has known the accused about one year and in his

opinion the accused is a good soldier and he would give the accused an "excellent" character rating. Neither he nor his section leaders have ever had any trouble with the accused and he never has given the accused a duty that the accused failed to carry out. He does not know if the accused was tried by summary court for sleeping on post when he was on guard duty (R 63-65).

4. Discussion

The accused's conviction of unpremeditated murder is amply sustained by the evidence. His plea of guilty to involuntary manslaughter together with his extrajudicial confession and sworn testimony admits the fact that he did, at Ebina, Japan, on or about 23 November 1949, feloniously and unlawfully kill Ko Kamiyo, alias Sachiko, alias Toyoko, a human being, by striking her on the head with a rock, and is competent proof of the accused's guilt of the facts so pleaded and confessed (CM 278122, Berg, 51 BR 329; Com. v. Mahoney, 115 Mass. 151; People v. Lennox, 67 Cal. 113, 7 Pac. 260, 6 Am. Crim. Rep. 542; Marks v. People, 204 Ill. 248, 68 N.E. 436). The record of trial shows affirmatively that the law member explained the meaning and effect of the accused's plea of guilty to him, and that the accused thereupon reaffirmed his desire to plead guilty to involuntary manslaughter, a lesser included offense of that charged, namely, murder (R 8). Since there is no indication in the record that the accused's plea of guilty was improvidently entered, and since he offered no evidence inconsistent therewith, it may be presumed that such plea was entered voluntarily by the accused with full understanding of its meaning and effect and that it was his desire to plead guilty to an unlawful killing of the person alleged at the time, place and in the manner alleged (CM 283260, Lemmenes, 55 BR 51; Hallinger v. Davis, 146 U.S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105).

In the absence of statutory prohibition, an accused has the right to plead guilty to a capital offense or to a lesser included offense thereof and he may be convicted upon his judicial confession alone, without other proof of the corpus delicti (6 A.L.R. 694; 35 L.R.A. (N.S.) 1149, and cases cited therein; 14 Am. Jur. 950, Criminal Law, Section 269; Coates v. The People of the State of Illinois, 72 Ill. 303; 19 N.Y.S. 2d 938). Whether one may be convicted upon his confession alone, without other proof of the corpus delicti, does not arise in the case where a plea of guilty has been duly entered (Smith v. Hess, 91 Ind. 424; Ramos v. State, 58 Nev. 446, 83 P. 2d 147; State v. Brown, 60 Wyo. 379, 151 P. 2d 950). Neither the Articles of War nor the Manual for Courts-Martial, U.S. Army, 1949, prohibits the acceptance of a plea of guilty by the court in a capital case.

In the instant case, however, the evidence adduced independently of the accused's plea of guilty to involuntary manslaughter and confessions conclusively established the corpus delicti as well as other aggravating

circumstances relevant to the commission of the offense which, together with the accused's plea and confessions, justify the findings of murder. Murder is the unlawful killing of a human being with malice aforethought and malice aforethought may exist when the act is unpremeditated, as found in the instant case (MCM, 1949, par 179a). That Ko Kamiyo was killed with malice aforethought is clearly shown by the testimony of Dr. Yasuo Fujii. His description of the injuries sustained by the deceased illustrates the brutality and viciousness of the blows which must have been inflicted upon her, and Prosecution Exhibit 2 (close-up photograph of her body) portrays the dire consequences of such blows. The brutality of the unprovoked assault as described by the evidence shows unmistakably that such vicious conduct flowed from an evil heart without regard to social duty and that malice was inherent in such an attack. The law presumes malice from such cruel and deliberate acts manifesting an utter disregard for human life (CM 330963, Armistead, 79 BR 201, 231; CM 334752, Wilson et al, 1 BR-JC 253, 265).

While the evidence indicates that the assault was motivated by the accused's provocation over the deceased's threat to report him to military officials for taking certain property from her employer, the cause of accused's provocation was not such as in law would be considered adequate to justify or excuse the killing or to reduce the alleged homicide to voluntary manslaughter (MCM, 1949, par 180a). Although the accused's testimony indicates that he had been drinking prior to the assault, no issue of drunkenness was raised as a defense or as a mitigating factor. By the accused's admission, it is shown that he was not drunk but was "pretty high" and his detailed account of the incident reveals that his faculties were not impaired thereby and that drunkenness did not preclude him from realizing the consequences of his felonious acts (CM 338934, Jones, 1950).

5. The civilian and military background of the accused, as shown by the Charge Sheet and Staff Judge Advocate's review, is as follows:

a. Civilian Background: The accused is 17 years of age, single, and graduated from grammar school. His mother and three brothers are living. In civilian life he worked at odd jobs, receiving a salary of about $25.00 per week. No record of civilian criminal offenses has been found.

b. Military Background: The accused's service record shows his character and efficiency to be unknown but his immediate commanding officer rated him as "satisfactory" both as to character and efficiency. The accused has a Class E Allotment of $50.00 per month to his mother for her support and a $10.45 Class E Allotment for commercial insurance.

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

opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to imprisonment for 50 years is authorized upon conviction of unpremeditated murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder not premeditated, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 275, Criminal Code of the United States (18 USC 454).

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

Samuel S. Lovejoy, J.A.G.C.

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

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

(11)

Board of Review

CM 341028

17 APR 1950

YOKOHAMA COMMAND

UNITED STATES v. Private RAYMOND PICKENS (RA 18260451), Battery "B", 76th Antiaircraft Artillery Automatic Weapons Battalion (Self Propelled), APO 713.	Trial by G. C.M., convened at Yokohama, Honshu, Japan, 10 March 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for fifty (50) years. A Federal Institution.

HOLDING by the BOARD OF REVIEW
McAFEE, WOLF and BRACK
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier 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 sentence .

Carlos E. McAfee, J.A.G.C.
Samuel S. Wolf, J.A.G.C.
Joseph T. Brack, J.A.G.C.

APR 21 1950

1st Indorsement

Dept. of Army, J.A.G.C. To the Commanding General, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California.

1. In the case of Private Raymond Pickens, RA 18260451, Battery "B", 76th Antiaircraft Artillery Automatic Weapons Battalion (Self Propelled), APO 713,

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. A radiogram is being sent advising you of the foregoing holding. Please return the said holding and this indorsement and, if you have not already done so, forward therewith six copies of the published order in this case.

(CM 341028).

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.

JAGK - CM 342031

26 JUN 1950

UNITED STATES v. First Lieutenant DONALD DUANE DRAKE (0-1340639), Headquarters Company, 6003 Area Service Unit, Fort Ord, California.	FORT ORD, CALIFORNIA Trial by G.C.M., convened at Fort Ord, California, 2 June 1950. Dismissal and total forfeitures.

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

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to the 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 Donald D. Drake, Coast Artillery Corps, did at Monterey, California, on or about 26 March 1950, wrongfully and unlawfully make and utter to the Commissioned Officers' Mess (Open), U.S. Naval School, Monterey, California, a certain check, in words and figures as follows, to wit:

No. 64 San Antonio, Texas 26 March 1950

30-65
1141

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

PAY TO THE ORDER OF Cash---------- $25. 00/100

Twenty Five Dollars and no cents ---------- DOLLARS

/s/ Donald D. Drake
1st Lt. CAC
Btry C 60 2491

Endorsed on Back:
For deposit only to the account of
Commissioned Officers' Mess (Open)
U.S. Naval School, Monterey, Calif

and by means thereof, did obtain from the said Commissioned Officers' Mess (Open), U.S. Naval School, Monterey, California, $25.00 in lawful money of the United States, he, the said 1st Lt. Donald D. Drake, 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.

SPECIFICATION 2: In that First Lieutenant Donald D. Drake, Coast Artillery Corps, did at Monterey, California, on or about 30 March 1950, wrongfully and unlawfully make and utter to the Commissioned Officers' Mess (Open), U.S. Naval School, Monterey, California, a certain check, in words and figures as follows, to wit:

No. 66 San Antonio, Texas 30 March 1950
30-65
1141

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

25 00

PAY TO THE ORDER OF Commissioned Officers Mess (Open) U. S. Naval School $25-00/100

Twenty-five Dollars and no cent ---------- DOLLARS

/s/ Donald D. Drake
1st Lt. CAC

Endorsed on Back:

For deposit only to the account of
Commissioned Officers' Mess (Open)
U. S. Naval School, Monterey, Calif.

and by means thereof, did obtain from the said Commissioned Officers' Mess (Open), U. S. Naval School, Monterey, California, $25.00 in lawful money of the United States, he, the said 1st

Lt Donald D. Drake 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.

Specification 3: In that 1st Lt. Donald D. Drake, Coast Artillery Corps, did at Monterey, California, on or about 10 April 1950 with intent to defraud, wrongfully and unlawfully make and utter to the Commissioned Officers' Mess (Open), U. S. Naval School, Monterey, California, a certain check in words and figures as follows, to wit:

Bank Name ANN ARBOR BANK

Branch STATE STREET BANK No. 1

City ANN ARBOR State MICHIGAN 10 April 19 50

PAY TO THE ORDER OF Commissioned Officers Mess (Open) U. S. Naval School $50 00/XX

Fifty Dollars and no cents ---------- DOLLARS

FOR VALUE RECEIVED I CLAIM THAT THE ABOVE AMOUNT IS ON DEPOSIT IN SAID BANK IN MY NAME SUBJECT TO THIS CHECK AND IS HEREBY ASSIGNED TO PAYEE OR HOLDER HEREOF

/s/ Donald D. Drake

1st Lt. CAC

Endorsed on Back: Address Btry C 60th AAA AW Bn

For deposit only to the account of
Commissioned Officers' Mess (Open)
U. S. Naval School, Monterey, Calif.

in payment of a debt, he the said 1st Lt Donald D. Drake, then well knowing that he did not have and not intending that he should have sufficient funds in the Ann Arbor Bank, State Street Bank, Ann Arbor, Michigan for the payment of said check.

He pleaded not guilty to and was found guilty of the charge 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 approved only so much

of the finding of guilty of Specification 3 of the Charge "as involves a finding that the accused wrongfully and unlawfully made and uttered the check in words and figures, at the time and place and to the payee alleged and for the purpose alleged, and that the accused uttered said check without intending to assure that he should have sufficient funds in the drawee bank for payment thereof," approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

It was stipulated that accused is a member of the military service; that on the dates stated in each of the three specifications of the charge he was a member of Battery C, 60th AAA AW Battalion, Fort Ord, California, and detailed in the Coast Artillery Corps; and that at the time of trial, he was a member of the 6003 Area Service Unit, Fort Ord, California.

On 26 March and 30 March 1950, two checks dated 26 March and 30 March, 1950, respectively, drawn on the National Bank of Fort San Houston, San Antonio, Texas, bearing accused's name as drawer, in amounts of $25 each, were presented to the Commissioned Officers' Mess (Open), U.S. Naval School, Monterey, California (hereinafter called the Officers' Mess), and on each occasion the sum of $25 in United States currency was paid to the presenter of the check (R 9-11, 13, 28-29; Pros Exs 1 and 2). Mr. Alfred W. Parnell and Mrs. Donya Savage, cashier and bookkeeper, respectively, of the Officers' Mess at the time the checks were cashed, were unable to identify the accused. The only personal identification required of individuals cashing checks at the Officers' Mess is their club membership card (R 10-11,13).

Mrs. Edna M. Shepherd, "head cashier" of the Officers' Mess, received both checks hereinabove described and deposited them in the Monterey County Trust and Savings Bank, Monterey, California, to the account of the Officers' Mess for collection (R 11, 17-18; Pros Exs 1 and 2). Thereafter both checks were returned unpaid by the drawee bank to the Officers' Mess because of insufficient funds in accused's bank account, and the amount of $50 was deducted from the Officers' Mess account (R 17,19,22). Relative to this matter, Mrs. Shepherd testified as follows:

"Q. And what response did the accused make to you after you told him he would have to make the checks good, as your account was debited?

"A. He apologized and was very sorry and asked if I would accept a check on another bank.

"Q. What did you state at that time?

"A. I said I would be glad to if the check was good.

"Q. Did you receive a check on another bank?
"A. He wrote out a check in my presence.

"Q. Did he have a check in his possession?
"A. No, I gave him a counter check.

"Q. What was the amount of the check he wrote?
"A. $50.00.

"Q. And what was the purpose of the $50 check he wrote?
"A. It covered these two checks." (R 20)

Accused gave Mrs. Shepherd this check, signed by him, in the sum of $50, drawn on the State Street Branch of the Ann Arbor Bank, Ann Arbor, Michigan, to cover the two dishonored checks which she deposited in the Officers' Mess bank account. About three weeks later this check was likewise returned unpaid by the drawee bank because of insufficient funds in accused's bank account, and the amount of $50 was deducted from the Officers' Mess bank account. About a week after the check was returned, accused reimbursed the Officers' Club by paying Mrs. Shepherd $50 (R 19-22,25; Pros Ex 3).

The three checks hereinabove described were admitted into evidence without defense objection as Prosecution Exhibits 1, 2 and 3 (R 22-23).

Mr. Sherman Forrest Bowles testified, by deposition, that he is a cashier in the National Bank of Fort Sam Houston, San Antonio, Texas, and a resident of that city; that he is responsible for the maintenance of the bank's records; that accused has an account in said bank; that accused's check dated 26 March 1950 in the amount of $25 (Pros Ex 1) was received by said bank on 31 March 1950 and again on 13 April 1950 and each time was returned unpaid because of insufficient funds in accused's account; that accused's check dated 30 March 1950 in the amount of $25 (Pros Ex 2) was received by said bank on 4 April 1950 and again on 15 April 1950 and each time was returned unpaid because of insufficient funds in accused's account; that accused's bank ledger sheet shows that, between 7 March and 18 May 1950, accused's bank balance never exceeded $24.69; and that it was overdrawn between 15 March and 6 April 1950 (R 30, Pros Ex 4).

Mr. Norman A. Ottmar testified, by deposition, that he is Assistant Cashier and Branch Manager of the State Street Branch of the Ann Arbor Bank, Ann Arbor, Michigan, and a resident of that city; that he maintained accused's bank records; that he has known accused "for the past 20 years, or possibly longer"; that accused has an account in said bank; that accused's check dated 10 April 1950 in the amount of $50 (Pros Ex 3) was received by said bank on 13 April 1950 and returned unpaid because

of insufficient funds in accused's account; that accused's bank balance on 13 April 1950 was $21.03; and that accused's bank ledger sheet showed changes in accused's account as follows:

Old Balance	Date	Deposits	Checks	New Balance
	31 March			$ 26.11
$ 26.11	10 April	$100.00		126.11
126.11	11 April		$104.60	21.51
21.51	12 April		.48	21.03
21.03	14 April		.50	20.53
20.53	27 April		20.00 (2)	.53

(R 31, Pros Ex 5)

4. Evidence for the Defense

The defense offered no evidence. After being advised of his rights as a witness, accused elected to remain silent (R 32-33).

5. Discussion

As to Specifications 1 and 2 of the Charge, accused was charged with and found guilty of wrongfully and unlawfully making and uttering two checks, in amounts of $25 each, on or about 26 March and 30 March 1950, respectively, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for their payment, in violation of Article of War 96. The evidence shows that in each instance authorized employees of the Officers' Mess, pursuant to established procedures, cashed two checks for the accused on the dates alleged. The checks were deposited in a local bank and thereafter each was forwarded for payment to the drawee bank on two different occasions, and on each occasion payment was refused because of insufficient funds in accused's account. Upon dishonor, both checks were charged to the Officers' Mess bank account in which they were deposited for collection. On 26 March and 30 March 1950, the dates accused is alleged to have committed the offenses, accused's account in the drawee bank was overdrawn. Between 7 March and 18 May 1950, accused's account never contained more than $24.69. After the two checks had been returned unpaid to the Officers' Mess, Mrs. Edna Shepherd, "head cashier" of the Officers' Mess, confronted accused with the checks, whereupon accused expressed his regret, and, in Mrs. Shepherd's presence, wrote out and signed a third check in the amount of $50 which he gave to Mrs. Shepherd to redeem the two previously dishonored checks.

The undisputed evidence hereinabove recited amply proves that accused made and uttered the two checks in question as alleged and that he did so with guilty knowledge of the insufficiency of his bank account to pay for the checks when they were presented for payment. In the case of CM 280789, Hughes, 53 BR 317, involving similar specifications and proof, the Board

of Review, at page 323, stated, in pertinent part, as follows:

"As a matter of military law, the utterance of worthless checks, without maintaining sufficient funds to provide for their payment upon presentation in due course, in itself constitutes conduct discreditable to the military service, in violation of Article of War 96, regardless of intent to defraud or guilty knowledge. A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it, and proof that a check given by him for value is returned for insufficient funds imposes on him, when charged with failure to maintain his account sufficiently to meet his checks, the burden of going forward with evidence to show that his action was the result of an honest mistake not caused by his own carelessness or neglect (CM 249232, Norren, 32 BR 95, 102-103, 3 Bull. JAG 290. Accord, CM 202027 (1934), McElroy, Dig. Op. JAG 1912-40, Sec. 453 (22); CM 224286, Hightower, 14 BR 97, 101; CM 249006, Vergara, 32 BR 5, 12, 3 Bull. JAG 289; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397, 402; CM 251451, 4 Bull. JAG 5).

"However, the proof here involved is not limited in its effect to establishing the offense of wrongful failure to maintain the account. The facts that the accused issued checks against an insufficient bank account which was not made sufficient, that the condition of the account was the result of his own acts, he being the person active in using the account, and that the checks were returned on presentation for want of sufficient funds, creates an evidentiary situation where, in the absence of adequate explanation or countervailing proof, the inference of fact is fully justified, from common human experience, that the accused knew that his account was insufficient and did not intend that it should be sufficient. If there be evidence of extenuation or excuse, the accused is the person to furnish it. This rule is well established, often stated in the language that the accused, under such circumstances, is 'chargeable' with knowledge of the condition of his own account (CM 202601, Sperti, 6 BR 171, 214; CM 236070, Wanner, 22 BR 279; CM 257069, Bishop, 37 BR 7, 13; CM 257417, Sims, 37 BR 111,117; CM 258314, Reeser, 37 BR 367; 378; CM 259005, Poteet, 38 BR 197, 206), and that the 'burden' (of going forward with proof in his defense to dispel the ordinary inferences from established facts) in such an evidentiary situation is on the accused (CM 249232, Norren, 32 BR 95, 103; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397, 402)."

The offenses alleged in Specifications 1 and 2 of the Charge are offenses in violation of Article of War 96 and in the opinion of the Board of Review proof is legally sufficient to sustain the findings of guilty (CM 337978, Gallo, 4 BR-JC 193,203).

As to Specification 3 of the Charge, accused was charged with and found guilty of wrongfully and unlawfully making and uttering a check, with intent to defraud, in the amount of $50, on or about 10 April 1950, in payment of a debt, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for its payment. The reviewing authority approved only so much of this specification as finds accused guilty of wrongfully and unlawfully making and uttering the check described therein, in words and figures, at the time and place and to the payee and for the purpose alleged, and that accused uttered said check without intending to assure that he should have sufficient funds in the drawee bank for payment thereof.

The offense found, as thus modified, has been held to be a lesser included offense of that charged in violation of Article of War 96 (CM 335159, Smith, 2 BR-JC 69,78).

The evidence shows that accused, when called upon to account for two previously dishonored checks, gave the Officers' Mess a check, dated 10 April 1950, in the amount of $50, to redeem them. On that date (10 April 1950) accused's account in the drawee bank contained $126.11. On the following day (11 April 1950), his account was reduced to $21.51 by another check which was charged against it in the amount of $104.60. The check in question was received by the drawee bank on 13 April 1950, at which time accused's bank balance was $21.03. The check was returned unpaid to the bank in which it was deposited for collection because of insufficient funds and consequently the amount of $50 was deducted from the bank balance of the Officers' Mess. Subsequently accused made restitution to the Officers' Mess for the dishonored check. Although accused had sufficient funds in his account on the date he wrote the third check his account was reduced the following day below the amount necessary to pay the check and was in that status when the check was presented for payment in due course. After learning that the two checks (Pros Exs 1 and 2) which he had written on a Texas bank had been returned unpaid because of insufficient funds in his account, accused wrote a third check (Pros Ex 3) on a Michigan bank, in an apparent attempt to avoid, at least temporarily, the consequences of his actions. The fact that there were sufficient funds in accused's account to pay the check either on the date it was written or during part of the period between the date it was written and the date it was presented for payment is no defense because the funds were sufficient only to pay a check which cleared the bank before the check in question was presented for payment

and because accused was at all times charged with knowledge of the status of his bank account (CM 337978, Gallo, supra, at page 202; CM 296074, Chennault, 58 BR 71,75). Where the condition of accused's bank account was the result of his own acts, his apparent irresponsibility and disregard for obligations justifies the conclusion that when accused made and uttered the checks in question he knew that he did not have sufficient funds in his bank accounts to pay them when presented for payment, and that he did not intend that his bank balance should be sufficient to pay them when presented for payment (CM 337978, Gallo, supra, at page 200; CM 280789, Hughes, supra, at pages 323 and 324).

Although the consideration for the third check was an antecedent indebtedness, it has been uniformly held that such an act as alleged in this specification committed under such circumstances is an offense punishable under Article of War 96 (CM 329503, Frith, 78 BR 83,90; CM 280747, Duncan, 53 BR 305, 312). The fact that accused made restitution to the Officers' Mess for its loss about one month after he issued the check and about the time that charges had been drawn thereon, while a mitigating circumstance, is no defense (CM 320020, Jones, 69 BR 217,224).

It is therefore the opinion of the Board of Review that the facts and circumstances presented in proof of this specification are legally sufficient to sustain the finding of the court as modified by the reviewing authority.

6. Department of the Army records show that accused will be 24 years of age on 28 July 1950 and is unmarried. He graduated from high school and attended the University of Michigan for one year. On 28 January 1944, he enlisted as a private in the Enlisted Reserve Corps, entered on active duty on 23 January 1945, was honorably discharged therefrom to accept appointment as a second lieutenant on 21 February 1946, and was promoted to first lieutenant in 1948 (date not shown).

On 7 December 1946, as Commanding Officer, 1962 Labor Supervision Company, accused received a letter of appreciation from the Commanding General, Third United States Army, for the superior demonstration and appearance of his unit during a Headquarters Third United States Army inspection.

On 30 January 1947, accused was convicted by general court-martial for wrongfully and unlawfully taking a female to his quarters in violation of standing orders, wrongfully engaging in sexual intercourse, wrongfully and unlawfully having a pistol in his possession, and committing an assault by wrongfully threatening with a weapon, and sentenced to be reprimanded and to pay a fine of $1200, which sentence was approved but the fine reduced to $600. On 11 January 1947 he received a reprimand and forfeiture of $25 under the provisions of Article of War 104 for

wrongfully dispatching a United States Government motor vehicle in violation of standing orders. On 20 October 1949, he received a reprimand under the provisions of Article of War 104 for wrongfully failing to maintain sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for eight checks, in the amount of $10 each, which he cashed at the Fort Bliss Officers Club and Mess, Fort Bliss, Texas.

His efficiency reports from 21 February 1946 to 30 June 1947 average 5.1. Thereafter, his overall efficiency ratings show 085 for the period 1 August 1947 to 31 January 1948; 073 for the period 1 March 1948 to 31 August 1948; 087 for the period 5 June 1949 to 31 August 1949; and 054 for the period 1 September 1949 to 28 February 1950.

He is entitled to wear the World War II Victory Medal and the Good Conduct Medal.

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

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

Samuel S. Cowles, J.A.G.C.

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

CM 342,031

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 Donald Duane Drake, 0-1340639, Headquarters Company, 6003 Area Service Unit, Fort Ord, California, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

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

26 July 1950

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

27 July 1950

(GCMO 50, August 4, 1950).

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

JAGN-CM 342150

13 JUL 1950

UNITED STATES v. Private ROBERT JOHN MILMOE (32766301), assigned (pipeline), 1201st Area Service Unit, Military Police and Prisoner Guard Detachment, Fort Jay, New York.	FIRST ARMY Trial by G.C.M., convened at Fort Jay, Governors Island, New York, 8 June 1950. Bad conduct discharge, total forfeitures after promulgation and confinement for forty-five (45) days. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
YOUNG, LUDINGTON 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 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 Robert John Milmoe, assigned (pipeline), 1201st Area Service Unit, Military Police and Prisoner Guard Detachment, then Private First Class, then a member of 6th Casual Company, 1260 Service Command Unit, War Department Personnel Center, did, at Fort Monmouth, New Jersey, on or about 26 January 1946, desert the service of the United States, and did remain absent in desertion until he surrendered himself at New York City, New York, on or about 1 May 1950.

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 discharged from 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 proper authority might direct for forty-five days.

The reviewing authority approved the sentence, designated the Post Guardhouse, Fort Jay, New York, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50e.

3.a. Evidence for the Prosecution.

Prosecution's Exhibit No. 1, received in evidence without objection, was an extract copy of the morning report of the 6th Casual Company, 1260th Service Command Unit, War Department Personnel Center, dated 8 February 1946, showing "Milmoe, Robert J. 32766301 Pfc. Above EM fr dy to AWOL as of 26 Jan 46." The return of the accused to military control was established by stipulation (Pros Ex 2) between the Trial Judge Advocate, Defense Counsel and accused to the effect that accused had surrendered himself to military authorities at New York City on or about 1 May 1950. The prosecution adduced no further evidence.

b. Evidence for the Defense.

The accused, having been advised of his rights, made a sworn statement to the effect that he had been drafted into the service in January or February of 1943 at Fort Dix, New Jersey, and had been later transferred to Camp Gruber, Oklahoma, where he was assigned to the 933d Field Artillery Battalion with which organization he went overseas in September 1943. He was landed in Africa where he engaged in combat and later took part, with the same organization, in combat in Italy (R-14). Following the action in Italy, he participated in the invasion of southern France and fought through into Germany, his battalion supporting the French First Army (R-15). He was transferred to the infantry and was then assigned to the 45th Infantry Division, where, in various engagements he was twice wounded, receiving the Purple Heart with Oak Leaf Cluster (R-15).

In September 1945, lacking two points for discharge under the Adjusted Service Rating program, he was again transferred, this time to the Ninth Infantry Division. When the Ninth Division departed Europe three months later, he was left behind because his records had been misplaced (R-16). He was returned to the United States in December 1945 accompanying the 14th Armored Division, and having accumulated sufficient points for discharge, was ordered to Fort Monmouth, New Jersey, for separation (R-17). Physical examination at Fort Monmouth disclosed the need for protracted dental treatment. He was authorized by the officer in charge of the dental clinic to remain at home during this period, returning weekly for his dental appointments (R-18). An "Authorization for Issue of Pass for Separatee Held for Dental Treatment" made out to the accused was introduced as Defense Exhibit A. Each week

he kept his appointments, his father accompanying him from his home to Fort Monmouth. About 26 January 1946 he was advised by an officer (name unknown) in the dental clinic that the separation center at Fort Monmouth was being closed and that he "could go home and wait for notification for dental treatment and my discharge would be sent to me" (R-19). He complied with these instructions. In August 1948 he registered for the draft under his own name. His draft card was introduced as Defense Exhibit C (R-22). In January 1950, he requested The Adjutant General (by letter) that he be furnished an honorable discharge or certificate in lieu thereof (Def Ex A for ident). On 24 March 1950 he was advised by The Adjutant General that he was being carried as absent without leave and it was directed that he "should report" to the nearest military post (Def Ex B). He surrendered himself in accordance with this suggestion (R-22). He never intended to desert the service of the United States nor remain absent without leave. Throughout the period of alleged desertion he used his own name and remained at his father's home (R-23). In addition to the Purple Heart he was awarded the Croix de Guerre with Star of Vermillion, the Good Conduct Medal, European Theatre of Operation Ribbon with five battle stars, American Defense Ribbon, German Occupation Ribbon, World War II Victory Medal and unit citation (R-15).

On cross examination and thorough examination by the court it was brought out that the accused continued to wear his uniform while at home until August 1946, at which time his mother received notice of discontinuance of his allotment. He believed that this indicated his separation had been completed (R-27). He did not apply for his mustering-out pay nor his regular pay because he "never needed the money", although he did make application for his National Service Life insurance refund. No military police called at his home, nor was a letter sent to his parents advising them of his status as absent without leave. He thought it strange that no discharge had been mailed to him but the "officer told me to go home and wait for it, and that's what I was doing" (R-31).

Michael Milmoe, the accused's father was sworn as a witness for the defense and corroborated his son's testimony, adding that the accused had never been arrested nor been in any trouble (R-45). He advised his son, the accused, not to apply for his mustering-out pay because "[He] can always get it. It's just as well there as it is with you." (R-46)

4. The accused has been found guilty of deserting the service of the United States at Fort Monmouth, New Jersey, on 26 January 1946 and remaining in desertion until 1 May 1950. In proving the offense of desertion, it is requisite to prove the lesser and included offense of

absence without leave. However, since length of absence and all other circumstances bearing upon the intent of an accused person to remain permanently away from the military service are as consistent with authorized absence as with unauthorized absence, such proof is not pursuasive upon the issue whether the alleged absence is unauthorized. (SPCM 552, Houghtlen, 4 BR-JC 453)

There must be determined, therefore, the issue of whether this accused's absence was in fact unauthorized. The sole evidence adduced by the prosecution upon this issue is a duly authenticated extract copy of the morning report of accused's organization for 8 February 1946 showing accused to be absent without leave on 26 January 1946, the alleged date of inception of desertion. This conclusion is contradicted by the defense as will be shown in the following summary of the defense evidence. The defense has shown by uncontradicted evidence that, under the readjustment regulations then in effect accused, by virtue of his service from early in 1943, his foreign service extending from September 1943 through September 1945, his participation in combat in North Africa, Italy, France, and Germany, his being twice wounded, had secured sufficient points to authorize his separation from the service prior to the date upon which it is alleged he deserted the service of the United States. He was redeployed to the United States for the purpose of separation and was sent to the War Department Personnel Center at Fort Monmouth, New Jersey, to be separated from the service. Physical examination at Fort Monmouth disclosed the need for remedial dental treatment and his separation was delayed for the purpose of according him that treatment. Between his various appointments with the dentist he was allowed to go to his home and was given a pass for that purpose. Thus, it was shown that accused was furnished a "pass" denominated as "Authorization for Issue of Pass for Separatee Held for Dental Treatment" (Def Ex A). He was accompanied to his weekly dental appointments by his father. At the time accused was about 21 years of age. Finally, on approximately 20 January 1946, he was informed by an officer at the dental clinic that the separation center was about to close and that he should return to his home and "wait for notification for dental treatment and [his] discharge would be sent to [him]." He returned to his home and continued to wear his uniform until August 1946. At this time his mother was informed that accused's allotment to her was discontinued, and accused stopped wearing his uniform believing that his separation had been completed. In August 1948, he registered for the draft, and finally in January 1950 he requested The Adjutant General to furnish him an honorable discharge or certificate in lieu thereof. He was subsequently informed by The Adjutant General that he was being carried as absent without leave and that he should report to the nearest military post. Accused thereupon surrendered himself. While other circumstances shown by the record, accused's failure to apply for

mustering-out pay or regular pay, appear to be consistent with an absent without leave status, they are also consistent with the advice given accused by his father to the effect the money was "as good in the army as in his pocket."

It may thus be seen that the uncontradicted evidence adduced by the defense is consistent solely with the conclusion that the accused was absent with leave. In fact, the defense evidence is consistent with that adduced by the prosecution, and assigning full weight to the morning report entry of absence without leave does not militate against the conclusion that accused's absence was not unauthorized. Thus, with reference to the offense here considered, Winthrop has stated:

> "* * * it will be a good defense that he was absent in good faith by the permission of a superior, although the latter may have had no authority to allow such absence." (Winthrop's Military Law and Precedents, 2d Ed, 1920, p 642)

Elsewhere it has been stated:

> "* * * it is believed that there rested on the enlisted man here concerned no duty to question the procedure followed by his military superiors and the resultant delay in his reassignment, and it was reasonable for him to conclude that his absence was authorized * * *." (SPJGA 1945/817, 7 Apr 1945, Conf.; CSJAGA 1948/8906, 15 Mar 1949)

In truth, accused may have been absent without leave from his organization, in so far as his absence was unauthorized by the appropriate officers of his organization, but the morning report entry of absence without leave does not necessarily determine that he was, in fact, absent without leave. The effect of evidence of such an entry was discussed in CM 335898, Charles, 2 BR-JC 311, 313, in the following terms:

> "By introducing the extract copy of the morning report showing the initial unauthorized absence of the accused on 22 October 1946 and by the stipulation showing termination of the absence by apprehension on 12 May 1948, the dates alleged, the prosecution established a prima facie case. An unauthorized absence once shown to have begun is presumed to continue until the contrary is shown (CM 331508, Harvey, 80 BR 43; par. 146a, p. 199, MCM, 1949). Upon this presumption rested the prima facie case established by the prosecution. It is stated in paragraph 125a, MCM, 1949, that:

"'The force of any inference of fact which may have been raised by the evidence is not necessarily overcome by the introduction of rebutting evidence. The proof as a whole, including any such inference and the presumption of innocence, is to be considered by the court in arriving at its conclusions' (Underscoring supplied).

Consequently, although an inference, or presumption, of fact is not necessarily destroyed by the introduction of rebutting evidence that is not necessarily credible, such an inference or presumption is successfully rebutted by undisputed proof to the contrary, which proof is sometimes spoken of evidence that the triers of fact cannot reasonably disbelieve (Scullin v. Cities Service Oil Co., 304 Mass. 75, 22 NE (2d) 666; CM 223448, Riesenman, 13 BR 389, 402; CM 289727, Melonas, 1 BR (A-P) 247, 252)."

The undisputed evidence of the defense showing that accused returned to his home pursuant to the direction of a military superior, together with the attendant corroborative circumstances, was such that the "triers of fact [could not] reasonably disbelieve." We are of the opinion, based upon all the circumstances shown by the record of trial, that accused was absent in good faith under an order of a military superior to "go home and wait for notification for dental treatment and [his] discharge would be sent to [him]."

The circumstances of record which we find are pursuasive of the conclusion that accused was absent with leave are also compelling toward the conclusion that, conceding absence without leave to be established by the morning report entry to that effect, the intent to remain permanently away from the military service has not been established despite the duration of absence. As has been noted, accused was qualified for separation, and, hence, had no motive to desert; he did not conceal his identity but lived openly under his own name at his usual place of abode; he registered for the draft; he applied for his dividend under his National Service Life Insurance policy; he invited detection by the Army by writing to The Adjutant General concerning his discharge; and, finally, at the direction of The Adjutant General, surrendered himself voluntarily to military control. These circumstances certainly negative any conclusion that accused entertained any illegal intent in relation to his absence from the Army and negative any inference to the contrary arising from the length of his absence.

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

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

W. Mudington, J.A.G.C.

J. W. Lynch, J.A.G.C.

JAGN-CM 342150 1st Ind
JAGO, Department of the Army, Washington 25, D. C.
TO: Commanding General, First Army, Governors Island, New York 4, New York

1. In the case of Private Robert John Milmoe (RA 32766301), assigned (pipeline), 1201st Area Service Unit, Military Police and Prisoner Guard Detachment, Fort Jay, New York, 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 342150).

E. M. Brannon
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.

JUL 27 1950

JAGH CM 342265

UNITED STATES	)	UNITED STATES FORCES IN AUSTRIA
	)	
v.	)	Trial by G.C.M., convened at Vienna, Austria, 24 May 1950. Dismissal, total forfeitures after promulgation, and confinement for six (6) months.
	)	
Captain FRANCIS BERNARD BAZANOS (0-292513), Headquarters, 7669 MIS Detachment, APO 777.	)	

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 58th Article of War.

Specification: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment, did, at Vienna, Austria, on or about 20 July 1949, desert the service of the United States and did remain absent in desertion until he surrendered himself at Vienna, Austria, on or about 5 May 1950.

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

Specification: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment did without proper leave absent himself from his organization at Vienna, Austria, from about 8 June 1949 to about 10 June 1949.

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

Specification 1: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment, did at Vienna, Austria, on or about 14 April 1949, with intent to deceive and injure, wrongfully and unlawfully make and utter to Corporal Philip Nasser, a certain

check in words and figures as follows to wit: A check drawn on the Merchants & Farmers Bank, Milledgeville, Georgia, dated April 14, 1949, no payee, written inscription Francis B. Bazanos, Capt, Inf, 0-292513 as payer, not indorsed, of the value of about ($200.00) two hundred dollars in payment of a gambling debt, he the said Captain Francis B. Bazanos, then well knowing that he did not have and not intending that he should have any account with the Merchants & Farmers Bank, Milledgeville, Georgia, for payment of said check.

Specification 2: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment, did at Vienna, Austria, on or about 24 April 1949, with intent to deceive and injure, wrongfully and unlawfully make and utter to Corporal Philip Nasser, a certain check in words and figures as follows to wit: A check drawn on the Merchants & Farmers Bank, Milledgeville, Georgia, dated April 24, 1949, payee Philip Nasser, with the written inscription Francis B. Bazanos, Captain, Infantry, as payer, indorsed on the back with the inscription, Philip Nasser, for the value of ($1,000.00) one thousand dollars in payment of a gambling debt, he the said Captain Francis B. Bazanos, then well knowing that he did not have and not intending that he should have any account with the Merchants & Farmers Bank, Milledgeville, Georgia, for payment of said check.

Specification 3: (Identical to Specification 2, except the amount of the check "$250.00.")

Specification 4: (Identical to Specification 2, except the amount of the check "$350.00.")

Specification 5: (Identical to Specification 1, except the date of the offense and the check "April 16, 1949.")

Specification 6: (Identical to Specification 1, except the date of the offense and the check "April 21, 1949," and the payee of the check "cash.")

Specification 7: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment, did at Vienna, Austria, on or about 19 July 1949, with intent to deceive and injure, wrongfully and unlawfully make and utter to 1st Lt. Alfred Bergheimer, a certain check in words and figures as follows to wit: A check drawn on the American Express Company, Inc, Vienna Branch, dated 19 July 1949, payee Alfred Bergheimer, written Francis B. Bazanos, as payer, not indorsed, of the value of about ($100.00) one hundred dollars in payment of a gambling debt, he the said Captain Francis B. Bazanos, then well knowing that he did not have and not intending that he should

have sufficient funds in the American Express Company, Inc, Vienna Branch, for payment of said check.

Specification 8: (Finding of not guilty).

Specification 9: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment did at Vienna, Austria, on or about 14 April 1949, gamble with Corporal Philip H. Nassar and other enlisted men.

Specification 10: (Identical to Specification 9, except the date "16 April 1949.")

Specification 11: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment did at Vienna, Austria, on or about 21 April 1949, gamble with Corporal Philip H. Nasser.

Specification 12: In that Captain Francis B. Bazanos, Headquarters 7669 MIS Detachment did at Vienna, Austria, on or about 24 April 1949, gamble with Corporal Philip H. Nasser and other enlisted men not named.

He pleaded not guilty to Charge I, but guilty of a violation of Article of War 61, guilty to Charge II and the Specification thereunder, and not guilty to all other Specifications and Charges. He was found of the Specification, Charge I: Guilty, except the words "desert" and "in desertion," substituting therefor the words "absent himself without leave" and "without leave," Of the excepted words, not guilty, of the substituted words, Guilty; of Charge I: Not Guilty, but guilty of a violation of the 61st Article of War. He was found guilty of Charge II and the Specification thereunder; guilty of Specifications 1,2,3,4,5,6,7 and 11, Charge III; not guilty of Specification 8; of Specification 9, Guilty, except the words "Corporal Philip H. Nasser and other", of the excepted words, Not Guilty; of Specification 10, Guilty, except the words "and other enlisted men," of the excepted words, Not Guilty; of Specification 12, Guilty, except the words "and other enlisted men not named," of the excepted words, Not Guilty, and guilty of Charge III. 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 six months. 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 accused, Captain Francis B. Bazanos, was assigned to Headquarters, 7669 MIS Detachment, Vienna, Austria (R 59).

As to the Specification, Charge I.

On 20 July 1949 the accused absented himself without leave from his organization, and remained absent until 5 May 1950, at which time he surrendered to military authority (R 22,64,67; Pros Exs 1,2,8).

As to the Specification, Charge II.

On 9 June 1949 the accused absented himself without leave from his organization and remained absent until 10 June 1949, at which time he was returned to military control (R 26,67; Pros Exs 7,8).

As to Specifications1 through 6, Charge III.

During the month of April 1949 the accused issued six checks to Corporal Philip H. Nassar. These checks, three of which were payable to, and indorsed by, Corporal Nassar, one payable to cash, and two naming no payee, were issued in payment of gambling losses, and were all drawn on the Farmers and Merchants Bank of Milledgeville, Georgia, in which the accused had had no account since 29 April 1947 (R 31,36,63; Pros Exs 8, 9,10,11,12,13,14,16). Corporal Nassar, in turn, used the checks as "stakes" in a poker game and lost four of them to Corporal Robert V. Andring, and two to Corporal Charles O. Hill (R 31,32,36). The accused was present and although he was not participating in the game at that time, stated to Corporal Andring and Corporal Hill that "the checks were good and he would make them good to anybody that got the checks. He would make sure that they got the money," and that "his wife had moved and his bank account was in doubt at the time" (R 31,36). Corporal Hill testified that he understood that the accused had no account in the bank on which the checks were drawn, and was not relying upon the existence of an account, but upon "the status of his [accused] being a gentleman and an officer" (R 38). Corporal Andring thereafter "asked for the money" on several occasions. He was told by the accused that he (the accused) would "make the checks good, when his wife changed the bank account where he had the money." The accused, however, redeemed one $200.00 check which is not the subject of a specification in this case, and paid $100.00 toward redemption of another. As to the remainder of the checks "he just kept stalling," saying he "would be getting the money later on and later on" (R 32). Corporal Andring, when asked whether he was aware of an arrangement between the accused and Corporal Nassar, replied "No, just hearsay" (R 33). Corporal Hill, however, "was under full knowledge of the arrangement" between the accused and Corporal Nassar whereby the accused "would let us know when the account changed * * * or if it was still in the same bank" (R 38). The checks were never presented for payment by the holders (R 31,32,33,35,37).

As to Specification 7, Charge III.

On 19 July 1949 the accused issued to First Lieutenant Alfred Bergheimer, a check drawn on the American Express Company, in the amount

of $100.00 without knowing the status of his account with the drawee (R 43,46; Pros Exs 8,15,17). It was issued, according to the accused's pretrial statement, "during the Poker game for money which I lost to him" (Pros Ex 8). It was stipulated that Lieutenant Bergheimer would testify that he "gave Captain Bazanos $100.00 in military payment certificates for the above mentioned check" (Pros Ex 17). On the same day the accused issued two other checks, identical with the one charged as to amount and drawee (Pros Ex 8). At that time the account of the accused with the American Express Company was credited with the amount of $50.00. On the following day (20 July 1949) there was a deposit of $50.10 to the credit of the account, and a withdrawal of $100.00 (Pros Ex 18).

As to Specifications 9 through 12, Charge III.

On several occasions in April 1949 the accused was seen gambing with enlisted men (R 49,50). The checks set forth in Specifications 1 through 6 were given in payment of losses incurred by the accused on these occasions (Pros Ex 8).

The accused, having been warned of his rights under Article of War 24, made a sworn pretrial statement (R 40,43; Pros Ex 8). He stated that he had absented himself from his organization, without leave, on 9 and 10 June 1949, and from 20 July 1949 to 5 May 1950. He issued six checks to Corporal Nassar during poker games with that individual, those checks being the ones set forth in Specifications 1 through 6, Charge III. Corporal Nassar, however, was asked by the accused to hold the checks, and not to deposit them, and was told that the accused would redeem them. The accused knew he had no account in the bank on which the checks were drawn. On 19 July 1949 he issued three checks, each in the amount of $100.00, all drawn on the American Express Company. He did not, at that time, know the status of the account against which those checks were drawn. He had played poker with a number of enlisted men (Pros Ex 8).

b. For the defense.

The place at which the accused stayed during his absence of 20 July 1949 to 5 May 1950 is in the American Zone of Vienna, and within the area under the command of the officer commanding the American forces in Vienna (R 52,57,58).

The accused, having been warned of his rights as a witness, elected to testify under oath (R 59). He testified, in substance, that he recalled having gambled with Corporal Nassar, and having issued checks to him. Corporal Nassar was informed by the accused at that time, however, that the accused had no money in the bank on which the checks were drawn, and that he was "to hold them and I would make them good as soon as I could get the money straightened out in the states; or that either I would take them up over here if I could get hold of the money." The accused held the note of an individual in the United States in the amount of $5,800.00. This note had matured, and the money in payment thereof was to have been deposited in the bank on which the checks to Corporal Nassar were drawn. Those checks were given "more in the idea of a promissory note" (R 63). He had given Corporal Andring $300.00 "on account" for some of the checks (R 64).

4. Discussion.

The accused was found guilty of being absent without leave during the periods 9 to 10 June 1949, and 20 July 1949 to 5 May 1950. These findings are amply supported by the evidence. That the accused remained within the American Zone of Vienna during his absence is no defense, it having been shown that he was absent from his place of duty (Par. 149, MCM, 1949; CM 280665, Matheron, 53 BR 293,296).

The defense objected to the admission in evidence of an extract copy of a morning report dated 20 July 1949 to show the absence of 9 to 10 June 1949, on the ground that it appeared that the entries were made in May 1950. Examination of that document shows that 10 May 1950 is the date of authentication (Pros Ex 7). The entries are dated 20 July 1949. The interval between the occurrence of the events and their entry into the morning report was thus only slightly in excess of one month. The law does not require that such an entry, to be admissible in evidence, must have been made on or about the date on which the events occurred. It is enough that the person who made the entry had, at the time it was made, the duty to ascertain and record the facts recited (Par. 130a, MCM, 1949; CM 336812, Milano, 3 BR-JC 225,232).

The accused is charged with having made and uttered seven worthless checks with intent to deceive and injure. The evidence shows that six of those checks were given in payment of gambling debts. It is not necessary, however, to determine whether there was any consideration given in exchange for the checks. The allegations are that the checks were made and uttered with intent to deceive. The receipt of consideration in exchange for the checks is not an element of the offense (CM 322695, Thomas, 71 BR 309,313).

There remains the question whether the checks were uttered with the intent to deceive. The accused maintained that they were given, not as checks, but as security for gambling debts, and "more in the idea of a promissory note." This assertion is supported by the testimony of Corporal Hill to the effect that the recipients of the checks, including Corporal Nassar, the first holder thereof, were asked by the accused to "hold" them. The testimony of Corporal Andring as to whether he knew of any arrangement between the accused and Corporal Nassar, implied that he had heard of some such arrangement. That testimony was, of course, incompetent to show that there was, in fact, any arrangement, but it was at the same time competent to show that the witness had been told that there was such an arrangement (CM 296654, Scharosch, 58 BR 219,224). The court, in finding the accused guilty of Specifications 1 through 6, Charge III, impliedly found that he uttered the checks with the alleged intent.

"Under Article of War 50g it is our right and duty to weigh the evidence as well as to pass upon the formal legal sufficiency

of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions are, strictly speaking, legally justified by the evidence appearing in the record. Briefly stated, we are allowed a difference of opinion. We, too, must be convinced of accused's guilt beyond a reasonable doubt." (CM 335070, Brown, 2 BR-JC 39,45).

The evidence tends to establish that the parties concerned knew that the accused had no account in the drawee bank, and that they were asked by the accused to hold the checks. If this were the fact, not only would it negate any inference of intent to deceive, but would reduce the checks to the status of mere evidences of indebtedness given in connection with a promise to pay at a future time (CM 279483, Davis, 52 BR 227,230). The probability that such is the fact is considered so great as to give rise to a reasonable doubt as to the guilt of the accused with reference to these offenses.

At the time when the accused uttered the check alleged in Specification 7, Charge III, on the American Express Company, his account with that firm was credited with only $50.00. He also admitted having written on the same evening two other checks identical with this one as to amount and drawee. He did not tell the payees of these three checks that his account was, or might be, insufficient to pay them. On the following day he deposited $50.10 in his account, but on the same day $100.00 was withdrawn, presumably in payment of one of the two checks mentioned, so that his account was insufficient to pay the check with which we are here concerned. It was not shown that this check was ever presented for payment.

In CM 314205, Bock, 64 BR 47,50, the Board of Review, in holding that the failure to prove presentment and dishonor was fatal to a charge of uttering a worthless check with intent to defraud stated that:

"There is no proof as to the nonexistence or condition of any account with that bank in the name of the accused."

In CM 284157, Willey, 55 BR 279,286, where the charge was uttering a worthless check with intent to defraud, it was said that:

"The evidence * * * indicates that the check * * was not presented for payment because the hotel had received information that accused's account in the drawee bank had been closed * * *. This evidence as to the condition of the accused's bank account was hearsay * *. Were there nothing else in the record of trial we would be compelled to disapprove the court's findings * * for lack of proof of the condition of accused's bank account * * when this check was uttered." (underscoring supplied)

and in CM 336515, Stewart, 3 BR-JC 115,131, the Judicial Council stated:

> "The authorities leave no room for serious question that although * * * evidence that the accused after uttering the check, failed to maintain an adequate balance in the drawee bank would be competent to the issue of fraudulent intent, proof of such failure is not legally requisite." (underscoring supplied)

No reason is perceived why this statement does not apply as well where the allegation is of intent to deceive, for it is elementary that deception is an element of every fraud. This principle was applied, but not discussed, in CM 322695, Thomas, supra, wherein the evidence clearly showed that a check, alleged to have been uttered with intent to deceive, was never presented for payment. It was there shown, however, that presentment would have been useless. The cases cited adequately support the proposition that proof of presentment and dishonor is unnecessary where it is otherwise shown that the account on which the check was drawn was insufficient to pay it, and it is so concluded. 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 on which it is drawn (CM 337978, Gallo, 4 BR-JC 193,201). The condition of the account of the accused in this instance makes it obvious that the check would not have been honored if presented. The representation of the accused was therefore false. There is some confusion in the evidence with respect to the precise nature of the transaction which surrounded the making and uttering of this check. It would appear from the accused's pretrial statement that the check was issued during a poker game as payment of a debt to the the payee resulting from the accused's losses to him during the game. The payee's stipulated testimony, however, indicates that he paid $100.00 in military payment certificates to the accused in exchange for the check. The specification alleges that the check was made and uttered in payment of a gambling debt. In view of the court's unqualified findings of guilty of the specification, it may be assumed that it believed that the check was issued during the poker game to cover military payment certificates which the accused owed the payee in connection with losses incurred during the game. It is obvious that the accused intended that the payee should rely upon the worthless check as payment for the concurrently incurred obligation, and thus intended to deceive, as alleged. With reference to the allegation that the accused also intended to injure, the verb "injure" is defined as "To violate the legal right of another or inflict an actionable wrong" (Black's Law Dictionary (3d Ed), p.965). The payee, as soon as the accused became indebted to him for the military payment certificates during the game, had the right to immediate payment of the amount owed him either in money or its equivalent. In the light of the evidence that the accused gave the payee not the equivalent of money, but what the accused knew was a worthless check, and viewing the evidence relating to the transaction as a whole, it seems clear that he intended to violate the payee's right and thus intended to injure, as alleged.

The fact that there were, for a short time sufficient funds in the account of the accused to have paid this check is no defense, since he, by issuing other checks which were presented before this one, so depleted the account that it was not sufficient to pay this check (CM 307125, Keller, 60 BR 335, 343). His conduct in this respect was a violation of Article of War 95 (CM 322695, Thomas, supra).

The accused was charged, in Specifications 8 to 12, inclusive, Charge III, with five separate offenses of gambling with enlisted men, and was found guilty of four of those offenses, which were alleged to have occurred on 14, 16, 21 and 24 April 1949. The evidence shows that the accused was seen gambling with enlisted men "several" times "during the month of April 1949." Furthermore the accused admits that the six checks given by him to Corporal Nassar were given during poker games with that individual. It is noted that of the checks to which the accused had reference three are dated 14, 16 and 21 April 1949, respectively, and three 24 April 1949. In the absence of evidence to the contrary a written instrument is presumed to have been executed on the date it bears (CM 332879, Boughman, 81 BR 223, 232) The checks in the instant case having been shown to have been executed during poker games with enlisted men, it may be assumed that these poker games occurred on the dates borne by the checks. A comparison of the dates of those checks with the dates on which the four offenses of gambling with enlisted men, of which the accused was found guilty, were alleged to have occurred shows that they are identical. It is the opinion of the Board of Review that these facts adequately sustain the findings of guilty of Specifications 9 to 12, inclusive, Charge III. However, those offenses, committed in the presence of military personnel only, and without any showing of disorderly or ungentlemanly conduct, were not properly laid under Article of War 95, but should have been alleged and found as violations of Article of War 96 (CM 336350, Hoover, 3 BR-JC 39,49; CM 276847, Ponsler, 51 BR 47,50).

5. Records of the Department of the Army show that the accused is 38 years of age and married. He graduated from Georgia Military College High School in 1930, and thereafter attended Georgia Military College and Vanderbilt University for one year each. In civilian life he worked as salesman, sales supervisor, assistant sales manager, and sales manager for a soft drink manufacturing company, and as a hospital attendant. He served in the National Guard from 1 August 1928 to 1 August 1931, and was commissioned as a Second Lieutenant in the Officers' Reserve Corps on 26 February 1932. This commission lapsed at the expiration of five years, and in March 1942 he enlisted in the Army. He attended officers candidate school from 22 July 1942 to 17 October 1942, and was appointed Second Lieutenant upon completion of that training. He was promoted to First Lieutenant on 19 May 1943, to Captain on 27 July 1944, and to Major on 7 March 1946, and was separated from the service on 15 May 1946. He entered upon his present tour of active duty on 29 October 1948 in the grade of Captain. He served overseas in Europe for sixteen months during his first tour of active duty, and returned there upon entry upon the

present tour. He is authorized to wear the Bronze Star Medal, the American Theater Ribbon, the European, African, Middle Eastern Theater Ribbon with three battle stars, the World War II Victory Medal, a Meritorious Unit Service Plaque, and the Combat Infantryman's Badge. His efficiency ratings have been one very satisfactory, one satisfactory, five superior, and two excellent. His last numerical rating, not included in the above, was 107.

6. 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 were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, as modified by the court, Charge II and its Specification, Charge III and Specification 7 thereof, and so much of the findings of guilty of Specifications 9 to 12, inclusive, of Charge III, as finds the accused guilty of a violation of the 96th Article of War, legally insufficient to support the findings of guilty of Specifications 1 to 6, inclusive, of Charge III, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal, total forfeitures after promulgation, and confinement at hard labor for six months are authorized upon conviction of an officer of violations of Articles of War 61 and 96. A sentence to be dismissed the service is mandatory upon conviction of violations of Article of War 95.

C. P. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

Edward Bauman, J.A.G.C.

CM 342,265

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 Captain Francis Bernard Bazanos, 0-292513, Headquarters, 7669 MIS Detachment, APO 777, upon the concurrence of The Judge Advocate General, the findings of guilty of Specifications 1 to 6, inclusive, of Charge III are disapproved and only so much of the findings of guilty of Specifications 9 to 12, inclusive, of Charge III as finds the accused guilty of violations of the 96th Article of War is approved. 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

21 Aug 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.

JAGK - CM 342372

4 AUG 1950

UNITED STATES v. First Lieutenant IRVING F. DICKERSON (O-1293220), Company "K", 505th Airborne Infantry Regiment.	82D AIRBORNE DIVISION Trial by G.C.M., convened at Fort Bragg, North Carolina, 9 June 1950. Dismissal, total forfeitures after promulgation, and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
McAFEE, WOLF 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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Irving F. Dickerson, Company "K", 505th Airborne Infantry Regiment, Fort Bragg, North Carolina, did, at Fort Bragg, North Carolina, on or about 31 January 1950, feloniously steal ten dollars ($10.00), lawful currency of the United States, the property of Sergeant First Class Kise Jones, Company "K", 505th Airborne Infantry Regiment.

NOTE: The remaining specifications similarly allege larceny of money on the dates, in the amounts, and from the persons shown below:

Spec.	Date	Amount	Person
2	3 Feb 1950	$100.00	Cpl Leon D. Toler
3	2 Feb 1950	$100.00	Pvt Jean R. Griffin
4	2 Mar 1950	$100.00	Pvt Jean R. Griffin
5	18 Mar 1950	$100.00	Pvt Jean R. Griffin
6	3 Apr 1950	$125.00	Pfc Herbert L. Cooper

He pleaded not guilty to and was found guilty of the charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, 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 years. 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

Accused is in the military service and has been a member of Company "K", 505th Airborne Infantry Regiment, Fort Bragg, North Carolina, since about the first of October 1949. On approximately the first of January 1950, his company commander, Captain William R. Reid, appointed accused Bonds and Savings Officer. In this capacity, accused was responsible for collection of soldiers' deposits after the men were paid (R 9). Within the 505th Airborne Infantry Regiment, the Savings and Bonds Officer after collecting money for soldiers' deposits was supposed to turn the money into the personnel office. The money would be accompanied by a list showing the "amount of each man concerned." In turn the Savings and Bonds Officer would receive a "bulk receipt" for the money turned in by him (R 24-27). The Soldiers' Deposit Books of the several depositors were kept in the personnel office and when the deposits were brought in to the personnel office by the Savings and Bonds Officer the deposits would be entered in the deposit books of the depositors and authenticated. At the same time, a collection voucher would be made up and the money would be turned in to Finance (R 24, 27, 29). The Finance Office received soldiers' deposits with a form "more or less *** [like] a roster" in six copies and the soldiers' deposit books. The books and six copies of the form would be receipted and the books and two copies of the form would be returned to the officer who brought the money. Of the remaining four copies of the form, three would be sent to St. Louis, and the remaining one would be retained in the Finance Office. From the retained copy a memorandum entry as to the deposits would be entered upon the pay cards of the several depositors (R 28-29). Individual pay cards were maintained in the regular course of business in the Finance Office and the fact of a deposit by an individual was supposed to be entered on his pay card (R 30).

Accused received money for deposits from the following named men of his company for deposit in their respective soldiers' deposit accounts in the amounts and on the dates shown opposite their names:

Name	Amount	Date
Sgt 1st Cl Kise Jones	$10.00	31 Jan 1950 (R 10-12)
Cpl Leon Toler	$100.00	2 Feb 1950 (R 13-14,46; Pros Ex 13)
Pvt Jean R. Griffin	$100.00	1 Feb 1950 (R 16-17,46; Pros Ex 14)
Pvt Jean R. Griffin	$100.00	1 Mar 1950 (R 17-18,46; Pros Ex 15)
Pvt Jean R. Griffin	$100.00	17 Mar 1950 (R 18,46; Pros Ex 16)
Pfc Herbert L. Cooper	$125.00	1 Apr 1950 (R 20-21,46; Pros Ex 17)

The deposits given by Griffin to accused were all in bills of twenty dollars, and the one deposit made by Toler did not contain a hundred dollar bill (R 45).

The service records and pay cards of the above named enlisted men have no entries evidencing the making of the deposits set forth opposite their names (R 23, Pros Exs 1,2,3,4; R 28,29,30, Pros Exs 7,8,9,10). Soldiers' Deposit Books pertaining to Griffin and Cooper retained by the personnel officer likewise were void of entries respecting deposits of the amounts above set forth opposite their names (R 24, Pros Exs 5,6). First Lieutenant Thomas W. Donovan, Personnel Officer of the 505th Airborne Infantry Regiment, testified that his office held the soldiers' deposit cards for Griffin and Cooper and that, as to Jones and Toler, no deposits had been made through his office, and, therefore, cards had not been initiated for them (R 23).

Sometime within a month after 2 February 1950, the date upon which Toler had given accused $100.00 to deposit in soldiers' deposits, accused called Toler and told him that he had not deposited his $100.00 in soldiers' deposits and explained that there was "a troubled affair in his family" (R 14). On 19 April accused had a conversation with Jones and informed the latter that he still had his ten dollars but would deposit it (R 11).

On or about 17 April 1950 Lieutenant Colonel Robert S. Moore directed Captain Reid, in the presence of accused, to proceed to accused's quarters and there witness "the entire procedure of [accused] taking from a footlocker a certain envelope containing money" belonging to Griffin and Cooper. Colonel Moore also directed that Griffin and Cooper accompany Captain Reid and accused (R 35,42). Pursuant to Colonel Reid's direction the party went to accused's home in Fayetteville. Accused drove his own car and the two enlisted men accompanied Captain Reid in his car. En route, stops were made at

"BOQ 34," the "Lakeview Officers' Mess," and at the "R & S Service Company" at Spring Lake. At the service station, accused asked James Roscoe Pope, a partner in the service station, to lend him four hundred and seventy-five dollars until the next morning. Accused explained to Pope that although he could write a check, a check would not do as he needed cash. Pope acceded to accused's request and lent him the money which included four one hundred dollar bills. Accused left his car to be serviced and to be picked up the next day. Although accused did not return for the car for seven or ten days, it had not been kept as a pledge for the loan (R 39-40). Pope considered accused to have a good reputation and to be a good risk (R 41). After leaving the service station, Captain Reid, Cooper, and Griffin accompanied accused to his home. Accused went to another room on the first floor and two or three minutes later returned to the room where Captain Reid was waiting (R 36). Concerning accused's action on his return Captain Reid testified:

> "Q: What then occurred?
>
> "A: He went to the footlocker that was sitting right there, and he opened it and looked inside of it, and he rummaged around there in it, and then he called me over and he picked out an envelope and he said, 'Here is the envelope.' It was down under some O.D. things. (R 36)
>
> * * *
>
> "Q: I recall you mind to your previous testimony concerning a transaction in the home of Lt. Dickerson during the month of April, 1950. Are you able to state of your own knowledge that the envelopes taken from the footlocker that you described actually came from that footlocker?
>
> "A: I could say that the envelopes appeared to have been taken from it, since he was there and the footlocker was opened, but he was between me and the footlocker. I was on the other side, and he was behind the footlocker, between it and me." (R 44)

The envelope which was unopened had the names of Cooper and Griffin upon it. Captain Reid opened the envelope and found at least three one hundred dollar bills in it. Captain Reid replaced the money in the envelope and left (R 37). Captain Reid preceded accused, Griffin and Cooper to his car. While accused was going to the car with Griffin and Cooper he asked them if they were satisfied with the "procedure going on." When they responded, "No, sir, we want someone in higher authority to see what satisfaction we can get from the matter," accused expressed the wish that they would not, that he did not want "the thing to come to that," and be "court-martialed or discharged" (R 45-46).

Captain Reid reported to Colonel Moore the following morning and subsequently turned over the envelope and money to Colonel Moore (R 37,42).

Colonel Moore identified Prosecution Exhibit 11, an envelope labeled with Griffin's name and three one hundred dollar bills contained therein, and Prosecution Exhibit 12, an envelope labeled with Cooper's name and one hundred dollar bill, seven ten dollar bills and a five dollar bill contained therein as the envelopes and money he received from Captain Reid (R 42-43).

b. For the Defense

Upon request of the defense counsel, the court took judicial notice of paragraph 8, DA Bulletin No. 56, Headquarters 82d Airborne Division, 9 March 1950, which provides as follows:

> "SOLDIERS' DEPOSITS: Enlisted men desiring to make Soldier's deposits will be encouraged to make such deposits immediately after being paid on payday. Personnel officers will deposit these funds with the Division Finance Officer on or before 1600 hours on payday. Arrangements for accepting deposits at a later hour may be made by contacting the Division Finance Office (Telephone 5-2116) prior to 1600 hours." (R 47)

Accused, after being apprised of his rights, elected to make an unsworn statement under examination of the defense counsel. He stated that he had been in the Army for 9-1/2 years and had combat duty with the 366th Infantry in Italy and had subsequently served in Japan. He had been awarded the Silver Star for gallantry in action and also received the Purple Heart and the Combat Infantryman's Badge. Prior to joining Company K, 505th Airborne Infantry Regiment, he had handled soldiers' deposits for the 24th Infantry Regiment in Japan and there never had been any occasion for anyone to accuse him of converting money to his own use (R 51). He joined Company K in October 1949 and since that time had the duties of Bonds and Savings Officer in the company. On several occasions after 1 February 1950 he received money from Griffin, Toler and Cooper. At the time he received deposits from Toler and Griffin in February, accused was preparing to take Platoon Airborne leadership and was taking part in platoon tests in attack and defense. During the month he did not have an opportunity of giving his collections to the Personnel Officer, but planned to turn them in on the 28th, pay day. On the 27th, however, he had to make a jump in the Mackall area, and did not return until after 5 o'clock on the 28th. Two or three days after pay day accused accepted more money for deposit from Griffin and at that time told Griffin that the earlier amount had not been deposited as accused had been unable to get to the Finance Office. When the Daily Bulletin came out from Division Headquarters stating that all deposits must be made on pay day, accused interpreted that to mean "that all deposits would be made on pay day" and so did not go to the Finance Office to make the deposit.

In the course of the month, accused received another deposit from Griffin although the latter was told that the deposit would not be made until pay day. On 27 March 1950, accused went to Fort Wayne, Indiana, to get his wife who had just left the hospital, and did not return until 1 April when he "umpire(d) the 325th." When accused returned from the field, Cooper gave him $125.00 although accused told him it would not be deposited until the 30th. It was accused's intention to take all the money which he had and which amounted to $475.00 and deposit it with the Finance Officer (R 48-49).

In each instance that accused received money for soldiers' deposits, he had given a receipt although the giving of a receipt by a Bond and Savings Officer wasnot authorized. Accused did not keep soldiers' deposit money in the company safe after one of the keys to the safe disappeared. Instead he kept it in a footlocker. When he accepted money for deposits he "just stuck it" with his own funds until he returned home. At that time he would put the several amounts received into envelopes labeled with the names of the persons who had given the money to him. He did not always put in the denominations of bills he had received, and did not feel it would make any difference so long as he put in the correct amount (R 49-50).

He admitted receiving money from Mr. Pope but added he had expenses at the time since his wife was in the hospital. He did not leave his car with Pope as a pledge. When he had been directed to go to his quarters in Fayetteville, he did not understand he was to proceed there directly. The following day, however, the Battalion Commander told him that he had meant to tell accused to go directly to his quarters (R 50, 51).

Captain William A. Reid, recalled as a witness by the defense, testified that he believed Company K took part in a field problem on the 27th and 28th of February 1950 but could not state whether accused took part in the problem. He recalled that in the approximate period of 27 March to 1 April accused went on a short leave. Captain Reid further testified that accused's reputation for truth, veracity, and honesty was very good and that his reputation for moral character was excellent.

With reference to previous testimony concerning the stop made at the Lakeview Officers' Mess en route to accused's quarters in Fayetteville, Captain Reid stated that a Major Morgan had called and asked that accused see him at the club (R 51-52).

Major James H. Porter testified that he had known accused for 2-1/2 years, had served with him for approximately a year; that accused's reputation for truth, veracity, honesty, and moral character

was excellent, and that in so far as he knew accused's performance of duty had been excellent (R 52,53).

Sergeant Ernest Thompson testified that he had known accused for approximately eight to nine months during which period accused had been his platoon leader. Based upon his association with accused Sergeant Thompson stated that accused's reputation for truth, veracity, honesty and moral conduct was excellent, and, further, that he was very efficient in his duties (R 53).

4. Discussion

Accused has been found guilty of six offenses of larceny totaling $535.00 from four named enlisted men during the period 31 January 1950 to 3 April 1950, inclusive. The evidence shows that within that period accused as Bonds and Savings Officer of his company accepted money from four enlisted men of his company for deposit in soldiers' deposits. In fulfillment of that purpose, accused was supposed to turn money so received into the Regimental Personnel Office where in turn the necessary voucher would be made up and from whence the money would be turned in to Finance. The pay records and service records of the several soldiers concerned, by their failure to record the fact of deposit of the amounts entrusted to accused, evidence the circumstance that the monies were never in fact deposited in Finance. On 19 April 1950, accused admitted to Jones from whom he had accepted ten dollars on 31 January that he had not deposited the ten dollars. In his unsworn statement to the court, accused admitted he had made no deposits after 1 February. On 19 April 1950, he was directed to produce the money entrusted to him by two of the enlisted men concerned. Pursuant thereto he proceeded to his home in Fayetteville where the money was supposed to be. En route he borrowed $475.00 of which $400 was in bills of $100.00 denomination. Upon arrival at his home accused absented himself for a few minutes from Captain Reid, his company commander, who had been directed to accompany him. Upon his return to the room in which Captain Reid was waiting, accused ostensibly withdrew an envelope from a footlocker. Contained in the envelope was $475.00, ownership of which was attributed to Cooper and Griffin, two of the enlisted men who had entrusted money to accused for deposit in soldiers' deposits. Of the $475.00, $400.00 was in bills of $100.00 denomination. None of the amounts severally entrusted to accused had contained bills of that denomination. Implicit in the findings of guilty by the court is the finding of fact that the $475.00 ostensibly taken from his footlocker by accused was the $475.00 accused had borrowed from Pope a few minutes earlier. Such a finding of fact was justified. That accused should have possession of $475.00 entrusted to him by others, which he was being called upon to produce, and coincident thereto, have the necessity of borrowing the identical sum to relieve domestic distress, is too unlikely to be considered fact (CM 340473, Morton, 1950). It should be observed that accused's

liability to Griffin and Cooper was but $425.00, and that his total liability to Griffin, Cooper, Toler and Jones was $535.00. It is apparent from all the circumstances shown by the record that on 19 April 1950 when he was called upon to produce the money which belonged to Cooper and Griffin that not only their money but that which belonged to Jones and Toler was not only undeposited but was dissipated. It is noted that even at the trial accused studiously avoided accounting for the funds received from Jones and Toler. In the light of the foregoing his claim of commingling the funds entrusted to him with his own is obviously specious.

> "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 conversion through breach of trust or bailment" (MCM, 1949, par 180g).

The evidence that accused at divers dates between 31 January and 3 April 1950, inclusive, received the sums of money totaling $535.00 from four enlisted men for the purpose of depositing said sum to their respective soldiers' deposit accounts, but did not do so, and failed to account therefor but tried to render a false account in part, exemplifies larceny within the definition set forth (Morton, supra).

Accused's pretext that the $475 borrowed from Pope belonged to Griffin and Cooper at best may be considered as an act of restitution, but restitution is not a defense to the offenses charged.

5. It is suggested by appellate counsel for accused (a) that Article of War 93 as amended by the act of 24 June 1948 (62 Stat 640, 10 U.S.C. 1565) does not abolish the historical distinction between common law larceny and embezzlement; (b) that the specifications of the charge which commonly allege that accused did "feloniously steal" is identical to the larceny specification contained in Appendix 4, Manual for Courts-Martial, 1928; (c) that, therefore, accused was charged with common law larceny; (d) that since the proof tends to show embezzlement rather than larceny there is a variance between the allegations and the proof.

We disagree. With reference to proposition (a), supra, we find that Congress intended to abolish the historical technical difference between larceny and embezzlement and to recognize the gist of those two offenses, the unlawful appropriation of the personal property of another, as one offense to be denoted as larceny. In hearings on HR 2575, 80th Congress, First Session, the purpose of the amendment to Article of War 93 was stated as follows:

"*** The purpose of this amendment is to remove the technical distinction between larceny and embezzlement which in many cases becomes very difficult of application, particularly with personnel administering courts-martial who are not thoroughly versed in the law. Larceny, as we know, at common law requires a trespass, whereas embezzlement is the fraudulent conversion of property into whose hands the property has lawfully come. We soon find ourselves in the area of custody as distinguished from possession. The proposed amendment we think follows the trend of most State jurisdictions toward avoiding the technical distinctions between larceny and embezzlement." (Hearings, p 2129)

It follows, therefore, since the manner of initial possession of property is immaterial, that larceny, or embezzlement may be defined identically as "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" (MCM, 1949, par 180g).

With reference to propositions (b) and (c), we observe that the larceny specification based upon Article of War 93 as amended contained in Appendix 4, Manual for Courts-Martial U.S. Army, 1949, alleges "Feloniously steal" whereas the larceny specification based upon common law larceny, contained in Appendix 4, Manual for Courts-Martial, 1928, alleges "Feloniously take, steal, and carry away." It is obvious that the specifications in the instant case allege the offense of larceny as defined in paragraph 180g, Manual for Courts-Martial U.S. Army, 1949.

It is apparent that since the major premises advanced by appellate counsel are without merit, the conclusions based thereon are similarly without merit.

6. Department of the Army records show that accused is 28 years of age, married, and has two children. He is a high school graduate and has received 22 hours of pre-medical school credits in the Indiana University Extension School. He had enlisted service from 1 April 1941 to 10 September 1942 when he was commissioned a second lieutenant. He was promoted to first lieutenant on 27 February 1945. He had combat service in Italy and as a result thereof was awarded the Purple Heart, Bronze Star Medal and Silver Star. He subsequently had foreign service in Japan. His efficiency ratings of record are "Very Satisfactory" (5), "Excellent" (10), and his overall efficiency ratings are "079", "078", "105", and "056."

7. The court was legally constituted and had jurisdiction over the person and 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 Article of War 93.

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

Samuel S. Cooper, J.A.G.C.

J. W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342,372

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Irving F. Dickerson, 0-1293220, Company "K", 505th Airborne Infantry Regiment, 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.

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

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

30 August 1950.

(GCMO 59, September 6, 1950).

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

JAGH CM 342392

JUL 28 1950

UNITED STATES v. First Lieutenant JOSEPH HENRY LONDON (060672), Headquarters 365th Infantry Regiment.	))))))))	9TH INFANTRY DIVISION Trial by G.C.M., convened at Fort Dix, New Jersey, 1 and 2 June 1950. Dismissal, total forfeitures after promulgation, and confinement for six (6) months.

HOLDING by the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 Charges and Specifications:

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

Specification 1: In that 1st Lieutenant Joseph H. London, Headquarters, 365th Infantry, did, at or near Fort Dix, New Jersey, on or about 18 April 1949, with intent to defraud, wilfully, unlawfully, and feloniously forge the signature of one of the makers of a certain promissory note in substantially the following words and figures, to wit:

(face of note)

$25.00 No. 7 Norfolk, Va. April 18, 1949
ON November 20, 1949 We, or either of us PROMISE TO PAY TO THE ORDER OF _____W. H. HOFHEIMER COMPANY _____Negotiable and Payable without offset, at
THE SEABOARD CITIZENS NATIONAL BANK
Norfolk, Va.
_____The Sum of $25 Dols 00 cts_____Dollars
for value received, with costs of collection including an attorney's fee of ten per cent, if incurred, in case of payment shall not be made at maturity; and we, the maker or makers, endorser or endorsers hereof, hereby waive the

benefit of our homestead exemptions as to this debt, and the endorser or endorsers hereof hereby waive presentment, protest and notices of dishonor and agree that the time of payment of this note may be extended from time to time without notice to, or the further consent of the said endorser or endorsers.

/s/ Mrs. Ruby London
Fort Dix N.J. Address

/s/ Lt Joseph H. London
Co. H. 365th Inf
Fort Dix N. J.

(back of note)

W. H. HOFHEIMER COMPANY
/S/ W. H. HOFHEIMER

HOFHEIMER & COMPANY
By .....

by falsely writing on the face thereof, without authority, the name "Mrs. Ruby London," which said promissory note was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that 1st Lieutenant Joseph H. London, Headquarters, 365th Infantry, did, at or near Fort Dix, New Jersey, on or about 18 April 1949, with intent to defraud, wilfully, unlawfully, and feloniously forge the signature of one of the makers of a certain promissory note in substantially the following words and figures, to wit:

(face of note)

$25.00 No. 8 Norfolk, Va. April 18, 1949
ON December 20, 1949 We, or either of us PROMISE TO PAY TO THE ORDER OF _____ W. H. HOFHEIMER COMPANY ____ Negotiable and Payable without offset, at

THE SEABOARD CITIZENS NATIONAL BANK
Norfolk, Va.

_____The Sum of $25 Dols 00 cts _____ Dollars for value received, with costs of collection including an attorney's fee of ten per cent, if incurred, in case payment shall not be made at maturity; and we, the maker or makers, endorser of endorsers hereof, hereby waive the benefit of our homestead exemptions as to this debt, and the endorser or endorsers hereof hereby waive presentment, protest and notices of dishonor and agree that the time of payment of this note may be extended from time to time without notice to, or the further consent of the said endorser or endorsers.

/s/ Mrs Ruby London
Fort Dix, N. J.
Address

/s/ Lt Joseph H. London
Co. H. 365th Inf
Fort Dix N. J.

(back of note)

W. H. HOFHEIMER COMPANY
/s/ W. H. Hofheimer

HOFHEIMER & COMPANY
By .....

by falsely writing on the face thereof, without authority, the name "Mrs. Ruby London" which said promissory note was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: In that 1st Lieutenant Joseph H. London, Headquarters, 365th Infantry, did, at or near Fort Dix, New Jersey, on or about 18 April 1949, with intent to defraud, wilfully, unlawfully, and feloniously, utter, pass, and use as true and genuine, a certain promissory note in words and figures substantially as follows, to wit:

(face of note)

$25.00 No. 7 Norfolk, Va. April 18, 1949
ON November 20, 1949, We, or either of us PROMISE TO PAY TO THE ORDER OF _____ W. H. HOFHEIMER COMPANY _____ Negotiable and Payable without offset, at
THE SEABOARD CITIZENS NATIONAL BANK
Norfolk, Va.
_____ The Sum of $25 Dols 00 cts _____ Dollars
for value received, with costs of collection including an attorney's fee of ten per cent, if incurred, in case payment shall not be made at maturity; and we, the maker or makers, endorser of endorsers hereof, hereby waive the benefit of our homestead exemptions as to this debt, and the endorser or endorsers hereof hereby waive presentment, protest and notices of dishonor and agree that the time of payment of this note may be extended from time to time without notice to, or the further consent of the said endorser or endorsers.

/s/ Mrs. Ruby London
Fort Dix N.J. Address

/s/ Lt Joseph H. London
Co. H. 365th Inf
Fort Dix N. J.

(back of note)

W. H. HOFHEIMER COMPANY
/s/ W. H. HOFHEIMER

HOFHEIMER & COMPANY
By .....

a writing of a private nature which might operate to the prejudice of another, on which the said signature of Mrs. Ruby London was, as he, the said 1st Lieutenant Joseph H. London, then well knew, falsely made and forged.

Specification 2: (Identical to Specification 1, except the No. of the note "8", and the date "December 20, 1949.")

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

Specification: In that 1st Lieutenant Joseph H. London, Headquarters, 365th Infantry, being indebted to W. H. Hofheimer Company, Norfolk, Virginia, in the sum of $125.00, which amount became due and payable from about 20 November 1949 to about 20 March 1950, did, at Norfolk, Virginia, from about 20 November 1949 to about 13 April 1950, dishonorably fail and neglect to pay said debt.

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, 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 six months. 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.

First Lieutenant Joseph Henry London, the accused, was stationed at Fort Dix, New Jersey (R 23,37,39,47; Pros Exs 1,2,5, Ap. 2).

In April 1949 he applied by mail to the W. H. Hofheimer Company of Norfolk, Virginia, for a three hundred dollar loan. This company was in the business of making loans to "personnel in the service" (Pros Ex Ap 1, 2; B pp.1,2). Pursuant to the requirements of the company, the accused submitted personal data information, twelve promissory notes each dated 20 May 1949, in the sum of twenty-five dollars and severally payable on the 20th day of each month from May 1949 to April 1950, inclusive, and twelve postdated checks dated one on each of the due dates of the installment notes in the sum of twenty-five dollars each and drawn on the Peoples

National Bank and Trust Company of Pemberton, New Jersey (R 42,43; Pros Exs 2,3,5,6,7, A pp 1,2,5). The promissory notes payable to the loan company were discounted (purchased) by Hofheimer and Company, an affiliate (Pros Ex A, p 3; B, p 1). The company required that the notes be signed by the accused and his wife (R 51; Pros Exs 2,5; A p 4; B p 3). They were actually signed by the accused and the signature of his wife was added by another person at his direction (R 24,30,31,34,43-45,51; Pros Exs 2,5,9). At that time his wife was living in Houston, Texas (R 41,42). Upon receipt of the installment notes and postdated checks the discounting company sent the accused the sum of $252.00 by check dated 28 April 1949 (R 44; Pros Ex 1, A p3, B p2). A woman who identified herself to an investigator as Mrs. Ruby London, the wife of the accused, signed a paper. This signature was compared with the signature on the notes and they did not appear to have been written by the same person (R 23-32,34-36; Pros Exs 2,5,9).

The checks issued by the accused dated 20 September 1949 and 20 October 1949 were dishonored by the bank, and upon notification by the company, the accused paid the sum by money order on 30 October 1949, and assured the company that it would "not happen again" (Pros Ex 8, A pp.7,8). No further correspondence was received by the company from the accused (Pros Ex A, pp.7,8).

For lack of sufficient funds and the closing of the account, the checks dated 20 November 1949, 20 December 1949, and January 1950 were not honored by the bank. Because of the notation "account closed" the postdated checks dated 20 February and 20 March were never presented for payment (R 42,43,45,46,48; Pros Ex A pp4-7). The company sent a notice by mail addressed to the accused of the dishonor of the 20 November check on 16 December 1949, but this notice failed to reach him and was returned "after March 2, 1950" (Pros Exs 3,4,4a, A p5). The company made no other or further demand upon the accused (Pros Ex A, pp.6,7). No notice was ever sent to the "co-signer," the wife of the accused (Pros Ex A p8). The company "informed the Assistant Adjutant General, Fort Dix, New Jersey, about this delinquent account on January 13, 1950" (Pros Ex A p6). The customary practice followed by the company in such matters is described thus: "When we receive absolutely no word or communication from the borrower for several months and his account becomes delinquent, we usually write and ask the Commanding Officer if he would be kind enough to call attention of the Officer to his past due account .... As a rule, we do not contact the co-signer if the co-signer is the wife, unless we get no response from our appeal to the CO, or after the Officer is deceased" (Pros Ex A p8).

The unpaid balance owing on the account as of 13 April 1950 (not including the note due 20 April 1950) and represented by the installment notes due 20 November 1949, 20 December 1949, 20 January 1950, 20 February 1950, and 20 March 1950, together with the postdated checks dated on the due dates of these notes, totalled $125.00 (R 45,47,49; Pros Exs 2,3,5,6, 7; A pp.4-7).

After being warned of his rights under the 24th Article of War the accused was questioned on 27 January 1950 by Lieutenant Colonel Donald J. Probes, the local Inspector General, who had been "in contact with the company" (R 37,39,50). The accused orally stated that he was married to Ruby Neal and described the negotiation of the loan substantially as related above (R 39,41-44). Colonel Probes "did not feel" that he should "pin him /accused/ down to the identity of the writer" of the signature "Mrs. Ruby London" (R 51). He was not aware of the dishonor of the 20 November check. He knew his bank account was "practically nil" at the time he was being questioned (R 46). He stated that he had written to the loan company to "determine the amount still owing" (R 47,50). He further stated that he did not plan to do anything "about this until the investigation for the court-martial had been completed" (R 47). He never denied the obligation. The accused was "very cooperative" (R 49). He did not indicate "what action he was actually taking at that time to become solvent and liquidate the indebtedness" (R 50). "There was some conversation about securing another loan recently at the bank in San Antonio" to pay up his smaller loans (R 50). He had made another loan from the Federal Service Company about the same time that he borrowed the money under consideration in this case (R 51).

b. For the defense.

The accused after being warned of his rights as a witness elected to take the stand and testify under oath (R 65,66). He testified in detail with respect to his military service (R 66-72). He was stationed at Fort Dix, New Jersey (R 67,76,79,80). He learned from a "brother officer" about the loan company and made application for a loan. At its request he submitted "personal history" data and received back twelve promissory note forms to be signed by him and his wife (R 74,75). He signed his name to the notes and had the name of his wife signed by another officer so that it would not appear to be the same handwriting as his own and possibly not be accepted by the loan company (R 75,79,81,82,89; Pros Exs 2,5). He had her address on the notes as Fort Dix, New Jersey (R 93; Pros Exs 2,5). He checked yes in the letter to the question: Is your wife with you? (R 93). She was living in Houston, Texas. She was recovering from illness (R 79,80,97). He sent his wife support money regularly (R 82). He had taken "similar action" on about four prior occasions in accordance with an agreement between him and his wife (R 79,80). Similarly she had also signed his name and obligated him at times when he knew about it or learned about it "later on" (R 79). In January 1950, when she learned about this transaction all she wanted to know was how much was involved and the source of the loan (R 80,86,87,98). She was adding up the total amount of his indebtedness (R 87). She came to Burlington 2 February 1950 (R 86). Colonel Probes later told her about the "mechanics" of the loan (R 86). He and his wife are "very friendly" (R 97). He returned the signed installment notes to the loan company together with checks "to correspond with the amount of $25.00 per month." He deposited $25.00 per

month to cover these checks as they became due (R 75,76). He received a check for $252.00 from the company (R 89, Pros Ex 1). When the company wrote to him about two delinquent payments, he replied in October inclosing them in the form of a money order (R 75). The bank did not honor the November and December checks (R 82,83,85,86). At that time he knew that these checks would not be honored (R 83,84,85). However, he intended to pay off the "entire balance" of the debt and had notified the company of his intentions to go overseas and requested it to inform him "what the entire balance consisted of" (R 83,84). He did not contact the company after writing the 30 October letter (R 84,94). He did not receive the company letter dated 16 December 1949 (R 90-92; Pros Ex 4). The company informed the Inspector General that "they would not deposit the checks" so he did nothing about the bank account (R 85). He did not buy an automobile. He had been purchasing an automobile "which the officer had taken" back. He had to go to Georgia to get it (R 84). Late in November he went on leave to talk to the officer and to arrange a loan with a bank in San Antonio, Texas (R 76). He went to Fort Benning, Georgia, San Antonio, and Houston, Texas (R 76). He secured about $1900 and it was his intention to pay off all his bills (R 76,77,95,98). He discussed them with his commanding officer (R 76). The regimental commander directed the accused to continue with his "clearing at that time" (R 77). He was informed of a letter in his 201 file and that it would result in an investigation (R 77). He told Colonel Probes that he would not pay off this debt "until the outcome of the investigation whether it resulted in court-martial or acquittal" (R 84). He decided this about 3 January 1950 (R 94-96,98). His "plan of action" was "not to compete in any way with their investigation" (R 85). The chances that the investigation might result in a charge against the accused appeared insignificant considering the matters before the Regimental Commander (R 77,96). The sum of $125.00 was due and owing (R 84,87,108). He could pay off the company promptly if he considered it necessary or important (R 78). At that time $75.00 was due (R 79). "I feel that my creditor is due an explanation as to why I didn't pay or haven't paid a bill. Using this particular investigation was the best reason I could give them" (R 96,97). He thought he had a "legal defense for not paying the debt to Hofheimer" under the circumstances (R 103). He did not interpret anything as being dishonorable. It was important that his record be "completely cleared" (R 104). An "incident" he had with his automobile prohibited him from paying when he did not have enough money (R 104,107). He was paying $75.00 per month for the car (R 106). The accused received pay of $331.00 per month (R 108,109).

Mrs. Ruby London, the wife of the accused, testified that she lived in Houston, Texas, until 29 January 1950 (R 110,111). She and the accused had an agreement when they were married. She authorized him to use her "name or signature in connection with a financial transaction of any kind" (R 112,117). "It was always understood between us that if it was necessary or became necessary for him to sign anything to his benefit, anything that he thought would benefit me too, that he could do it" (R 113). She had authorized her husband to either sign her name or have her name signed

to any legal obligation "that he might desire" (R 119). She had signed his name to a government check and for some furniture which she purchased (R 112,114,115). She did not know "how many obligations where Lt. London" had signed her name (R 114). The accused told her that he owed a loan company but she learned about the details when Colonel Probes showed her the notes (R 113,115). She recognized "those notes as being a joint obligation" (R 114). She would have paid the obligation if anything happened to her husband (R 113). She realized that she was jointly responsible for the debt when her name "went on that note" (R 119). She does not know if it has been paid (R 119). She thought it was to have been paid in January (R 120). She told Colonel Probes that she had not signed the notes. He did not ask her if she had authorized her husband to sign her name and she did not tell him so (R 116). Her husband told her another officer had signed the notes (R 116). She had not signed them. She was residing in Houston, Texas, on 18 April 1949 (R 117,118; Pros Exs 2,5). She had no objection to the "entry" of her name on the notes. It never occurred to her to prefer to have such papers sent to her for her signature (R 118). She received money from her husband "always" by telegram (R 118). She and her husband had not executed powers of attorney (R 119). They had had a joint bank account (R 118).

The commanding officer of the accused was of the opinion that the accused "performed his duty in a superior manner" (R 121,122). In connection with his duty his character is excellent (R 122). A prior commanding officer of the accused considered him "an excellent officer and a good instructor." As far as he knew the character of the accused was excellent in the company (R 124).

4. Discussion.

A conviction of the offense of forgery requires proof:

> "(a) That a certain writing was falsely made or altered as alleged; (b) that the writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that it was the accused who so falsely made or altered such paper; and (d) facts and circumstances indicating the intent of the accused thereby to defraud or prejudice a right of another person .... The falsity of a written instrument may be proved by the testimony of the person whose signature was forged, showing that he had not signed the document himself, and that he had not authorized the accused to do so for him ...." (Par. 180i, MCM, 1949, p.244).

The evidence fails to show a lack of authority in the accused to use the name of his wife on the promissory notes referred to in the specifications under Charges I and II. Proof of absence of authority is essential to establish forgery. To support a conviction, a lack of authority must be

shown by direct evidence or by evidence of circumstances from which a lack of authority may reasonably be inferred (Dig. Ops. TJAG, 1912-40, Sec. 451(29), p.321).

In the specification under Charge III the accused is charged with dishonorably failing and neglecting to pay prior to April 13, 1950, certain loan installments totalling the sum of $125.00, evidenced by five installment notes, in the amount of $25.00 each, one of which was due on the 20th day of each of the months of November and December 1949, and January, February and March 1950. This obligation is further evidenced by five postdated checks executed in May 1949 with dates and amounts corresponding to the due dates and amounts appearing in the installment notes.

> "A postdated check is one containing a later date than that of delivery. The presumption is that the maker has an inadequate fund in the bank at the time of giving it, but that he will have enough at the date of presentation. A postdated check is, in effect, the same as a bill of exchange or bank draft payable on demand at or after the day of its date." (10 C.J.S. 412).

A postdated check is "evidence of debt coupled with a promise to pay at a future time" (CM 279483, Davis, 52 BR 227,230). Three of the checks were presented to the drawee bank for payment. Two were not. The notes due 20 November and 20 December 1949 are the same as those referred to in the specifications under Charges I and II. By 13 April 1950 these notes had been due less than five months and four months, respectively. The note due 20 January had been due less than three months, the note due 20 February less than two months, and the note due 20 March had been due about three weeks. The final installment for repayment of the original loan was not yet due.

The payee made no demand upon the accused for payment of any of these installment notes. No notice was ever sent to the "co-signer." The "customary practice" followed by the company was to write to the commanding officer "when we receive absolutely no word or communication from the borrower for several months." When the accused was questioned by Lieutenant Colonel Probes on 27 January 1950 there was an "inference that five or six payments were still past due" (R 45). At that time the accused knew his bank account was "practically nil." However, he "stated that he had written a letter to the Hofheimer Company to determine the exact amount still owing" (R 47,50). He further stated that he did not plan to do anything about the payments "until the investigation for the court-martial had been completed" (R 47). He never denied the obligation (R 49). He did not indicate definitely "what action he was actually taking at that time to become solvent and liquidate the indebtedness" (R 50). There was "some conversation about securing another

loan." It is noted that the company was in the business of making unsecured loans to service personnel by mail. The high interest rate charged for this service can be estimated from the fact that the accused was charged $48.00 for the use of $252.00, a part of which he was to have had the use of for only one month, part for two months and so on up to twelve months. It appears that the payee took no steps to collect the money by civil processes. It made no demand upon the accused but relied entirely upon Army agencies to force collection of its account. Using the processes of the Army in this way and under these circumstances amounts to an attempt to use the Army as a collection agency.

Mere failure to pay an obligation promptly is not of itself sufficient grounds for charges against an officer under the Articles of War. For conviction of the offense charged, there must be evidence of fraud, deceit, evasion, false promises or some other circumstances in connection with the failure to pay the debt of such a nature as to bring dishonor upon the military service. This is lacking. In CM 339424, Elliot, 18 Jan 50, it is stated:

> "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; CM 320687, Terrebonne, 70 BR 143; CM 318398, Doty, 67 BR 281; CM 323108, Rockett, 72 BR 83; CM 325231, Silverio, 74 BR 129)."

It appears that the evidence as a whole does not show that the failure of the accused to pay the five installments due from 20 November 1949 to 20 March 1950 was dishonorable.

5. Records of the Department of the Army show that the accused is 28 years of age, married, and has one child. He graduated from Jack Yates High School in Houston, Texas, in 1938, and thereafter attended Houston College for Negroes and Texas State University for one year each. In civilian life he worked as a laborer, tractor operator, shop steward, and postman. He enlisted in the Army on 13 January 1942, and attended Officer Candidate School from 5 February to 31 May 1945. He was commissioned as Second Lieutenant on 1 June 1945 and separated from the service on 1 February 1946. He was appointed Second Lieutenant, Officers' Reserve Corps, on 7 October 1946, completed a short tour of active duty, and a competitive tour of duty for appointment in the Regular Army. He was appointed Second Lieutenant, Regular Army, on 3 October 1949. He served overseas for one year, and is entitled to wear

the Good Conduct Medal, the Bronze Star Medal, the Asiatic-Pacific Campaign Ribbon with three bronze stars, the Combat Infantry Badge, and the World War II Victory Medal. His efficiency ratings of record are one very satisfactory, and numerical ratings of 117, 147, 137, 127 and 114.

6. The court was legally constituted and had jurisdiction of the person and the offenses. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

C. P. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

W. Chase Parker, J.A.G.C.

AUG 11 1950

JAGH CM 342392 1st Ind

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

TO: Commanding General, 9th Infantry Division, Fort Dix, New Jersey

1. In the case of First Lieutenant Joseph Henry London (060672), Headquarters 365th Infantry Regiment, 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 342392).

E. M. Brannon

E. M. BRANNON
Major General
The Judge Advocate General

1 Incl
Record of trial

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

JAGH CM 342409

AUG 9 1950

UNITED STATES v. Private LOUIS WOODALL (RA 14199733), 519th Engineer Base Depot Company.	)))))))	RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters Ryukyus Command, APO 331, 29 June 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 opinion, to the Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Louis Woodall, 519th Engineer Base Depot Company did, at RYCOM Engineer Depot, Army Post Office 719, Okinawa Ryukyus Islands, on or about 0830 hours 18 June 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Private Roger Lee Colbert, a human being, by shooting him with a carbine.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction by summary court-martial for disobedience of standing orders 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 accused, Private Louis Woodall, and Private Roger Lee Colbert,

the alleged murder victim (known also as "Big Tom") were assigned to the 519th Engineer Base Depot Company at Rycom Engineer Depot, Okinawa, Ryukyus Islands (R 24,31,51,58). Colbert had in the past frequently taunted and molested the accused (R 24,25,28-30).

The accused remarked to Corporal Emmett Doe, 519th Engineer Base Depot Company, three or four days prior to the offense charged, that if Colbert "didn't stop molesting or picking at him [accused] every time, he probably will make him [accused] kill him" (R 25). Corporal Doe stated, however, that he thought the accused made this statement in a "frivolous manner" (R 27).

On or about 0830, 18 June 1950, the deceased, together with Privates Joshua Senegar and Walter Sirmon, was in his quarters, Room 7, Building T-100 Rycom Engineer Depot (R 13,32,39,40; Pros Exs 4,8). This room was contiguous to a hallway and connected therewith by a door and a row of windows opening on the hallway. Within the room itself were two rows of beds placed side by side in the usual fashion of Army barracks. One row of beds was located beneath the mentioned windows (R 13,32,39,40; Pros Exs 4,8). Private Senegar had been lying awake on his bed, marked bed number 1 (Pros Ex 8) with his head toward his footlocker. Private Sirmon was on his bed opposite that of Private Senegar marked bed number 2 and Colbert had been standing between beds 2 and 3 "playing the record player" (R 17,32-35,39,40; Pros Ex 8). At about 0830 Private First Class Aaron Jones entered this room and had awakened Private Sirmon to get his helmet liner (R 31). As Private Jones was about to leave the room he met the accused who was armed with a carbine. The accused thrust his head into the room and said to Colbert: "Big Tom, I am going to shoot you" (R 24,35, 43,44,45). Thereupon Colbert started toward the door, then crouched behind the footlocker in front of bed number 1 and called to Private Jones to "catch that man." Private Jones "reached for the rifle" in the hands of the accused, who warned him to get back before he got shot. The accused then jumped back from the door and fired two shots at Colbert through the screen of the window to room 7 from the hall of the barracks building (R 9,12,13,32-34,37-42-44; Pros Exs 1,2,3,8). Colbert, bleeding profusely, cried "take me to the hospital" and then slumped to the floor. Private Jones observed that Colbert was badly wounded and "yelled" to the orderly room to call an ambulance (R 33,34,37,44).

Captain Leon D. Graybill, Medical Corps, Rycom Hospital, testified that at 0930, 18 June 1950, he saw Colbert dead on a stretcher in the Emergency Clinic.

On the morning of 19 June 1950, the day following the shooting, Captain Graybill performed an autopsy on the deceased and found that the "basic cause of death" was "wound, gunshot, thoracic" caused by "the .30 caliber military bullet * * *" (R 22,23; Pros Exs 5,6,7).

Mr. Charlie R. Busch, 515th Criminal Investigation Detachment, identified a pretrial statement made by the accused on 20 June 1950 (R 47). He testified that prior to the interrogation the accused was advised of his rights under Article of War 24, and without the use of force, duress, promise, or coercion the accused made a voluntary statement in his own handwriting (R 49).

The defense objected to the reception in evidence of the statement made by the accused on the ground that it was involuntary (R 59). The accused was sworn and testified only as to the circumstances under which the statement was made. The accused testified concerning the events leading up to the making of the statement as follows:

"Q. Woodall, I hand you this piece of paper here. It has been identified by Agent Busch as a statement made by you in his presence on Tuesday, June 20. Is that your handwriting and is that your signature?
A. Yes, Sir.

Q. To whom was this statement made?
A. It was made to Agent Busch and I don't remember that other one.

* * *

Q. Tell the court in your own words what those men told you prior to your making the statement.
A. Agent Busch, who was doing most of the talking, told me that he had statements from three or four of the fellows, and they gave testimony. And he said he wanted to get down to the bottom of the whole situation. He told me to tell him about some prior incidents that had occurred, and said he was doing all that for my benefit. And he said that the main purpose was to know—he said before then, as the situation stood, it was pretty bad on my part. And he said their main purpose was to get in all the information they could, to reduce it from murder to manslaughter; if there was any way possible, he was sure that it would be done. About that time he read the penalties for each one of them, murder and manslaughter, to me, and then he said, 'Do you want to make a statement?'

CROSS EXAMINATION

Questions by prosecution:

Q. Private Woodall, did you make this statement?
A. Yes, Sir.

Q. Why did you make this statement?
A. I made it because he had told me that he was going to do all he could to help me, plus the fact that as the situation stood,

he told me--he said that it was pretty bad. And he said if he could get all the information he could, there would be a very great possibility it would be reduced from one to the other.

Q. He said he would help you if he could?
A. In other words, he said he would help me.

Q. Not 'In other words' did he say that he would help or try to find anything in your defense or he would if he could?
A. He said what I would tell him would help; if it was substantial, he said it would help.

Q. Did he use any force on you?
A. No, Sir.

Q. Any fraud?
A. No, Sir.

Q. Make any promises to you?
A. Nothing other than he said it would help--it would do a great deal if it was possible to have it reduced.

Q. Did he say, anything that you said could help you; or did he say, you may or may not help yourself, depending on what you said?
A. He didn't say, anything I said would help me; providing it was substantial, it would help; if it was true facts and he could get proof of it.

Q. He didn't say necessarily that he was going to help you, or this would help, or it may help you depending on what you would say?
A. Yes, Sir.

Q. Did you sign this statement of your own free will?
A. Yes, Sir. He also reminded me again of the penalties before I signed it at the end.

EXAMINATION BY THE COURT

Questions by law member:

Q. What did he say specifically when he reminded you of the penalties?
A. He said again, 'You are in a pretty bad situation, as it stands, there are four or five fellows that saw the incident that occurred.' He called their names and said he had testimony from them. I didn't see their testimony, I just saw their

names. He said, the recommendations that they would round up would go to AJ--JA. He said my statement over-weighed the other fellows' testimony. He said it would probably be reduced from murder to manslaughter. And where it would go from there, I disremember.

Q. He said, it would be reduced from murder to manslaughter or it is possible that it would?
A. He said, if my statements over-weighed the other testimony statements--

Q. What do you mean by 'testimony statements'? You mean the statements made by the other soldiers?
A. Yes, Sir.

Q. If your statements over-weighed theirs, then it might be possible to reduce it from murder to manslaughter. Is that your testimony?
A. Yes, Sir." (R 51,52,53)

Mr. Busch was recalled as a witness for the prosecution and testified as follows:

"Q. Agent Busch, did you at any time tell Private Woodall that if he made a statement, it would reduce the offense from murder to manslaughter?
A. No, Sir, I did not make that statement.

Q. Did you say you would help him to reduce it from murder to manslaughter?
A. I told him I would investigate the incident as an impartial individual and attempt to establish a motive, and this motive may help him.

Q. Did you tell him his statement would reduce the charge from murder to manslaughter?
A. No, Sir.

RECROSS EXAMINATION

Questions by defense:

Q. Did you state that if he made this statement, you would try to help him?
A. Yes, Sir.

REDIRECT EXAMINATION

Questions by prosecution:

Q. Did you also state that whether he made the statement or not you would try to help him?
A. I stated to Private Woodall that, if he would give me the necessary information, I would attempt to establish a motive, and if it helped him, it would be all right; that any assistance I could I would give him; it would be my job to get the facts and bring them out at the trial.

Q. Did you imply you would help him more if he did give the statement?
A. I did not imply that, to the best of my knowledge. What I stated to him was that, the more he could tell me about the incidents prior to 0830 on the 18th of June, the more thorough investigation could be conducted.

Q. You didn't promise him that he would get a lighter sentence if he did make a statement?
A. No, Sir, I did not promise him anything.

* * *

Q. Agent Busch, did you make any promise of immunity to the accused?
A. No, Sir.

Q. Did you make any promise of clemency or reward or benefit?
A. No, Sir.

Q. Did you make a promise of any substantial nature likely to induce a confession or admission from the accused?
A. No, Sir." (R 54,55).

The pretrial statement was received in evidence as Prosecution Exhibit 10. In admitting this statement the law member ruled:

"The ruling of the law member that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court. The ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto." (R 56)

This statement of the accused was a complete confession of the offense charged in the specification (Pros Ex 10).

b. For the defense.

The deceased had been a well-built man who weighed about 230 pounds. He carried a straight razor on his person "almost all the time" (R 57,58). His "general reputation in the company" was "bad" (R 58,59). He frequently got into arguments with "people" and threatened to fight them for no apparent reason (R 58). The accused had a good reputation in the unit (R 59,63). "He was very quiet." "He had no trouble from him." "He never bothered anybody," "he was a good fellow" (R 61) and a "very fine soldier" (R 66). The accused had been afraid of the deceased because the latter "would try to pick a fight with him every time he got about half-drunk" (R 59). At other times he "molested" the accused (R 57-66).

The accused after having been advised of his rights as a witness elected to make an unsworn statement as follows (R 66,67):

"I came to Okinawa in September 1949. Shortly thereafter I became acquainted with Colbert who was assigned to the same company shortly after his arrival in October. He also was the driver for several company recreation trips. On these recreation trips I soon got the reputation of being sort of easy going and a free spender, as on several occasions I supplied the liquor and some of the food. Everyone called me by my nickname 'Cool Breeze.' In January I had my first personal contact with Colbert. He stopped me one day and asked me if he could borrow two dollars. I let him have the money and he promised to pay me back on pay day. On pay day I didn't ask him for it, but a few days later he stopped me and asked me for another dollar. I then mentioned that he hadn't paid me back the other two. He assured me that he would if I would lend him another dollar, so I lent it to him and forgot about it until sometime after pay day in March. At that time when I asked him for the three dollars he told me to beat it as he had no intention of paying me the money. I didn't do anything about it because Colbert is a big man. He is over six feet tall and he weighs over 200 lbs. From then on he kept bothering me for little things. He always kept asking me to give him small sums of money, or liquor or food. He never asked to borrow any more. He just said 'Give me.' I always did because I didn't want any trouble and I tried to avoid him as much as possible.

"However, on several instances I was unable to avoid him. One incident occurred on the roof of the building where we were quartered. There's a club up there and I was up there drinking with Cpl. Dixon when Colbert came in. He asked me if I had any whiskey. I said I didn't have any, although I did have a bottle down in my room. He obviously didn't believe me for he grabbed hold of me and dragged me up close against him. He then took a razor out of his pocket and held it down at his side. He told me to 'quit acting so big' and to 'watch it'. He then let me go and I went down to my room for the rest of the evening.

"A short time later I was watching a card game which was in progress down in Cpl. Dixon's room. Colbert came up behind and asked me if I would lend him a dollar as he wanted to get into the game. I told him I didn't have anything to give him. I then started toward the door. He grabbed me, spun me around and put his razor against my side. Again he warned me that if I didn't watch my step, I'd be mighty sorry. This episode was followed by another incident up on the roof. Some friends and I were sitting up at the bar, drinking, when Colbert came up from behind me and cuffed me on the head. None of us could figure out why he did it. He just seemed to enjoy making me miserable. Again on Saturday morning, the morning before Colbert was killed, I had trouble with him during a painting detail. I was in charge of a detail painting foot lockers, out on the lawn outside of our quarters. We only had one brush and we were having difficulty getting the job done before noon. Colbert came out and insisted that I let him paint his foot locker. I explained the situation to him but he kept insisting. Finally, however, he said 'that big talk I was talking was going to get me in trouble.' He then left.

"That evening, after spending the afternoon and early evening with my friends, I left my quarters and started walking down the road toward the village. On the road I met an Okinawan and a girl. He asked me if I wanted the girl. I told him I did. I paid him and the girl and I returned to my room. We fell asleep around 11:30 and I didn't awaken until approximately 0200. I was awakened by Colbert trying to pull this girl out of my bed. I asked him what he was trying to do and he said he wanted the girl. I told him that she was my girl and I helped her resist him. He then hit me in the mouth, cutting my lip, but he finally let her go. I put my arm around her and we finally went back to sleep.

"The next time I was awakened was around 0530. The girl was crawling back into bed. She looked like she had been in a fight. One side of her face was bruised and her dress was torn and dirty. I asked her what had happened and she said that the 'big man had come again and taken her away.' I knew it was Colbert. We got up and I took her to the gate. I then returned to my quarters, got cleaned up and went to breakfast. After breakfast, I went up to Colbert's room. Everyone was asleep. I woke Colbert up and asked him why he had taken my girl. He said that he 'just wanted to'. He asked me what I intended to do about it. I told him that I didn't intend to do anything about it. He then said that I better act like it or that he would do something about it. As he said that he reached behind his head and under his pillow as if looking for something. I saw his razor sticking out from under the other side of his pillow, so I left. I went looking for some

sort of weapon to scare him as he was always scaring me. I never had any intention of killing him. I never carried a razor or any such weapon. I went to Futrail's room as I knew he had just come off guard duty and might have his gun. He wasn't there so I went to the guard house and got a carbine. I returned immediately to Colbert's room. As I started through the door, Pvt. Jones was coming out. He made a grab for the gun. I backed away but he kept coming. I looked through the window. Colbert was coming after me in a low crouch. I was scared and fired the gun without raising it to my shoulder. Canty then came up and took the gun away from me. I then went down to my room and got my helmet. I didn't realize what I had done. It was several hours before I fully realized that I had shot Colbert." (Def Ex A)

4. Discussion.

The accused has been found guilty of a specification alleging that he did at the time and place indicated "*** with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill Private Roger Lee Colbert, a human being, by shooting him with a carbine."

"Murder is the unlawful killing of a human being with malice aforethought." By "unlawful" is meant "without legal justification or excuse" (Par. 179, MCM, 1949, p. 230).

Malice has been defined as:

"* * including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And, therefore, malice is implied from any deliberate or cruel act against another, however sudden.

"It is none the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denotes purpose and design in contradistinction to accident and mischance." (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

"Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death." (MCM, 1949, Par. 125, p.151)

"It /malice aforethought/ may mean any one * * of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, * * even though such knowledge be accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused * *." (MCM, 1949, Par. 179, p.231).

"Premeditation and deliberation, as an element of murder, consist in the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill. In this connection the word 'premeditation' means simply entertainment by the mind of an intent or design to kill" (Sec. 420, Wharton's Criminal Law, 12th Ed.). "It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act, as if it entered ten years before" (Sec. 507, Wharton's Criminal Law, supra). "Premeditation imports substantial, although brief, deliberation or design" (MCM, 1949, Par. 179, p.231).

The elements of proof of the offense are as follows:

"Proof.--(a) That the accused unlawfully killed a certain person named or described by certain means, as alleged (requiring proof that the alleged victim is dead, that his death resulted from an injury received by him, that such injury resulted from an act of the accused, and that the death occurred within a year and a day of such act); (b) that such killing was with malice aforethought; and if alleged, (c) that the killing was premeditated." (MCM, 1949, Par. 179, p.232)

In considering the above precedents and requisites of legal proof we are particularly impressed by the undisputed evidence in the instant case showing that the accused, using a weapon, designed primarily to kill, fired his carbine at close quarters into the body of Private Colbert. Clearly there was no legal justification or excuse for the act, and nothing in the record shows provocation in any degree approaching that regarded by the law as adequate to reduce the seriousness of the offense. Quite the contrary, the accused's several accounts of previous difficulties with the deceased, even when considered in the

light most favorable to the accused, only serve to belie his statement that "* * I never had any intention of killing him **." It is clearly established that the shot was fired intentionally and not accidentally. It is undisputed that immediately preceding the shooting the accused said to the deceased: "I am going to shoot you." It follows that the evidence unquestionably compels the conclusion of accused's legal and moral guilt of premeditated homicide perpetrated with malice aforethought (CM 336405, Jonson, 3 BR-JC 69, 73, 74).

The pretrial statement of the accused was received in evidence over the objection of the defense that it was not voluntarily made. The accused testified that he made this statement in his own handwriting of his own free will. The evidence is uncontradicted that CID Agent Busch did not use physical force, coercion, duress or make any threats to induce the accused to make a statement. It is undisputed that accused was fully advised of his rights under Article of War 24 prior to making his statement. The accused corroborated the testimony of Agent Busch in practically every detail. The salient feature of his testimony was his assertion that Agent Busch told him that the charge would be reduced from murder to manslaughter only "If my statement overweighed the other testimony statements." Such a representation if made falls short of being a promise of a benefit of a substantial nature. Indeed, the sum of all the testimony adduced upon the issue of the voluntary character of the pretrial statement of the accused warrants the conclusion that there was no illegal inducement in its procurement (CM 337089, Aikins et al, 25 Nov 1949).

In view of the foregoing, and in view of the overwhelming evidence showing the accused's guilt independent of his admissions or confession, had error been present it would not have been of such character as to require that the conviction be disturbed (CM 336405, Jonson, supra; CM 328584, Yakavonis, 77 BR 131, 141; CM 329162, Sliger, 77 BR 361; CM 324725, Blakeley, 73 BR 307, 321; CM 313689, Davis, 63 BR 219).

The quantity and quality of the evidence in this case is compelling as to the guilt of the accused. It is considered that the erroneous ruling of the law member to the effect that the good character of the accused is to be considered only in arriving at the sentence and not in connection with the findings does not constitute prejudicial error.

The reviewing authority designated a United States penitentiary, reformatory, or other such institution as a place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides on page 97:

> "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 . . . 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.

5. The accused is 21 years of age. He has a Class E allotment of $75.00 per month to his dependents. He had prior service from 1 February 1946 to 31 January 1949. His current service extends from 31 January 1949. His service prior to the commission of the offense in question has been characterized by his commanding officer as satisfactory.

6. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of murder in violation of Article of War 92.

C. D. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

[illegible] Parker, 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 Louis Woodall, RA 14199733, 519th Engineer Base Depot 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
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

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

30 August 1950

I concur in the foregoing action. Under direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the term of confinement adjudged is reduced to twenty years.

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

13 September 1950

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

Board of Review

CM 342468

UNITED STATES v. Private HARVEY C. LEDFORD (AUS 34891312), Headquarters and Headquarters Detachment Section 1, 3420 Area Service Unit.	FORT BRAGG Trial by G.C.M., convened at Fort Bragg, North Carolina, 6 July 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.

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

The record of trial in the case of the soldier 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 sentence.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

JAGE CM 342468 1st Ind

JAGO, SS, USA, Washington 25, D. C. 2 August 1950

TO: Chairman, the Judicial Council, Office of The Judge Advocate General

In the foregoing case of Private Harvey C. Ledford (AUS 34891312) Headquarters and Headquarters Detachment Section 1, 3420 Area Service Unit, the Board of Review has held the record of trial to be legally sufficient

JAGE CM 342468

to support the findings of guilty and the sentence but deems modification of the sentence necessary to the ends of justice. 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.

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
Washington 25, D. C.

JAGU CM 342468

15 August 1950

UNITED STATES	)	FORT BRAGG
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 6 July 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for one year. Disciplinary Barracks
Private HARVEY C. LEDFORD, AUS 34891312, Headquarters and Headquarters Detachment Section 1, 3420 Area Service Unit	)	

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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 and the holding by the Board of Review in the case of the soldier named above, together with a separate memorandum dated 21 July 1950 of such Board recommending a reduction of the sentence, have been transmitted 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 desertion at Fort Bragg, North Carolina, from on or about 28 March 1946 until his apprehension at Newton, North Carolina, on or about 26 May 1950. 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 four years. The reviewing authority approved 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 year, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and withheld the order directing execution of the 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 sentence, as approved by the reviewing authority, but deems modification of the sentence necessary to the ends of justice, on the ground that although the accused performed combat service, his counsel failed to bring this fact before the court,

and on the further ground that his unauthorized absence commenced only slightly before the time he was to have received an honorable discharge.

3. The Judicial Council concurs 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, as approved by the reviewing authority. The Council is of the further opinion, however, that in view of all the circumstances of this case, a reduction in the sentence is necessary to the ends of justice.

In his unsworn statement at the trial, the accused requested that the court take into consideration his former service. He further pointed out that he had never been in trouble before and that he had a wife, without "too much ways of supporting herself," and two children (R 9).

The extract copy of the morning report which establishes the inception of the accused's unauthorized absence on 28 March 1946 (R 7; Pros Ex 1) shows that he was at that time a member of a Separatees Section at the Separation Center at Fort Bragg, North Carolina. The defense counsel failed to place any material before the court with respect to the accused's military service or the circumstances under which he left the Separation Center without authority, or any other matters which might have served to mitigate his sentence.

The Staff Judge Advocate, in his review of the record of trial, stated that the accused admitted no civil criminal record, that his service record revealed no previous military convictions or time lost under Article of War 107, and that the accused stated he was never punished under Article of War 104. The review further stated that the accused was inducted in August 1943, and in February 1945 accompanied the 97th Infantry Division to the European Theater, "where he saw combat in the Ruhr." He returned to the Zone of the Interior with his division in June 1945, and left for Japan on 30 August 1945, returning on 8 February 1946. He reached the Fort Bragg Separation Center on 27 March 1946 "and was to have been discharged within a few days." The next day he went absent without leave from his organization "to go home to his wife and three-year-old son." In view of these circumstances and the inadequacy of the defense, the Staff Judge Advocate recommended reduction of the sentence to bad conduct discharge, total forfeitures and confinement for six months.

The defense counsel should have brought to the court's attention the circumstances which led the Staff Judge Advocate to recommend a substantial reduction in the sentence which it imposed. It is likely that such failure influenced the court in fixing what it deemed an appropriate sentence. Under the circumstances, the Judicial Council must consider the appropriateness of the sentence, as modified by the reviewing authority, in the light of the mitigating circumstances above mentioned. On this basis it is deemed that the approved sentence of confinement for one year is excessive and that the ends of justice require its reduction.

4. Under the provisions of Article of War 49b, the Judicial Council has the power to approve only a portion of the approved sentence herein (see SPCM 1482, McDonald, BR-JC March, 1950). The Judicial Council is of the opinion, however, that an offense of the seriousness of the accused's prolonged desertion should not be condoned by disapproval of any portion of the approved sentence.

In view of the foregoing, it is the opinion of the Judicial Council that the sentence should be confirmed, but it is recommended that the unexecuted portion of the confinement be remitted.

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

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

In the foregoing case of Private Harvey C. Ledford, AUS 34891312, Headquarters and Headquarters Detachment Section 1, 3420 Area Service Unit, 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.

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

15 August 1950

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the unexecuted portion of the confinement adjudged is remitted.

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

23 August 1950

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

JAGK - CM 342538

4 AUG 1950

UNITED STATES v. Captain FREDERICK SMITH (0-1284777), Headquarters and Headquarters Company, 2nd Battalion, 86th Infantry Regiment, 10th Infantry Division.	FORT RILEY, KANSAS Trial by G.C.M., convened at Fort Riley, Kansas, 27 June 1950. Dismissal, total forfeitures after promulgation, and confinement for one (1) year.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Captain Frederick Smith, Headquarters and Headquarters Company, 2nd Battalion, 86th Infantry Regiment, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 1 April 1949, desert the service of the United States, and did remain absent in desertion until he was apprehended at Denver, Colorado on or about 22 May 1950.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction 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 and six months. The reviewing authority approved the sentence, reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. <u>Evidence for the Prosecution</u>

Two duly authenticated extract copies of morning reports of Headquarters

and Headquarters Company, 2nd Battalion, 86th Infantry Regiment, Fort Riley, Kansas, were admitted into evidence without objection by the defense as Prosecution Exhibits 1 and 2 (R 7).

These exhibits list the following pertinent entries:

"M/R 4 Apr 49

Smith Frederick (Inf) 0284777 Capt 2162
Duty to AWOL eff 1200 hours 1 Apr 49 *** (Pros Ex 1)

"M/R 11 May 49

CORRECTION M/R 4 Apr 49
Smith Frederick (Inf) 0 284777 Capt 2162
Duty to AWOL eff 1200 hours 1 Apr 49
SHOULD BE
Smith Frederick (Inf) 01284777 Capt 2162
Duty to AWOL eff 1200 hours 1 Apr 49 ***" (Pros Ex 2)

It was stipulated "that the accused was apprehended at Denver, Colorado, on or about 22 May 1950, as alleged in the specification of the charge" (R 7).

After being duly warned of his rights under Article of War 24, the accused, on 7 June 1950, made a voluntary statement to First Lieutenant Harold L. Moore. This statement was admitted in evidence without objection by the defense as Prosecution Exhibit 3 (R 7-9). In this statement the accused said at the time he left the Army he was assigned to Headquarters and Headquarters Company, 2nd Battalion, 86th Infantry Regiment. About the first part of March 1949 he requested relief from active duty. About 31 March 1949 the Regimental Executive Officer, Lieutenant Colonel Farthing, informed him that his request for separation had been approved by "5th Army and was at that time at Division Headquarters." However he could not clear the post until he had settled a personal indebtedness in Manhattan, Kansas. Colonel Farthing told him to go to town and settle the indebtedness. He went to Manhattan, Kansas, where he had a "few drinks too many." He awoke two days later in St. Louis, Missouri. He then went to Ashland, Kentucky, and Ironton, Ohio. About the last of April 1949 he went to Canyon City, Colorado, and secured employment with the Diamond Fire Brick Company. About 6 June 1949 he went to Denver, Colorado, and obtained employment at the Shirley Savoy Hotel. He worked there from 14 June 1949 until 22 May 1950, at which time he was apprehended by agents of the Federal Bureau of Investigation and delivered to the Provost Marshal's office in Denver. While absent he did not wear his uniform. He did not have permission to remain away from the Army and he was not separated from the military service by means of a discharge. In May 1950 he knew that he would be apprehended

within a few days. He made no attempt to leave Denver or to avoid apprehension.

4. Evidence for the Defense

Major Paul C. Brown, Headquarters Fort Riley, Kansas, became acquainted with the accused in November of 1948 when the accused joined the 86th Infantry, 10th Infantry Division, Fort Riley, Kansas. The accused was first assigned as a Battery Commander but later he became the S-3 of the 2nd Battalion. His overall performance of duty was excellent (R 11).

Corporal Charles J. Crawford, Headquarters, Special Troops, 10th Infantry Division, became acquainted with the accused in December of 1948. The accused was in command of a Battery and later became Battalion S-3. At this time he (Corporal Crawford) was on duty as an officer as executive officer of the 35th Field Artillery. The accused's performance of duty was excellent (R 12,13).

The defense offered in evidence several documents as Defense Exhibits A,B,C,D,E,F and G (R 13-15). Exhibit A is section 15 of "W.D. A.G.O. Form Number 66-1" pertaining to the accused and shows that between 20 June 1942 and 23 June 1947 his performance of duty was rated excellent and superior.

Exhibit B is a letter dated 23 October 1942 by Major Ernest S. Brown, Commanding Officer of the 76th Infantry Training Battalion, and states that since 19 June 1942 the accused has performed his duties in a superior manner, showing a high degree of initiative, intelligence and good troop leadership. He was not promoted solely because of limited vacancies. The Commanding Officer of the 16th Infantry Training Regiment concurred in this letter by first indorsement.

Exhibit C is a letter of commendation, dated 23 October 1943, by the Commanding Officer of the 2nd Battalion, 349th Engineers (GS), whereby the accused is commended for his leadership, energy and example to the men under his command. By successive indorsements the commanding officers of the 349th Engineers (GS), United States Troops, APO 980, and 37th Infantry, concurred in the commendation.

Exhibit D is an honorable discharge from the Army of the United States dated 8 January 1940. The accused was discharged as a private first class with character rating very good.

Exhibit E is an honorable discharge from the Army of the United States dated 1 June 1942. The accused was discharged for the convenience of the Government to accept appointment as a second lieutenant, Army of the United States. His character rating was excellent.

Exhibit F is a certificate of service showing that the accused served honorably in the active Federal service in the Army of the United States from 2 June 1942 to 19 November 1947.

Exhibit G is an honorable discharge from the Army of the United States showing that on 16 September 1948 the accused was discharged as a sergeant first class.

The accused was advised as to his rights as a witness in his own behalf and elected to remain silent (R 15).

5. Discussion

That accused was absent without leave for the period of 1 April 1949 to 22 May 1950 and that this absence was terminated by apprehension is conclusively shown by the evidence introduced by the prosecution. The circumstances of his departure from his organization, his absence without leave for over a year and the fact that during that period he wore civilian clothes and worked at numerous civilian jobs, constituted facts sufficient to warrant the court in finding an intent to desert. The evidence of previous honorable service and prior good character introduced by the defense was properly received by the court and considered by it in arriving at its findings of guilty and determining a proper sentence. However, these facts do not constitute a defense to the charge and specification. The evidence established all of the elements of desertion (MCM, 1949, par 146a; CM 336607, Hosick, 3 BR-JC 151, 155; CM 282723, Garvey, 55 BR 1, 7; CM 286579, Pfeiffer, 56 BR 265, 268; CM 316657, Sheldon, 65 BR 369,370).

6. Department of the Army records show that accused is 34 years of age, is married, and has one child ten years of age. He graduated from high school in 1936, and from 1936 to 1937 was employed as a meat cutter. He enlisted in the Army on 27 March 1937 and was honorably discharged therefrom on 8 January 1940. He reenlisted in the National Guard on 23 April 1940, successfully completed the Officers Candidate Course at The Infantry School, Fort Benning, Georgia, and was commissioned a second lieutenant, Army of the United States, on 2 June 1942. He was promoted to first lieutenant on 23 July 1943 and to captain on 17 February 1945. Upon separation from the service on 19 November 1945, he received a promotion to major in the Organized Reserve Corps. He reenlisted in the Army on 29 May 1948 in grade of technical sergeant, and on 17 September 1948 was ordered to extended active duty in grade of captain. He is authorized to wear the Asiatic-Pacific Theater Ribbon, American Defense Ribbon, Army of Occupation Medal, Combat Infantryman's Badge and two overseas bars.

His efficiency reports from 1 January 1945 to 23 June 1947 average 4.91. Other efficiency reports included in the accused's record show

no numerical ratings.

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. Dismissal is authorized upon conviction of an officer of a violation of Article of War 58.

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

Samuel S. Lovett, J.A.G.C.

J.W. Lynch, J.A.G.C.

(94)

342,538

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 Captain Frederick Smith, O-1284777, Headquarters and Headquarters Company, 2nd Battalion, 86th Infantry Regiment, 10th Infantry Division, 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

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

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

28 August, 1950

GCMO 56, September 1, 1950).

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

JAGK - CM 342559

24 AUG 1950

UNITED STATES v. Recruit ELMER VENNIE (RA 13215798) and Private JAMES H. MORRIS (RA 14267351), both of Company "A", 373rd Infantry Battalion (Separate).	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Wurzburg, Germany, 2 and 9 June 1950. EACH: Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

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

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

Specification: In that Private James H. Morris, Company "A", 373rd Infantry Battalion (Separate), and Recruit Elmer Vennie, Company "A", 373rd Infantry Battalion (Separate), acting jointly and in pursuance of a common intent, did, at Brueckenau, Germany, on or about 17 March 1950, forcibly and feloniously, against her will, have carnal knowledge of Emma Weber.

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

Specification 1: In that Private James H. Morris, Company "A", 373rd Infantry Battalion (Separate), and Recruit Elmer Vennie, Company "A", 373rd Infantry Battalion (Separate), acting jointly and in pursuance of a common intent, did, at Brueckenau, Germany, on or about 17 March 1950, by force and violence and by putting him in fear, feloniously steal from the person of Wilhelm Loehmer, seventeen (17) Deutsche Marks, value about four dollars, five cents ($4.05), and one (1) wallet, of some value, the property of the said Wilhelm Loehmer.

Specification 2: In that Private James H. Morris, Company "A", 373rd Infantry Battalion (Separate), and Recruit Elmer Vennie, Company "A", 373rd Infantry Battalion (Separate), acting jointly and in pursuance of a common intent, did, at Brueckenau, Germany, on or about 17 March 1950, with intent to commit a felony, viz: robbery, commit an assault upon Rose Holzapfel, Maria Schaefer, Franz Schaefer, Paul Loehmer, Anton Loehmer, Anna Loehmer and Friedrich Leipold, by feloniously and willfully threatening the said Rose Holzapfel, Maria Schaefer, Franz Schaefer, Paul Loehmer, Anton Loehmer, Anna Loehmer and Friedrich Leipold with a pistol.

Each pleaded not guilty to and was found guilty of the charges and specifications. Evidence of one previous conviction by summary court-martial was introduced in evidence against accused Vennie. No evidence of previous convictions was introduced in evidence against Morris. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after promulgation and to be confined at hard labor at such place as proper authority may direct for life. The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence

a. For the Prosecution

On 17 March 1950, the two accused, members of Company "A", 373rd Infantry, then stationed at Wildflecken, visited Bruckeneu, Germany accompanied by three other soldiers, Broaddus, Hainsworth and Trent. In the evening, at about 10:30 or 10:45, the group visited the Restaurant Stern and sat at a table (R 11-14). Present, when the group entered the restaurant, were Wilhelm Loehmer, his two brothers Paul and Anton, his sister-in-law, Anna, Anna's sister, Rose Holzapfel, Franz Heffman, Fritz Leibold, Schaefer, the landlord, his wife, and Emma Weber, the maid (R 15,24). Earlier, accused and their group had been drinking beer, and at the Restaurant Stern Morris tried to obtain wine but was told by the maid it was after curfew. Nevertheless one of the group produced a bottle of wine and glasses were secured from the proprietor (R 13,14, 28,44). Both accused arose and went into the hall where Emma Weber was scrubbing. Vennie said something to Emma in English, and Schaefer, the landlord, appeared and told Emma to leave. She and Schaefer ran into the guest room followed by the two accused who had their pistols out. At this juncture, accused's companions, after trying unsuccessfully to get the accused to join them, left the restaurant (R 12,28,44). After Broaddus, Hainsworth, and Trent had left, accused Vennie pointed his pistol at the German civilians and told them to keep still and put their

hands on the table. Morris, in the meantime, approached them, looked at the women present, and finally grabbed Emma Weber by the arm, and despite her protestations forced her out of the room (R 29,32,44). He brought her to the kitchen where she switched the light on. At gunpoint, he forced her to turn the light out, and then "threw /her/ with force upon the stone floor." He took off his trousers and ordered Emma to take off her pants. She complied since he still had his pistol in his hands. He lay on top of her, placing his pistol beside him, and despite her pushing him away with her hands, "insert/ed/ his privates in /her/ privates." He had sexual intercourse with her and in about a quarter of an hour attained a sexual climax (R 44-46). Both returned to the guest room, where, in the meantime, Vennie was confronting the guests and the Schaefers with his pistol. Emma appeared to be very excited, her hair was in disorder, and the back of her dress was white. The two accused had a conversation and, then, at gunpoint demanded of the German civilians their watches and money. Wilhelm Loehmer's purse containing 17 to 18 marks, which he had on the table to pay his bill, was seized by Vennie. Morris searched Schaefer and one of the other Loehmers. Suddenly, Leibold arose and snatched the pistol from Vennie's hand. A fight started in which Wilhelm Loehmer was struck on the head and, in the melee, both accused fled from the room, Vennie making his escape by running through a window (R 16-17,26,29,32-33,45). After the two accused had left, Emma Weber admitted to Anna Loehmer, in response to the latter's question, that she had been raped (R 33).

A short time later, after midnight, the two accused were admitted to the home of Maria Hohmann about two kilometers from the Restaurant Stern. Vennie who was bleeding washed himself and then Morris put powder on the wound. Morris took off his shirt and put it in water along with his belt and holster and both departed (R 55-58).

Dr. Martin Steichele, an "official physician" of the Health Office of Bruckenau, examined Emma Weber at about 0425 hours 18 March 1950. His examination disclosed "a large scar" on Miss Weber's hymen which was "still fresh and was bleeding" and which showed that sexual intercourse had been performed recently. The hymen also showed some old scars. There were also scratch marks on her abdomen which were caused by her girdle. Doctor Steichele took two smears from Miss Weber's vagina and had them mailed to the Institute of Criminology at the University of Wurzburg. The package containing the smears were labeled with Miss Weber's name and there was attached "a writing" to the Institute (R 48-50).

On or about 19 March 1950 Doctor Karl Reuter of the Institute of Criminology at the University of Wurzburg received by mail a package from the Public Health Office in Bruckenau. Within the package were two smears and a letter which indicated that the smears were taken from Emma Weber. Tests performed upon the smears by Doctor Reuter

disclosed the absence of gonococcus and the presence of spermatozoa. Doctor Reuter concluded the smears had been taken from a person who had had sexual intercourse with a male person a short time earlier (R 51-52).

On 26 April 1950, a Board of Medical Officers composed of Colonel Daniel H. Berry, Chief of Neuropsychiatric Service, 98th General Hospital, Lieutenant Colonel Hans Lowenbach, EUCOM Neuropsychiatric Consultant, and Major Charles W. Alden, Assistant Chief of Neuropsychiatric Service, 98th General Hospital, convened at the 98th General Hospital to determine the sanity of accused Morris. Major Alden identified Prosecution Exhibit 3 as the original report of the Board, signed by the three members, and stated that the report represented the unanimous opinion of the Board. The report was admitted in evidence without objection as Prosecution Exhibit 3 (R 86-87).

A board of identical composition convened at the 98th General Hospital on 24 May 1950 to determine the sanity of accused Vennie. Major Alden identified Prosecution Exhibit 4 as an original copy of the Board's report signed by the members, and stated that the report represented the unanimous opinion of the Board and the report was admitted in evidence without objection (R 87-88).

Prosecution Exhibit 3 recites that accused Morris was under observation in the Neuropsychiatric Service from 17 to 25 April 1950, during which time he was given a complete physical and neuropsychiatric "work-up." The Board reviewed all the evidence in Morris' case and expressed the opinion that accused Morris was presently and at the time of the alleged offenses so far free from mental defect, disease, or derangement as to be able concerning the particular act charged to distinguish right from wrong and to adhere to the right, and that he then presently possessed sufficient mental capacity to understand the nature of the proceedings and intelligently to conduct and cooperate in his own defense.

Prosecution Exhibit 4 recites that Vennie was under observation at the 98th General Hospital from 26 April to 2 May 1950, during which time he was given a complete physical "work-up" and neuropsychiatric evaluation.

The symptomatology in Vennie's case was expressed by the Board as follows:

> "In November 1949 the prisoner suffered a head injury sufficiently severe to produce several (allegedly 16) hours of unconsciousness. Since then he has had

frequent bouts of severe headaches and he states that he has become more susceptible to the effects of alcohol. With regard to the particular acts charged, the prisoner declares consistently and convincingly that he has no memory for the events and that he found himself with injured and bleeding hands in his tent not knowing how he got there or how he got injured. He made no attempts, according to his statements, to escape prosecution, was surprised when placed under arrest and he voices now adequate feelings of remorse and guilt."

The Board further stated that on the basis of the evidence available "it could not establish beyond a reasonable doubt that the prisoner was at the time of the alleged offense(s) so far free from mental derangement as to be able to distinguish right from wrong and to adhere to the right," but when examined possessed that ability, and further possessed sufficient mental capacity to understand the nature of the proceedings and intelligently to conduct and cooperate in his own defense.

Major Alden testified that the Board was unable to find any suspicion of mental disease in the case of Morris (R 88). In Vennie's case, however, there was evidence that in November 1949 Vennie suffered a head injury which Vennie claimed rendered him unconscious for sixteen hours. The history obtained by the Board showed that following the head injury Vennie had a personality change, frequent severe headaches, greater susceptibility to alcohol, and frequent blackout spells followed by an absence of recollection of events occurring in that state. Vennie denied convincingly to the Board any recollections with reference to the acts with which he was charged. Major Alden stated that there was a definite possibility that the head injury so damaged the central nervous system that Vennie was suffering from a condition called "fugue states, which are characterized by periods during which the individual has no recollection of what has happened to him and that, to the best medical knowledge, no control over what he does." The evidence of the head injury was subjective, having been related by Vennie, and autoptic, based upon a fresh scar above the eye. The Board, however, was unable to state whether or not Vennie at the time of the acts alleged, was able to distinguish between right and wrong (R 88-89).

Upon cross-examination Major Alden testified that at the time the Board made its evaluation of Morris it was aware that Captain Houlihan, a psychiatrist, had admitted Morris to the locked ward as "Schizophrenic reaction, paranoid type," (R 90, Def Ex A) but added that the diagnosis was based upon a preliminary examination lasting but fifteen minutes (R 95). The Board was also aware that a diagnosis of suspected syphilis had been made on Morris, but nevertheless found no evidence of psychosis attributable to that disease. There was no evidence to substantiate a suspicion of traumatic psychosis, and Morris was classified as having

no neuropsychiatric disease (R 90).

Defense counsel stated the following hypothesis for an expression of opinion by Major Alden:

A soldier between the age of 20 and 21, one of a family of three children plus one adopted brother, was brought up in the slum section of Chicago. He quit school at the tenth grade and started prize fighting at the age of 14, engaging in amateur and later in semi-professional fights. He was knocked unconscious sustaining "a head injury of undetermined brain shock." Subsequently because of "environmental anxiety and compulsion" he joined the Army. He served as a paratrooper at Fort Bragg and suffered a brain injury in a plane crash in which the pilot and co-pilot were killed. Thereafter he was "seized" with violent headaches and frequent "blackout spells." He arrived in Germany in October 1948 where he continued to have headaches and frequent blackout spells. The latter were characterized by bizarre behavior of a violent character of which he had no recollection upon regaining consciousness. He presently shows a diagnosis of suspected syphilis and on a certain occasion consumed an excessive amount of intoxicating liquors (R 91-93).

Major Alden stated that the symptomatology narrated by the defense is not characteristic of any type of mental disease but is characteristic of the "so-called behavior disorders," but he would have to see the patient in order to classify the behavior disorder (R 93).

Upon examination by the court Major Alden described the routine employed at the hospital in the neuropsychiatric evaluation of patients. Upon admission, an initial examination, including a physical, is performed by a ward officer. Daily notes on the patient are kept by the nurse and ward officer. After allowing the patient three or four days to adjust to hospital routine, a history is taken of the patient. After about two weeks, information is obtained from the ward nurses and doctors and coupled with the observations of the Board members. The Board then interviews the patient for about an hour during which his history is reviewed, and the answers of the patient, his manner of delivery, and his emotional reactions are observed. It is on the basis of the foregoing that a determination is made as to the patient's condition (R 94). In Vennie's case an X-Ray was made of his skull and no damage found. No clinical reasons were observed, however, suggesting an X-Ray of the brain of either Vennie or Morris (R 93-94).

b. For the Defense

The two accused after being apprised of their rights each elected to make an unsworn statement through counsel upon the collateral issue of sanity (R 62-63).

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NAVY DEPARTMENT

As to Morris, defense counsel stated that he had boxed since the age of fourteen, and that prior to entering the Army had boxed semi-professionally. He had also boxed after entering the Army and received a knockout at Fort Benning. While a paratrooper at Fort Bragg, Morris was in an airplane accident, as a result of which he sustained a head injury. As evidence of the head injury, defense counsel pointed out to the court a scar approximately 3/5 or 2/5 of an inch in a vertical position in the center of Morris' forehead. The pilot and co-pilot of the plane were killed and Morris suffered severe headaches and was hospitalized. Following his assignment to the European Command he complained of headaches. The following examples of bizarre conduct on Morris' part were narrated by defense counsel: At Marburg, accused was found sitting in a field at six o'clock in the morning. He was found shovelling in the orderly room, at which time he stated he was burying a dog. Following this incident Morris was sent to the hospital for examination and X-Rays. On frequent occasions accused would walk into the orderly room and snatch telephones from the persons using them. He was in frequent fights and in Berlin a worker who was in front of a room occupied by accused was injured, apparently by accused. At Kitzingen, he had frequent headaches and minor disturbances and was committed to the dispensary. Later, when assigned to the Mannheim Honor Guard Morris had a similar history. From the time of the offenses alleged until 25 May 1950, he was hospitalized at Munich (R 63-64).

Defense counsel stated that Vennie had engaged in semi-professional boxing prior to his enlistment in the Army in November 1948 and on one or more occasions had been rendered unconscious. While a member of the Kitzingen Training Center Honor Guard he was struck by a box car and received a scar on the left temple described as follows in the record:

> "DEFENSE: The accused Vennie has a scar just to the left of the center of his forehead approximately an inch and one-fifth running in a vertical direction to the top of the forehead and plainly visible.
>
> "LAW MEMBER: And a further notation that the scar leaves a well healed or non-disfiguring defect in the forehead." (R 64)

Subsequent to the accident, accused was in various minor disturbances of which he had no memory. Following the offenses with which he is charged, accused was committed to the hospital at Munich and was released on 25 May 1950 (R 64).

Master Sergeant Robert L. Crosby, 557th Rifle Platoon (Separate), testified that for approximately three months during 1949 accused Morris was a member of his organization, which was likewise denominated as an "Honor Guard." Although a newly assigned person was always restricted for seven days, Morris, after duty would always call up the "CO" to find

out why. After returning from pass, whether he was sober or otherwise, Morris would "holler" in the hallway to let everyone know he was back. On one occasion when Crosby talked to accused about being late for reveille, Morris showed a lackadaisical attitude. Accused would want to know why he had to drill and when Crosby informed the unit they would have to march to mess hall, stated, "Everyone knows where the mess hall is. Why do we have to march?" From Crosby's observations, accused was below average in mental responsibility (R 35-38).

Private First Class John Thimas, who was Morris' roommate while the latter was assigned to the "557th Honor Guard," recalled that on one occasion when he and accused became involved in a fight with a German he had great difficulty in pulling Morris out of the fight. Accused was accustomed to come into the barracks at night, yell in Thimas' ear and yell up and down the halls. On one occasion when Morris had been told by Sergeant Crosby to wash a khaki shirt, he took a khaki shirt belonging to Thimas and showed it to Crosby instead of washing his own shirt. In Thimas' opinion, Morris was below average in mental responsibility (R 39-40).

Master Sergeant Charles C. Dodson was acquainted with accused when both were members of the "7800th" for a period of five or six months during 1949. Morris was transferred out of the unit because of information concerning him which came to Sergeant Dodson. On one occasion, Morris was found in the orderly room with a shovel and stating "he was going to kill a white dog on the floor." On another occasion when Morris was restricted, Dodson found him outside the gate. At other times when Dodson talked with Morris about his going out after bedcheck and asked if he knew what he was doing, accused responded that he did. Dodson was of the opinion that Morris was below average in mental responsibility (R 41-43).

First Lieutenant William H. Terry testified that Vennie had been a member of the Demonstration Platoon commanded by him and that during that time he had been informed that Vennie had suffered a head laceration as a result of stepping in front of a moving freight car. Lieutenant Terry subsequently saw Vennie after he had been released from the 5th General Dispensary and observed that accused had sustained a severe laceration of the head. At the time, Lieutenant Terry talked to Vennie and received the impression that accused took the incident very lightly, more so than would the average soldier (R 65-66).

Private First Class Sidney R. Ross testified that he observed Morris, then a prisoner at the stockade, choking one Isolus Morris, a fellow inmate. The incident was reported to the prison officer and accused Morris was transferred to the 57th Field Hospital (R 69).

Private William C. Conine, a sentry at the stockade, on one occasion observed accused Morris pretending that he was fishing (R 71).

Private First Class Roger L. Witherspoon testified that he had known Morris at Fort Bragg, North Carolina, had heard that Morris was injured in a jump, and had seen Morris after his release from the hospital (R 73).

Sergeant Samuel Brock, Company A, 373rd Infantry, testified that Morris had formerly been assigned to his company, and had come in contact with him while the company was in the field. He found that while Morris understood orders, he did not want to obey them. In performing his duties he knew exactly how he wanted to do them and felt that any other way was wrong. Brock was of the opinion that Morris was "an unusual character" (R 74-77).

Sergeant First Class Fred Glaze testified that he had been Vennie's platoon sergeant for about a year, and that during that time he knew that Vennie received an injury and was hospitalized in the 57th Field Hospital. Subsequent to the injury, he observed that at silent drill Vennie would remain standing as the other men moved out. On one occasion subsequent to the injury he talked to Vennie concerning a delinquency report which Vennie had received for an incident in Munich. At the time, Glaze observed that Vennie's reaction was not normal since he could not give any reason why he was charged with misconduct (R 77-79).

Private Leo Hainsworth testified that on 17 March 1950 he accompanied the two accused to the Stern Restaurant, and subsequently tried to get them to leave. The accused, however, "just acted like they didn't want to go" (R 80).

Upon being duly qualified as a psychiatrist, Doctor Rudolph Kloue testified that during the week preceding trial he had twice examined accused Morris. The examinations included an electrical examination of the brain and "a neurotic and psycho examination." Doctor Kloue stated that accused had fallen in a plane from a height of 1500 feet and sustained a brain injury and a brain trauma. Accused informed Doctor Kloue that subsequent to the crash he had been unconscious for a half hour. Since the incident accused complained about pains, headaches, "spells of blackout," and "increased emotions." Nonetheless, both physical and psychiatric examination did not disclose any abnormal findings, and, in fact, Morris appeared to be "a very well oriented personality." With reference to Morris' sanity at the time of the acts charged, he suggested the possibility of residual difficulties from the accident. In response to substantially the identical hypothetical statement presented to Major Alden, Doctor Kloue stated that the increased signs of psychopathy and decreased tolerance to alcohol after the accident were such circumstances that substantiated the conclusion

that the hypothetical person "is not able to know what is right and what is wrong" (R 98-102).

At the same time he examined Morris, Doctor Kloue also examined Vennie. On examination of Vennie, Doctor Kloue, in addition to scars from the injury, found "a likely disorder of the reflexes," and "a difference in the reflexes of the belly skin." He also found, "not for sure," sensibility paralysis of the left side. In addition, "electro brain examination" showed the existence of a disorder in the functioning of the brain. Doctor Kloue was of the opinion that at the time of examination accused under the influence of liquor was not sane, but was sane when not under the influence of liquor, and further, that at the time of the offenses alleged accused "not absolutely has been sane and he has a showing of a disorder -- a slight disorder -- of the mental functions, he is getting more quickly involved in emotions and his tolerance for alcohol has been decreased" (R 102). Defense counsel described substantially the following hypothetical person to Doctor Kloue:

A person, one of a family of three children, had never seen his father and only occasionally his mother and spent his childhood in the congested area of a large city. He quit school in the eleventh grade and from the age of 13 engaged in amateur and semi-professional boxing. His boxing career was terminated by his being rendered unconscious for two hours, having sustained an undetermined head injury or brain shock. He enlisted in the Army at the age of 14 and was later discharged. Because of environmental difficulties he rejoined the Army in November 1948, and thereafter exhibited "a pattern of irrational conduct" by engaging in unprovoked fights. In November 1949 he was struck on the head by a moving freight train and rendered unconscious thereby for 16 hours. Thereafter, he suffered violent headaches, increasing susceptibility to alcohol, loss of memory, and showed a progressively worse pattern of irrational conduct characterized by violence of action and speech, of which he has no memory, and has no memory of the offenses charged. The person, who at present is 19 years of age, does not know the seriousness of the charges against him, and exhibits only passive interest and cooperation in his own defense. In answer to a query concerning the sanity of the hypothetical person described, Doctor Kloue stated the opinion that he would not be sane under the influence of alcohol (R 102-103).

4. Discussion

The uncontradicted evidence of record shows that on the night of 17 March 1950 the two accused, accompanied by three other soldiers repaired to the Restaurant Stern in Bruckenau, Germany. When the accused with drawn pistols chased the proprietor and the maid, Emma Weber,

into the guest room, the other soldiers, after an unsuccessful attempt to have the accused accompany them, left the restaurant. The accused then confronted the occupants of the guest room with their pistols, and Morris after scrutinizing all the women present pulled Emma Weber from the room and took her to the kitchen where he threw her to the floor, removed his trousers and, at gunpoint, compelled Miss Weber to remove her pants. He lay on her, placed his pistol by his side, and although she manifested her lack of consent by pushing him away with her hands, inserted his privates into hers, and at the termination of an estimated 15 minutes attained "a sexual climax." In the meantime, Vennie held the others in the restaurant at gunpoint. Upon the foregoing uncontradicted factual situation both accused were found guilty of rape. As to Morris, these facts show beyond question that he had unlawful carnal knowledge of Emma Weber by force and without her consent. While lack of consent to sexual intercourse may not be evidenced merely "by verbal protestation" or a "pretense of resistance" (MCM 1949, par 179b), where, as here, the victim's resistance is rendered ineffectual by the terroristic methods employed by her assailant, such resistance as is employed is sufficient to negative consent (CM 333860, Haynes, 81 BR 375, 384-385). All elements of the offense of rape on Morris' part are established by the uncontradicted evidence of record.

Since Vennie did not personally rape Emma Weber, his responsibility therein is vicarious, and must be predicated upon his being an aider and abettor to the rape committed by Morris. Thus, it is provided that: "Anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal *** and punishable as such" (MCM 1949, par 27, p 21). To determine that Vennie was an aider and abettor it must be established either that he, knowing before hand that Morris was going to accomplish sexual intercourse by force and without consent if necessary, consented to and, pursuant to such consent, did facilitate that unlawful purpose by preventing others to aid and rescue the unwilling victim, or that knowing that Morris was going to violate the person of Emma Weber lent encouragement to Morris in that unlawful purpose by holding at gunpoint those persons who might prevent the consummation of the unlawful act (CM 321915, McCarson, 70 BR 411; CM 334790, Cruz, 1 BR-JC 277). It should be noted that at the time that Morris scrutinized the women present and seized Emma Weber and took her from the guest room there was no hint that robbery was to be an object of the show of force employed by accused. By a process of elimination, it becomes apparent that the joint show of force had for its object that which was accomplished, rape. To our minds it would be the height of naivete on our part to say that neither preconcert between Vennie and Morris nor active encouragement by Vennie existed. It being thus apparent that Vennie was an aider and abettor to Morris in the violation of Miss Weber's person he has been properly found

guilty of rape.

When the rape was completed, Morris and Miss Weber returned to the guest room. Here, during their absence, Vennie had held, at gunpoint, the persons named in the Specifications of Charge II. One of the persons, Wilhelm Loehmer, had his wallet lying on the table ready to pay his bill. The two accused, pistols in hand, demanded of the German civilians their watches and money. Vennie seized Loehmer's wallet while Morris was searching Schaefer and one of the other guests. One of the guests, Leibold, put the accused to flight by attacking Vennie and disarming him. It is thus shown that the taking of Loehmer's property was without his consent and with the intent permanently to deprive him of it, and that the taking was accomplished by intimidation. Every element of robbery as defined in paragraph 180f, Manual for Courts Martial U.S. Army, 1949, is evidenced in the record of trial. Moreover it is patent that the show of force by accused, accompanied as it was by words and actions evidencing their intent to take by whatever means were necessary the property of the persons present evidences every element of the offense of assault with intent to rob as defined in paragraph 180k, MCM, 1949. The findings of guilty of robbery (Chg. II, Spec. 1) and assault with intent to rob (Chg. II, Spec. 2) are warranted by the evidence.

5. Sanity

A psychiatrist testified that on examination he found accused Vennie to be sane when sober, but not sane when under the influence of alcohol, and further that at the time of the offenses Vennie was not absolutely sane but showed a slight disorder of the mental functions, was more quickly involved in emotions and had a decreased tolerance for alcohol. An Army psychiatrist found that Vennie at the time of examination was sane, but could not similarly state he was sane at the time the offenses were committed. Opposed to this testimony was the evidence that Vennie had assisted Morris in the commission of rape and with Morris had committed robbery. Following their departure from the restaurant wherein these offenses took place, accused Vennie washed his wounds, while Morris disposed of articles of clothing which would evidence his participation in a robbery. On the basis of this evidence that the accused cared for their wounds and attempted to conceal the visible proof of their recently committed criminal acts, the court was justified in concluding that Vennie was sane at the time of the offenses (CM 332151, Missik, 3 BR-JC 243,268).

The defense psychiatrist found Morris on examination to be a very well oriented individual, but suggested that at the time of the offenses Morris might have been suffering from residual difficulties from a plane

accident of which Morris allegedly was a victim. The prosecution countered with the testimony of an Army psychiatrist, Major Alden, who found accused at all times in question to be sane. In addition, the prosecution placed in evidence a report of a Board of Medical Officers, of which Board Major Alden was a member, in which the same opinion as to Morris' sanity was voiced. It is provided that:

> "*** The opinions as to the mental conditions of the accused contained in the report of a board of medical officers *** may be received in evidence, provided the officers making such report are made available for call as witnesses by the prosecution, defense, or the court for examination. ***" (MCM, 1949, par 112c).

The record of trial does not establish that the other two members of the Board were not so made available, and it thus appears that the admission of the Board's opinion evidence was proper. There was therefore for the court's consideration competent expert testimony that at all times in question Morris was sane, and in view of the inconclusive character of the testimony of the defense psychiatrist the court also was fully warranted in concluding that Morris was sane.

We have not assigned any weight to the testimony adduced upon the hypothetical questions propounded by the defense.

> "*** An expert witness may also be asked to express his opinion upon a hypothetical question (a question supposing a certain state of facts to exist) if the question is based on facts in evidence at the time the question is asked, or, if the court so permits in the exercise of a sound discretion, on facts which are later to be received in evidence." (MCM 1949, par 125b, p 153.)

Many of the salient facts upon which the hypothetical questions by the defense counsel are based are to be found only in the unsworn statements of accused made through their defense counsel. Facts related in an unsworn statement have not been received in evidence (MCM, 1949, par 76) and hence the hypothetical questions and the answers thereto were incompetent.

6. Vennie is 19 years of age, unmarried, and is the father of an illegitimate child. He completed eleven years of school, quitting to enlist in the Army in 1946. He again enlisted in the Army in November 1948. His service has been characterized as excellent.

Morris is 20 years of age, unmarried, and the father of an illegitimate child. He attended school for ten years and in civilian

life was variously employed as a bottling machine operator, waiter, and bellboy. He has had enlisted service since 18 August 1947. His service has been characterized as excellent.

7. The court was legally constituted and had jurisdiction over the persons 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 sustain the findings of guilty and the sentences and to warrant confirmation of the sentences. A sentence 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 is authorized upon conviction of a violation of the 92nd Article of War.

_____, J. A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342,559

THE JUDICIAL COUNCIL

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

In the case of Recruit Elmer Vennie, RA 1[illegible],[illegible]98, and Private James H. Morris, RA 14267351, both of Company "A", 373d Infantry Battalion (Separate), 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, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

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

I concur in the foregoing action.

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

5 October 1950

(GCMO 68, October 12, 1950).

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

JAGH CM 342605

AUG 1950

UNITED STATES v. Captain JOHN CLIFFORD POWERS (0301280), Medical Service Corps, 33d Army Medical Depot, APO 696, US Army	NURNBERG MILITARY POST Trial by G.C.M., convened at Nurnberg, Germany, 3 July 1950. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 Captain John Clifford Powers, Medical Service Corps, 33d Army Medical Depot, did, without proper leave, absent himself from his organization at Furth, Germany, from about 0800 hours, 1 June 1950, to about 2325 hours, 2 June 1950.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Captain John Clifford Powers, Medical Service Corps, 33d Army Medical Depot, was at Nurnberg, Germany, on or about 2 June 1950, in a public place, to wit: Kertzinger Cafe, drunk and disorderly while in uniform, to the disgrace of the military service.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Captain John Clifford Powers, Medical Service Corps, 33d Army Medical Depot, was, at Furth, Germany, on or about 0700 hours, 3 June 1950, drunk and disorderly in quarters.

Specification 3: (Finding of not guilty).

Specification 4: In that Captain John Clifford Powers, Medical Service Corps, 33d Army Medical Depot, was, at Nurnberg, Germany, on or about 5 June 1950, in a public place, to wit, Grand Hotel, drunk and disorderly while in uniform.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Specifications and Charges with the exception of Specification 3 of Charge III of which Specification he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 1, Charge II, and Specification 1, Charge III; approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. Evidence.

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

a. For the prosecution.

The accused, Captain John C. Powers (0-301280), Medical Service Corps, attached to the 33d Army Medical Depot, APO 696, was shown to have been absent without proper leave from his organization at Furth, Germany, from about 0800 hours 1 June 1950, to about 2325 hours, 2 June 1950 (R 30; Pros Exs 1,2,3).

Private First Class Donald L. McIlvee, a military policeman, observed the accused in the Aquarium Bar, Nurnberg, Germany, at about 2030 hours, 2 June 1950 (R 9). The accused was dressed in "Class A uniform," was drinking and was using profane language to enlisted men present. Private First Class McIlvee's companion, Private Criste, cautioned the accused to be quiet and to refrain from the use of profanity (R 10). About fifteen minutes later, McIlvee noticed the accused at the Cafe Kertzinger, also located in Nurnberg, Germany, in the act of "pouring" beer over his clothes. His breath smelled of alcohol; he staggered and was unable to hold himself erect. He grasped a corporal's hand and refused to let go when requested. In the opinion of the witness the accused was drunk (R 10-12). The MP duty officer, having been called, arrived with additional military policemen and took the accused into custody. The accused at first refused to get into the patrol wagon and told the duty officer that "he could break [his] ass and all seven MP's that were with him." However, he finally

was persuaded to get into the patrol wagon peaceably (R 11). When seen by the duty officer of the 33d Army Medical Depot at 2340 hours that evening, the accused was unsteady on his feet and showed signs of having been drinking (R 13). He was loud, and argumentative. His blouse was unbuttoned and his breath smelled of alcohol (R 15-16).

At 0710 hours the following morning, 3 June 1950, the accused was observed "plunking" at a piano in officers' quarters located at Waldstrasse 64, in Furth. The house in question was the billet of the Commanding Officer and the Executive Officer of the 33d Army Medical Depot and also served as an officers' mess and lounge (R 14-15). The accused's clothing was disheveled and wet and in the opinion of the witness, he was drunk (R 18-19).

The accused's playing also was heard by Katharina von Kossuth, the housekeeper, who asked him "to stop with the piano playing so loud" as other officers were still asleep. "He had already in hand a bottle of beer ***" (R 22). The accused left the piano, went into the bar for more beer, turned on the radio and when the housekeeper came in to replenish the ice box pulled her into a corner and tried to kiss her. His jacket was open, he was dirty and his breath smelled of alcohol. In the opinion of the housekeeper he was drunk. The accused continued to pursue the housekeeper following her from room to room, tickling her and attempting to kiss her. He pushed her into a corner, told her "some crazy things" and threatened to hit her with a beer bottle he had in his hand (R 23). Following her into the garden, he attempted to grab her hand stating: "I am a strong man, I can pull you into the swimming pool." The housekeeper lost her temper, slapped the accused in the face and struck him across the legs with a broom. Thereafter, she ran into the house and telephoned the depot in an effort to locate the depot Executive Officer. The accused followed her into the house but was so drunk he was unable to climb the stairs (R 25). The accused had known the housekeeper only three days prior to this incident (R 29).

At about 2200 hours, 5 June 1950, the accused was observed in the Marble Room of the Grand Hotel, Nurnberg, Germany. This room was used as an officers' club and was crowded with military personnel and their dependents at the time. The accused approached WOJG Oliver Ferrell, who was sitting at a table with his wife and several friends, grabbed him roughly by the shoulder and asked for a cigarette. A member of the party gave the accused a cigarette and he left the table. WOJG Ferrell was not acquainted with the accused. About fifteen minutes later, the accused again approached Ferrell, again grabbed him roughly by the shoulder and again asked for a cigarette. When Ferrell replied that he did not have one, the accused demanded: "Why do you not have one?" Further difficulty was avoided by the club officer who intervened. In Mr. Ferrell's opinion, the accused was under the influence of alcohol (R 32). His opinion was based upon the accused's inability to stand erect and in the manner in which he walked.

Mr. Ferrell's opinion was shared by the club officer, Captain Ralph S. Foster. In addition to observing the accused's conduct at Mr. Ferrell's table, Captain Foster also intercepted the accused when the latter attempted to go to another table for the purpose of asking a girl (who apparently did not know him) to dance, and later removed him from behind the bar. Thereafter, with the help of the headwaiter, he took the accused to his room in the hotel. The accused could not walk without staggering and was unable to climb the stairs without assistance. His speech was thick. He was drunk (R 34-35).

b. For the defense.

WOJG Kenneth E. Bates, called as a witness for the defense, testified that he had known the accused since May 1941, and that in this entire time he had never known the accused's conduct to be anything but good (R 37).

It was stipulated that if Major William R. Finks, MSC, 9th Station Hospital, APO 541, were present and sworn as a witness, he would testify to the efficiency and ability of the accused as Supply Officer at Walter Reed General Hospital Annex in February, 1949 (R 39, Def Ex A).

It also was stipulated that if Colonel Clifford V. Morgan, MC, Medical Division, EUCOM, were present and sworn as a witness, he would testify that he was the Deputy Chief, Army Medical Center, Washington, D.C., between February and November 1948, and that during that time he had received no unfavorable reports concerning the accused (R 39, Def Ex B).

It was further stipulated that the accused had never been AWOL, court-martialed or reprimanded in his entire 21 years of service (R 39, Def Ex C).

The accused, having been duly advised of his rights as a witness, elected to remain silent (R 39).

4. Discussion.

Charge I and the Specification thereunder.

This specification alleges that the accused was absent without proper leave from his organization at Furth, Germany, from about 1 June to about 2 June 1950. The only evidence tending to prove the offense as alleged consists of extract copies of morning reports purporting to establish the initial absence and the return to military control respectively. The prima facie case so established was neither contradicted nor rebutted by the defense, with the result that the only question before the Board of Review is whether these extracts are sufficient to support the finding of guilty.

The extracts in question read in pertinent part as follows:

"Powers John C (atchd) 0-3011280 Capt
Dy to AWOL 2400 hrs eff 31 May 50

/s/ Robert C Frase
/t/ Robert C Frase
1st Lt MSC" (Pros Ex 1)

"CORRECTION (2 June 50)
Powers John C (atchd) 0-3011280 Capt
Dy to AWOL 2400 hrs eff 31 May 50
SHOULD BE
Powers John C (atchd) 0-3011280 Capt
Dy to AWOL 0800 hrs eff 1 June 50

Powers John C (atchd) 0-3011280 Capt
AWOL to arrest in qtrs 2325 hrs eff
2 June 50

Powers John C (atchd) 0-3011280 Capt
Arrest in qtrs to absent sk 15th Evac
Hosp APO 696 LD No AR 35-1440

/s/ Robert C. Frase
/t/ Robert C. Frase
1st Lt MSC" (Pros Ex 2)

"CORRECTION (3 June 50)
Powers John C (atchd) 0-3011280 Capt
AWOL to arrest in Qtrs 2325 hrs
eff 2 June 50
SHOULD BE
Powers John C (atchd) 0-3011280 Capt
AWOL to Dy 2325 hrs eff 2 June 50
Powers John C (atchd) 0-3011280 Capt
Dy to arrest in Qtrs 0900 hrs eff
3 June 50

Powers John C. (atchd) 0-3011280 Capt
Absent sk 15th Evac Hosp APO 696 to
Arrest in qtrs LD No AR 35-1440

/s/ Robert C. Frase
/t/ Robert C. Frase
1st Lt MSC" (Pros Ex 3)

The authenticating certificates on the above-quoted morning report extracts are dated 2 June 1950, 3 June 1950, and 5 June 1950, respectively.

It is seen that the extract copies of the morning reports under consideration are defective in that none of them are dated, with the result that it is impossible to determine when the entries were made. This defect is not cured by the dates on the authenticating certificates as it is well established that facts stated in such certificates have probative value only for the purpose of the authentication (CM 325518, Alberto and Sielky, 74 BR 283; SP CM 2064, Babineau, 8 May 1950). On the other hand, the instant case is distinguishable from the cited cases in that here facts are related in the body of the entries themselves from which the date of the accused's initial absence and the date of his return to military control can be determined, and which dates correspond to those alleged.

In the absence of a showing to the contrary, it will be presumed that the morning report entries were made regularly (CM 269103, Zoller, 44 BR 387,394); nor is the time of making of such entries material in the absence of proof offered by the defense for the purpose of impeaching the entries (CM 298315, Stevens, 58 BR 277,280; CM 296066, O'Dell, 58 BR 61,64). In the instant case, the defense neither objected to the receipt in evidence of the extract copies of the morning reports, nor otherwise attacked their sufficiency. We are of the opinion, therefore, that the defect noted was not one which, under the circumstances, rendered them inadmissible in evidence or insufficient to support the findings of guilty of this Charge and Specification.

Specification 2, Charge II.

The evidence is undisputed that the accused was drunk at the Cafe Kertzinger on the evening of 2 June 1950, as alleged. The record does not indicate the nature of this establishment other than by its name "Cafe Kertzinger," the fact that enlisted men were present and that it was visited by the military police. We believe these facts to be adequate, however, to indicate it to be a "public place" as alleged (CM 315105, Rochon, 64 BR 355; CM 269105, Kolick, 45 BR 1).

A variance, if it be a variance, between the allegation and proof is noted in that the evidence indicates certain acts of the accused at the time to have taken place outside the Cafe Kertzinger rather than "in" such place as alleged. No objection to the testimony in question was raised by the defense. We do not find such variance in locale to be material or to have resulted in any prejudice to the accused (CM 269105, Kolick, supra).

The only proven acts of the accused at the Cafe Kertzinger which may be considered as disorderly are: that he poured beer over himself, that he grasped a corporal by the hand and refused to let go, and that upon being taken into custody by the military police he at first refused to enter the patrol wagon and profanely indicated a willingness to fight

all of them. While his conduct in these respects was reprehensible and was unquestionably prejudicial to good order and military discipline the proof falls short of establishing either the gross drunkenness or serious disorder deemed necessary to sustain a finding of guilty of violation of Article of War 95 (CM 236450, Nicholson, 1 BR (ETO) 397; CM 235295, Anderson, 21 BR 369). The Board of Review consequently is of the opinion that as to this specification the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty in violation of the 96th Article of War.

Specifications 2 and 4, Charge III.

The record of trial contains uncontradicted proof establishing the fact that the accused was drunk and disorderly in military quarters on the morning of 3 June 1950, and again at an officers' club on the evening of 5 June 1950. His conduct on both occasions was disreputable. The Board of Review finds no difficulty in determining the record of trial to be legally sufficient to sustain the findings of guilty as to these specifications of Charge III and to Charge III.

5. Consideration has been given to representations for and on behalf of the accused, orally and in writing, by Captain Henry A. Tarbox, MSC, and by Major Gerard J. Sheehan, MSC.

6. Records of the Department of the Army show that the accused is 39 years of age, married and has one child. He completed two years of high school at Quincy, Illinois. He enlisted in the Regular Army at Fort Sheridan, Illinois, 27 September 1928, and served continuously as an enlisted man in the Medical Department, Regular Army, until 18 March 1941. He was appointed a Second Lieutenant, MAC Reserve, on 22 October 1932, and entered on his present tour of extended active duty in this grade 19 March 1941. He was promoted to the grade of First Lieutenant, 2 June 1942; to the grade of Captain, 21 July 1943; and on 29 May 1947 was appointed a Major in the MA Reserve (ORC). He is entitled to wear the American Defense Medal, the Asiatic-Pacific Campaign Medal, the American Theater Ribbon, the Philippine Independence Ribbon, and the World War II Victory Medal. His efficiency reports are not available to the Board of Review at this time. There is no record of previous convictions or of civil offenses.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors adversely 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 sustain the findings of guilty of the specification and Charge I, of specifications 2 and 4, Charge III and Charge III, and of so much of the findings of guilty of specification 2, Charge II and of Charge II as involves findings of guilty of violation of Article of War 96. The Board

of Review is further of the opinion that the record of trial is legally sufficient to sustain the sentence and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of violations of Articles of War 61 and 96.

C. P. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

Robert Kaufman, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

(119)

CM 342,605

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain John Clifford Powers, 0301280, Medical Service Corps, 33d Army Medical Depot, upon the concurrence of The Judge Advocate General, only so much of the findings of guilty of Charge II and Specification 2 thereof as involves findings of guilty of being drunk and disorderly while in uniform, in the public place and at the time alleged, in violation of the 96th Article of War, is approved. Upon the concurrence of The Judge Advocate General the sentence is confirmed but commuted to a reprimand and forfeiture of One Hundred Dollars ($100.00) pay per month for six months. As thus commuted, the sentence will be carried into execution.

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

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

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

(121)

JAGK - CM 342627

16 AUG 1950

UNITED STATES	2D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 14 July 1950. Dismissal.
Captain BRADFORD L. WEBSTER (O-503597), Medical Company, 23d Infantry.	

OPINION of the BOARD OF REVIEW
WHIPPLE, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

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

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

Specification 1: In that Captain Bradford L. Webster, Medical Service Corps, Medical Company, 23rd Infantry, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 12 May 1949, wrongfully authenticate, by afixing his signature thereto, WD AGO Form 66, 1 July 1947, the "Officer's, Warrant Officer's, and Flight Officer's Qualification Record" pertaining to the said Captain Bradford L. Webster, the said WD AGO Form 66 containing statements to the effect that the said Captain Bradford L. Webster had been admitted to the Bar of the State of California in 1937 and was licensed to practice law in that State, which said statements were known by the said Captain Bradford L. Webster to be untrue, in that the said Captain Bradford L. Webster had not been admitted to the Bar of the State of California in 1937 and was not licensed to practice law in that State.

Specification 2: In that Captain Bradford L. Webster, Medical Service Corps, Medical Company, 23d Infantry, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 28 June 1949, with intent to deceive The Adjutant General, officially state in a letter addressed to the said The Adjutant General, through channels, that

he, the said Captain Bradford L. Webster, was a member of the Bar of the State of California, which said statement was known by the said Captain Bradford L. Webster to be untrue in that he, the said Captain Bradford L. Webster, was not a member of the Bar of the State of California.

Specification 3: In that Captain Bradford L. Webster, Medical Service Corps, Medical Company, 23d Infantry, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 28 June 1949, with intent to deceive The Adjutant General, officially state in a letter addressed directly to the said The Adjutant General, that he, the said Captain Bradford L. Webster, was a member of the Bar of the State of California, which said statement was known by the said Captain Bradford L. Webster to be untrue in that he, the said Captain Bradford L. Webster, was not a member of the Bar of the State of California.

Specification 4: In that Captain Bradford L. Webster, Medical Service Corps, Medical Company, 23d Infantry, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 30 August 1949, with intent to deceive The Adjutant General, officially state in the 3rd indorsement to a letter dated 28 June 1949, addressed to the said The Adjutant General, through channels, that he, the said Captain Bradford L. Webster, passed the Bar examination of the State of California and was admitted to practice there in 1936, which said statements were known by the said Captain Bradford L. Webster to be untrue in that he had not passed the said Bar examination and had not been admitted to practice in the State of California in 1936.

Specification 5: In that Captain Bradford L. Webster, Medical Service Corps, Medical Company, 23d Infantry, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 2 February 1950, while serving as Individual Defense Counsel before a regularly organized general court-martial in the case of the United States versus Private Leander Williams at Fort Lewis, Washington, wrongfully and willfully affirm to the said general court-martial that he, the said Captain Bradford L. Webster, was a member of the bar of the Supreme Court of the State of California, which averment he, the said Captain Bradford L. Webster, then knew to be untrue in that the said Captain Bradford L. Webster was not then a member of the Bar of the Supreme Court of California.

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

Specifications 1-5 inclusive are identical to Specifications 1-5 of Charge I.

Specification 6: In that Captain Bradford L. Webster, Medical Service Corps, Medical Company, 23d Infantry, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 14 February 1950, in the course of an official investigation being conducted by Colonel Frank E. Bertholet, IGD, Inspector General, 2d Infantry Division, Fort Lewis, Washington, make under oath statements in substance as follows: "I took the state bar examination in February, 1936, in San Francisco"; "I was told officially by the California Bar Association that I had passed"; and "I was admitted to the bar", which statements the said Captain Bradford L. Webster then knew to be untrue.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence of one previous conviction by general court-martial was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence

a. For the Prosecution

It was stipulated that the Officer's, Warrant Officer's and Flight Officer's Qualification Record (WD AGO Form 66) to be offered in evidence is accused's actual "Officer's, Warrant Officer's and Flight Officer's Qualification Record (WD AGO Form 66)" (R 43, Pros Ex 5). A WD AGO Form 66 pertaining to Bradford Leander Webster dated 12 May 1949 and authenticated by the signature "Bradford L. Webster" was introduced in evidence without objection as Prosecution Exhibit No. 6 (R 44). Item 37 thereof, "Civilian Occupational Experience (Main and Secondary)" contains the following pertaining to main civilian occupation:

"Title of Position Attorney at Law Code 01.866

Name and address of Employer Self

Dates Employed From 1937 to 1941

Duties Performed
After 2 yrs law school & 4 yrs study in fathers law office passed bar exam in California and admitted to the bar of that

state. Practiced corporation law."

It was stipulated that the photostatic copy of a letter addressed to The Adjutant General through channels, dated 28 June 1949, bearing file reference "AMNLE-AP 201-Webster, Bradford L. (O)" was received from The Adjutant General's office in response to a request therefor by the Staff Judge Advocate's Office, Headquarters 2d Infantry Division (R 45, Pros Ex 7). A photostatic copy of a letter of identical file number, date and addressee was admitted in evidence without objection as Prosecution Exhibit 8 (R 45). The basic letter and five indorsements thereto are authenticated by the seal of The Adjutant General. The basic letter, Subject: Request for Detail in JAGC, addressed to The Adjutant General, through channels, over the signature "Bradford L. Webster," asserts in part that the writer is a member of the California State Bar and American Bar Association and had practiced "6 years of law" prior to entering the Army. The third indorsement thereto dated 30 August 1949, over the signature "Bradford L. Webster," states in part:

> "a. I am not a graduate of any law school, but through diligent effort and study I passed the bar examination of the State of California and was admitted to practice there in 1936.
>
> "b. I was admitted on motion in 1936 to practice before the Supreme Court of California in 1936.
>
> "c. I practiced six (6) years law, full time, before entering the Army."

It was stipulated that the carbon copy of a letter dated 28 June 1949, addressed directly to The Adjutant General is as complete as the original in all essential respects and that the signature that appears thereon is in fact that of Bradford L. Webster, Captain, MSC (R 48, Pros Ex 9). A carbon copy of a letter dated 28 June 1949, Subject: Request for Detail in JAGC, addressed to The Adjutant General, bearing the signature "Bradford L. Webster" was received in evidence without objection as Prosecution Exhibit 10 (R 49). The reverse side of the carbon copy bears a time and date stamp of The Adjutant General's Office indicating that it was received in The Adjutant General's Office on 5 July 1949. The letter which is a request for transfer to The Judge Advocate General's Corps states in part that the writer thereof is a member of the California State Bar and the American Bar Association, and had practiced law for six years prior to entering the Army.

Leslie R. Hansen, who was employed as a reporter of courts-martial by the Staff Judge Advocate's Section, Headquarters 2d Infantry Division, reported the trial by general court-martial of Private Leander Williams on 2 February 1950. Hansen in reporting cases utilized an electrical recorder to record the proceedings of a court-martial, and later the

record of trial is transcribed from the wax recordings (R 19-20). Hansen identified Prosecution Exhibit 2 as the record of trial in the Williams case which he had recorded and transcribed (R 22). The record of trial in the latter case shows the following at page 3:

> "The accused stated that he desired to be defended by the regularly appointed assistant defense counsel and Captain Bradford L. Webster, specially requested defense counsel.
>
> * * *
>
> "PROSECUTION: Let the record show that Captain Webster, as special counsel, is a member of the Supreme Court of the Bar of the State of California. Is that correct?
>
> "DEFENSE: <u>That is right.</u>" (Underscoring supplied.)

Hansen further identified Prosecution Exhibit 3 as the wax recording of the Williams trial, and when the record was played in court identified accused as the speaker of the words underscored above (R 27-28).

The record of trial proper in the Williams case (Pros Ex 2) was authenticated by the signature "Walter C. Rathbone," as Law Member and President, and "Stephen A. Day Jr," as Trial Judge Advocate, and prior to authentication was signed with the signature "Bradford L. Webster," as "Requested Defense Counsel." It was stipulated that the signatures "Walter C. Rathbone" and "Stephen A. Day Jr" are the actual signatures of the President and Trial Judge Advocate of the court (R 22, Pros Ex 1).

On 14 February 1950, accused was interviewed by Colonel Frank E. Bertholet, Post Inspector General, Fort Lewis, Washington. Colonel Bertholet "swore" the accused and advised him of his rights under Article of War 24. Colonel Bertholet identified Prosecution Exhibit No. 11 as an accurate transcript of the ensuing interview conducted by him with the accused and the transcript was admitted in evidence (R 53-55). The transcript reflects the following sworn testimony by the accused:

> "5. Q. Captain, it has been alleged that certain information contained in your records and other official papers with reference to you may or may not be correct. The purpose of this investigation is to determine the status of such. Now, I show you WD Form 66 which is your individual record. Is this your signature? (The witness was shown WD Form 66).
>
> A. Yes, sir.
>
> "6. Q. Will you read the data contained in par. 37 thereof?
>
> A. 'After 2 years law school and four years study in father's law office passed bar exam in California and admitted to the bar of that state. Practiced corporation law.'

"7. Q. The dates were from 1937 to 1941?
A. That is correct.

"8. Q. Is that a true and correct statement?
A. To the best of my knowledge and belief, sir.

"9. Q. I now show you a letter dated 28 June 1949 (Exhibit A). Is that your signature?
A. Yes, that is my signature.

"10. Q. Will you read paragraphs 3 and sub-paragraphs f and g?
A. 'This request is based on the fact that the undersigned has had approximately seven (7) years experience in JAG work in the Army of the United States.'
'f. Member of California State Bar and American Bar Association.
'g. Practiced 6 years of law prior to entering Army.'

"11. Q. Were those statements written by you and are they correct?
A. Yes, they are correct.

"12. Q. I have another letter dated the same date 28 June 1949, subject the same, addressed THRU: Channels, (Exhibit B). Is this your signature?
A. Yes, sir.

"13. Q. Are the statements in paragraphs 4f and g correct?
A. They are correct.

"14. Q. Here is the third indorsement to this letter dated 30 August which is unsigned, it being just a copy (Exhibit B). Are you familiar with that indorsement?
A. Yes, sir.

"15. Q. Is that a true copy of the indorsement?
A. Yes, sir.

"16. Q. The information contained in sub-paragraphs a,b and c, were they made by you and are they correct?
A. Yes, they were made by me, and they are correct.

"17. Q. Captain, will you state in your own words the period in which you practiced law in San Francisco or vicinity?
A. From June 1936 until January 1941.

"18. Q. What firm or corporation, if any, were you employed with?

A. Under my own name.

"19. Q. At what time did you take the State Bar Examination?
A. In February 1936.

"20. Q. Where did you take that examination?
A. In San Francisco, sir.

"21. Q. Can you give me any detailed information as to the location and before whom you took the examination?
A. In the Federal Court Building. It took three days. I don't remember the name of the individual giving the examination.

"22. Q. You don't remember who was in charge?
A. No, sir, I don't.

"23. Q. What was the result of that examination?
A. I was told I had passed, sir.

"24. Q. You were admitted to the Bar?
A. Yes, sir.

"25. Q. Who told you?
A. I received an official publication from the California Bar Association."

Colonel Bertholet identified Prosecution Exhibit 6 as a document which he showed accused during the interview and added that accused told him that the statements therein that accused was a member of the Bar were correct (R 44). He stated that Prosecution Exhibit 8 seemed to be a photostatic copy of an original letter of which he had shown accused a carbon copy during the interview. He recalled pointing out to accused statements in the letter to the effect that accused was a member of the California State Bar and American Bar Associations, asking accused if such statements were true, and receiving accused's acknowledgment of the truth of such statements. With reference to the 3rd indorsement to the basic letter, accused told Colonel Bertholet that the statement therein that accused in 1936 was admitted on motion to practice before the Supreme Court of California was correct (R 46-47). Prosecution Exhibit 10 was identified by Colonel Bertholet as being similar to another document concerning which he examined accused during the interview. Specifically, Colonel Bertholet recalled that accused assured him that the statement therein that he was a member of the California State Bar and the American Bar Association was correct (R 49-50).

Jerold E. Weil, by deposition, testified that he is the Secretary and Counsel of the State Bar of California and had served as such since March 1942. Pursuant to Section 24 of the State Bar Act of 1927, as amended, the Board of Governors of the California State Bar, with the approval of the Supreme Court had established the requirements for admission to the Bar of the State of California. The requirements which were published in "213 Cal. Reports, page CXIV, became effective on 1 September 1932." Although not expressly required by law, the State Bar of California, in order to carry out its duties, maintained records of all applicants for admission, and all applicants who took the bar examination and the results of such examination. Further, the Rules and Regulations of the State Bar of California require that the secretary keep a record of all members of the State Bar. This record shows as to each member whether he was admitted on motion or on examination and other information, and whether a member is active or inactive. These records have been maintained since 1927 and the Secretary of the State Bar has general custody of the records and files of the State Bar, although physical custody of the files and records of the Committee of Bar Examiners are in the physical custody of the secretary of that committee. According to Mr. Weil the records of the State Bar of California show that no person with one of the following names: Bradford Leander Webster, Bradford L. Webster, B. Leander Webster, B. L. Webster, had filed application for admission to the Bar of California during, had successfully passed a bar examination, or had been admitted to practice law in California since 1927. This conclusion was based upon a search of the pertinent files and records by Weil and Goscoe O. Farley, Secretary of the Committee of Bar Examiners, at Weil's request (R 60, Pros Ex 12).

By deposition, William I. Sullivan, Clerk of the Supreme Court of California, testified that the Supreme Court of California maintains a roll of all attorneys admitted to practice before it, of which roll of attorneys the Clerk of the Supreme Court is custodian. A search of the roll made by a deputy clerk in the presence of Sullivan failed to show any person named Bradford Leander Webster, Bradford L. Webster, B. Leander Webster, or B. L. Webster had ever been entered on the roll of attorneys, although the roll does show that an Albert Bradford Webster was admitted on 14 June 1894. Sullivan's information was to the effect that the latter Webster had died on 4 June 1941 (R 61, Pros Ex 13).

b. For the Defense

Accused after being apprised of his rights elected to remain silent.

Lieutenant Colonel Walter C. Rathbone testified that he had been a member of the Bar of the Supreme Court of the District of Columbia since 19 January 1916, and that until he had been sent to the hospital a few weeks earlier had served on general courts-martial at Fort Lewis since

1 February 1949. During his tenure as a member of general courts-martial at Fort Lewis, accused, as defense counsel, appeared before him on many occasions. Of six persons who appeared as defense counsel before the several courts-martial of which he was a member at Fort Lewis, Colonel Rathbone rated accused as "number two" (R 62-63).

First Lieutenant Stephen A. Day testified that he had been trial judge advocate for general courts-martial since April 1949 and, in that capacity, was closely associated with accused, having tried as trial judge advocate 100 to 200 cases in which he had been opposed by accused as defense counsel. Lieutenant Day had also been opposed by other defense counsel including six civilian attorneys and rated accused as "tied for first place" (R 64-66).

An affidavit of accused's mother, Margaret B. Webster, was accepted in evidence without objection. It recited that deponent's late spouse, Albert B. Webster, practiced law in California from about 1900 until his death in 1941; that accused attended San Francisco Law School for two years, and subsequently for a period of about four years assisted his father in the latter's practice of law (R 67, Def Ex A).

An honorable discharge and certificate of service, both pertaining to accused, were admitted in evidence as Defense Exhibits B and C (R 67-68). A certificate evidencing accused's appointment as master sergeant in the Army of the United States Medical Service Corps was received in evidence as Defense Exhibit D (R 68). Defense Exhibits D,F,G, and H, received in evidence (R 68-69,75), are respectively: A letter of commendation to accused dated 26 April 1949, from Colonel Edwin B. Howard, then accused's regimental commander; an office memorandum from the then Staff Judge Advocate at Fort Lewis recommending favorable action upon accused's request for transfer to The Judge Advocate General's Corps from the Medical Service Corps; General Court-Martial Orders Number 10, Headquarters, Fort Lewis, Washington, 10 November 1949, remitting the unexecuted portion of a sentence pertaining to accused promulgated in General Court-Martial Orders Number 35, Headquarters, United States Army, Alaska, 2 December 1948; a stipulation to the effect that on 10 July 1950 accused initiated a letter through channels to the Commanding General, 2d Infantry Division, requesting assignment to a combat unit, preferably with the 2d Infantry Division if he be allowed to remain in the service after his court-martial trial.

4. Discussion

Accused stands convicted essentially of having falsely stated, in official transactions on five occasions, that he was a member of the Bar of the Supreme Court of the State of California in violation of

Articles of War 95 and 96, and of having falsely stated under oath in an official investigation substantially to the same effect in violation of Article of War 96.

That accused had never applied for membership in the State Bar of California, had never taken a qualifying examination for membership in said Bar, had never been certified by the State Bar to the Supreme Court of California as having fulfilled the requirements for practice, and had never by the Supreme Court been admitted as an attorney at law in "all the courts of that state" was proven beyond doubt. The court, as do we, took judicial notice of the following provisions of law pertaining to admission to the practice of law in California:

> "The board shall have power to constitute and appoint an examining committee which shall have power to examine all applicants for admission, to administer the requirements for admission to practice, and to certify to the supreme court for admission those applicants who fulfill the requirements and successfully pass the examination.
>
> * * *
>
> "Upon certification by the examining committee that the applicant has fulfilled the requirements for admission to practice law the supreme court may admit such applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect, and a certificate of such admission thereupon shall be given to him by the clerk of the court." (Statutes 1931, Chapter 861, Section 24)

Further, we take judicial notice that the State Bar is a public corporation (Stats. 1927, Ch. 34, sec.1).

It is apparent that the only enduring and indubitable evidence of the fact of application for admission to practice law and the fact of the successful passing of a prescribed examination or the converse, would be the record of the State Bar of California showing such application and showing the results attained by the applicant upon the prescribed examination.

The only indubitable evidence that a named person had not applied for admission to the practice of law would be the lack of entry in the records of the State Bar showing that such named person had applied for admission to the practice of law. To evidence the non-occurrence of a fact or act by the lack of an entry to the contrary in a record, the record must be official in character, i.e., there must be a duty imposed upon the person making the record, by law, regulation, or custom to

record the fact or event, or to know, or to ascertain through customary and trustworthy channels of information, the truth of the matters recorded (MCM, 1949, par 130b; CM 334270, Stricklin, 1 BR-JC 141; CM 337950, Deyo, 4 BR-JC 175). The mode of proof of such absence of entry is as follows:

> "A duly authenticated certificate or statement signed by an officer having the custody of an official record, or by his deputy, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office is admissible as evidence that the records of his office contain no such record or entry. It is also proper to prove that an official record contains no entry as to a particular fact in issue or that there is no official record as to such fact by the testimony of the custodian of the official record in question, or his deputy." (MCM 1949, par 129a, pp 163-164.)

While there is no express provision of law requiring the State Bar of California, a public corporation, to maintain the records pertinent to the issues in this case, the powers given the State Bar to regulate admission to the practice of law implicitly require the maintenance of such records for the proper fulfillment of its duties. The records of public corporations which otherwise come within the rules prescribing official records are official records (Owings v. Speed, 18 U.S. 42, 56 ed 124), and there is no requirement, in order to constitute a record as official, that its keeping be required by statutes. "It is sufficient that they are kept in the discharge of a public duty" (Evanston v. Gunn, 97 U.S. 660, 663-664, 25 L. ed. 306; see also Sandy White v. U.S., 164 U.S. 100, 103-104, 81 L. ed. 1331, 57 S.C. 791; Hardison Seed Co. v. Jones, 149 Fed 252, 256-257). It is apparent, therefore, that the records of the State Bar of California are official records, and, a diligent search of those records having been made and no entries found which would evidence that accused had applied for admission to practice law, had taken and passed a qualifying examination, and had been admitted to practice, there is competent and compelling evidence that accused never applied for admission to practice law, never took a qualifying examination, and never was admitted to practice.

For the reasons hereinbefore set forth, the evidence that accused's name is not carried on the roll of attorneys of the Supreme Court of the State of California, the authority authorized to admit persons to practice law in California, is competent and compelling evidence that accused was not admitted to practice law in California.

A WD AGO Form 66, dated 12 May 1949 authenticated by accused's purported signature was introduced in evidence without objection. In

the absence of anything to the contrary showing it may be assumed that the signature was placed on the form on the date thereof (CM 332879, Boughman, 81 BR 223), and in the absence of objection to the genuineness the purported signature of accused, the signature may be considered as genuine (MCM, 1949, par 129b, p 164).

The evidence thus shows, as alleged, that, on 12 May 1949, accused authenticated an official record pertaining to his qualifications, wherein it is stated that he had passed the "bar exam" in California and had been admitted to the Bar of that state. By his signature upon the form, accused had vouched for the truth of the statements therein, which statements he obviously knew were false and had, therefore, wrongfully authenticated an official record as alleged. Accused by his act held out to his military superiors that he was qualified to perform duties in the Army beyond the scope of officers untrained in law, and presumably accused was assigned to such duties. It is difficult to envisage a more flagrant breach of trust on the part of an officer, a breach of trust violative of Article of War 95, and discreditable to the military service in violation of Article of War 96. The findings of guilty of Specifications 1, Charges I and II, are fully warranted by the record of trial.

Specifications numbered 2, 3 and 4 of Charges I and II relate to communications allegedly addressed to The Adjutant General by accused. There was admitted in evidence without objection a photostatic copy of letter dated 29 June 1949 addressed to The Adjutant General, through channels, and five indorsements thereto, bearing the seal of The Adjutant General's Office. The photostat may be considered a facsimile of the original basic communication and five indorsements thereto in the possession of The Adjutant General. As noted before, the absence of objection concedes the genuineness of the signatures appearing thereon. It thus appears that the basic communication of 28 June 1949 and third indorsement thereto of 30 August 1949 were written by accused. In each, accused stated, what has been demonstrated to be false, that he was a member of the Bar of California and was licensed to practice law in that state. To the same effect was another letter, dated 28 June 1949 addressed to The Adjutant General directly, and evidenced by a copy bearing accused's purported signature, and bearing the time and date stamp of The Adjutant General's Office. Here, again, by its failure to object the defense conceded the genuineness of accused's signature. It thus has been proven that in the three instances alleged accused falsely stated in official communications to The Adjutant General that he had been admitted to the Bar of California. It is obvious that the falsity of the statements was known to accused and, hence, the requisite intent to deceive may be inferred (CM 338837, Kelley, 4 BR-JC 319). The conduct denounced in Specifications numbered 2,3, and 4 of Charges I and II is violative of both Articles of War 95 and 96 (CM 338522, Howard, 4 BR-JC 291; Kelley, supra).

There was introduced in evidence the record of trial by general court-martial of Leander Williams. Pertinent portions of the record of trial were excerpted and the record of trial returned to the Office of The Judge Advocate General where it now reposes. The record at page 28 thereof bears accused's signature as "requested defense" counsel, and otherwise the record shows the presence of accused at the trial as defense counsel. The record at page 3 shows that the trial judge advocate announced that accused is a member of the Bar of the Supreme Court of California and requested confirmation of the announcement. Immediately thereafter the record shows the following: "DEFENSE: That is right." Other evidence shows that the trial was reported by the use of a voice recording device from which the written record was later transcribed by a stenographer. The wax record produced by the recording device was played back in court and the reporter identified accused as the person speaking the words "That is right." We are not aware of any legal objection to this method of proving that accused, in fact, confirmed the assertion of the trial judge advocate to the effect that accused was a member of the Bar of the Supreme Court of California. Otherwise, the showing that accused was present when confirmation was made of the trial judge advocate's announcement would be sufficient to establish that accused, by his silence, confirmed the statement of the trial judge advocate. This transaction is the subject of Specifications 5 of Charges I and II, which allege that accused wrongfully and willfully affirmed to a general court-martial that he was a member of the Bar of the Supreme Court of California. Black's Law Dictionary (Third Edition) defines the word "affirm" in the following terms: "To ratify, make firm, confirm, establish, reassert."

In the sense that accused ratified or confirmed the statement that he was a member of the Bar of the Supreme Court of California, he wrongfully and willfully made affirmance of what he knew to be false. In substance accused knowingly made a false official statement with intent to deceive in violation of Articles of War 95 and 96.

Finally, it was shown that accused, under oath, in an official investigation, after being apprised of his rights under Article of War 24, asserted the truth of the statements found in the documents subject of Specifications numbered 1-4, inclusive, Charges I and II, which have been hereinbefore shown beyond peradventure of doubt to be false. We are aware that the Boards of Review, in both perjury and false swearing cases, have adhered to the rule requiring two living witnesses to the falsity of the statement alleged to be false, or one witness and other corroboratory evidence, or contradiction of the false statement by a public record proved to have been well known to the accused when he took the oath, or contradiction by documentary evidence emanating from accused (CM 331723, Sowder, 80 BR 143). It might be said that in the instant case there were two living witnesses, the Secretary of the State Bar, and the Clerk

of the Supreme Court, but it is obvious that their testimony was based upon records in their custody. It cannot be said that the absence of entries in a public record would constitute a contradictory public record of which accused had knowledge. Finally, there is no contradictory documentary evidence emanating from accused. In fact, the proof of the falsity of accused's statements rests upon records of agencies of the State of California, or rather, the absence of entries pertaining to accused in those records, which entries would be in those records were the several assertions of accused true. We are unable to envisage more satisfactory evidence of the falsity of accused's statements, and upon the state of the official records are of the opinion that accused was guilty of knowingly making under oath the false statements alleged. We find the following statement of law to be particularly appropriate to the factual situation with which we are confronted:

> "Clear and direct testimony of one or more witnesses, or the testimony of one witness and convincing corroborating circumstances, or indubitable facts absolutely incompatible with the truth of the testimony charged to be false, may be ample to sustain a verdict of perjury." (Gordon v. U.S., 5 F 2d, 943) (Underscoring supplied.)

We find that the "indubitable facts" shown by the record of trial are absolutely incompatible with the truth of the statements alleged to be false. The offense of false swearing which we find to have been proven by the competent evidence of record is violative of Article of War 96 (MCM, 1949, par. 183c, p. 260).

5. The defense objected to Colonel Bertholet's testimony concerning his interview with accused which became the subject of Specification 6, Charge II (false swearing), on the ground that the interview and transcript thereof was confidential. The objection appears to be based upon two considerations, one being that accused was told not to communicate with anyone concerning the interview, and the other being based upon the following statement from the Manual for Courts-Martial, U.S. Army, 1949, paragraph 137b, page 182:

> "The officers of the Inspector General's Department are confidential agents of the Secretary of the Army or of the commander on whose staff they are serving. Their investigations are confidential unless a different procedure is prescribed by the authority ordering the investigation. Reports of such investigations and their accompanying testimony and exhibits are likewise confidential and there is no authority of law or practice requiring that any persons be furnished with copies thereof. ***"

As to the first consideration, accused was apprised of his rights under Article of War 24, and hence was on notice that what he said might be used against him. Otherwise, it is apparent that the interview was confidential in the sense that accused was not to talk about the interview, and not in the sense that he was making a privileged statement as to a chaplain (CM 334866, Schultz, 1 BR-JC 321).

With reference to the second consideration, it is extremely doubtful that it was accused's privilege to exercise the prerogative of the officer on whose staff Colonel Bertholet was serving. We need not, however, decide that question since the officer upon whose staff Colonel Bertholet was serving authorized the use of Colonel Bertholet's report in the trial (MCM, 1949, par 137b, p 183).

Other objections to Colonel Bertholet's testimony concerning his interview with accused were properly overruled by the court and require no comment.

6. Accused is 43 years of age and divorced. He attended the University of California for one year and the University of San Francisco Law School for two years. In civilian life he was an oil company employee. He had enlisted service from 14 March 1941 to 11 November 1942 when he was commissioned as First Lieutenant, Medical Administrative Corps. He was promoted to captain on 8 June 1943. He separated from the service on 28 January 1946, and again served as an enlisted man from 20 April 1946 until 22 July 1946 when he was recalled to active duty as a captain.

He has had foreign service in the Philippines and in Alaska. General Court-Martial Orders Number 55, Headquarters, United States Army, Alaska, dated 2 December 1948 show that on 16 November 1948 accused was found guilty of the wrongful conversion of the property of another and was sentenced to forfeit $100.00 of his pay per month for six months. On 2 December 1948, the sentence was ordered executed. On 28 July 1948, accused was reprimanded under Article of War 104 by the Commanding General, Sixth Army, for absence without leave, and rendering himself unfit for duty by excessive use of alcoholic beverages. His efficiency ratings of record are as follows: "Very Satisfactory" (1); "Excellent" (4), and "Superior" (6). His overall efficiency ratings are "51", "73", "67", "68", "52" (2), and "54".

7. The court was legally constituted and had jurisdiction over 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 to be dismissed the service is mandatory upon conviction of violations of Article of War 95 and is authorized upon conviction of violations of Article of War 96.

Howard R. Whipple, J.A.G.C.

On Leave, J.A.G.C.

Jno Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342,627

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Bradford L. Webster, 0-503597, Medical Company, 23d Infantry, 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

I concur in the foregoing action.

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

21 September 1950

(GCMO 63, September 28, 1950).

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

(139)

JAGH CM 342651

AUG 17 1950

UNITED STATES v. First Lieutenant WILLIAM B. REESE (01342211), Company M, 187th Airborne Infantry Regiment, 11th Airborne Division, Fort Campbell, Kentucky.	)	FORT CAMPBELL Trial by G.C.M., convened at Fort Campbell, Kentucky, 26 June 1950. Dismissal and total forfeitures after promulgation.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 1: In that First Lieutenant William B. Reese, Company "M", 187th Airborne Infantry, did, at Fort Campbell, Kentucky, on or about 12 May 1950, with intent to deceive Lieutenant Colonel H. J. Jablonsky, Commanding Officer, 187th Airborne Infantry Regiment, Fort Campbell, Kentucky, officially state to the said Lieutenant Colonel H. J. Jablonsky, that he had deposited his April pay check in the Fort Campbell Branch of the Planters Bank and Trust Company in a savings account, which statement was known by the said Lieutenant William B Reese to be untrue, in that he had not deposited his April pay check in the Fort Campbell Branch of the Planters Bank and Trust Company in a saving account.

Specification 2: In that First Lieutenant William B. Reese, Company "M", 187th Airborne Infantry, did, at Fort Campbell, Kentucky, on or about 21 March 1950, with intent to defraud, wrongfully and unlawfully make and utter to First Lieutenant Robert L. Vranish, a certain check, in words and figures as follows, to wit:

FRONT SIDE OF CHECK VB

~~VIRGINIA-BEACH, VIRGINIA-~~ 21 March 19 50
~~VIRGINIA-BEACH-OFFICE~~ 68-692
~~NATIONAL-BANK OF-COMMERCE)~~ 514
OAK CLIFF BANK & TRUST DALLAS 8, Tex

Pay to the N.P. (Stamp)
Order of Cash 73-68 $ 100.00

One Hundred and no/100 ----------Dollars

s/ William B Reese
1st Lt Inf

LEGIBLE STAMPS AND SIGNATURE ON REVERSE SIDE OF CHECK

s/ Robert L Vranish
1st Lt 0-60386
Btry B, 88th Abn AA Bn

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO
ALL PRIOR ENDORSEMENTS GUARANTEED 18
FIRST NATIONAL BANK
DEERWOOD, MINN
F. W. SHWANKE, Pres

and by means thereof did fraudulently obtain from First Lieutenant Robert L. Vranish, One-hundred ($100.00) dollars, he the said Lieutenant William B. Reese, then well knowing that he did not have and not intending that he should have sufficient funds in the Oak Cliff Bank and Trust Company, Dallas, Texas, for payment of said check.

Specifications 3 and 4: (Nolle Prosequi).

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

Specification 1: In that First Lieutenant William B. Reese, Company M, 187th Airborne Infantry Regiment, did, at Fort Campbell, Kentucky, on or about 5 March, 1950, wrongfully fail to maintain a sufficient balance with the Oak Cliff Bank and Trust Company, Dallas, Texas, to cover the payment of a certain check made and uttered by him in words and figures as follows, to wit:

FRONT SIDE OF CHECK Hopkinsville, Ky 73-68
PLANTERS BANK & TRUST CO "OAK CLIFF BANK & TRUST" 5 Mar 1950 No. 832
ESTABLISHED 1873 ~~PLANTERS-BANK-&-TRUST-CO~~
MEMBER FEDERAL RESERVE SYSTEM
DALLAS TEXAS

Pay to Cash OR BEARER $50.00

Fifty and no/100----------DOLLARS

For s/ William B Reese
1st Lt Inf

LEGIBLE STAMPS AND SIGNATURE ON REVERSE SIDE OF CHECK

s/ Warren R. McDonald
2 Lt Inf
0-2001792
Ph 7459
Co M 187
MAR 6 1950
PLANTERS BANK & TRUST COMPANY
73-68 Hopkinsville Ky 73
H W JOHNSON, Cashier

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO
ALL PRIOR ENDORSEMENTS GUARANTEED

MAR 6 1950
PLANTERS BANK & TRUST COMPANY
73-68 Hopkinsville, Kentucky

then well knowing that he did not have and not intending that he should have sufficient funds on deposit with the Oak Cliff Bank and Trust Company for the payment of said check when presented for payment in due course.

Specification 2: In that First Lieutenant William B. Reese, Company M, 187th Airborne Infantry Regiment, did, at Fort Campbell, Kentucky, on or about 21 March 1950, wrongfully fail to maintain a sufficient balance with the Oak Cliff Bank and Trust Company, Dallas, Texas, to cover the payment of a certain check made and uttered by him in words and figures as follows, to wit:

FRONT SIDE OF CHECK

Form for Checks on Other Banks for Use of Customers of Planters Bank & Trust Company, of Hopkinsville, Ky. HOPKINSVILLE, KY., 21 Mar 1950 194

Oak Cliff Bank & Trust Co. LOCATION Dallas 8, Texas

(Write the Name and Location of Your Bank On the Line Above)

PAY TO THE ORDER OF Cash $386 00

Three-hundred eighty-six and no/100 ---------- DOLLARS 100

s/ William B Reese
1st Lt Inf

Address
Co "M" 187th AIR

LEGIBLE STAMPS AND SIGNATURE ON REVERSE SIDE OF CHECK

s/ Robert L Vranish
1st Lt 88th Abn A.A. Bn
0-60386

RETURNED
2-3
APR 27 1950

then well knowing that he did not have and not intending that he should have sufficient funds on deposit with the Oak Cliff Bank and Trust Company for the payment of said check when presented for payment in due course.

CHARGE III: Violation of the 93d Article of War.
(Finding of not guilty).

Specification 1: (Finding of not guilty on motion by defense).

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He 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, 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 only so much of the sentence as provides for dismissal from the service and the forfeiture of all pay and allowances to become due after the date of the order directing execution of 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:

On or about 21 March 1950 the accused, First Lieutenant William B. Reese, 187th Airborne Infantry Regiment, 11th Airborne Division, Fort Campbell, Kentucky, participated in a poker game with First Lieutenant Robert L. Vranish and others. During this game the accused was "light some odd dollars" in a "pot" which Lieutenant Vranish had won. The accused wrote and signed a check in the amount of $100.00 payable to the order of "cash" drawn on the Oak Cliff Bank and Trust Company of Dallas, Texas, and gave it to Lieutenant Vranish. In return the accused received from Lieutenant Vranish two $20.00 bills and the balance in poker chips which were redeemable in money. The check was returned unpaid because of no account after having been duly presented to the drawee bank for payment. The accused upon being apprised of this fact by Lieutenant Vranish admitted that he knew that his check had been thus returned, and stated "that he didn't have any money" (R 19-24, Pros Ex 2).

Second Lieutenant Warren R. McDonald, 187th Airborne Infantry, testified by deposition in substance as follows: On or about 1 March 1950 he engaged in a poker game with the accused and others. At one point in the game the accused "was short some monies" in the sum of $4.00 which he owed to Lieutenant McDonald who had "won the hand." The accused wrote and signed a check in the amount of $50.00 payable to the order of "cash" drawn on the Oak Cliff Bank and Trust Company of Dallas, Texas, and gave

it to Lieutenant McDonald. In return the accused received from Lieutenant McDonald $46.00 in poker chips which were redeemable in cash. The accused postdated this check 5 March 1950 stating to Lieutenant McDonald that it would be negotiable on that date. On 6 March 1950 this check was duly presented to the drawee bank for payment and was returned unpaid because of no account. During the last week of March 1950 the accused gave Lieutenant McDonald $20.00 on account (R 24,25; Pros Exs 3,4).

On or about 14 March 1950 the accused engaged in a poker game with Lieutenant Vranish and others. At the conclusion of this game the accused owed the winner, Lieutenant Vranish, $386.00. He thereupon wrote and signed a check for that amount payable to the order of "cash" drawn on the Oak Cliff Bank and Trust Company, Dallas, Texas, and gave it to Lieutenant Vranish. The accused at the time stated to Lieutenant Vranish that this check would have to be postdated to 21 March 1950 as he was writing to his bank to have $800.00 in his savings account transferred to his checking account. On 22 March 1950 Lieutenant Vranish deposited this check for collection and it was returned unpaid because of no account (R 26, Pros Ex 6).

It was stipulated that if Mr. Sam H. Busby, Vice President of the Oak Cliff Bank and Trust Company, were present in court and sworn as a witness he would testify that the records of his bank showed that the accused's checking account had been closed since 7 February 1950 (R 32, Pros Ex 7).

By deposition Lieutenant Colonel Harvey J. Jablonsky, 187th Airborne Infantry Regiment, testified that prior to 30 April 1950 he had ordered the accused to keep his next pay check uncashed until he, the Colonel, returned from maneuvers. The accused "was having financial difficulties," and Colonel Jablonsky, as his regimental commander, "was attempting to save some of his /accused's/ pay each month." "I was acting as his regimental commander because I had information that Lieutenant Reese owed a considerable amount of money to various individuals on the post. The debtors continually called my headquarters in an effort to get some satisfaction in the way of payment and my stock answer was, 'the commanding general will determine the priority of payments.' In other words the commanding general was aware of the action I was taking." On 12 May 1950 Colonel Jablonsky asked the accused for his April pay check. The accused replied that he had opened a savings account with the proceeds of the check in the Planters Bank, Fort Campbell Branch. Colonel Jablonsky thereupon handed the accused a bank book representing a bank account he had opened for the accused and told him to transfer $250.00 into that account. On 16 May 1950 the accused admitted to Colonel Jablonsky that he had not opened a savings account saying, "Sir I lied to you, I did not open up a savings account with my April pay check" (R 16, Pros Ex 1).

Mr. J. Austin Clark, Manager of the Planters Bank and Trust Company, Fort Campbell Branch, testified that the accused never had had an account with this bank (R 17,18).

b. For the defense.

After having been advised of his rights as a witness, the accused elected to remain silent (R 47).

4. Discussion.

Specification 1, Charge I.

Under this specification the accused was found guilty of a violation of the 95th Article of War in that he "* * * did, at Fort Campbell, Kentucky, on or about 12 May 1950, with intent to deceive Lieutenant Colonel H. J. Jablonsky * * officially state * * that he had deposited his April pay check in the Fort Campbell Branch of the Planters Bank and Trust Company in a savings account, which statement was known * * to be untrue."

Concerning the elements of proof necessary to sustain the findings of guilty of knowingly making a false official statement the Board of Review has said:

> "In order to support a conviction of the offense of knowingly making a false official statement, the record must show that the accused; (a) made a certain official statement, (b) that the statement was false, (c) that the accused knew it to be false, and (d) that such false statement was made with intent to deceive the person to whom it was made." (CM 338837, Kelley, 4 BR-JC 319,323).

The accused was having pecuniary difficulties. As his regimental commander, Colonel Jablonsky had the duty to supervise and assist the accused in the settlement of his debts. In his interviews with the accused, Colonel Jablonsky was engaged in an official capacity. It follows that any statement made to Colonel Jablonsky by the accused relative to his financial status would be an official statement. The evidence shows that on 12 May 1950 Colonel Jablonsky asked the accused for his April pay check, which the accused had previously been ordered to hold uncashed. The accused answered that he had opened a savings account with the check in the Planters Bank at Fort Campbell. At a later interview with Colonel Jablonsky, the accused admitted that this statement was false.

The intent to deceive may be inferred where the statement is knowingly false. The making of a false statement by an officer, knowing it to be false and with intent to deceive, has been consistently held to

be a violation of Article of War 95 (CM 288574, Wilkins, 56 BR 373,377; CM 202819, Rogers, 6 BR 303,317; CM 338837, Kelley, supra). We conclude that the finding of guilty under Specification 1 of Charge I is warranted by the evidence.

Specification 2, Charge I.

The accused has been found guilty of wrongfully and unlawfully making and uttering the check described in this specification with intent to defraud, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for its payment, and that by means of the check he fraudulently obtained the face amount of this check from the holder. The undisputed evidence shows that this check was uttered for valuable consideration, that the accused obtained the proceeds thereof and that the check was in turn dishonored. The only question requiring determination, therefore, is whether the check was uttered by the accused with an intent to defraud. On this point the uncontroverted evidence shows that the accused knew at the time the check was uttered, that he did not have sufficient funds on deposit to pay the check. Indeed his account with the bank had been closed since 7 February 1950. Additional proof of fraudulent intent arises from the fact that prior to the date on which this check was dishonored, other checks of the accused were returned unpaid.

The utterance of checks by an officer without maintaining sufficient funds on deposit to provide for the payment thereof and with intent to defraud constitutes a violation of Article of War 95.

It is concluded that the evidence establishes proof of conduct unbecoming an officer and a gentleman in violation of Article of War 95 (CM 337978, Gallo, 4 BR-JC 193,201; CM 335585, Bridges, 2 BR-JC 145,150).

Specifications 1 and 2, Charge II.

These specifications allege that the accused wrongfully failed to maintain a sufficient balance to cover the payment of the described checks made and uttered by him. The proof amply establishes that the accused uttered these two checks and failed without justification or proper excuse to maintain a sufficient balance in his bank account to pay them when presented to the drawee bank. The accused had actual knowledge of the condition of his bank account. This may be further implied from the undisputed testimony of First Lieutenant Warren B. McDonald, and First Lieutenant Robert L. Vranish, to the effect that the accused gave them postdated checks stating they would be negotiable on the date the checks were dated. That these checks were postdated does not affect accused's guilt of the offense of uttering checks without maintaining a sufficient bank balance to pay them.

The essential elements of the offense are (a) uttering a check and (b) having insufficient funds on deposit to pay it when presented in due course to the payee bank, such insufficiency resulting not from an honest mistake but from the accused's own carelessness or neglect. Although the checks are postdated and the delivery thereof be conditional until arrival of the date thereof, nevertheless, the delivery becomes absolute when the day arrives. The offense is committed if, on the date borne by the check and thereafter, the accused fails to maintain a sufficient bank balance so that when presented for payment, this instrument which has been launched upon the public may not be discharged. No fraud was alleged in connection with the issuance and utterance of the checks, but it has been repeatedly held to be a violation of Article of War 96 for one in the military service to issue a check on a bank, knowing that there were not sufficient funds and not intending that there should be sufficient funds to meet such checks on presentation, even though an intention to defraud was absent. The evidence sustains the findings of guilty as to these specifications (CM 270641, Smith, 45 BR 329,342; CM 337978, Gallo, supra; CM 249006, Vergara, 32 BR 5,13,14; CM 279483, Davis, 52 BR 227,232).

5. Records of the Department of the Army show that the accused is 23 years of age and unmarried. He is a high school graduate, and in civilian life worked as a newspaper distributor, freight car checker, and member of the United States Merchant Marine. He enlisted in the Army on 18 September 1946 and attended Infantry Officers' Candidate School from 23 January 1947 to 19 July 1947, on which date he was appointed Second Lieutenant. He was later promoted to First Lieutenant. He is entitled to wear the World War II Victory Medal. His efficiency ratings of record are numerical ratings of 111, 096, 115, 074, and 079.

6. 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 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 modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of the 95th Article of War. A sentence to dismissal and total forfeitures after promulgation is authorized upon conviction of violations of the 96th Article of War.

C.D. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

Lemuel Baker, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342,651

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant William B. Reese, 01342211, Company M, 187th Airborne Infantry Regiment, 11th Airborne Division, Fort Campbell, Kentucky, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution.

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

I concur in the foregoing action.

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

3 October 1950

(GCMO 66, October 10, 1950)

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

JAGH CM 342722

26 October 1950

UNITED STATES v. First Lieutenant John K. Waggoner, 0-1019890, Headquarters and Headquarters Company, 7th Cavalry Regiment (Infantry).	)))))))))	1ST CAVALRY DIVISION (INFANTRY) Trial by G.C.M., convened at Camp Drake, Tokyo, Japan, 14 and 18 April 1950. Forfeiture of $75.00 pay per month for six (6) months and reprimand.

HOLDING by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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1. The record of trial in the case of the officer named above has been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50(f).

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

CHARGE: Violation of the 96th Article of War.

Specification 1: Not guilty, motion by defense sustained.

Specification 2: Not guilty, motion by defense sustained.

Specification 3: Not guilty, motion by defense sustained.

Specification 4: Not guilty, motion by defense sustained.

Specification 5: Not guilty, motion by defense sustained.

Specification 6: In that First Lieutenant John K. Waggoner, Headquarters and Headquarters Company, 7th Cavalry Regiment (Infantry), did, at McKnight Barracks, Tokyo, Japan, on or about 17 October 1949, wrongfully and unlawfully accept and receive a check, value about $61.20, without lawful consideration therefor, from Private Charles F. Wille, his subordinate and under his control, in violation of AR 600-10, paragraph 2e, subparagraph (6).

The accused pleaded not guilty to all Specifications and the Charge and was found guilty of Specification 6. No evidence of previous convictions was introduced. He was sentenced to forfeit seventy-five dollars ($75.00) pay per month for six (6) months and to be reprimanded. The reviewing authority approved the sentence and ordered the same executed.

3. Evidence.

a. For the prosecution.

First Lieutenant Marie E. Wilson was the custodian of the Eighth Army General Welfare Fund and had served in that capacity since 15 August 1949 (R 38-39). The accused, who is in the military service of the United States, was one of Lieutenant Wilson's purchasing officers and his duties in that connection covered the welfare fund activities of the 7th Cavalry Regiment (R 39). A check dated 17 October 1949 to Charles F. Wille in the amount of $61.20 in payment of "part time salary in sports" and signed by Lieutenant Wilson was admitted in evidence without objection on the part of the defense (R 44). This check was issued in connection with a payroll voucher which was presented to Lieutenant Wilson by the accused (R 46). When such duplicate payrolls came into Lieutenant Wilson's office, she would usually have a check typed and, after signing it, would send the check and a copy of the payroll back to the officer who sent it in and that officer "is to deliver the check to the boy it is made out to" (R 45).

The top of the reverse side of the check in question contained the following handwriting in ink:

Charles F. Wille
Pvt. RA 12315130
Hq. C 7th Cav. Regt.
A.P.O. 201 Unit 4

John K. Waggoner
1st Lt 7th Cav. SSO

followed by letters and figures, handwritten in pencil (R 74-75):

AGO D 223206
SNO 1019890

opposite which name of the accused and letters and figures appeared a Japanese character or ideograph, all of which was followed by two ink stamps reading:

PAID
Teller Two
Oct 21 1949
The National City Bank
of New York

Pay to the Order of any
Bank, Banker or Trust Company
PRIOR ENDORSEMENTS GUARANTEED
The National City Bank of New York
Tokyo Branch

The check, as returned to Lieutenant Wilson by the bank, contained all of these words, letters, and figures (R 45).

Private Charles F. Wille, Jr., was assigned to the accused as driver in September. After regular duty hours, he also worked as a Special Service lifeguard (R 50). In October 1949, the check to the order of Wille as payment for his services as lifeguard, signed by Lieutenant Wilson, was received by accused, who sent for Wille and asked him to sign the check. Wille, without examining the check, signed it and left it lying on the desk at which accused was seated (R 53, 56). Private Wille did not recall whether he received any payment in October for his lifeguard services in September (R 52, 54); he did not remember looking at the check when he signed it (R 53); he did not recall having any conversation with accused concerning the check (R 53); he did not know if anyone he worked with was paid for being a lifeguard (R 54); he was "pretty sure" he knew it was a check when he signed it (R 54); he didn't "recall thinking anything about it" when he signed the check. It "just didn't mean anything" (R 54). He did not take the check when he left accused's office (R 54). Since joining the 1st Cavalry Division, Wille had been "in a lot of trouble" and was waiting to go home on an "undesirable discharge, 368" (R 55). He recalled discussing the case with the trial judge advocate and defense counsel two weeks before the trial and telling them, "If I cashed it, I must have been drunk at the time," (R 55). He informed them that he had a poor memory, not being able to remember things that happened two or three months previously (R 58). He could not remember much of the events transpiring during the months of September and October (R 55-59). Therefore, he might have been paid and just didn't remember it (R 54). He didn't remember the accused giving him $61.20 at any subsequent time either after 17 October or on 17 October (R 57).

Mariko Yamagata was counter clerk at the National City Bank of New York in Tokyo and had been so employed for two years (R 77-78). She did not remember anything regarding "this single check," but recognized the pencilled writing of a serial and AGO card number as being her own (R 81, 83). She also saw her section chief, Mr. Funatani, place his initials opposite the name, John K. Waggoner, on Prosecution Exhibit 10 (R 79, 82-83). Except for these two facts, her testimony to the effect that "the lieutenant" came to the bank with the check was based upon her customary business practices (R 79). Whenever an AGO card is presented, Miss Yamagata checks the person presenting it with the photo on the AGO card and likewise compares the signature on the check with the signature on the AGO card before requesting the approval of her department or section chief (R 79, 81). The initial of the section chief near Miss Yamagata's handwriting indicated to her that the section chief also compared the numbers written on the check with that on the AGO card and also the check signature, "John K. Waggoner," with the signature on the AGO card, thereupon approving the cashing of the instrument in question (R 82). If Wille instead of accused had presented the check, then Wille's Class A pass and his signature would be compared with that on the check "and Mr. Funatani would place his initials next to Wille's signature, signifying that Wille was the one who came to the counter" (R 83). At the time Miss Yamagata placed the "numbers" on Prosecution Exhibit 10, she had no doubt about the identity of the person who signed and presented the check (R 79). If someone other than accused had presented the identification card of the accused with such check for payment, Miss Yamagata would ask that person for their own identification card or the section chief would be consulted (R 80). Although the bank keeps a record of serial and AGO card numbers of officers having accounts with the bank, and recorded signatures are sometimes consulted and compared, yet the information contained on the check as to serial and AGO card numbers would "absolutely not be taken from such records" (R 82-83). Indeed, "this information that appears on the back of Exhibit 10" could only have come from the person presenting the check for payment (R 83).

The court took judicial notice of Army regulations pertaining to the use of War Department AGO Form 65, Identification Card, to the effect that they are issued by the Department of the Army for the official use of the holder designated thereon and that its use by any other persons is unlawful (R 84). The court also took judicial notice of AR 600-10 (R 59).

b. <u>For the defense</u>.

On about the first of October, the accused asked Corporal Henry S. Slovocki to tell Wille there was a check in the office for him (R 62). Wille came to the office and asked the accused to sign the check (R 62). Accused had acted as accommodation endorser for soldiers on other occasions to facilitate their cashing checks (R 62). Slovocki did not see the

check and did not know whether Wille took the check from accused (R 64).

A private and a corporal who had served with Wille testified that his reputation for truth and veracity among the men of his unit was very poor (R 62-63,66), and that he was a drunkard (R 65). Accused had never brought pressure on the men "to do something that they should not do" (R 63). At the time of trial, Wille was waiting to be sent to the ZI for an "undesirable discharge, 368" (R 55).

Accused, having been duly advised of his rights, elected to take the stand and testify under oath (R 67-68). The testimony of the accused with regard to the check for $61.20, payable to Wille, was that when he gave Wille his check, Wille stated that to cash it, an officer's signature was required (R 68). The accused then "signed it and placed it on the corner of my desk and went back to work" (R 68). When he looked up, the check was gone and he assumed Wille had taken it with him (R 68). He denied that he had ever kept any check belonging to any man working for him in Special Services (R 68). He did not solicit any contribution from Wille and the check was never in the possession of accused after he endorsed it. (R 69). The accused did not actually see Wille sign the check, but merely handed him a fountain pen (R 70). The accused examined the reverse side of Prosecution Exhibit 10 and identified the signature thereon as his own (R 72). Defense Exhibit A was a receipt dated 17 October 1949 for net pay of $61.20 which was signed "Received Charles F. Wille." Despite Wille's testimony that "it don't look like mine but it could be mine. I write a lot of different ways.", the accused testified that Wille "signed a receipt for it," "I didn't see him sign it but this is the type of receipt we use" (R 55-56,72). In November 1949, the accused did all of his business with the Tokyo Branch of the National City Bank of New York but "I know I didn't cash that check" (R 73,74). The accused admitted that his serial number was 01019890 and that his AGO number was D-223206, both of which numbers appeared below his signature on Wille's check (R 74-75). He had had a couple of "run-ins" with Wille which might have given Wille a motive for trying to get the accused in trouble (R 73). As rebuttal defense witness, accused testified he had at various times given his AGO card to various enlisted men to enable them to cash their checks (R 85). On one occasion, he had given Wille his AGO identification card to go to Yokohama to pick up some freight (R 85).

Mariko Yamagata, a teller at the National City Bank of New York, who accepted the check in question, could remember nothing definite about this particular instrument. Before coming into court, she had been told that accused would be at the defense table and she felt she had seen him a few times in the bank (R 78,81). Miss Yamagata waited on a lot of people each day at the counter and what she testified to was the normal procedure followed in cashing checks (R 80). "In cases where nominal amounts are involved--say amounts less than $100," the bearer of a check could present an officer's AGO card and after the bearer showed his own

identification card, he would be asked to put his signature on the back or the chief of the section would be consulted and the bearer could receive the cash (R 80).

It was stipulated that if Mr. Chester V. Grant, assistant manager of the National City Bank of New York, Tokyo Branch, were present, he would testify that on more than one occasion the bank has cashed checks in amounts of less than $100.00, where the bearer of the check has presented the identification card of an officer endorsing the checkfor identification, the officer not being present. Mr. Grant has been surprised by the number of officers who permit their identification cards to be carried by persons other than themselves (R 84).

In the middle of October 1949, Private Joseph May accompanied Wille into some bank in Tokyo where Wille received "better than fifty dollars" for a check (R 92,94-95). At the time Wille was "pretty drunk" (R 92). It was an unusual check, "greenish in color and had some kind of emblem of 8th Army" on it (R 92-94).

4. Discussion.

The accused was charged with and found guilty of violating paragraph 2e(6), AR 600-10, dated 8 July 1944, by wrongfully and unlawfully accepting a gift of a check of a value of about $61.20 from his subordinate, Private Charles F. Wille.

The pertinent provisions of the Army Regulation in question read as follows:

> "No officer * * * in the United States Government employ * * * shall * * * receive any gift or present offered or presented to them as a contribution from persons in Government employ receiving a less salary than themselves * * *." (AR 600-10, Par. 2e(6)(a))

Violation of the foregoing prohibition against receiving a gift or present from a subordinate is a violation of the 96th Article of War (CM 264728, Price, 42 BR 243,254; CM 264936, Sansweet, 42 BR 355,370).

A gift may be defined as "a voluntary transfer of property by one to another without consideration or compensation therefor" (Vol. 4, Words and Phrases, 1st Series, p.3085, and cases there cited). Whether there is a gift involved in any particular transfer of property depends upon all the facts and circumstances surrounding the transaction (CM 204639, McMullen, 8 BR 25,46).

It is not contradicted that the accused was Special Service Officer for the 7th Cavalry Regiment, and that as such officer was responsible

for the preparation of payrolls submitted in order to obtain compensation for employees of special service activities under his control. It also is not contradicted that the payroll submitted by the accused for the month of September 1949, indicated an amount of $72.00 due Private Wille for 144 hours work as a lifeguard performed during the month of September. It is further established that, in accordance with the normal course of business, the custodian of the 8th Army General Welfare Fund prepared a check to the order of Private Wille in the amount of $61.20, which represented the amount due him for services as a lifeguard less withholding tax, and forwarded this check together with a duplicate copy of the payroll to the accused. It further appears that thereafter the accused sent for Private Wille and upon the latter's reporting to his office, tendered the check in question to him. What then transpired is in dispute. According to Private Wille's testimony, having reported to the accused's office, the accused tendered him a paper and told him to sign it. He was not certain that the paper was a check although at the time of the trial he believed it to have been such, as the Regimental S-2 had subsequently shown him such a check. He did not remember looking at the paper. If it was a check, he did not notice the amount, and, while he may have had several reasons for signing the paper at the time, he remembered none of them at the time of the trial. His signing the paper "just didn't mean anything [to him] at the time." Although he performed approximately 144 extra hours of duty as a lifeguard in the summer of 1949, he did not know whether he was to have received extra pay for such duty. He did not know whether he had been paid during the month of October for the extra duty performed in September, although he might have signed a receipt for such payment. If he had been paid he had forgotten about it, and if he had been paid by check and had "cashed" the check, he "must have been drunk at the time." He was specific, however, in that upon leaving the accused's office he left the paper which he had signed on accused's desk.

The testimony of Mariko Yamagata, a teller at the National City Bank of New York, at first appears to corroborate Wille's testimony that the accused did not deliver the check to Wille but rather retained possession of it; and to further establish that the accused subsequently cashed the check himself at the National City Bank of New York, Tokyo Branch. Upon careful examination of Miss Yamagata's testimony, however, it becomes increasingly apparent that she had no distinct recollection of the transaction in which the check was cashed but was testifying merely as to the normal course of business which she followed as a counter clerk at the National City Bank. According to her testimony, a person presenting a check would be required also to present an identification card from which she then copied the card number and the individual's serial number on the back of the check. Thereafter she took the check and identification card

to her superior for his approval. As accused's serial number and AGO card number appeared on the back of the check in question in Miss Yamagata's handwriting, she concluded that it was the accused who had presented the check at the bank. Testifying as a witness on his own behalf, the accused admitted that the paper signed by Wille was the check issued to him in payment for extra duty as a lifeguard performed during September 1949.

The record contains no other proof in support of the charge and specification.

If the defense case be completely disregarded and the foregoing proof, together with all reasonable inferences arising therefrom, be viewed in the light least favorable to the accused, the following facts may be taken to have been established:

a. That a check in the sum of $61.20 payable to Private Wille was issued by the custodian of the Eighth Army General Welfare Fund;

b. That this check was forwarded to the accused for delivery to Private Wille;

c. That the accused sent for Wille and secured the latter's endorsement on the check;

d. That after endorsing the check, Private Wille left it on the accused's desk;

e. That the accused later negotiated the check at the National City Bank of New York, Tokyo Branch.

The prosecution apparently relied upon the theory that, in the absence of an adequate explanation by the accused, the foregoing proof raised a presumption that the accused received the check from Wille as a gift. If so, the prosecution was in error. As the Board of Review stated in the McMullen case:

> "No presumption may be indulged from the mere fact of the transfer of the tickets, that they were intended as a gift" (CM 204639, McMullen, supra, at 46).

Similarly in Roberts v. Morse, the court stated:

> "Granting it to be true that possession of personal property is presumptive evidence of ownership, yet it is not necessarily presumptive evidence of a gift" (Roberts v. Morse, 181 NW 678, 680).

In the absence of such a presumption, it was incumbent upon the prosecution to prove that the check was transferred to the accused as a gift. This it failed to do. As the gravamen of the offense alleged is the receiving of a gift and as no gift was proved, the record of trial must be held to be legally insufficient to sustain the findings and sentence.

It is not necessary for the Board of Review to rest its opinion wholly on the failure of proof by the prosecution as indicated heretofore.

In contradiction to Wille's testimony, the accused testified that having called Wille into his office in order to deliver his check for payment of services rendered as lifeguard during the month of September 1949, he gave Wille the check whereupon Wille, or someone in the office, stated that it was necessary to have an officer's endorsement in order for Wille to cash it, the accused thereupon endorsed the check, and placed it on his desk in front of Wille. As he was busy at the time he did not notice whether Wille picked up the check or what happened to it. He denied further possession of the check or having cashed it.

The accused's testimony as to the original delivery of the check to Private Wille and his acting as an accommodation endorser for Private Wille was corroborated by Corporal Slovocki.

Wille's testimony is uncertain, vague, and contradictory. He was shown to be a person of bad reputation for truth and veracity and a self-confessed drunkard. At the time of the trial he was awaiting discharge under the provisions of AR 615-368.

Any inference arising as the result of Miss Yamagata's testimony indicating it to have been the accused who negotiated the check at the Tokyo Branch of the National City Bank of New York also is refuted by other testimony. The testimony of the assistant manager of the bank to the effect that frequently officers gave their identification cards to other persons to permit such persons to cash checks; Private Wille's admission that he had had the accused's identification card sometime during October 1949; and the testimony of Private May that he had been with Wille sometime in October 1949, at which time Wille cashed a similar check at the National City Bank of New York, corroborates the accused's version of the incident.

The Board of Review is aware of the fact that "considerable weight must be accorded the court's findings by reason of the superior position it enjoyed in seeing the witnesses and hearing them testify (CM 266302, Brown, 43 BR 221,227; CM 320489, Velasquez, 69 BR 395,404)." (CM 323161, Lacewell, et al, 72 BR 105,109). On the other hand it is our duty to reach our own conclusions with regard to the weight of the evidence (AW 50(g); CM 335526, Tooze, 3 BR-JC 313,340; CM 336706, Pomada, 3 BR-JC 209,

216). We have done so in the instant case and are unable to agree with the trial court that the evidence of record is sufficient to establish the guilt of the accused beyond a reasonable doubt.

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

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

JAGH CM 342722 1st Ind

JAGO, Department 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 K. Waggoner (O-1019890), Headquarters and Headquarters Company, 7th Cavalry Regiment (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 Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. It is requested that you publish a general court-martial order in accordance with this holding and indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and 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 please place the file number of the record in the brackets at the end of the published order, as follows:

(CM 342722).

2 Incls
1 Record of trial
2 Draft GCMO

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

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

JAGK - CM 342763

11 OCT 1950

UNITED STATES v. First Lieutenant ALEXANDER S. FISH (0-954046), 7890 Headquarters Group, European Command	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Heidelberg, Germany, 11,12,15,16,17 and 19 May 1950. Dismissal, total forfeitures after promulgation, and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, at or in the vicinity of Heidelberg, Germany, in or about the month of December 1949, wrongfully conspire with Albert Kroner and Margot Herman to wrongfully transport into the French Saarland certain dutiable goods, to wit: five (5) adding machines of German manufacture, without paying the proper and lawful duty thereon.

Specification 2: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, at Nohfelden, Germany-Turkismuhl, French Saarland, on or about 26 December 1949, wrongfully, knowingly and willfully fail to declare to customs officials of the Republic of France the presence in his automobile, which he was then driving from Germany into the French Saarland, certain dutiable goods, to wit: five (5) adding machines of German manufacture.

Specification 3: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, on or about 26 December 1949, wrongfully attempt to export from the US Area of Control, Germany to the Saarland, a point outside the Western Area of

Germany, five (5) adding machines of German manufacture, in violation of Circular No. 21, Headquarters, European Command, dated 12 September 1949.

Specification 4: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, at Nohfelden, Germany-Turkismuhl, French Saarland, on or about 26 December 1949, violate the laws and customs regulations of the Republic of France by attempting to import into the French Saarland five (5) adding machines of German manufacture without securing a permit for such importation, without declaring said adding machines and without paying the import duty.

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

Specification 1: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, in the US Area of Control, Germany, between the dates of September 1949 and January 1950, wrongfully engage in the trade or business of selling and offering for sale the following items and commodities, to wit: coffee, cigars, porcelain, chinaware, insulin, strophantine, penicilin, a total value of over five hundred dollars.

Specification 2: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, in the US Area of Control, Germany, between the dates of September 1949 and March 1950, wrongfully conspire with Peter Lies and Lorenz Klink to wrongfully and feloniously traffic in a narcotic drug, to wit: morphine.

Specification 3: In that First Lieutenant Alexander S. Fish, 7890 Headquarters Group, EUCOM, did, at or in the vicinity of Heidelberg, Germany, between the dates of September 1949 and March 1950, wrongfully have in his possession, for the purpose of sale or barter for personal gain, quantities of strophantine, insulin and penicilin.

Specification 4: (Finding of not guilty).

ADDITIONAL CHARGE II and Specification: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of the Charge and its specifications, guilty of Specification 1, Additional Charge I, except the words "porcelain, chinaware and penicilin," of the excepted words not guilty, guilty of Specification 2,

Additional Charge I, guilty of Specification 3, Additional Charge I, except the word "penicilin," of the excepted word not guilty, not guilty of Specification 4, Additional Charge I, guilty of Additional Charge I, and upon motion was found not guilty of Additional Charge II and its specification (R 354). 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 (3) years. The reviewing authority approved only so much of the findings of guilty of Specifications 2 and 4 of the Charge with respect to the place alleged as finds that the offenses occurred at Nohfelden, French Saarland; only so much of the finding of guilty of Specification 1 of Additional Charge I with respect to value as involves some value in excess of $50.00; and only so much of the finding of guilty of Specification 3 of Additional Charge I with respect to the property possessed as involves possession of strophantine. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence

For the Prosecution

In September 1949, Doctor Hans Krause at accused's request obtained a bottle containing a half kilogram of strophantine from Doctor Werner Heid, pharmacist at the hospital in Heidelberg and gave the bottle of strophantine to accused (R 284,285,311). Prosecution Exhibit 11 was identified as the bottle of strophantine given to accused (R 315). The cost of the strophantine to the hospital was 1250 marks (R 287).

At or about the same time, accused resumed his acquaintance with Lorenz Klink. They discussed business and what could be traded, specifically mentioning coffee, tobacco, and cigarettes. Accused told Klink of his intention to sell cigars. A few days after this meeting they met again and discussed the possibilities of selling radium, insulin and strophantine, accused stating that he was going to Switzerland to find out the price there of those commodities. Accused also asked Klink to obtain some insulin for him which he would sell to a friend in Switzerland (R 227-228). Accused while visiting Margot Herman in Saarbruecken at the end of September 1949 met Julian Moser at Mrs. Herman's house and offered to deliver one "kilo" of insulin to Moser in Paris one week later (R 222,224). Klink accompanied by accused subsequently obtained a sealed bottle of insulin from Tasso Dimitroff (R 230,268). Klink, with "a 250 gram insulin bottle" in his possession, went to Konstanz, Germany, near the Swiss border, accompanied by one Von Dallwitz, Peter Lies and accused (R 198,229). Upon arriving at Konstanz, Lies and Von Dallwitz took the insulin and conducted negotiations for the sale of the insulin with a Doctor Behrens. Von

Dallwitz returned to where Klink and accused were waiting and after some conversation with accused the latter and Von Dallwitz left Klink. A few minutes later Von Dallwitz returned and summoned Klink to the negotiations. It was finally agreed to entrust the bottle of insulin to Doctor Behrens against his certificate of debt for "15,000 D marks" (R 199, 231). Klink thought the price was rather high inasmuch as he had told accused that his price was "4 to 5 thousand marks." According to Lies, Klink was to receive six thousand marks, Lies himself one thousand marks, and the remainder was to go to Von Dallwitz and accused (R 200). Klink, who left the division of the proceeds of the sale up to accused, heard of this arrangement from Lies (R 232). Subsequently, Doctor Behrens returned the insulin to Klink at Lies' place, and Klink tore up the certificate of debt, and returned the bottle of insulin to Dimitroff (R 235,268). At this time the seal was missing from the bottle (R 268). Dimitroff in turn gave the bottle to Mrs. Gudrun Busse to sell. She identified Prosecution Exhibit 10 as the bottle (R 271-272). Shortly after Christmas the bottle was confiscated by Karl Bieringer, Secretary of the German Police (R 270,272).

At a time subsequent to the Konstanz trip, accused offered Lies a large quantity of strophantine at six thousand marks per kilogram. Accused also informed Klink that he had 14 kilograms of strophantine for which he wanted five or six thousand marks per kilogram (R 204,238). During Lies' absence from his apartment, accused delivered a bottle there which he gave to Maria Benz, Lies' former fiancee. Maria identified Prosecution Exhibit 11 as being similar to the bottle she received from accused (R 328-329). Two or three days later, accused came to Lies' apartment and suggested that he attempt to sell the strophantine. Lies, however, made no attempt to sell it, and shortly thereafter accused picked it up (R 206). Accused returned to Doctor Krause the bottle of strophantine which he had secured from him, and Krause returned it to Doctor Heid (R 286,303).

Sometime after the trip to Konstanz, Klink, accused and Lies met at the latter's apartment and accused asked if Klink and Lies could obtain morphine for him. Klink stated that he could not obtain any (R 203). Later, however, a family named Reis, in Karlsruhe, offered to sell Lies a quantity of insulin and cocaine and other medicaments (R 211,212). Lies informed Klink and accused that a friend of his in Karlsruhe had insulin, cocaine and morphine. The trio went to Karlsruhe in accused's car and Lies visited his friend. After an hour, Lies returned to the others with a bottle of cocaine in his possession. They drove into town where accused sent Klink into a restaurant to sell a box of cigars. Klink was unsuccessful but tried again in another restaurant accompanied by accused and Lies. This attempt, too, was unsuccessful. They then drove to the Restaurant Seehoff where accused said he had sold cigars to the proprietor on numerous occasions. In

fact, accused had been a guest at the restaurant on occasion and would usually settle his bill with coffee, cigars, cigarettes, or chocolate. On one or two occasions, accused sold boxes of cigars for fifty pfenigs a cigar. Some of the cigars were subsequently confiscated by a customs official (R 241,324,337-338,339). Accused went into the restaurant alone, and when he returned told the others that the proprietor still had cigars from his last delivery. Upon returning to Heidelberg, it was decided to have the cocaine analyzed. It was taken to a chemist whose address was furnished by accused, and a couple of days later Lies and Klink were informed by the chemist that the cocaine was not pure. However, since Lies' information showed that such a large quantity was involved, 8 kilograms of insulin, the same amount of cocaine, and a little morphine, an agreement was reached upon a proposal by accused. Specifically, accused proposed to enlist the aid of a French official and to confiscate the merchandise while Klink and Lies were posing as buyers, and that he "would wear an MP brassard or a French uniform." Accused further proposed to sell the merchandise in Switzerland. The three went to Karlsruhe in accused's car, though as to what there transpired with reference to their agreement the record is silent (R 211, 241-242). Accused took Klink to the Bratwurstgloeckle Restaurant to collect money for cigars that he had sold there and to inquire if the proprietor needed more cigars. According to Klink's recollection he received about 40 marks which he turned over to accused (R 242).

Klink, who lived with his father, an innkeeper, recalled that upon the first visit to him by accused the latter paid his bill with chocolate and cigarettes (R 246).

In January 1950 while Klink was walking on the Haupt Strasse, accused beckoned him to his car. In the conversation which followed accused told Klink that he needed insulin badly and that he was going to Switzerland over the weekend. After accused's return from Switzerland he told Klink that he had 40 pounds of coffee in his car and that "he had had some good business" there. He also showed Klink his billfold, which in Klink's estimation contained about 1500 or 2000 marks, and stated, "This is what I earned" (R 240, 244-245).

Klink admitted on cross-examination that he had made a statement prior to trial in which he denied that accused ever brought tobacco or coffee to Klink's father's restaurant except for his own use, and further denied that he, Lies and accused ever wanted to sell morphine. He denied, however, that the statement was true (R 253,254; Def Exs E and F). Klink also admitted that prior to trial he had tried to borrow money from accused (R 250-251). He also denied that he had been convicted of burglary in the following equivocal terms:

"*** They were quite funny circumstances. At that time,

I had received gasoline from a German. About four days ago, Doctor Wulsten personally said to me, if I would not have talked so much I would not have been punished. It was my fault only. It was no burglary. I only had the key and I went inside" (R 250).

On the ninth or tenth of December, Albert Kroener and Mrs. Roland Herman had a conversation with accused in Heidelberg. Accused stated that he wished to go to Saarbruecken in the near future, and Mrs. Herman inquired if she could accompany him as she was going to bring something with her (R 74-75). On the 19th or 20th of December, Kroener was in Frankfurt and called accused at Doctor Peter's place in Heidelberg and requested a ride to Saarbruecken in the event accused left before Christmas. Kroener explained that he had to carry something with him. Kroener called accused again with the same request and was informed by accused that the latter's car had to be repaired but that if it was ready he would go on Christmas day (R 76-78).

Accused visited Doctor Richard Peters, an acquaintance, at the latter's apartment around Christmas time, 1949, and told Doctor Peters that he wanted to take some adding machines to the Saar territory. He explained that he was going to do it for a friend because he was going to Paris for the Christmas holidays any way. Doctor Peters expressed misgivings about accused's proposal, explaining that there was a customs office at the border crossing and that he was not sure that adding machines could be taken into the Saar. Accused stated that he had information that if "he would take these with him nothing would be found." Accused explained to Doctor Peters that the phrase "nothing would be found" meant that "it was not prohibited" (R 347-348).

Kroener identified Prosecution Exhibit 1 as one of two baggage checks which he received from a Mr. Blumenfeld and added that the checks represented merchandise deposited by Blumenfeld in the baggage department of the Frankfurt Bahnhof. Prosecution Exhibit 1 was for a box and a package and "it was supposed to be an adding machine in it". There were needles in the box (R 95-96). Kroener did not recall exactly what the other baggage check was for, but believed that it represented three or four packages wrapped in wood and that the three or four packages together weighed about 30 kilograms (R 104-105, 120-121). Kroener put Prosecution Exhibit 1 and the other baggage check in an envelope and left the envelope with Mr. Anton Crames in Frankfurt on 24 December 1949 (R 79-80, 94-96,114). The same day, Kroener traveled by automobile to the border where he took a train for Saarbruecken(R 78). On 24 December 1949 Anton Crames received a letter from Kroener which he was instructed to give to accused. The same day, accused appeared at Crames' place, identified himself and stated, "I am to pick up a letter here." Crames

gave accused the letter left by Kroener. Prior to leaving Crames, accused at the other's request sold him two cans of coffee and a box of cigars (R 123-125).

At 2:15 in the morning of 26 December 1949, accused drove up to the customs point in Nohfelden in the Saar, at the French-German border. He told Jules Marguet, the customs agent on duty at the time, that he wished to go to Saarbruecken. After ascertaining that accused did not have a customs title to take his car across the border, but that he wanted one, Marguet made out a special tourist pass. In response to Marguet's query, accused stated he had only money and coffee to declare. Upon inspection of the car, however, Marguet found five adding machines of German manufacture in the trunk, four being found in a suitcase under two shirts, and the fifth wrapped in paper beside the suitcase. The machines were taken into the customs station and Marguet remained with them until 8 o'clock in the morning when they were locked up (R 127-130). Subsequently, the machines and accused were brought to Maurice Jeannet, duty tax collector at Nohfelden, and Marguet's immediate superior (R 138-139). Jeannet identified Prosecution Exhibits 4-8, inclusive, as the adding machines, Prosecution Exhibits 4, 5,7 and 8 being of Brunsviga manufacture and Prosecution Exhibit 6 being of Walther manufacture. After receiving a report of this incident involving accused, Jeannet offered and accused accepted a "transaction" to settle the matter. Accused was to have his car but the machines were to be confiscated, and accused was to pay a fine of 100,000 francs. Jeannet identified Prosecution Exhibit 3 as a memorandum of the transaction. It was signed by Jeannet, Marguet and accused and recited in part that accused was charged with a violation of the law, "consisting of importing prohibited items without license, to wit: five (5) computing machines, lever type, value one hundred forty thousand (140,000 Frc) Francs"; that accused admitted the violation, and, further, that accused "wants especially to clear himself before the court, as a result of which no regular investigation will be made to establish the violation as described above, provided it is upon his own request that such investigation will not be made." Accused was told he would receive back his car and could go his way if he made the "transaction." The car was being kept to make sure that the fine was paid. The memorandum of the transaction was admitted in evidence over the objection of the defense (R 140-141,142,147-148; Pros Exs 3 and 3A). Without objection, Jeannet testified that the duty on the machines would have been 35,000 francs (R 154).

Jean Wolf testified that he graduated from law school in 1929 and that he presently serves as prosecutor in the courts of the Saar pursuant to the France-Saar Judicial Convention. According to Wolf, the Judicial Convention between the Saar and France made the local customs laws of France applicable to the Saar. Further, at the end of 1947 the Saar was

incorporated into the French economy, and the French franc is the medium of exchange in the Saar (R 156-159). In traveling from Germany to the Saar a passport is needed, and in order to transport merchandise into the Saar it is necessary to have an import license from the "change office" in Paris. Otherwise, the Saar is self-governing having its own government and its own minister of justice (R 161-164).

Wolf's duties were principally concerned with customs offenses, and in connection therewith he was aware of an agreement between the United States and France whereby members of the United States occupation forces were subject to fines but not imprisonment for infractions of the customs laws (R 159-160). Wolf stated that adding machines are dutiable items but added that non-declared, non-dutiable items may be confiscated (R 166).

On 2 February 1950, Warrant Officer Junior Grade Richard W. Comerford, 9th Criminal Investigation Detachment, Nurnberg, Germany, in the presence of Agent Michaud and Lieutenant Doss, interviewed accused concerning an alleged attempt by accused to bring merchandise into the Saarland. At the inception of the interview, Comerford started to read the 24th Article of War to accused. Accused interrupted by stating he knew the Article as well as Comerford, whereupon the latter had accused explain it. Accused stated, "Well, I don't have to say anything, and anything I say has to be voluntary, and I don't have to answer any of your questions if they tend to incriminate me, or degrade me and it can be used in a trial" (R 168-169,173,190). Nevertheless Comerford read the accused all but the last sentence of Article of War 24. Comerford did not make any threats or promises to accused, and specifically did not promise the accused that he would not question accused's fiancee if accused told his story. Accused also told Comerford that he had discussed the matter with the provost marshal and had reason to believe that nothing would happen if he told Comerford the story he told the provost marshal (R 170-172). Accused made an oral statement on 2 February. On 3 February, accused dictated a statement to a German secretary. The same day Comerford accompanied accused to Major Dixon's office in Heidelberg where accused gave Dixon a copy of his statement. On Dixon's advice, accused said he was going to take the statement home and reword it. The day following, Comerford accompanied accused to Major Miller's office where accused showed the statement to Major Miller. Acting upon Major Miller's advice, the accused destroyed the statement (R 190,191). Comerford's testimony concerning accused's verbal statement from which the written statement was transcribed was interrupted by the defense proffer of testimony concerning the circumstances surrounding the making of the statement (R 173).

Accused elected to testify concerning the circumstances under which he made his pretrial statement. He stated that he had heard from officers

in the Provost Marshal Division that some report had come in with reference to "these matters on the border." Accused went to see Colonel Singer, the deputy provost marshal, and told him, "Colonel, if there is any explanation to this I am glad to give it." Accused then made some explanations at the end of which Colonel Singer told him that if what he said was correct all would be forgotten and nothing would happen. Accused was aware that at the time the C.I.D. was making an investigation and told Colonel Singer that he would not like his fiancee to be questioned by the C.I.D. Accused stated that if he were promised that his fiancee would not be questioned he would be glad to talk to any of the agents and give any necessary information. Accused was assured that his fiancee would not be questioned and it was reiterated that if his story was correct nothing would happen. Accused was contacted by Comerford with whom he had been acquainted for about a year and a half. Their first conversation concerning the case was private and informal. Accused mentioned the assurance previously given him that his fiancee would not be bothered and was further assured to the same effect by Comerford. There was no mention "of rights or no rights" during this and other informal conversations. Finally, they got together in the C.I.D. office where Agent Michaud and Lieutenant Doss were present. Comerford commenced to read the 24th Article of War to accused, but accused told him it was not necessary. Accused dictated his statement to the secretary, and after it was typed Comerford gave it to accused to sign, but accused declined as he wanted to read it first. The next day accused claimed there were too many mistakes in it and stated that he wanted to talk to some lawyers. He took Comerford to task because his fiancee had been questioned. Accused also mentioned to Comerford his belief that the statement was not official until he had signed it. Comerford and accused discussed the statement with some other officers and they advised accused "not to bother with it any more." Accused then volunteered to make another statement. He went home, made it up, and the next day showed it to Comerford. The latter would not accept it, and told accused either to sign the other or not make a statement at all (R 174-176). Accused had been an enlisted man in the "CMP Branch" from 1943 until 1945, during most of which time he was an undercover man in North Africa, Sicily, and Italy, dealing with civilians. Since 1948 he served about two years as an investigating officer in the C.I.D. In addition, he had about one and a half to two years of law school work. Despite this background he had a misunderstanding of the 24th Article of War. He stated, "My firm belief is that only if you sign something of if you stated it on the rolls it can be used against you" (R 176-178).

Major Robert C. Miller testified that early in February accused visited him at his office seeking advice as to whether he should sign a statement he had with him. Major Miller advised accused not to sign the statement. From the discussion he had with accused, Major Miller was of the opinion that accused felt that until such time as he put a statement in writing and signed it, it could not be used against him (R 179-181).

Over objection by the defense, Comerford testified as to the contents of the oral statement made by accused to him. In substance, accused related to Comerford that he had met a Mrs. Herman in Heidelberg in September of 1949. At the time, Mrs. Herman was wearing a monkey fur coat which accused tried unsuccessfully to purchase. In December 1949 accused again met Mrs. Herman in Heidelberg, at which time she was accompanied by Kroener whom she introduced to accused. Mrs. Herman asked accused if he were still interested in the monkey fur coat and told him he could have it if he would transport some merchandise for her and Kroener. She explained that their transportation had broken down. Kroener informed accused that the merchandise consisted of adding machines and needles. Accused did not acquiesce but decided "to sleep on it" even though Kroener assured him that the transaction would be legal. Kroener instructed accused to go to a certain address in Frankfurt where he would secure an envelope addressed to accused. In the latter part of December, accused went to the address where he was given an envelope addressed to "Fish." Upon opening the envelope, accused found two baggage checks from the Frankfurt Bahnhof baggage room. He presented both checks at the Bahnhof but when he saw the amount of merchandise to be transported he decided to divide the load. He, therefore, took out four boxes and one package. Later, he opened the boxes in order to ascertain what he was carrying. The boxes contained adding machines which he placed in his suitcase. He threw the boxes away and placed the package alongside the suitcase. He then proceeded to Saarbruecken through Nohfelden. Upon reaching the French customs accused told the French customs official that he had cigars, candy, some small items, and did not believe that he had anything to declare, but that the customs official should take a look. Accused opened the back of his car at the official's request, and then the suitcase. Five adding machines were uncovered and were taken by the customs officials to the customs house. After much discussion, it was decided that accused would pay a fine of 100,000 francs. Since accused did not have that amount on him he was allowed to enter Saarbruecken to raise the money. The machines were confiscated. Accused informed the customs people that the machines were to be transported to Kroener and took them to Kroener's home but the latter was away. Finally, the customs people released accused. He contacted Kroener on numerous occasions in order to secure the amount of the fine but was unsuccessful. Accused denied that he was to receive any remuneration other than the fur coat from Mrs. Herman (R 186-189).

b. For the Defense

Accused elected to make a written unsworn statement through counsel (R 418). In substance, he stated that he was born in Vienna in December 1920. He was brought up in Switzerland and came to the United States in 1941. Although an alien he elected to be drafted in the Army with the possibility of becoming a citizen. Because of his ability to speak four

languages he was sent to the C.I.D. school where he was trained in crime detection and undercover work. In March 1943 he arrived in North Africa where he worked as an undercover investigator breaking up large scale "blackmarket" operations. One method of operation was to pretend to engage in the same activities. The operatives were always protected from prosecution in these activities. It was also a normal practice for agents to admit to the gangsters the commission of criminal offenses for the purpose of gaining their confidence.

Shortly after accused returned to Germany "last August 12" he ran across Klink whom he had known as an informer in 1945 when accused was connected with the Heidelberg criminal police. Klink was a psychopathic liar and a little crazy but had brought in some useful information. Accused talked to him in a general way and asked him in what rackets people were engaging. Accused continued to see Klink and, during one conversation, was told by Klink that he could get uranium that "was coming out of the Russian zone." Accused determined to find out if there was any truth to the story before he made a report on it.

At this time, accused was called before a board to see if he should be retained in the service. The board proceedings had been brought about by enemies of the accused, and because of the proceedings accused had no duties to perform. Accused saw in the uranium matter a chance to make a name for himself and to help his case before the board. He was also trying to get a transfer to Military Intelligence and reported the uranium matter to Captain Kushen, the personnel officer of the Military Intelligence Division, who thought accused should follow up the lead.

Accused asked Klink to secure a sample of the uranium. Klink said he could not get any because of lack of funds. At the time, he was trying to sell some "alleged insulin." Accused also met Lies, the nature of whose connection with Klink accused did not know. Accused told both Lies and Klink numerous stories of implication in rackets. He even borrowed strophantine from Dr. Krause to show that his intentions were good. Lies and Klink had "fantastic" plans for getting medical supplies to sell and accused pretended to acquiesce in their plans even to the extent of making several trips with them in his car. He never intended to take part in their plans and actually discouraged them in their attempts to carry them out. Finally, he received from Klink what the latter claimed was a sample of uranium, which he turned over to Captain Kushen to have analyzed. Three weeks later, he was informed by Kushen that the material did not have very much radioactive material in it and the lead was not worth pursuing any further. By that time, his board hearing was over and since his retention in the service was recommended he lost all interest in the matter, and though he occasionally saw Klink and Lies had nothing further to do with them. He denied that he had ever actually planned or offered to traffic in any narcotic drug or medicine.

He related that on the evening of 26 December 1949 at Nohfelden he informed a Mr. Schmeyer, a local industrialist, and Judge Nieten, a local judge, of what had happened at the customs barrier. They, in turn, told accused that what had happened to him was a common occurrence, that the customs agent would always ask if there was anything to declare and then confiscate all items of value that were not specifically declared. Following this, they would claim that the traveler's car was subject to confiscation, and then offer to settle by a "transaction." It was explained to accused that the "transaction" was an agreement between the customs agent and the traveler on a sum to be paid so that the matter would be terminated. Schmeyer lent accused money with which to pay for the "transaction" and told accused that it was a common custom for the agents to get part of the money collected.

Accused concluded his statement by stating that since his return to the European Command on 12 August he had not been assigned any duties by the "Provost Marshal Division" (R 418-421).

It was stipulated that Earnest Schoemann, a French national residing in the Saar, would testify that he has been a Doctor of Law since 1925 and has practiced law before the Bar of Saarbruecken since 1947. In his practice he had settled many cases involving customs offenses. In such cases no stigma attached to the offenders (R 409-410, Def Ex G).

Captain Donald B. Kushen, Intelligence Division, European Command, testified that in the latter part of September 1949 accused came to his office looking for a job. Thereafter he saw Fish practically every day. In one of their discussions, accused told Kushen that he had been informed by an ex-informer of the latter's knowledge of a source of uranium. Accused wanted to know whether he should try to get some. Kushen told him to go ahead. Accused brought Kushen a vial with some material in it and informed Kushen that it had been brought out of the Russian Zone of Germany. Kushen gave the vial to Colonel Lewis, a graduate chemist in the Division, to test. The first test showed that there was some radioactivity in the test tube. Subsequent tests, however, were negative (R 387-389,391). Kushen admitted that he had made no report of the occurrence (R 392).

After being qualified as an expert in international law, Karl Bilfinger testified that under international law the territory of Germany could not be annexed by France without a treaty of peace whereby the territory was ceded and that, since a treaty of peace with Germany had not been consummated, the Saar was still an integral part of Germany and not a sovereign state. He stated that the Saar was not included within the Federal Republic of Germany as constituted in September 1949. He further testified that a Customs Union could only

be attained by sovereign states, and since the Saar is not a sovereign state, in his opinion, the customs union between France and the Saar is illegal under international law. He admitted, however, that the French do apply their customs laws to the Saar, and did so during December 1949 (R 375-385).

Karl Bieringer, who had previously testified as a witness for the prosecution relative to the confiscation of a bottle of insulin, admitted into evidence as Prosecution Exhibit 10, testified as a witness for the defense that he had ascertained that the greater portion of the substance contained in Prosecution Exhibit 10 was an inorganic salt, that only a very small portion of it was insulin, and that he had communicated this information to the trial judge advocate (R 399,406). He further testified that Klink was currently living in jail, and that Lies had been tried by the German criminal courts fifteen or sixteen times and was presently under investigation (R 399-400).

It was orally stipulated that if Dr. Paul Seifert were present he would testify that on 7 February 1950 he made a chemical analysis of two bottles. His analysis of the contents of "the 250 cubic centimeter bottles" showed that they consisted of a mixture of raw and beet sugar, including a preparation of dextrose. The contents of the other 500 cubic centimeter bottle which was labeled "insulin, chrystalline, Bayer" were found to be a very clever falsification of insulin. "The substance contained nitrogen, as well as sulphur, as well as insulin in the molecule." Tests "clearly showed that the substance in question is not insulin" (R 416).

4. Discussion

Accused has been found guilty of conspiring with Albert Kroener and Margot Herman to transport wrongfully into the French Saarland five adding machines of German manufacture without paying the proper and lawful duty thereon. He was also found guilty of the substantive offenses in connection with the conspiracy of failing to declare the adding machines to French customs officials, of attempting to export them from the U.S. Area of Control, Germany, to the Saarland, and of violating the laws and customs of France by attempting to import them into the Saarland without a permit, without declaring them, and without paying the import duty on them (Chg, Specs 1, 2 and 4). In connection with the attempted transportation of the adding machines to the Saar from the western area of Germany, accused was found guilty of a violation of Circular 21, Headquarters European Command, 12 September 1949 (Chg, Spec 3). We, as evidently did the court, take judicial notice of the following general facts of history: That in April 1947 at the Council of Foreign Ministers in Moscow, the French proposed that the Saar should be detached from Germany and integrated with the French economy. It was finally agreed, the United States being one of the

adherents to the agreement, that the French proposal be adopted subject to revision when a treaty of peace with Germany should finally be consummated; that pursuant thereto the French customs laws apply to the Saar, and that the Saar is not included in the West German Republic. In view of the assent given to the integration by the United States (The Department of State Bulletin, Vol XVI, p 695-696), its legality may not be questioned by the Board of Review.

The "Code des Duanes" or Customs Code of France, effective as of 1 January 1949, in the form of an official publication published by the French government in the French language, was properly admitted into evidence (MCM, 1949, par 133b, p 174). Incident to its authority to judge the construction and meaning of all official documents in issue, the Board of Review has obtained an accurate translation of certain Articles of said Code. Article 84 thereof provided as follows:

> "1.- All imported or exported goods must be the object of a detailed declaration classifying them into a customs category.
>
> "2. - Exemption from levies or taxes, be it at the entry or exit, does not dispense with the obligation provided in this article."

Sections 197 and 198 provide for entry of goods without customs formality at the point of entry if the goods are accompanied by a permit allowing such entry.

There was testimony by the customs inspector, Jeannet, who, by virtue of his office as customs inspector, was qualified to testify on the subject, that the duty on the adding machines in issue was 35,000 francs. This testimony, to which objection was not made, competently established that the machines were dutiable (MCM, 1949, par 133b, p 173).

With reference to the conspiracy charge, the evidence, apart from accused's pretrial statement, shows that during December 1949 one Albert Kroener proposed that accused transport merchandise to the Saar for him, and made arrangements for accused to secure the merchandise which consisted of five adding machines. On 24 December 1949 Kroener left Frankfurt where the merchandise was located and traveled to the Saar border by train and thence by car to Saarbruecken. At or about the same time, accused told a friend, Doctor Peters, that he was contemplating taking adding machines into the Saar for a friend. When Peters expressed misgivings about the project accused told Peters that the merchandise would not be found. Peters in his testimony explained that the phrase "would not be found" was explained to him by accused as meaning that the operation would be legal. We are, as evidently

was the court, of the opinion that the explanation was an afterthought, either on the part of the accused or of Peters, to remedy a slip of the tongue, and that, in fact, accused inferred that he was contemplating the smuggling of adding machines into the Saar. Inasmuch as accused's conversation by its very terms was prospective in character, it antedated his assent to Kroener's proposal and could be admitted in evidence without the usual predicates (Warszower v. U. S., 312 U.S. 342). Accused subsequently secured the adding machines from the baggage room in the Bahnhoff in Frankfurt and in the early morning hours of 26 December 1949 attempted to take them into the Saar without observing the formality of declaring them to the customs officials for the obvious purpose of avoiding the payment of the customs duty.

Very seldom is it possible to spell out by testimony the meeting of minds of persons bent on unlawful enterprises, especially, as in this case, when the testimony is obtained from a conspirator anxious to shield his own transgressions. On the surface, Kroener's testimony is innocuous, but when it is assayed against the substantive act performed by accused, and the other circumstances of record, it becomes apparent that accused's act was the object of an agreement attained by Kroener and accused. No other purpose but an evasion of the customs laws of France was to have been served by having accused transport the machines. Kroener went to Saarbruecken by train and automobile and no satisfactory reason is shown in the record of trial as to why he could not take the merchandise with him. It is apparent that the thought that accused's uniform could cloak the evasion of the customs laws was uppermost in the minds of both Kroener and accused. It is thus clear that, in so far as accused and Kroener are concerned, the evidence, without recourse to accused's pretrial statement, establishes their participation in the conspiracy alleged. All that accused's pretrial statement adds to the other evidence is the participation in the conspiracy by Margot Herman.

"A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end" (MCM, 1949, par 181j). In the instant case the object of the conspiracy was the evasion of the customs laws of France. While no stigma may necessarily attach to the indigenous smuggler for his infractions of the customs laws, it is clear that similar conduct on the part of an officer of the Army is "of a nature to bring discredit upon the military service," and, hence, unlawful. Since the specification under consideration alleges no overt act affecting the conspiracy it is not violative of any Federal statute. Such a conspiracy to commit an unlawful act not violative of the 94th Article of War is violative of the 96th Article of War (CM 336639, Cole, 3 BR-JC 159, 168-169).

As has been noted herein, a person bringing goods or merchandise into French territory has the necessity of declaring the goods at the

time of entry into the territory or of having a permit which dispenses with that formality until the arrival of the goods or merchandise at their destination within France. It is certain that accused had no such permit else when the adding machines were found by the customs inspector he would have produced it. Otherwise, the evidence affirmatively shows accused's failure to declare the adding machines to the customs inspector, and failure to pay the customs duty. The version of accused's conversation with Doctor Peters, which we accept, demonstrates accused's awareness of the customs laws. The evidence thus warrants the findings of guilty of Specifications 2 and 4 of the Charge. Evasion by an officer of the customs laws of a nation with which the United States is in comity is conduct of a nature to bring discredit to the military service.

The court took judicial notice of Circular 21, Headquarters European Command, 12 September 1949, whereby members of the command were enjoined to comply with Ordinance 38, Military Government, Germany, United States Area of Control. Paragraph 3, Article 1, of said ordinance, with exceptions not herein pertinent, forbids the export of property from the United States Area of Control to any point outside of the Western Area. It is obvious that this provision had for its purpose the protection of the economy of Germany under the control of the United Kingdom, France, and the United States. By virtue of the integration of the Saar into the French economy, the Saar of necessity may not be considered as a part of the economy of the Western Area. It is not included within the territory of the Federal Republic of Germany, and hence may not be considered as within the Western Area of Germany. It is clear that Frankfurt, where accused secured the adding machines, is within the United States Area of Control. Accused's failure to transport the adding machines beyond the Western Area was frustrated solely by the detection of the machines by the French customs officials. Specification 3 of the Charge substantially alleges an attempt to violate the provisions of Circular 21, supra, and the evidence supports the allegation.

As approved by the reviewing authority, accused was also found guilty of engaging in the trade or business of selling and offering for sale coffee, cigars, insulin and strophantine of a value in excess of $50.00 (Add'l Chg, Spec 1); of conspiracy with Lies and Klink to traffic in morphine (Add'l Chg, Spec 2); and of having in his possession quantities of strophantine for the purpose of sale or barter for personal gain (Add'l Chg, Spec 3). The evidence shows that accused procured a quantity of strophantine which cost 1250 marks (that 1250 marks at the time were of a value in excess of $50 is a fact of which we take judicial notice), and then attempted to sell it at a greatly

inflated value. It also shows that he had Klink secure a substance alleged to be insulin and attempted to sell the purported insulin to a Dr. Behrens for two and one-half times the value set upon it by Klink. He also offered to deliver insulin to one Moser in Paris. He tendered cigars and coffee in payment of hotel bills, and he never lost an opportunity to sell cigars. Indeed, the evidence pertaining to his trip to Karlsruhe would indicate that accused had an established route for the delivery of tobacco and other products. When securing the baggage checks for the adding machines from Crames, he sold to Crames at the latter's request a quantity of cigars and coffee. It would thus appear that accused was recognized as a vendor of these products.

Commercial activities on the part of Army officers are not necessarily prohibited. If they do not interfere with the full performance of an officer's military duties and if they are not of a type discreditable to the military service, their indulgence is not violative of the Articles of War (CM 307046, McBride, 60 BR 137; CM 307097, Mellinger, 60 BR 199, 216-217). The record fails to delineate accused's military duties and we are thus unable to state that his commercial activities interfered with such. On the other hand, the spectacle, in an occupied former enemy country, of an Army officer arranging deals in presumably scarce medicines at inflated profits to himself, and of peddling cigars and coffee at every opportunity to former enemy subjects is decidedly discreditable to the military service and violative of the 96th Article of War.

The defense sought to show that the substance which accused arranged to sell to Doctor Behrens was not, in fact, insulin. Conceding that the substance was not insulin, a defense would not be established to the allegation that accused offered to sell insulin.

The evidence also shows that accused sought to trade in morphine along with his insulin, strophantine, and tobacco dealings. He requested Klink and Lies to obtain morphine for him which he would sell in Switzerland. Lies finally found a source of insulin, cocaine, and morphine. Accused suggested a plan, agreed to by Lies and Klink, to "hijack" the merchandise and subsequently sell it in Switzerland. Other than a trip to Karlsruhe, where the merchandise was purportedly located, no other steps to effect the fruition of the plan are shown in the record. None, however, are necessary to establish the offense of common law conspiracy which is "the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end" (MCM, 1949, par 181j). To traffic in morphine which was substantially the object of the plan proposed by accused and assented to by Klink and Lies would involve the possession of morphine. Possession of such is denounced by General Orders 25, War

Department, March 11, 1918, which provides as follows:

> "The possession by any person subject to military law of any habit forming drug not ordered by a medical officer of the Army shall be taken and considered as a disorder to the prejudice of good order and military discipline and as conduct of a nature to bring discredit upon the military service, and any such person so offending shall be brought to trial under the 96th Article of War."

The evidence supports the findings of guilty of conspiracy to traffic in morphine (Add'l Chg, Spec 2).

We find it unnecessary to discuss the question of multiplicity of pleading, since the sentence in this case is supported by the findings of guilty attained upon the two conspiracy specifications which are entirely unrelated.

5. The defense in this case exerted every effort to prevent a trial on the merits of the several charges and specifications. Most of their objections were directed to the procedural steps taken before trial, and involved allegations that the defense was not afforded an opportunity to confront all the witnesses against the accused, and that the case was referred to trial although the pretrial investigation did not produce evidence pertaining to several of the offenses charged. During the trial objection was made to the appearance of witnesses whose names were not endorsed upon the charge sheet. To all these objections the law member offered the defense a continuance in order to remedy any real or fancied grievances caused by the alleged procedural lapses. The real nature of the defense objections is disclosed by counsel's answer to one such proffer by the law member:

> "DEFENSE COUNSEL: The accused does not wish to stand on the question of time. There is nothing we can do, in time, to erase the irregularities. The accused's rights are already prejudiced. Time would only further prejudice them. We want the charges dismissed here and now. We do not want further time." (R 44)

The remedy offered by the law member is that prescribed by paragraph 70c, Manual for Courts-Martial U. S. Army, 1949, as follows:

> "c. Defects arising out of the pretrial investigation. - A substantial failure to comply with the requirements of 35a and Article 46b may be brought to the attention of the court by a motion for appropriate relief. Such a motion should be sustained only if the accused shows that the defect in the conduct of the investigation has in fact prevented him from

properly preparing for trial or has otherwise injuriously affected his substantial rights. If the motion is sustained the court may grant a continuance to enable the accused to prepare his defense properly, ***."

It would have been beyond the capacity of the law member to dismiss the charges on the grounds advanced by the defense.

The defense also challenged the trial judge advocate on two grounds, viz, that he was prejudiced and that he was the investigating officer. As to the latter, there is no evidence whatever that the trial judge advocate had been appointed as investigating officer pursuant to Article of War 46b. It is not expected that a trial judge advocate would be so negligent as to enter the trial of a case without interviewing the witnesses whose testimony he expects to present to the court. It was intimated by the defense that one of the additional charges in the case was prepared as a result of interviews had by the trial judge advocate with witnesses as to the original charges. Presuming that the trial judge advocate received information from these witnesses which might disclose additional offenses by the accused, he would be most derelict in his duty if he failed to transmit this information to the appropriate authorities for whatever action might be indicated. The transmittal of such information by the trial judge advocate would not constitute a formal accusation, but, if so, it would not debar the trial judge advocate from acting as such.

To prove bias and prejudice the defense sought to show that the trial judge advocate suppressed evidence favorable to accused. Evidence was introduced tending to show that prior to trial a chemical analysis was performed upon the contents of the bottle of purported insulin which was offered for sale to Doctor Behrens, and that the analysis showed that the contents did not constitute insulin. The report of this analysis was transmitted to the trial judge advocate who did not introduce it in evidence. The evidence showed that when Klink obtained the bottle from Dimitroff it was sealed, but was unsealed when it was returned to Dimitroff. The fact that some months after the attempted sale the contents were other than insulin would hardly show that the bottle did not contain insulin when accused offered the bottle for sale.

In any event, there is no provision of law whereby the trial judge advocate may be challenged. It is true, that if the trial judge advocate has acted as member, defense counsel, assistant defense counsel, or investigating officer in the case, the court is without jurisdiction. The trial judge advocate in this case has not so acted.

Otherwise, the conduct of the trial judge advocate which might be criticized appears to be the result of constant badgering by the defense

counsel and was not motivated by bias toward accused.

Certain testimony was stricken by the law member after having been heard by the court. We do not deem it necessary to determine the competency of the stricken testimony. It is obvious, however, that in certain cases it is necessary for the law member to hear the testimony in order to determine its competency. Usually, in a court-martial, such testimony is received by the law member in the presence of the court subject to his instruction to the court to disregard the testimony in the event he deems it incompetent. In the instant case, this procedure was followed and we see no prejudice to accused's substantial rights (U. S. v. Weintraub, 165 Fed 756).

There was admitted in evidence over the objection of the defense what we have termed the memorandum of the transaction entered into by accused with the French customs officials in which he admitted his violation of the French customs laws. Also admitted over objection was accused's pretrial statement to Comerford with reference to his excursion to the Saarland and his brush with the French customs officials. That accused consciously attempted to evade the customs laws of France was proven by the competent evidence of record without recourse to either the memorandum or pretrial statement. The defense contended that accused's execution of the memorandum of transaction was induced by a promise to return his car to him if he signed the memorandum. It is noted that the contents of the memorandum had no relation to the conspiracy to evade the customs laws. We therefore find it unnecessary to discuss the competency of the memorandum, it not being contended that it was extorted by force, threat of force, coercion or duress, since, if incompetent for other reasons, the uncontradicted evidence of record other than that emanating from accused compels the findings of guilty pertaining to accused's evasion of the customs laws of France (CM 342409, Woodall, 13 Sep 1950; CM 336403, Jonson, 3 BR-JC 69, 74).

With reference to accused's pretrial statement to Comerford, we find nothing in the record which affords a basis for holding the statement incompetent.

6. In arriving at its opinion in this case the Board of Review has carefully considered the memorandum submitted on behalf of the accused as well as matters presented in oral argument by Frederick Bernays Wiener, Esquire, and Thomas H. King, Esquire, before it in Washington, D.C., on 22 September 1950.

7. Accused is 29 years of age, divorced, and the father of one child. He was born in Austria and received the equivalent of a college education in that country and Switzerland. He has had about 1-1/2 years

of legal education in this country. In civilian life he had employment as a musician, language tutor, and private detective. He had enlisted service from 18 September 1942 to 2 August 1946 when he was honorably discharged. He was appointed first lieutenant in the Military Intelligence Reserve on 15 March 1948, and entered on extended active duty on 13 October 1948. He served in North Africa, and Europe from March 1943 to August 1946. His current tour of duty in Germany extends from August 1949. His overall efficiency ratings of record are "072" and "052" (2).

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 96.

Robert Faulkner, J.A.G.C.

Samuel S. Wolf, J.A.G.C.

Jno Lynch, J.A.G.C.

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

JAGU CM 342763

UNITED STATES	UNITED STATES ARMY, EUROPE
v.	Trial by G.C.M., convened at Heidelberg, Germany, 11, 12, 15, 16, 17 and 19 May 1950. Dismissal, total forfeitures after promulgation, and confinement for three years.
First Lieutenant ALEXANDER S. FISH, 0-954046, 7890 Headquarters Group, European Command	

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

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1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the officer named above 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 the following offenses, as approved by the reviewing authority, all in violation of Article of War 96: wrongfully conspiring with Albert Kroner and Margot Herman to wrongfully transport into the French Saarland dutiable goods, five adding machines of German manufacture, without paying duty thereon, at or in the vicinity of Heidelberg, Germany, in or about the month of December 1949 (Charge, Specification 1); wrongfully, knowingly and willfully failing to declare to customs officials of the Republic of France the presence in his automobile, which he was then driving from Germany into the French Saarland, of dutiable goods, five adding machines of German manufacture, at Nohfelden, French Saarland, on or about 26 December 1949 (Charge, Specification 2); wrongfully attempting to export from the United States Area of Control, Germany, to the Saarland, a point outside the Western Area of Germany, five adding machines of German manufacture, in violation of Circular Number 21, Headquarters European Command, dated 12 September 1949, on or about 26 December 1949 (Charge, Specification 3); violating the laws and customs regulations of the Republic of France by attempting to import into the French Saarland five adding machines of German manufacture without securing a permit, declaring said machines or paying import duty, at Nohfelden, French Saarland, on or about 26 December 1949 (Charge, Specification 4); wrongfully engaging in the business of selling and offering for sale coffee, cigars, insulin and "strophantine," of a total value in excess of fifty dollars, in the United States Area of Control, Germany, between September 1949 and January 1950 (Additional Charge I, Specification 1); wrongfully conspiring with Peter Lies and

Lorenz Klink to wrongfully and feloniously traffic in a narcotic drug, morphine, in the United States Area of Control, Germany, between September 1949 and March 1950 (Additional Charge I, Specification 2); and wrongfully having in his possession, for the purpose of sale or barter for personal gain, quantities of "strophantine," at or in the vicinity of Heidelberg, Germany, between September 1949 and March 1950 (Additional Charge I, Specification 3).

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 three years. The reviewing authority, along with action modifying the findings, 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 all findings of guilty and the sentence and to warrant confirmation of the sentence.

3. We concur with the Board of Review in its opinion that the record of trial is legally sufficient to support the findings of guilty, except the finding of guilty of Specification 3 under Additional Charge I, and the sentence and to warrant confirmation of the sentence. We do not concur with the Board's opinion that the record is legally sufficient as to the excepted specification, because in our opinion this specification fails to state an offense in violation of the Articles of War.

In substance, Specification 3 of Additional Charge I as approved by the reviewing authority alleges that the accused wrongfully had a quantity of "strophantine" in his possession for the purpose of sale or barter for personal gain. The Boards of Review have repeatedly held in effect that if the specification alleges acts which are innocent on their face, an allegation that the acts were done wrongfully does not make the specification state an offense. It is essential that the specification contain a statement "of the facts constituting the offense" (MCM 1949, par 29a, p 22). The reason is that if the facts and circumstances which make otherwise innocent acts wrongful are not alleged, the accused is neither adequately informed of the offense against which he must defend nor adequately protected against double jeopardy (see Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, pages 132-133).

Thus, for example, in CM 244014 LaLone, 28 BR 165, 176-177, it was held that an allegation that the accused, a warrant officer, wrongfully and unlawfully stated to the father of two soldiers that the soldiers would not be transferred from the accused's post, which statement was alleged to be "conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service," did not state an offense because the alleged statement was innocent on its face. The Board quoted from Winthrop (p 723) and the Manual for Courts-Martial, 1928 (par 152a, p 187) the rule which in its current form reads as follows:

"'To the prejudice of good order and military discipline' refers only to acts directly prejudicial to good order and military discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline, but the article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable." (MCM 1949, par 183a, p 255)

In CM 260398, Gallagher, 39 BR 225, 229, the court by exceptions and substitutions found the accused guilty of wrongfully and unlawfully making and uttering to named parties certain described checks which were not paid upon presentation. The Board of Review held that these words failed to state any offense because they did not include facts or elements necessary to constitute an offense and that the court's findings therefore amounted to an acquittal.

In CM 315215, Ressel, 64 BR 371, the Board of Review held that a specification alleging that the accused wrongfully had in his possession a 1937 Ford, property of another, failed to allege any criminal offense cognizable by military or civil law, and that the allegation was entirely consistent with a mere civil trespass without any unlawful intent.

In CM 334573, Costas, 1 BR-JC 219, 223, 226, the court by exceptions and substitutions found the accused guilty of wrongfully and unlawfully making and uttering to an officers' club certain described checks and by means thereof obtaining value "under such circumstances as to bring discredit upon the military service." The Board of Review referred to the rule that a specification must exclude every reasonable hypothesis of innocence and cited the Ressel and Gallagher cases, supra. In concluding that the specifications involved did not state offenses, the Board stated:

"The words of criminality, 'wrongfully,' 'unlawfully,' and 'under such circumstances as to bring discredit upon the military service' remaining in the specifications are but empty conclusions when no specific fact or circumstance has been found by the court which could be construed as rendering the making and uttering of the check wrongful or unlawful."

In our opinion the instant case falls within the principles of the above cited cases. Although strophanthin is a bitter, very poisonous glucoside which is used as cardiac stimulant (Webster's International Dictionary, 2d Ed, p 2500), it could legally be imported into Germany in any amount and it was not rationed or regulated by German law (R 287,

296). Paragraph 2, Circular 21, Headquarters European Command, 12 September 1949, entitled "Prohibited Activities and Transactions in the European Command" provides in pertinent part as follows:

> "1. Except as provided in paragraph 2 of this Article or as otherwise authorized by Military Government or any agency designated by it, the following activities by persons subject to this Ordinance are prohibited:
>
> "a. The acquisition, from a person whose ordinary residence is in the Western Area, of real or intangible property, property for commerical purposes or for the purpose of resale, or currency;
>
> "b. The sale to or bartering with any person not subject to this Ordinance of any property, other than motor vehicles, acquired from the United States Army or the European Command Exchange System; or
>
> "c. The purchase, from a person whose ordinary residence is in the Western Area, of property which is rationed by competent German authority or restricted by such authority for sale by special permit for professional use.
>
> "2. Notwithstanding the provisions of subparagraph 1(a) of this Article, persons subject to this Ordinance may receive German currency from a person whose ordinary residence is in the Western Area as consideration for the lawful sale, or other lawful transfer, of property, if the currency received is commensurate with the value of the property sold or transferred."

It is to be noted that Circular 21, supra, does not prohibit the mere possession of property for the purpose of sale or barter. Moreover, the circular specifically permits the receipt of German currency from a resident of the Western Area of Germany as consideration for the lawful sale or transfer of property provided the currency received is commensurate with the value of the property sold or transferred. So far as the specification alleges, the accused's purpose may have been within the permissive provision inasmuch as personal gain to the seller is not necessarily inconsistent with the receipt of currency commensurate with the value of the property sold, although the pleader may have intended to use the words "personal gain" to connote the receipt of currency in an amount greater than the commensurate value of the property. The specification is thus ambiguous with respect to violation of Circular 21, supra. No inculpatory facts are alleged with requisite certainty showing wherein these prima facie innocent acts were otherwise wrongful or unlawful in any respect. We therefore conclude that the specification fails to state an offense. In arriving at this conclusion we have not overlooked CM 322257, Hartman, 71 BR 111 (wrongfully and unlawfully having sexual intercourse with a woman not the accused's wife) and CM 330551, Catalano, 79 BR 81 (wrongfully and unlawfully secreting himself by stowing away aboard a Victory ship). In each of these cases the specification was held to state an offense. In our opinion, however,

these cases are distinguishable from the instant case in that they allege either an immoral act or conduct clearly discreditable or prejudicial to military discipline.

4. On appellate review of the record of trial, counsel for the accused argued that several errors were committed during the trial which were prejudicial to the substantial rights of the accused. We have carefully considered each of the alleged errors and are of the opinion that even if they were errors, no substantial prejudice resulted therefrom, which would require the invalidating of the proceedings. Of these alleged errors, we shall discuss one, inasmuch as it may have affected the sentence imposed by the court and approved by the reviewing authority. After the defense rested and before the court closed for its findings, the Trial Judge Advocate in his argument to the court stated a maximum punishment for each of the offenses alleged against the accused (R 425). We are unaware of any rule of military procedure which prohibits the Trial Judge Advocate from advising the court of the maximum authorized sentence either before or after the findings are reached. However, in this case the Trial Judge Advocate incorrectly informed the court. According to him, the maximum confinement that could be imposed on the accused aggregated seventeen years. In this figure were included five years for Specification 4 of Additional Charge I, of which the accused was acquitted. It thus appears that the Trial Judge Advocate informed the court that the maximum confinement was twelve years for the offenses of which the accused was convicted. There is nothing in the record to indicate that the law member otherwise informed the court.

Applying the maximum punishment prescribed for conspiracy and violation of standing orders, and for the other offenses the maximum punishment prescribed for the most closely related offenses, we find that the maximum confinement for this charge is two years and eight months. It appears, however, that the offenses alleged in Specifications 2, 3 and 4 of this Charge constitute substantially one transaction which should be punished only in its most important aspect, which is the violation of standing orders alleged in Specification 3 of the Charge. Thus the maximum authorized for the offenses under the Charge is one and one-half years for Specification 1 and six months for Specifications 2, 3 and 4, or a total of two years (MCM 1949, par 117c, pages 139, 142). With respect to Additional Charge I, considering the offenses alleged in their most serious aspect, the maximum authorized confinement is six years. This maximum of six years confinement is arrived at by considering the offenses alleged in Specifications 1 and 3 to constitute violations of standing orders each punishable by six

months confinement. The remaining five years maximum confinement is arrived at with respect to Specification 2, as follows: The specification charges conspiracy to wrongfully and feloniously traffic in a narcotic drug, morphine. The maximum confinement is five years for conspiracy to commit an offense for which confinement in excess of one year is authorized (MCM 1949, par 117e, p 139). The offense listed in the Table to which trafficking in a narcotic drug is most closely related is introducing a habit-forming drug into command, quarters, station or camp for sale. The maximum for this offense is two years (Ibid, p 140). Thus conspiracy to traffic in a narcotic drug would carry a maximum confinement of five years. In our opinion such confinement, while legal, is excessive for the actual conspiracy alleged and proved in this case.

5. We conclude that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications, and Additional Charge I and Specifications 1 and 2 thereof, legally insufficient to support the findings of guilty of Specification 3 of Additional Charge I and legally sufficient to support the sentence and to warrant confirmation thereof. However, in view of our holding respecting the legal insufficiency of Specification 3 of Additional Charge I, the incorrect information given the court by the Trial Judge Advocate concerning the maximum authorized sentence, and the fact that, except for Specification 2 of Additional Charge I alleging conspiracy to traffic in morphine, the offenses of which the accused was convicted were not such as to warrant prolonged confinement, we recommend that the confinement portion of the sentence be reduced to two years.

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

(188)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342,763

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Alexander S. Fish, 0-954046, 7890 Headquarters Group, European Command, upon the concurrence of The Judge Advocate General the finding of guilty of Specification 3 of Additional Charge I, as modified by the reviewing authority, is disapproved, and 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.

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

DEC 4 1950

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendations of the Judicial Council, the term of confinement is reduced to two years.

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

6 December 1950

(GCMO 89, December 12, 1950).

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

JAGH CM 342775

AUG 22 1950

UNITED STATES v. First Lieutenant HAROLD H. ANTHONY (01179766), Headquarters and Headquarters Battery, 39th Field Artillery Battalion.	3D INFANTRY DIVISION FORT BENNING GEORGIA Trial by G.C.M., convened at Fort Benning, Georgia, 6 July 1950. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 93rd Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that First Lieutenant Harold H. Anthony, Headquarters and Headquarters Battery, 39th Field Artillery Battalion, did, at Benning Park, Fort Benning, Georgia, on or about 4 June 1950, wrongfully strike Sally Anthony on the head, arms, back and abdomen with his fist and did kick the said Sally Anthony on the body and legs with his foot.

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

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge II and its Specification except the words: "and did kick the said Sally Anthony on the body and legs with his foot." He was found

not guilty of the excepted words in the Specification of Charge II and of the other 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. The evidence pertinent to the finding of guilty of Charge II and the Specification thereunder is summarized as follows:

a. For the prosecution.

The accused, First Lieutenant Harold H. Anthony, was assigned to the 39th Field Artillery, Fort Benning, Georgia. On the morning of 4 June 1950, his wife, Sally G. Anthony, had attended church and Sunday School with their three small children at Chapel No. 2, Sand Hill (Fort Benning, Georgia). At about 1230 hours, she returned to their quarters, 23 Allison Avenue, Benning Park, Fort Benning, Georgia, where she found her husband, the accused, with Sergeant Guy Moody. Sergeant Moody left some time after her return and she commenced preparing dinner. The accused suggested to the children that he take them swimming which suggestion she opposed, as it was raining. Her opposition made the accused angry. She describes what happened as follows:

"I left my husband sitting at the table with the children and went over to the utility table to start slicing a tomatoe. I was just preparing to cut into the tomatoe when my husband came toward me. As I turned to see what he wanted I had the knife and tomatoe in my hand, he grabbed my arm and said 'Oh, so your going to try and stick me!' I said 'I am going to try and slice this tomatoe if you will leave me alone.' During this time he had both my arms from the back and was holding me. I dropped the knife, and then he slapped me. During this time he was threatening me with words and I do not recall everything he said. I tried to break loose and escape from him, at no time did I try to fight back by biting, kicking or scratching. As I tried to break for the door he grabbed me again and threw me to the floor.

* * *

"He struck me on the face and head. He struck me with both his open hand and fist. I have no clear knowledge of how many times he struck me but it was more than two or three.

* * *

"The blows I remember were hard and painful. I don't know if they were with his full force.

* * *

"I left my quarters as soon as I could break away from my husband and went to Chaplain Riley's quarters at 25 Allison Ave.

* * *

"I was physically in pain and hysterical.

* * *

"I had a fractured jaw. Bruises on arms and legs. Bruises generally about the head." (Pros Ex 1)

Mrs. Frank C. Riley, 25 Allison Avenue, Benning Park Homes, first saw Mrs. Anthony on 4 June 1950, at about 1330 hours, at which time she observed Mrs. Anthony running across the yard from her apartment to the Riley door. Mrs. Anthony's hair was "flying all in her face" and she was screaming: "Somebody help me, somebody help me; he is killing me, he is killing me" (R 12). Upon her arrival at the Riley door she exclaimed: "My husband is killing me, he's killing me. I can't go back in that house. Somebody please help me; please help me, Mrs. Riley." Mrs. Riley took her in, led her to a bed in the living room, and examined her. "* * there were knots from one side to the other on the back of her head, and her ear had a bruise on it, and she seemed to be drawing with the pain in the stomach" (R 13). An ambulance was called and Mrs. Anthony was taken to the Station Hospital at Fort Benning where she was found to be suffering from a fracture of the right mandible (R 28). She was treated by the dental service at the hospital from 4 to 12 June on which latter date she was examined by a medical officer. This examination revealed black and blue marks on her arms and left knee and tender areas "over the back of her neck," "all over the abdomen," and "over both loins" (R 24).

The accused was arrested by the military police later in the afternoon of 4 June. Upon the arrival of the police at the accused's quarters, he was found to be asleep (R 18). There were bloodstains around the collar of his shirt which appeared to have come from a cut on his lip (R 21). His breath smelled of liquor. His speech and actions were not normal but he was not so much under the influence of alcohol "that it interferred or conflicted with his movements, both mentally and physically" (R 22).

b. For the defense.

The accused after having been properly advised of his rights as a witness was sworn, and testified in his own behalf.

Describing the incident alleged in the Charge and Specification under consideration the accused testified:

"On the day the incident happened, the 4th of June, my wife got up that morning and seemed to be mad at everyone. She screamed at the children, and every time I said anything she screamed at me, and I walked away. I realized she had been taking treatment for ulcers, and I know what it is. I had it myself. I spent three months in the hospital for ulcers, myself, and I realize what the condition is. About 10:30, she left for church, and she tried to get me to go with her. I told her I would stay there since the house hadn't been cleaned up for a week and I would not go. She did not ordinarily go to church, but when she was mad at me she wanted to go to church.

* * *

"My wife returned about 11:30 and did not speak to me. She spoke to Sergeant Moody, and she went in the kitchen and Sergeant Moody left. My wife started preparing dinner and did not speak to me during the time she was preparing dinner. She would walk through and make remarks to the children about me. When my wife finished preparing dinner, she called the children to dinner but did not call me. I went in anyway, and I still had a part of my drink left. I asked the children if they would like to go swimming. It was Sunday afternoon, and I thought they might like to go swimming. So I asked them if they would like to go swimming after they took their nap, and they all said they would and began asking questions about purchasing an inner tube or a rubber duck for them to stay on top of the water. I started out and realized I had left my drink. I turned to get it, and my wife faced me and said I would not take the children anywhere; she would kill me first. She got a butcher knife at that point. I grabbed her. I realized she was hysterical and asked her to sit down.

Q Where did you grab her?
A On her arms about half way between the wrists and elbows. I asked her to sit down and calm down and eat her dinner. She screamed something about not taking the children any place, I had been drinking, and she would kill me before she would let me take them any place. She kept screaming, and the children began to cry a little, and one of the boys came over and started kicking me on the leg. I told him to go sit down; I had no intention of hurting his mother. He did not stop, so I turned facing my son and backhanded him and told him to go sit down. He did at that point go and sit down. While I had turned my wife had gotten the butcher knife, and when I turned back to her she did manage to stick the butcher knife in my throat. However, it did not do any serious damage. I again tried to get her to sit down. She was crying and screaming, and I attempted to get her to sit down, but she seemed to be getting worse.

Q Was she trying to get away or trying to stick you?
A She was trying to stick me with the knife.

Q Did you get the knife away from her?
A Not at that time. There was a square cabinet over the sink, and she did bump her head on that, and she fell to her knees, but at no time was she on the floor. Again she was screaming and hysterical; so I turned and popped her across the face with my left hand. That quieted her a little, and I was able to get the knife away from her at that time. When I released her hand, I began backing away from her, and she stood quiet for a moment--I would say roughly 30 seconds--then she tore at me and grabbed at me with both hands and started kicking me. I grabbed her hands, but she did not stop; so I turned her loose and hit her with my right hand.

> I did not hit her with my fist, and I did not kick her. I hit her with my right hand in an attempt to get her quiet, and she did quieten down for a moment. Then I backed up through the hallway and stood there to see if she was going to attack me again. My idea was to get out of the room and see if she would get quiet. At that time there was a knock on the door, and it was a lady from two or three houses up the street, and it was about a kitten she had given the children which had been run over two or three days before. We discussed that, and my wife was still pretty hysterical, and when the lady left she went out the side door and went next door to Chaplain Riley's." (R 32,33-34)

The accused denied ever having hit his wife with his fist (R 36). The accused had had one and a half drinks of liquor prior to the incident, and took some more after his wife left the house (R 37,38). As he assumed it would be some time before his wife returned home, he took a nap from which he was awakened by the military police (R 36).

He married his "present wife" (the complaining witness) in January 1942. Their married relationship continued normally until she became pregnant in 1944. At this time, she became hysterical frequently and was difficult to live with. After the birth of twins in July 1944, her condition deteriorated and her periods of hysteria became more frequent (R 29). In December of that year she became hysterical on the way to a party, attacked the accused with a flashlight and struck him over the back of the head with her shoe. He slapped her in the face with the back of his hand in order to shock her out of her hysteria. Thereafter, they were able to resolve their differences and they lived together normally until the accused departed for Europe in January 1945 (R 30-31).

After returning from Europe, the accused was ordered to Japan where his wife joined him at a later date. She appeared to resent him and attacked him on two occasions, once striking him over the head with a leather scabbard, and once stabbing him in the back with an ice pick as he lay on a couch. Again, however, they were able to reach a satisfactory solution of their problems and lived together without further difficulty until the summer of 1949, when Mrs. Anthony "again * * threw one of her fits and tried to kill [the accused] with a butcher knife" (R 31).

After Mrs. Anthony joined the accused at Fort Benning in April 1950, their marital relations again were unsatisfactory. The accused testified

> "* * she seemed to resent me, and every statement I made seemed to irritate her. She didn't seem to be in her right mind at times. I don't know how to explain it, but for no reason at all she would make threats to kill me, and I would walk away to avoid an argument. I made every effort possible to avoid any argument whatsoever" (R 32).

Major Paul R. Conrad, Headquarters, 39th Field Artillery, testified that the accused's performance of duty had "been of an excellent nature on all counts." In rating the accused, Major Conrad would "prefer him to most officers of his rank and experience * *." (R 44).

Lieutenant Colonel Roderick L. Carmichael, Jr., Executive Officer, 3d Infantry Division Artillery, testified that the accused had performed the duties of Counter-Mortar Radar Officer, and Assistant S-3 of the 39th Field Artillery Battalion "in a very satisfactory manner" during the month and a half the witness was in command of the 39th Field Artillery Battalion (R 45-46).

4. Discussion.

The accused is charged with assault and battery upon "Sally Anthony" in violation of Article of War 95. The essential elements of the offense of assault and battery in violation of this Article are no different from those of assault and battery in violation of Article of War 96. It must also be proved, however, that the act of the accused amounted to conduct unbecoming an officer and a gentleman. Such conduct is described by Winthrop as conduct which:

> "* * offend(s) so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession * *" (Winthrop, Military Law and Precedents (2d Ed, 1920 reprint) 711-712).

It must be ascertained if the record of trial under consideration establishes by competent evidence, first: that the accused did commit an assault and battery, as alleged, upon Sally Anthony, and, second, that the acts of the accused in so assaulting his victim amounted to conduct unbecoming an officer and a gentleman within the foregoing definition.

The evidence is conflicting as to the origin of the quarrel between the accused and his wife on 4 June 1950. If Mrs. Anthony's version alone is accepted, it must be found that the accused brutally assaulted her without provocation or excuse except for her opposition to his proposal to take the children swimming. On the other hand, if her testimony is disregarded and the accused's story is accepted, he must be found to be the unhappy spouse of a shrewish, ill-tempered woman prone to hysterical outbursts and physical attempts to take his life; who, acting in self-defense in repulsing a murderous assault with a butcher knife, slapped his wife with the back of his hand in an effort to shock her out of her hysteria. The evidence of Mrs. Anthony's physical condition immediately following the assault and battery upon her contradict the accused. Her jaw was broken. Her head bore unmistakable evidence of blows. Her ear was discolored. She was suffering from severe pain in the abdomen. Eight

days later her body still carried the external indicia of the blows she had received. Such evidence alone, without consideration of her testimony, establishes beyond question that she was the victim of a severe physical beating. By his own testimony, it was the accused who administered the beating.

The accused's testimony regarding the circumstances of the affair is further contradicted by the military police officer. Although the accused contended that his wife had stabbed him in the throat, Captain Land, who saw him within an hour after the fracas, noticed no marks on his throat and determined the blood on his shirt collar to have come from a cut lip.

The court was fully justified in rejecting the accused's defense and finding him guilty of assault and battery (MCM, 1949, subpar. 180k).

It remains to be determined whether the offense properly was charged as a violation of Article of War 95. Whether the accused's acts amounted to conduct in violation of the 95th Article of War depends upon all of the facts and circumstances of the case (CM 322536, Finnie, 71 BR 241,247). Assault and battery upon a woman frequently has been held to be a violation of the 95th Article of War (CM 279578, Loyd, 52 BR 255,261; CM 275715, Burleigh, 48 BR 137,142; CM 227747, Wescott, 15 BR 345,349), even where there has been provocation (CM 316965, Lascheck, 66 BR 139,141; but cf. CM 322536, Finnie, supra; see also CM 283737, Macintyre, 55 BR 151, 4 Bull JAG 422).

In CM 260331, Stone, 39 BR 203, the accused, concealing the fact that he was a married man, wrongfully persuaded Jessie Christine Faulkner O'Connell to marry him. Upon learning of the deceit which had been practiced upon her and calling the accused to account, the "accused 'got mad,' 'grabbed' her by the neck and choked her. She 'screamed' and he hit her in the face with both fists and 'ran out of the door'." She was found by a neighbor sitting on the stairs of the apartment "crying and moaning." The Board of Review did not appear to deem extended comment to be necessary, but stated: "The evidence is legally sufficient to support conviction under each Article." (95 and 96) (CM 260331, Stone, supra, at 207). In the instant case the assault and battery upon the victim was more brutal, her injuries were more extensive, and it was attended with more publicity. The Board of Review finds that the evidence is legally sufficient to support the conviction under Article of War 95.

5. Department of the Army records show that the accused is 31 years of age, married and has three children. He completed eight grades of elementary school. He enlisted in the Regular Army on 15 December 1936, attended the Field Artillery Officer Candidate School, and was appointed a Second Lieutenant, Field Artillery, upon graduation, 1 April 1943. He was promoted to the grade of First Lieutenant on 5 December 1944, and on 16 October 1947 was appointed a Captain, ORC. He served on active duty

as an officer from 1 April 1943 to 22 February 1946, and continuously since 23 July 1946. His efficiency ratings of record covering his service as an officer are: 3 excellent, 1 superior, and numerical ratings of 065, 068, 072, 096, 083 and 102.

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

C. P. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

Arthur Barkin, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342,775

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Harold H. Anthony, 01179766, Headquarters and Headquarters Battery, 39th Field Artillery Battalion, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

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

SEP 2 1950

I concur in the foregoing action.

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

25 September 1950

(GCMO 64, October 3, 1950).

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

JAGI CM 342985

AUG 30 1950

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by GCM, convened at Camp Carson, Colorado, 16 June 1950 and 13 July 1950. As to accused SMITH and PLEMMONS: Dishonorable discharge, total forfeitures after promulgation, and confinement for three (3) years, Disciplinary Barracks.
Recruit WILLIAM I. SMITH (US 53004336) and Recruit JOHN P. PLEMMONS (RA 44133532), both of Company I, 14th Infantry, Camp Carson, Colorado.	)	

HOLDING by the BOARD OF REVIEW
JOSEPH, TAYLOR and HORSTMANN
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 holding, to The Judge Advocate General under the provisions of Article of War 50e.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Recruit then Private William I. Smith, Company "I", 14th Infantry and Recruit then Private John P. Plemmons, Company "I", 14th Infantry, acting jointly and in pursuance of a common intent, did, at Camp Carson, Colorado, on or about 2 April 1950 feloniously steal, four (4) caliber 45 pistols, value in excess of $50.00, the property of the United States.

Each accused pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of three and two previous convictions was introduced as to accused Smith and Plemmons, respectively. Each of the accused 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 might direct for three years. The reviewing authority, as to each accused, approved the sentence, designated the United States Disciplinary

Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army might direct, but not in a penitentiary, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The pertinent evidence adduced by the prosecution showed that on 1 April 1950, Corporal Robert E. Shouse was charge of quarters of Company "I", 14th Infantry, Camp Carson, Colorado (R. 9). At about 2330 hours he locked the supply room door and put the keys in a drawer of the first sergeant's desk. The following morning the charge of quarters notified Corporal James T. Huber, supply sergeant for the above mentioned organization, that the keys to the supply room were missing (R. 9, 10, 11). Thereafter, the supply sergeant unlocked the door to the supply room with his own key and found that the footlocker containing ordnance items was open, an inventory showing a shortage of four (4) .45 caliber pistols (R. 11). He identified by the serial numbers four (4) .45 caliber pistols, M-1911 A-1, introduced in evidence by the prosecution as the pistols that were missing at the time he took his inventory (R. 12).

Accused Plemmons was arrested by William H. Hawkins, of the Pueblo Police Department, on 2 April 1950, at approximately "seven o'clock in the evening" (R. 15). When arrested, Plemmons had in his possession a suitcase containing four (4) .45 caliber pistols (R. 16) which were subsequently identified as the pistols that were missing from the supply room of Company "I" (R. 16, 23).

On 3 April 1950, after being warned of their rights under Article of War 24, each accused made a written statement in the presence of Walter H. Leuthard, an Investigator of the Provost Marshal's Office, Camp Carson, Colorado. These statements were subsequently admitted in evidence as Prosecution's Exhibits 6 and 7. The law member correctly instructed the court that the statement of each accused could not be considered as evidence against the other (R. 25, 27; par. 127b, MCM, 1949).

Plemmons admitted in his statement that he took the keys to the supply room from the first sergeant's desk and that he removed the pistols from the supply room.

Accused Smith's statement is as follows:

JAGI CM 342985

"I left the company about 2100 hours Saturday evening (1 Apr 50) and caught a cab into town. I stayed up there (town) until around 2430 hours. I then came back out to camp in a cab. PLEMMONS went over to the orderly room and in a little while came back with (4) 45 modle pistols. I took two (2) of them and put them in my bosom and not being able to start the car we left it and caught a yellow cab back into town around 0200 hours and then drank coffee in the Ranch Cafe and went over to the Central Cab Stand and stayed there until around 0800 hours Sunday (2 Apr 50). I then went to the Bus Station where I shaved and took the two (2) pistols and put them in a suit case and around 0915 hours I got on a bus and went to Pueblo, Colorado. I then put the suitcase in a locker and gave the keys to PLEMMONS and that was the last time I seen (sic) the suitcase. I came back to Camp from Pueblo around 100_ hours Monday (3 Apr 50)."

The value of a .45 caliber pistol was established as being thirty-eight dollars ($38.00) (R. 27).

The accused were properly advised of their rights as witnesses and both elected to remain silent (R. 29). Evidence was not introduced in behalf of either accused.

4. The record of trial is legally sufficient to support the findings and the sentence as to accused Plemmons. The only question presented by the record concerns the legality of the findings of guilty and the sentence as to accused Smith.

With reference to joint offenses, the Manual for Courts-Martial, in pertinent part, provides:

"A joint offense is one committed by two or more persons acting together in pursuance of a common intent. Anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal; and anyone who causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such. But an accessory after the fact cannot be charged as a principal. A person whose only connection with a larceny was that he received the stolen goods, knowing them to be stolen, cannot be charged with the larceny, although he may be charged with wrongfully receiving stolen property." (Par. 27, p. 21, MCM, 1949).

The necessary elements of proof which must be established before an accused may be found guilty of aiding, abetting, counseling, commanding, inducing, or procurring the commission of a crime are:

"(1). Preconcert of action or prior arrangement with the principal actor, plus presence at the crime; or

(2). Overt act aiding or encouraging the crime done with intent to aid or encourage * * *"
(CM 312657, Reck and Montgomery, 62 BR 247, 255).

5. The evidence of record fails to establish that there was a formal agreement or tacit understanding between the two accused to steal the pistols. (par. 127b, MCM, 1949). Neither does the evidence establish that Smith was either present at the time the crime occurred nor that he by some overt act aided or encouraged the commission of the crime. Smith's statement that "Plemmons went over to the orderly room and in a little while came back" with the pistols, in the absence of evidence to the contrary, precludes a finding that Smith was present at the time the crime was committed. The prosecution offered no evidence tending to indicate that Smith committed an overt act in aiding or encouraging the crime. We are, therefore, of the opinion that Smith was not an "aider" or "abettor", as contemplated by the Manual for Courts-Martial, so as to be chargeable as a principal.

6. The only question remaining for consideration is whether or not Smith's actions in helping remove the pistols to Pueblo, Colorado, is sufficient to constitute him a principal.

In CM 210619, Jewell, 9 BR 283, the Board of Review was confronted with a similar question. In that case the accused aided another soldier, Private Goad, in "stripping" a car that Goad had previously stolen. Jewell admitted that Goad informed him that the car was stolen prior to the time that they removed the tires and battery from the car. The Board held that Jewell was not guilty of larceny but that he might be charged with receiving stolen property or with being an accessory after the fact. We think that the decision in the Jewell case, supra, is decisive of the case under consideration. While Smith may be guilty of receiving stolen property, in violation of Article of War 96, he is not, based on the record of trial, guilty of larceny.

Insofar as the case at hand appears to be contrary to the principle enunciated in CM 332232, Lillard-Anderson, 81 BR 61, 62, to the effect that "the legal possession of goods stolen continues in the true owner; and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation," it is the opinion of the Board of Review that the cases are sufficiently distinguishable upon the facts so as not to

be in conflict as to the legal consideration involved. In the Lillard-Anderson case, supra, the Board of Review used the theory in holding legally sufficient an assault with intent to commit a felony where the two accused assaulted a guard while attempting to remove cigarettes from the confines of a dock area. There it may have been considered that although the accused had the stolen property in their possession at the time of the assault, that the removing of the property beyond the confines of the dock area was a necessary part of the larceny. In the instant case, the Board is of the opinion that the larceny was in fact completed prior to the time that Smith received two of the pistols.

7. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to sustain the findings and the sentence as to accused Plemmons and legally insufficient to sustain the findings and the sentence as to accused Smith.

Robert H. Joseph, J. A. G. C.

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

John W. Instenum, J. A. G. C.

(204)

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

JAGU CM 342985

UNITED STATES v. Recruits WILLIAM I. SMITH, US 53004336, and JOHN P. PLEMMONS, RA 44133532, both of Company I, 14th Infantry, Camp Carson, Colorado	)	FIFTH ARMY Trial by G. C. M., convened at Camp Carson, Colorado, 16 June and 13 July 1950. Each: Dishonorable discharge, total forfeitures after promulgation, and confinement for three years. 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(4) the record of trial by general court-martial in the case of the soldiers named above and the holding 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 each accused pleaded not guilty to and was found guilty of the joint larceny of four caliber .45 pistols, value in excess of $50.00, the property of the United States, at Camp Carson, Colorado, on or about 2 April 1950. Evidence was introduced of two previous convictions by special court-martial and one by summary court-martial as to the accused Smith and of two previous convictions by special court-martial as to the accused Plemmons. Each accused 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 three years. The reviewing authority, as to each accused, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and withheld the order directing execution of the 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 sentence as to the accused Plemmons and legally insufficient to support the findings of guilty and the sentence as to the accused Smith. The Judge Advocate General has not concurred in the Board's holding as to each accused.

3. The evidence is substantially as set forth in the holding by the Board of Review. The Judicial Council concurs with the Board in its conclusion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to the accused Plemmons.

4. With respect to the accused Smith, the question is whether the evidence establishes his guilt of the larceny alleged as an aider and abettor of the accused Plemmons, a member of Smith's company. The corpus delicti of the larceny was established by evidence that four Government-owned, caliber .45 pistols, which were missing from the company supply room on the morning of the alleged theft, 2 April 1950, were found with a suitcase in the possession of Plemmons in the evening of the same day. Smith, in his pretrial statement made the following day after due warning as to his rights, admitted that sometime after 12:30 a.m. on 2 April, while in camp, Plemmons brought four "45 modle" pistols, two of which Smith took and placed in his "bosom," after which the two accused took a cab to town; the next morning Smith placed the two pistols in a suitcase, which he left in a locker in Pueblo, Colorado, giving the "keys" to Plemmons. This evidence, in our opinion, establishes that Smith actively aided and abetted Plemmons in removing the pistols from the camp where Plemmons had stolen them. The question is whether such participation by Smith made him an aider and abettor in the larceny and thus guilty as a principal (18 U.S.C. 2; MCM 1949, par 27, p 21). The Board of Review has held that since the larceny was in fact completed prior to Smith's receipt of the two pistols, he did not aid or abet Plemmons in the larceny.

In CM 332232, Lillard and Anderson, 81 BR 53, the accused assaulted a gate guard for the purpose of effectuating the removal from a Tidal Basin Area of cigarettes which had been taken from a ship. The Board of Review held that the evidence supported the accused's conviction of assault with intent to commit the felony of larceny, on the common law principle that the legal possession of goods continues in the true owner, and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation; also that a thief is stealing property from the time he takes it up until he lays it down. The Lillard-Anderson case was followed in CM 340608, Brutout, et al, BR-JC, May 1950, wherein the Judicial Council, in concluding that the record of trial was legally sufficient to support the conviction of the accused Meehan of the offense of "joyriding" in a military truck, used the following language:

> "With respect to Meehan, the evidence shows that he sat on the front seat of the truck next to Brutout, the unauthorized driver, whom he knew by name. Meehan heard Brutout tell the sentry at the gate that his name was 'Plack.' This false identification, under the circumstances, was ample notice to Meehan that Brutout had

no authority to drive the truck, yet Meehan remained silent and acquiesced in its continued unauthorized operation. Meehan made no claim that he believed Brutout had authority to drive the truck. * * * This conclusion [that Meehan was an aider and abettor] is not altered by the fact, assuming it to be such, that Meehan was unaware that Brutout lacked authority to drive the truck up to the time of his false identification. In law, the unlawful taking and use amounted to a new unlawful taking and use every moment it was continued (See CM 332232, Lillard and Anderson, 81 BR 53, 61-62). Meehan aided and abetted in its continuation from the time the truck left the gate."

A recent Virginia case well illustrates the principles involved herein (Dunlavey v. Com. (1945), 184 Va. 521, 35 S.E. 2d 763, 765). The defendant in that case was convicted of larceny of an automobile:

"The crime here consisted of moving the automobile by the accused in order to get it started and not in receiving the parts taken from it of the value of $15. When he moved the automobile the accused knew it had been stolen. He moved it in pursuance of a previous agreement between him and Hall, the thief, to the effect that the accused would purchase certain parts which were to be stripped from the automobile. The movement was accomplished by the accused pushing the automobile with his own automobile in order to get the stolen automobile started. It was then driven from Linden street to a secluded section of Bryan Park by Hall and others. The accused followed in his own automobile to Bryan Park where the stolen automobile had been brought to a stop. There he was apprehended by a park policeman, and the parts taken from the stolen automobile were found in his own automobile. This conduct on the part of the accused amounted to larceny of the automobile.

"The part taken by the accused was one incident of a continuous transaction. He was in the possession of the automobile when he started it by pushing it, even though his possession might have been a joint one. His conduct amounted to a trespass upon the constructive possession of the true owner with animus furandi.

"Larceny has been held to be a continuous offense. This seems to be the weight of authority in other jurisdictions. * * *"

As the Virginia court points out, there is some conflict of authority, but the general rule is that one who joins with a thief and assists in the asportation and disposal of stolen property, knowing at the time he does so that the thief acting with him is in the act of carrying away the property of another, is equally guilty of larceny, even though he was not present at the taking and neither instigated

nor conspiredto commit the larceny. (Good v. State (1922), 21 Okl. Cr. 328, 207 P. 565, 29 ALR 1029; 32 Am Jur, Larceny, Sec. 49, p 948; 52 CJS, Larceny, Sec 58, p 849.)

In the instant case it clearly appears that Smith joined with the thief, Plemmons, in effectuating the removal of the pistols from the camp to a place of comparative security. That he was aware that the pistols had been unlawfully appropriated cannot be doubted. We perceive no reason why the general rule, which has heretofore been applied by Boards of Review, should not apply in this case and be determinative of Smith's guilt of larceny as an aider and abettor, even though he may have had no connection with the larceny until after the original appropriation by Plemmons.

We have not overlooked the case of CM 210619, Jewell, 9 BR 283, cited by the Board of Review herein, which in our opinion appears to be distinguishable on its facts from the instant case. In the Jewell case the evidence showed that an automobile had been stolen in Portland, Oregon, and driven to Vancouver, Washington, ten miles away, and that thereafter the thief drove the car to Fruit Valley, apparently near Vancouver, where the accused assisted the thief in stripping and selling the tires and battery. The Board of Review held that since the larceny of the automobile was complete before the accused participated in its dismantling, he was guilty not of larceny of the tires and battery as charged, but of being an accessory after the fact to the larceny of the automobile and of receiving stolen goods, and that the record of trial accordingly was legally insufficient. The value of the Jewell case as authoritative precedent, in any event, is impugned by the fact that The Judge Advocate General did not concur in the Board's holding of legal insufficiency. His grounds were that if the larceny of the automobile had been complete, the accused committed a new trespass against the true owner with respect to the tires and battery; and the further ground that if the taking and dismantling of the automobile were viewed as a single larceny, the accused's participation in the asportation and disposition of the property made him guilty of larceny under the general rule which we are applying in the instant case (9 BR 300-303). The Secretary of War agreed with the conclusion of The Judge Advocate General and confirmed the sentence. Whatever value as authority the holding of the Board of Review in the Jewell case may have had, we are of the opinion that in so far as it is inconsistent with this opinion it should not 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 to each accused.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr

JAGE CM 342985 1st Ind

JAGO, SS USA, Washington 25, D. C. 13 SEP 1950

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Dept of the Army, Washington 25, D. C.

In the foregoing case of Recruits William I. Smith (US 53004336) and John P. Flemmons (RA 44133532), both of Company I, 14th Infantry, Camp Carson, Colorado, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally sufficient to sustain the findings and the sentence as to accused Flemmons and legally insufficient to sustain the findings and the sentence as to accused Smith. 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.

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

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

In the foregoing case of Recruit William I. Smith, US 53004336, and Recruit John P. Plemmons, RA 44133532, both of Company I, 14th Infantry, Camp Carson, Colorado, upon the concurrence of The Judge Advocate General the sentence as to each accused 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
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

OCT 24 1950

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

I concur in the foregoing action.

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

27 October 1950

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

SEP 13 1950

JAGH CM 342992

UNITED STATES v. First Lieutenant ROBERT E. LEE STREET (0-546667), Tokyo Area, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command.	HEADQUARTERS AND SERVICE GROUP GENERAL HEADQUARTERS, FAR EAST COMMAND Trial by G.C.M., convened at Tokyo, Japan, 3 August 1950. Dismissal, total forfeitures after promulgation, and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and FITZHUGH
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 93rd Article of War.

Specification 1: In that First Lieutenant Robert E. L. Street, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command, did, in conjunction with Sergeant Lawrence S. Kiyabu, 319th Military Intelligence Company, General Headquarters, Far East Command, at Tokyo, Japan, on or about 16 December 1949, by force and violence and by putting him in fear feloniously steal from the presence of Chitose Funakoshi about 340,000 yen of the value of about $944.45, the property of Chitose Funakoshi.

Specification 2: In that First Lieutenant Robert E. L. Street, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command, did, in conjunction with Sergeant Lawrence S. Kiyabu, 319th Military Intelligence Company, General Headquarters, Far East Command, at Tokyo, Japan, on or about 25 February 1950, by force and violence and by putting him in fear feloniously steal from the presence of Yong-jen Tsai, Military Payment Certificates of the value of about $760.00, the property of Yong-jen Tsai and the Shin How Trading Company.

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Robert E. L. Street, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command, did, in conjunction with Sergeant Lawrence S. Kiyabu, 319th Military Intelligence Company, General Headquarters, Far East Command, at Tokyo, Japan, on or about 11 April 1950, unlawfully and feloniously pretend to be an agent of the Criminal Investigation Division of the United States Army and in such pretended character wrongfully obtain about 97,000 yen of the value of about $269.44, Military Payment Certificates of the value of about $150.00, and Foreign Trader Certificates of the value of about $100.00, the property of Masa Saito.

Specification 3: In that First Lieutenant Robert E. L. Street, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command, did, in conjunction with Sergeant Lawrence S. Kiyabu, 319th Military Intelligence Company, General Headquarters, Far East Command, at Tokyo, Japan, on or about 8 March 1950, unlawfully and feloniously pretend to be an agent of the Criminal Investigation Division of the United States Army.

Specification 4: (Disapproved by the reviewing authority).

Specification 5: In that First Lieutenant Robert E. L. Street, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command, did, in conjunction with Sergeant Lawrence S. Kiyabu, 319th Military Intelligence Company, General Headquarters, Far East Command, at Tokyo, Japan, on or about 25 February 1950, unlawfully and feloniously pretend to be an agent of the Criminal Investigation Division of the United States Army and in such pretended character wrongfully obtain Military Payment Certificates of a value of about $760.00, the property of Yong-jen Tsai and the Shin How Trading Company.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Charge I, guilty of Specification 2, Charge I, except the words "by force and violence and by putting him in fear" of the excepted words, not guilty, and guilty of Charge I. He was found not guilty of Specification 1, Charge II, guilty of Specifications 2, 3 and 5, Charge II, and guilty of Specification 4, Charge II, except the words "pretend to be an agent of the Criminal Investigation Division of the United States Army and in such pretended character wrongfully,"

of the excepted words, not guilty, and guilty of Charge II. 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 disapproved the finding of guilty of Specification 4 of Charge II, 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:

The accused, First Lieutenant Robert E. L. Street, during all the time involved in this case, was a member of the military service and assigned to the 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command (R 8,45-47,50).

As to Specification 1 of Charge I.

On 16 December 1949, the accused and several other individuals entered the place of business of one Chitose Funakoshi (R 25). One of the persons with the accused, a Nisei, named Sergeant Lawrence S. Kiyabu, did the talking, presented a billfold containing a metallic badge, and said "he was CID" (Criminal Investigation Division) (R 25-27,31). The accused was present and holding a pistol on Funakoshi and others in the store while the CID "credentials" were being shown (R 25,31). Funakoshi realized that the Nisei and the others with him, including the accused, were impersonating the CID but there was nothing he could do "because the gun was pointed at me" (R 27). While in the store of Funakoshi, accused and his associates took possession of a package containing 340,000 yen, the property of Funakoshi, and this package they carried away (R 25, 26,31,32).

As to Specification 2 of Charge I and Specification 5 of Charge II.

On 25 February 1950 a Japanese National entered the place of business of Yong-jen Tsai and traded Military Payment Certificates for yen (R 9,10,18,21). Immediately afterwards, the accused and several other persons came into the store, searched the persons therein, and found $760.00 worth of Military Payment Certificates which they later carried away. These were the same certificates Yong-jen Tsai had just purchased (R 10,11,12,20). Accused and his associates represented themselves as members of the CID (R 10,12,14,17,18,22). During this whole transaction the accused held a pistol on Yong-jen Tsai, and the others in the house, putting him in fear (R 11,12,18,21,24).

As to Specification 2 of Charge II.

On 11 April 1950, the accused and several other persons entered the store of Masa Saito, searched the occupants and took from the place 97,000 yen ($269.44), Military Payment Certificates worth $150.00, and Foreign Trader Certificates of the value of $100.00, all the property of Masa Saito. The accused showed Saito a yellow badge which he represented was his CID symbol of authority (R 32-35).

As to Specification 3 of Charge II.

On about 8 March 1950, the accused and two other persons entered the house of Shiro Suzuki. In the accused's presence, his companions presented supposed credentials and stated that they were all from the CID (R 42,43).

b. For the defense.

Four fellow agents in the same CIC detachment as the accused testified that his character and efficiency as an agent were excellent (R 45-52).

The accused after being advised of his rights as a witness elected to remain silent (R 53).

4. Discussion.

a. In general.

The evidence throughout the entire case against the accused is uncontradicted and certain. It shows that on four different occasions the accused and the same companions entered the houses or places of business of Japanese Nationals for the purpose of taking their property by force while unlawfully pretending to be agents of the Criminal Investigation Division of the United States Army. On three of these occasions, the accused and his associates took and carried away yen, Military Payment Certificates, or Foreign Trader Certificates valued in United States money as follows: $944.45 from Chitose Funakoshi on 16 December 1949, $760.00 from Yong-jen Tsai on 25 February 1950, and $519.44 from Masa Saito on 11 April 1950.

b. Specific offenses.

The evidence shows that the accused on 16 December 1949 held a pistol on Chitose Funakoshi and others while the accused's confederate picked up 340,000 yen, the property of Funakoshi. Such property was taken forcibly from the presence of its owner by putting him in fear. This proof is sufficient to sustain the finding of guilty of robbery under Specification 1, Charge I.

By exceptions and substitutions, the court found the accused not guilty of robbery under Specification 2 of Charge I but guilty of the lesser included offense of larceny. The facts are sufficient to prove a theft of the property of Yong-jen Tsai on 25 February 1950, of the value alleged.

The evidence, as it applied to the allegations of false personation under Specifications 2, 3 and 5 of Charge II, indicates that on three different occasions the accused, in conjunction with another, represented himself as being a member of the CID with the intent to deceive Japanese Nationals. On two of these occasions, as in effect alleged in Specifications 2 and 5, the facts show that the accused's false personation was with intent to defraud and that he did in fact obtain thereby valuable property of the Japanese Nationals.

It is apparent from its findings that the court took judicial notice that the official exchange rate was 360 yen to one dollar in United States money. This the court was entitled to do (CM 316809, Pardee, 66 BR 59,65; CM 312414, Brown, 62 BR 155,161,162; CM 340087, Mathis, 17 Feb 1950).

From the foregoing it is concluded that the evidence is legally sufficient to sustain all of the findings of guilty under the 93rd and 96th Articles of War.

The reviewing authority designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides on page 97:

> "If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving . . . dismissal and confinement of officers, . . . the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War 48(c)(3), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

5. Department of the Army records show that the accused is 29½ years old having been born 6 March 1921, at Worcester, Massachusetts. He is an adopted child. He went through grade school and high school at Westboro, Massachusetts. His main civilian occupation is a machinist. He attended United States Maritime School for seven months and graduated as a marine engineer. On the basis of this training, he received a direct appointment as a second lieutenant 7 March 1944, and was promoted to first lieutenant, 19 August 1945. In July 1945 he was released from active duty and promptly enlisted as a master sergeant. He continued in this capacity until recalled to active duty as a first lieutenant in December 1948. Under the numerical rating system, from 10 March 1944 to 24 January

1947 he received ratings from 3.6 to 4.8; over-all his rating was excellent. He has three over-all numerical efficiency ratings of 078, 080, and 089. The accused is married, his wife is currently reported as living in Honolulu.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, as modified by the reviewing authority, and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for three years is authorized upon conviction of an officer of violations of Articles of War 93 and 96.

C. P. Hill, J.A.G.C.

(Absent), J.A.G.C.

William C. Fitzhugh, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 342992

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Robert E. Lee Street, 0-546667, Tokyo Area, 441st Counter Intelligence Corps Detachment, General Headquarters, Far East Command, 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

OCT 1 0 1950

I concur in the foregoing action.

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

10 October 1950

(GCMO 71, October 16, 1950).

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

CSJAGK - CM 339254

29 MAR 1950

UNITED STATES v. General Prisoners WILLIAM D. BARNES, R/N 1964, RA 14220661, CLARENCE E. COONS, JR., R/N 1428, 37633985, JOHN LEE, R/N 2230, 33402971, and RICHARD SPASOFF, R/N 3563, RA 15249741, all of Branch United States Disciplinary Barracks, Camp Cooke, California.	SIXTH ARMY Trial by G.C.M., convened at Camp Cooke, California, 7-13 September 1949. EACH: Death.

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

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1. The record of trial in the case of the general prisoners 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 jointly upon the following charge and specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that General Prisoner William D. Barnes, General Prisoner Clarence E. Coons, Jr., General Prisoner John Lee, and General Prisoner Richard Spasoff, Branch United States Disciplinary Barracks, Camp Cooke, California, acting jointly and in pursuance of a common intent, did, at Camp Cooke, California, on or about 10 June 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Charlie W. Taylor, Jr., a human being, by stabbing him with knives and by beating him with a club.

The accused, individually and jointly, pleaded not guilty, "denying each and every, all and singular, the allegations of the charge, and the charge, *** specifically deny that they are the persons as stated in the charge, with their status noted, denying that they have any

participation or that they are named in the specification at all; conceding only that their names are William D. Barnes, Clarence E. Coons, Jr., John Lee, and Richard Spasoff." Each accused was found guilty of the specification and the charge and sentenced to death. Evidence of one previous conviction was considered as to the accused Barnes and Spasoff. The reviewing authority approved the sentences as to each accused and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

A duly authenticated copy of a Letter Order of the Secretary of War, dated 30 June 1946, Subject: "Trial of Persons for Murder or Rape in Violation of Article of War 92" (Pros Ex 1), together with a first indorsement from The Judge Advocate General to the Commanding General, Sixth Army, Presidio of San Francisco, California, dated 3 August 1949, advising that the Secretary of the Army authorized trial of the accused by general court-martial (Pros Ex 2), were admitted in evidence for the limited purpose of showing "jurisdiction" (R 23,25,28,65-67). The court was requested to take judicial notice that peace, in the complete sense, has not been declared in connection with the recent hostilities against the Empire of Japan and Germany (R 23).

Warrant Officer Junior Grade Albert L. Aycock, Prison Personnel Officer at Camp Cooke, California, who was charged with the responsibility of maintaining records of general prisoners, testified that the records of the Branch Disciplinary Barracks, Camp Cooke, California, show that one Clarence E. Coons, John Lee, Richard Spasoff and William D. Barnes are confined at that institution in the status of general prisoners (R 29-30). The court took judicial notice of Section II, Army Regulations 600-375, dated 6 January 1948 (R 31).

At about 0745 hours, 10 June 1949, Sergeant Oran A. Parker came on duty as the Assistant Cell Block Commander of "Upper I Cell Block" at the Branch United States Disciplinary Barracks, Camp Cooke, California. The four accused were confined in Upper I Cell Block (R 82). Upper I Cell Block contained an upper and a lower tier of cells, the upper tier being assigned to "permanent detention" prisoners and the lower tier to "administrative segregation" prisoners. The accused Barnes, Coons and Spasoff were confined in individual cells on the upper tier and Lee was assigned to a cell on the lower tier (R 290). At the time Sergeant Parker assumed his post, three prisoners, namely, Charlie W. Taylor, Jr. (negro, the deceased), John Lee (accused), and Charles W. Taylor (white) were at liberty as orderlies within the Upper I Cell Block (R 117A-118, 291-292). Shortly after Sergeant Parker entered the cell block the accused Lee came over to him and told him that the accused Coons and Barnes were detailed as painters, and asked, "Do you want to let them

out so they can start painting?" Parker replied that he could not let them out (from their cells) until he found out for sure that they were painters (R 73). Lee left but returned later and again asked Parker about releasing Coons and Barnes to do their painting (R 65). Parker then received a telephone call at his office in the cell block. In response to that call he proceeded to the upper tier of cells and released the accused Spasoff from his cell (R 85-86). Parker told Spasoff that he (Spasoff) was to see the Supervisor of Prisoners and directed him to go down the stairs to the "cage" and to wait there for a guard who was to come for him (R 88). Meanwhile, Lee went up to the upper tier of cells where Coons and Barnes were confined. As Spasoff started down the stairs to the "cage," pursuant to Sergeant Parker's directions, Lee called to Parker to come over to Coons' and Barnes' cells because they wanted to talk to him (R 88, 117A-118,381). When Parker reached the cells of Coons and Barnes, Lee again told him that Coons and Barnes were painters and "to let them out so they could start painting" (R 89,118-119,382). Parker repeated that he would have to check (R 89). While Parker, Lee and Coons were engaged in conversation, Spasoff came up to Parker and asked, "Are you going to leave Coons and Barnes out?" (R 91). Parker replied, "It couldn't be done" (R 92). Then Lee and Spasoff repeated their questions and Spasoff pulled a knife out of his right hand pocket and held it against Parker's back (R 92,119). Lee, who had been standing about three feet away from Parker, moved closer toward Parker and told him, "You'd better open up." Parker refused and then Lee, with his hand in his pocket, again said, "You'd better do it, Sergeant" (R 93,396). Induced by the threat of Spasoff's knife, Parker turned around and proceeded down the corridor toward the control box to open Barnes' and Coons' cell. Spasoff and Lee walked down the corridor with Parker. Spasoff, with knife in hand, walked adjacent to Parker on the latter's left-rear and Lee on his right. The blade of Spasoff's knife was between four and seven inches long (R 94, 119-122,148,162, 190,383-384). At the control box, which controls the locking of the cell doors on the upper tier, Parker indicated that he did not know which cells Coons and Barnes were in. Lee told Parker the number of their cells (R 95,384,396). Fearing the threat of Spasoff's knife, Parker unlocked the cells of Coons and Barnes (R 95,114,384,396). Parker then proceeded down the stairs to the "cage" door and there told Corporal Dunleavy, the guard, and Sergeant Dean, the turnkey, that "Spasoff would be coming out" (R 95-96,136). Coons, Barnes, Spasoff and Lee followed Parker down the stairs to the lower tier of cells (R 95,114,134A). When Parker turned around at the "cage" door he saw inmate Charlie W. Taylor (deceased) standing in the doorway to the shower, clad only in a pair of shorts (R 97,143). Taylor "hollered" to Parker, "What you do, takin these guys out to jump on me?" (R 160). Taylor was shielding himself with a folded steel chair and Coons, Barnes and Spasoff were threatening him. Coons was holding a club raised over his head and Barnes and Spasoff each held a dagger or knife in his hand (R 97-98,114,143-145). Coons, Barnes and Spasoff "rushed" Taylor who dropped the steel chair and ran down the

corridor with the three accused chasing him (R 99,145). He fell to the floor in front of Cells 8 and 9. Parker ran down the corridor to within five feet of the group. Taylor was rolling from side to side on his back. Spasoff, Coons, Barnes and Lee were around the prostrate Taylor (deceased). Coons was striking and making passes at Taylor with his club; Barnes and Spasoff were "bending over Taylor, striking him, pushing their arms at him." Spasoff had a knife in his hand. Lee, to the best of Parker's knowledge, "*** was just standing -- standing there." Parker did not see Lee strike any blows (R 101-104).

General Prisoners Ellis K. Johnson and Dallas Coleman were confined in Cells 12 and 14, respectively, and witnessed the assault on Taylor from their cells by means of hand mirrors which they held outside of the grill doors of their cells (R 160,219-220). General Prisoner Shirley S. Barney, who was confined in Cell 11, witnessed the assault directly from his cell (R 185-186).

Inmate Johnson testified that he saw Taylor (deceased), Spasoff, Barnes and Coons come out of the shower room toward his (Johnson's) cell. Taylor was "Trying to defend himself, to fight." Coons was striking Taylor with an iron bar and the rest of them (Barnes and Spasoff) were punching him and threatening him with a knife. Spasoff had a knife in his hand and it looked "like he was going to stick the guy." Taylor backed up into a ping pong table that was in front of Cells 7 and 8 and fell down on his back. Lee stepped between Taylor and the rest of the group and held his hands up as though he was defending Taylor. Taylor got up and moved toward Cell 12. Coons, Barnes and Spasoff got behind Taylor and again started to strike and hit him. Taylor got as far as Cell 11 and again fell on his hands and knees. "Coons was beating him [Taylor, deceased] with the iron bar and the rest of them were jabbing and telling him to get up and get out." Barnes and Spasoff had knives (R 161-169).

Inmate Barney first saw Taylor, Coons, Barnes, Spasoff and Lee when they were in front of his cell (Cell Number 11). Taylor was down on the floor "kicking and hollering." Coons, Barnes and Spasoff were standing around Taylor. Coons had something in his hand about 18 to 20 inches in length and about one inch in diameter which was wrapped in tape. Spasoff had a knife with a blade about seven inches long which was "crooked." Spasoff struck at Taylor with the knife but he did not see the knife "go in" (R 186-189).

Inmate Coleman saw Taylor when the latter was standing about four cells to the left of his (Coleman's) cell (Cell Number 14). Coons, Barnes, Spasoff and Lee were around Taylor when Taylor was being hit over the head with "some kind of instrument." Taylor went down to a sitting position "and he was still being hit on the head, so I [Coleman] quit looking." Taylor was being hit with something about two feet long and about an

inch in diameter. Coleman could not say who was holding the instrument but he definitely saw Taylor being struck. Taylor was saying, "Give me a break" (R 221-224).

During the assault, inmate Johnson saw a wound under Taylor's right shoulder blade and blood all over his body (R 169-170). Inmate Barney saw a wound about 1-3/4 inches in circumference on Taylor's back and blood on his head (R 189).

The knife used by Spasoff was described by Sergeant Parker as being similar to a knife depicted in a photograph (Pros Ex 4 for Iden.), which is a picture of a crudely made knife about nine inches in length with a blade measuring about 4-3/4 inches and a handle wrapped in tape about 4-1/4 inches in length (R 94). Elsewhere throughout the record it is described by various witnesses as a "knife" or "dagger," the blade being about four to seven inches long and about one inch wide at the hilt, tapering down to a point (R 148); a "long knife," "with a tape or strings around it," about 1/4 inch or less thick (R 162); the blade was "crooked" or "curved sideways" (R 188), about seven inches long with blood on it (R 190-191).

The club used by Coons was variously described as an "iron pipe" about 18 inches long and about the size of a nickel or quarter in diameter with white strips of material wrapped around it (R 139); an "iron bar" about 18 inches in length or longer and about as big around as a broom handle, wrapped up in rags and with blood or red stains on the bar (R 167-168); "something" wrapped up in tape about 18 to 20 inches in length and one inch in diameter (R 187); "something about two feet long, *** an inch in diameter" (R 221).

When Spasoff backed away from Taylor in front of Cell 11, Taylor got up. Sergeant Parker left the scene and then noticed that Taylor was trotting after him toward the corridor gate. Parker and Taylor were admitted into the outer cell block by the turnkey and there Parker saw that Taylor was bleeding from a wound on the left side of his body. Taylor collapsed just as he cleared the door to the outer cell block (R 105-107, 146-147). Parker then went to the Out Patient Clinic in the Disciplinary Barracks to summon medical aid for Taylor (R 107).

After the assault, Coons, Barnes and Spasoff spoke to inmate Johnson at the latter's cell and each one of them told Johnson that he (Johnson) was the cause of what happened; that they would get him next and; that he would not leave the "institution" alive (R 170-172). Lee was not present during this conversation but, shortly before, Lee asked Johnson "how many guys did I [Johnson] see stabbing." Johnson replied he did not see anything (R 172).

About 5 or 10 minutes after Taylor (deceased) and Sergeant Parker

left the scene of the assault, the accused Lee started to mop up the corridor. At that time the accused Barnes went over to inmate Barney's cell and told Barney, "You're a rat; I'm going to get you" (R 193-194). About 30 minutes later, Barnes again visited Barney and told him "to write a statement out and tell Major Raven /Supervisor of Prisoners/ about what happened" (R 194-195). Because of threats made by Barnes and other threats made by inmate E. K. Johnson, inmate Barney wrote two statements, the first addressed to the accused Lee and the second, written shortly afterward, to Major Raven (R 197-198,200,205). On cross-examination of Barney as a prosecution witness, and at the request of the defense, these statements were admitted in evidence (R 197-200, 204; Def Ex A; R 209, Def Ex B). These exhibits read as follows:

"Dear Sir,

"By the time you get this letter I guess everything will be over, I was in cell 42, and Johnson came up there and ask me what was going on. I said nothing, and then he said why don't you move down stairs with us, I said I tried but the Sgt. said I couldn't and then he said, I'll get you down stairs and for me to leave everything to him. So about twenty five minutes the sgt. move me to cell elevean down stairs I don't know what he told them but they move me. And then when I was down here he told me that he told Taylor that I said that barns tried to set my bed afire. I swear I didn't say that to nobody, he then said if I didn't stick to it that he would beat the hell out of me. So I was scare and I didn't know what to do. Sir, I wish you would get me out of here, because I'm afraid Johnson will carry out his threat. I was sleep when I heard some hollering but I didn't see nothing. Sir, Johnson is the cause of this trouble that happen here.

"I am about to take some poison Sir to end my worrys. I drank green soap and some adsic to try and kill my self. I don't care what happen as long as you keep my cell look up. My life is in much danger now. Sir, please don't let Johnson know I wrote this to you because, I'm so scare I don't know what to do. I know Taylor was wrong but Johnson had no bussiness telling those lies I guess this wouldn't happen if he kept his big mouth out of it. Sir, I am now begging you for transfer from here, I hope you can see how much my life is in danger. Sir I haven't never messed up since I been in the stockade, and I never messed with anybody. So Sir, this is the honest to God truth.

"From General Prisoner Shirley S. Barney.

"Given to me this 10th day of June 1949 by G.P. John Lee.

W. R. Raven
Maj AGD" (Def Ex A)

"Lee, I want you to let barns and Coons and Spasaw to read this. I, Barney is willing to give myself up because I didn't know what was up. He came up stairs and starting asking me different questions you can ask Coons, and he'll tell you that we got along alright until some body put me up to that. I'll take the blaim for what ever happen everybody can tell the man I'm the blaim I know he the one cause of this trouble. I'm sorry now I liston to him.

"Don't let him see this because he'll beat me up for telling you this.

"I'm so scare now Lee I'm taking green soap and eating this aisse stuff for it is suppose to kill you if you eat it.

Shirley S. Barney" (Def Ex B).

The law member instructed the court that evidence of the statements made by Barnes to inmate Barney were binding only against the accused Barnes and not against the other accused (R 193).

On redirect examination witness Barney reiterated that "the reason I wrote this letter [Def Ex A], Sir, is because Barnes threatened me." That it is only true in some parts. That the part which says, "I was sleep when I heard some hollering but I didn't see nothing," is not true, and that the part which says, "A Sworn Statement" is not true because he was not sworn to that statement (R 200-203). He further testified that he wrote Defense Exhibit B "mostly because I was scared," and that only some of the statements contained in it are true. The statement, "I, Barney is willing to give myself up," is not true, and was made "Because when I said I was willing to give myself up I was meaning that mostly because I was trying to take the blame on myself about something I didn't know was happening." By the statement that he was willing to give himself up, the accused was referring to a previous incident concerning the setting of his bed afire for which he (Barney) was willing to be blamed (R 205-207).

At about 0820 hours on 10 June 1949, Major Harry E. Hoch, the acting Supervisor of Prisoners, was summoned to Upper I Block (R 108,227). When he arrived at the entrance of Upper I Block he saw an inmate (negro) lying face down on the floor, just outside of the door. This inmate was dressed in a pair of OD shorts and he was covered with blood. A large circular wound was on the upper part of his back. Behind the grilled entrance of the administrative segregation area he saw the four accused. They were clustered near the entrance of this area and appeared to be very excited, i.e., they were waving their arms and talking in an excitable tone of voice, all together and at one time. The accused Coons was holding what appeared to be an iron bar about 3/4 of an inch thick wrapped in white material or tape with blood or red stains on it. While

the accused were talking among themselves, Major Hoch heard the accused Lee say, "We got that dirty *** and we'll get the rest of them. At about the same time the other accused each said, "Yes, we did get him," or words to that effect (R 228-234).

Prior to 1100 hours on the day of the alleged incident and while the accused were in a group conversing among themselves, Sergeant Parker heard the accused Lee say, "This isn't the first man I've killed and it won't be the last" (R 110-112).

Major Wilbur R. Raven, the Supervisor of Prisoners at the United States Disciplinary Barracks, Camp Cooke, California, testified that he knew the accused as a result of his duties and daily contact with them since December 1948 and identified them as General Prisoner Spasoff, General Prisoner Barnes, General Prisoner Coons and General Prisoner Lee (R 288). At about 1100 hours on 10 June 1949, he arrived at the grilled door leading to Upper I Cell Block (R 271). He saw the four accused immediately behind the grilled portion of the administrative segregation cell block. When he approached the accused and was immediately in front of them accused Lee extended a note (Def Ex B) to him, saying, "I want this to be preserved in my behalf in the event this case comes to trial." Major Raven told the accused to return to their cell blocks but they refused. "They did nothing but stand and bicker ***." Major Raven then proceeded to his office (R 271-274). At about 1500 hours, Major Raven returned to the cell block with officers and guards and again told the accused to return to their individual cells and that he came prepared to use force if necessary, that the "jig was up" and, that it was going to be done and done then (R 275,277). After some reluctance, the accused Spasoff, Coons and Barnes each returned and was secured in his individual cell. The accused Lee remained behind the grilled portion of the cell block until all of the other accused were secured in their cells (R 278). Major Raven then entered the cell block and talked to Lee (R 279).

At the request of the prosecution and with the concurrence of the defense, the court, together with counsel for the prosecution and the defense, the accused and the reporter, inspected and viewed the scene of the alleged incident, namely, Upper I Block of the Branch United States Disciplinary Barracks, Camp Cooke, California. Major Wilbur R. Raven, Supervisor of Prisoners of that institution, was sworn as escort and conducted the view. Prior to the view, the law member read paragraph 75d, Manual for Courts-Martial, 1929, titled, "Views and Inspections", to the court (R 61-65, 73-80).

Dr. David E. Young, Jr., testified that on 10 June 1949 he was a member of the U.S. Army Medical Corps attached to the Branch United States Disciplinary Barracks, Camp Cooke, California. On that date between 0800 and 0900 hours he was at the Camp Cooke Station Hospital when he received a call to surgery at the Disciplinary Barracks

hospital. He proceeded immediately to the latter hospital and there found Charlie Taylor, whom he knew, on the operating table in a shock-like state with multiple cuts and lacerations. He described the patient's wounds as follows: Several transverse lacerations across the dome of the head extending on to the scalp. Edges of wounds were ragged and wound depth extended to the outer layer of skull. Quite a few bruised or contused areas over the front of head and parietal region. Lacerated wound near lower end of sternum or breast bone. Stab wound in right chest near right arm pit in the mid-axillary line, third interspace. Deep lacerations on left forearm. Two stab wounds on either side of spine below last rib about 3-1/2 inches from mid-line. Large lacerated wound of upper right posterior chest (R 33-34). Patient's blood pressure was taken immediately but, because he was in rather severe shock, witness was unable to determine the blood pressure (R 34). The primary object of medical treatment at that time was to have the patient recover from shock and to stop hemorrhage. As soon as patient's blood type was determined, blood plasma was given to him and witness proceeded to stop the hemorrhage as far as possible and also repaired the superficial wounds. Because of the patient's state of shock at that time it was not seen fit to fully explore the deep wounds, especially the one on the left lower back and the one in the front middle chest. The treatment after the initial treatment was to combat shock and to observe the patient. Witness' initial examination revealed that the stab wound on the chest separated the middle part of the sternum (breast bone) from the lower part of the breast and it was impossible to determine the exact depth of that wound at that time (R 34). The stab wound on the patient's back was 10 or 10-1/2 inches in depth (R 35). Witness had treated approximately 750 cases of severe wounds during his medical career and it was his opinion, based on this experience, that the wounds on the head of the patient Taylor were caused by a blunt instrument; the wounds on his back were caused by a long knife-like instrument, and the wound on the chest was caused by a long, slender, sharp-edged, knife-like instrument (R 36). Continuing his description of the initial treatment administered to the patient, witness testified that the patient was kept on the operating table until 11:30 a.m. to assure that he had recovered to a satisfactory degree from his shock and then was moved to a room in the hospital in the Disciplinary Barracks. The bleeding from most of the wounds had stopped, except that the wound in the left lower back continued to ooze a bit which caused witness some concern. It was packed with pressure bandages because the point of bleeding could not be located through superficial examination. When the witness first saw the patient, he felt that the patient was not in clinical shape to stand a thorough exploration of that wound at that time (R 36). Since the wound was about 10 or 10-1/2 inches deep, in a direct backward-forward, anterior-posterior position, in the region of the left kidney and the spleen, he stated, "to open a deep wound of that type would require opening the abdomen deep enough to see where the bleeding was coming from." Witness visited the patient in the hospital ward at intervals and checked his condition about 15 times. During these observations the patient seemed to rally from shock, his blood pressure

became stable but slight bleeding continued from the left lower chest, posteriorally, and shortly after the noonday period he began attempts to vomit. He retched and with increasingly severe pain in the left upper abdomen, in front, anteriorally, as the afternoon wore on, the muscles in the left upper abdomen started to become a bit rigid and tense. The retching and the attempted vomiting continued. Witness stated, "*** since there was something wrong here of a relatively serious nature and I wanted to go in and find what was wrong as soon as the man could stand it -- and I mean by 'stand it' until he had recovered sufficiently from shock," it was decided that exploratory laporatomy (operation to determine cause) was necessary. At that time it was determined that the patient had signs of "acute abdomen" (spreading peritonitis) and those signs made it imperative that witness go in and find what was causing the spreading peritonitis. At 1800 hours, he performed a "lithotomy incision" which was described as an incision beginning near the spine, comes below the lower rib and down into the front of the abdomen. This operation disclosed that there was a "through and through stab wound of the left kidney"; the small bleeding point was discovered which was ligated at the time. A stab wound of the liver was found which previously bled but had now ceased to bleed. The spreading peritonitis was caused by bleeding from that region which spreads through the abdomen (R 38-39). When the witness was asked to describe the condition of the patient during surgery, he testified as follows:

> "Well, as far as I was concerned, the patient seemed to do fairly well in the initial part of surgery. Of course that is really the problem of the anesthetist, to check the blood pressure and pulse of the patient, if anything turns up to notify the man who is doing the operating and the man seemed to withstand the surgery fairly well up until I started closing the incision, and at that time I noticed that the fresh bleeding in the incision, which is normally red, was becoming a bit dark and I, in passing, I just mentioned to the anesthetist, Captain Barbanti, that blood was getting a little bit dark and asked what the blood pressure was and he told me he just checked a little while ago and it seemed satisfactorily--it seemed satisfactory and he immediately checked the blood pressure and informed me that the blood pressure had very suddenly dropped and Captain Barbanti immediately gave the man oxygen and instituted plasma intravenously--gave the man plasma through the vein of the arm.
>
> "Q. And did you complete your sewing him up?
> "A. Yes, sir, I completed the surgery and the man returned to his room living.
>
> "Q. Did you observe him after he returned to his room?
> "A. Yes, sir, I went along down when we took the patient down to his room and the man was definitely in shock. In view

of the fact that emergency treatment had been instituted, I went back up to surgery and was directing my enlisted men about cleaning up the surgery and getting it ready for the next case, etcetera, and I then proceeded to take a shower and at the time I was taking the shower they called me and had me come down to Mr. Taylor's room right away and I went down and by the time I got in the room, when I got in the room, Captain Crittenden was there, and Taylor had already expired.

* * *

"Q. And did you determine to your own satisfaction that he had expired?

"A. Yes, sir.

"Q. Doctor, from your observation and treatment in this case, would you say that anyone of the wounds that you have described caused his death?

"A. Oh--now, by that question I assume you mean, did any one particular wound cause the man's death?

"Q. That's right, Doctor?

"A. No, sir.

"Q. Doctor, can you assign any medical reason why Charlie Taylor ceased to live?

"A. Oh, yes, he ceased to live because of shock and asphyxia.

"Q. Now, Doctor, can you elaborate a little bit then as to the cause of this shock, for instance?

"A. The causes of shock, in the hands of the best authorities, are even today a bit questionable. I would attribute the shock that developed in this man to nervous shock, loss of blood, the trauma to vital organs, liver and kidney. I believe I did mention nervous shock and blood loss?

REPORTER: Yes.

"Q. Doctor, in your opinion, did the injuries from which Taylor was suffering from when you observed him, give rise to the chain of circumstances which, combined with asphyxia, caused his death?

* * *

"A. Yes, I would.

"Q. Doctor, what do you mean by 'asphyxia'?

"A. Asphyxia, I believe, technically, is defined as indicating amount of oxygen in the circulating blood, with an increased amount of carbon dioxide in the circulating blood.

"Q. Now, in your opinion that condition existed in this case?

"A. Yes, sir.

"Q. Do you have any opinion as to how that condition came about?

"A. In my opinion is that the shock and/or asphyxia produced the decreased amount of oxygen in the circulating blood and -

"Q. Well, dealing specifically with the asphyxia itself, as a condition, do you have any opinion as to how that arose?

"A. The asphyxia, as proved by post morten examination, we assume to be present, due to the fact that this patient, sometime during the anesthesia administration, aspirated some vomitus down into the lungs.

"Q. Now, your answer leaves me somewhat doubtful as to whether he could have aspirated any vomitus at any other time. Could you answer that?

"A. You didn't ask me.

"Q. Well, I realize that. I wonder if you could amplify on that? (Pause) Well, I'll withdraw that question. What type of anesthetic was administered in this case?

"A. The patient was given a general ether anesthesia.

"Q. And you said Captain--what was his name?

"A. Barbanti.

"Q. Do you know whether he is a Medical Officer?

"A. Yes, sir, he's a graduate of the University of Pennsylvania Medical School." (R 39-42)

On cross-examination Dr. Young testified that when he operated on Taylor he was satisfied that he was not risking an operation (R 43). Concerning the operation he further testified as follows:

"Q. Now, you have stated that as you commenced to--well, I have to use the term 'close him up', I don't know what the Medical term is, as you started to close him up you were satisfied that conditions were going along satisfactorily until you noticed the darkened blood?

"A. Yes, sir.

"Q. Up to that point, Doctor, in your opinion was the man in a serious condition, where you anticipated death, up to the point where you noticed the darkened blood?

"A. We always anticipate death when--with any surgical procedure.

"Q. Five minutes prior to the time you noticed the darkened blood, did you, in your opinion, feel that the man was going to recover?
"A. Yes, of course, I did.

"Q. You were satisfied that everything had worked out successfully?
"A. I had no reason to believe otherwise at that time.

"Q. Yes. We have 'scurvied' around a very important subject. To return to these wounds again, was there anyone of them which, in your opinion, was fatal and would cause death?
"A. I can't say any of the single wounds would have caused death, no.

"Q. Now, with respect to the wounds, in what-- and excluding for the moment, which is, of course, difficult for a doctor to do, but excluding for the moment outside matters, would the aggregate of those wounds, in your opinion, cause death?
"A. Sir, would you be a bit more explicit as to exactly your definition of 'outside matters'?

"Q. I mean by that expression--aspiration of vomitus, for example, and shock which might be attendant with asphyxia?
"A. I see, yes, I fully expected the man to recover from the aspect of purely the wounds.

"Q. Will you tell the Court what caused the--or how the aspiration of vomitus occurred?
"A. Request clarification--how the aspiration occurred or occurs?

"Q. Occurs?
"A. Occurs. Yes. Many times during anesthesia, and I think we are all probably fairly familiar with the--especially with the anesthetic. When you--when the patient has inducted--when you start to give the anesthesia to a patient, many times he will fight that anesthesia and they many times will rave a bit as they go under the anesthesia. By the same token when a patient is coming out from under the effects of ether anesthesia they many times will attempt to retch and vomit a bit. Because of the fact that the ether has dulled, to some extent, their reflexes, this vomitus they bring up into their mouth may be aspirated, sucked down into the lungs and by so doing it may partially occlude or totally occlude the bronchi or tubes which normally carry the oxygen out into the lungs. Is that what you wish, sir?

* * *

"Q. During anesthesia you stated when you inducted--and as the man was coming out, you expected to have a possibility of retching?
"A. Yes, sir.

"Q. And vomiting?
"A. Anyone would, yes, sir.

"Q. Now, does the average--I don't mean the good, but the average--doctor expect that?
"A. Oh, sure.

"Q. He knows that that may occur?
"A. Yes.

"Q. And does he watch for it?
"A. Yes.

"Q. Did you have occasion to notice the condition of the mask that was used by which the ether and oxygen was given to this patient?
"A. I inspected the mask after the surgery was completed.

"Q. And what did you find?
"A. I found some vomitus in the mask.

"Q. Vomitus in the mask?
"A. Yes, sir.

* * *

"Q. You found vomitus in the mask?
"A. Yes, sir.

"Q. In this case?
"A. Yes sir.

"Q. Did that carry any meaning to you?
"A. The only meaning that carried to me was that the man had regurgitated.

"Q. Now the regurgitation, and with the mask over his face in such a manner that his nostrils were closed, then, isn't it your opinion that he also must have, necessarily, aspirated vomitus?

"A. Oh, not necessarily, he could have vomited up and as soon as Doctor saw the vomit take the mask off and--

"Q. Did the Doctor do that?
"A. I don't remember; I didn't see.

"Q. Do you know what the cause of death was?
"A. Cause of death was shock and asphyxia.

* * *

"Q. Do you recall what the causes of death were given on the death certificate of which we are speaking?
"A. If the unsigned death certificate gave as the direct cause of death of General Prisoner Taylor asphyxia and shock, I agree.

"Q. Now do you recall what the certificate which you saw stated?
"A. The certificate I saw, which was unsigned, stated 'shock and asphyxia'.

"Q. And you agree with those conclusions as being the primary ques--cause of death?
"A. I said the direct cause of death. In order to clarify, gentlemen, what I mean, as far as the direct cause of death is concerned, the man had both shock and asphyxia--the which--which of the two directly caused his death I cannot give an opinion on because the man went into shock immediately before his death. He had aspirated some vomitus, as evidenced by the post morten examination, which produced asphyxia. Therefore, in view of the fact that medical science today does not have any method of differentiating whether death was due to shock or asphyxia, I am not able to say which was the direct cause of death.

"Q. Have you ever seen, in your previous training and clinical experience, a case recover which has had a like amount of aspiration of vomitus during anesthesia?
"A. I have never seen a case recover that had a like amount of aspiration; neither have I seen a case recover with a like amount of shock.

"Q. Now, are you able to state definitely that the shock which you refer to was not caused by the asphyxia?
"A. I am not able definitely to say.

"Q. Because the science of medicine is not sufficiently

advanced for you to arrive at that opinion. Now, with respect to the shock, could it also have been caused by exsanguination?

"A. The shock could have been caused by exsanguination, the trauma or physical hurt to the liver and kidney.

"Q. Uh-huh.

"A. And--or nervous shock.

"Q. Uh-huh, now, in your opinion, which type of shock do you believe was present accompanying the asphyxia caused by aspiration?

"A. In view of the fact that is an unknown quantity, I have no opinion.

"Q. Under anesthesia, in surgery, a person may develop severe irreversible shock, that is correct, is it not?

"A. Yes, sir.

"Q. So that condition could have been present here, could it not?

"A. Yes, sir.

"Q. It could have also resulted--the shock, I mean--could also have resulted from the trauma to the man?

"A. Yes, sir.

"Q. Could also have resulted from the asphyxia of the man?

"A. Yes, sir.

"Q. In other words, it could have been any one of those or a combination of them, is that right?

"A. Yes, sir." (R 44-47, 50-51)

On redirect examination witness testified that aspiration of vomitus in an operation such as was conducted on Taylor is the rule rather than the exception but the aspiration of such a large amount of foreign body material as was present in this case is the exception (R 54-55). In his opinion, the operation on Taylor was necessary because he would not have survived if action was not then taken (R 55,57).

b. For the Defense

At about 0815 hours on 10 June 1949, Corporal John P. Dunleavy, a guard, went to Upper I Cell Block to pick up Spasoff for an appointment pursuant to instructions. As he reached the cell block he saw Sergeant Parker coming out. Parker's face was white and he looked scared. By the expression on Parker's face, Dunleavy sensed something was wrong. He then called the Commander of the Guard (R 401-403).

Counsel for the accused and the law member advised the accused of their rights to testify, to make an unsworn statement or to remain silent, and further advised them of the legal effect of either election. After consultation between the accused and their counsel, the latter stated that each of the accused directed him to announce to the court that each of them desired to remain silent (R 403-405).

4. Discussion

a. Jurisdiction

(1) As to Subject Matter

The prosecution proceeded on the assumption that since the accused are charged with murder committed within the geographical limits of the United States and since Article of War 92 provides:

> "*** No person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace,"

that it was incumbent upon it to show affirmatively "the state of war at that time." Accordingly, it requested the court "to take judicial notice that peace, in the complete sense, has not been declared in connection with the recent hostilities against the Empire of Japan and Germany."

The defense objected strenuously to the court taking judicial notice as requested by the prosecution. Defense counsel contended that "peace" is a factual situation; that since the war has been over for some time and there has been a cessation of hostilities, "peace" did in fact exist and that, therefore, the proviso of Article of War 92, which prohibits the trial of persons by court-martial for murder committed within the geographical limits of the United States "in time of peace" precludes the court from trying the accused for the alleged offense. This contention was properly overruled.

The phrase "in time of peace," contained in Article of War 92, has been judicially interpreted to mean "*** peace in the complete sense, officially declared" (Kahn v. Anderson, 255 U.S. 1, 10; 65 L. Ed. 469, 475).

It has been further held;

> "In the absence of specific provision to the contrary,

the period of war extends to the ratification of the treaty of peace or the proclamation of peace" (Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 64 L.ed. 194, 40 Sup. Ct. Rep. 106). See also Kahn v. Anderson, supra.

"That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable" (Kahn v. Anderson, supra, citing Hamilton v. Kentucky Distilleries & Warehouse Co., supra).

In paragraph 179 of the Manual for Courts-Martial, U.S. Army, 1949, it is expressly provided that the phrase in time of peace, as used in Article of War 92, contemplates a complete peace, officially proclaimed.

The current political conditions of war and peace are properly a subject of judicial notice (MCM, 1949, par 133a).

In view of the foregoing authorities, the court was fully justified in taking judicial notice that at the time of and prior to trial in this case Congress had by appropriate declarations proclaimed a state of war to exist between the United States and other specified countries, and also, that at the time of trial, peace had not been officially proclaimed nor had treaties of peace with all nations with which a state of war existed been ratified (CM 325200, Hightower, 74 BR 103,117-118). Concurring, as we do, in the conclusion of the court that peace in the complete sense had not been officially proclaimed at the time of the trial in this case, it is our opinion that the accused, in contemplation of law, was not tried by court-martial "in time of peace" and that the proscription upon court-martial jurisdiction contained in Article of War 92 was not, therefore, effective to divest the court of jurisdiction over the subject matter.

The prosecution introduced Prosecution Exhibits 1 and 2 upon the belief that War Department Letter Order (Pros Ex 1) had "temporarily withdrawn" from the jurisdiction of court-martial all trials for murder committed within the geographical limits of the United States after 31 January 1946, except in cases in which authorization is given to prosecute and that therefore it had to show that such authorization was given. Prosecution Exhibit 1 is a duly authenticated copy of War Department Letter Order, dated 30 January 1946, "Subject: Trial of Persons for Murder or Rape in Violation of Article of War 92" which is addressed: "To: Each Commanding Officer Exercising General Court-Martial Jurisdiction in the Continental Limits of the United States, including the District of Columbia" and provides in pertinent part:

"1. No person subject to military law shall be tried by court-martial for murder or rape committed after the 31st

day of January, 1946, within the geographical limits of the States of the Union or the District of Columbia, except upon special authorization in each instance of the Secretary of War.

"2. Applications for such authorization shall indicate fully the reasons which make trial by court-martial desirable and shall be accompanied by a summary of the available evidence in each case. Such applications will be transmitted to The Judge Advocate General, who will review the same and transmit them, with appropriate recommendations, for consideration by the Secretary of War.

"3. Nothing herein shall be construed to limit the right to arrest or confine an accused pending trial, or to transfer an accused to civil authorities, or release him, as may be proper in the circumstances."

Prosecution Exhibit No. 2 is a first indorsement, dated 2 August 1949, from the Office of The Judge Advocate General, Department of the Army, Washington 25, D. C., and is addressed: "To: Commanding General, Sixth Army, Presidio of San Francisco, California," in reply to a letter (application) from the latter officer, dated 14 July 1949, "Subject: Criminal Jurisdiction over Criminal Acts on Camp Cooke Military Reservation." It states:

"The Secretary of the Army, pursuant to the provisions of War Department letter, file AG 250.4 (30 Jan 46) OB-S-SPJ&J-WDOUS-M, subject: 'Trial of Persons for Murder or Rape in Violation of Article of War 92,' on 30 July 1949, authorized the trial of General Prisoners William Barnes, R/N 1964; Clarence Coons, R/N 1428; John Lee, R/N 2230; and Richard Spasoff, R/N 3563 by general court-martial for murder of General Prisoner Charlie W. Taylor, Jr., R/N 2285.

"FOR THE JUDGE ADVOCATE GENERAL:

/s/ W P Connally, Jr.
/t/ WILLIAM P. CONNALLY, JR., Colonel, JAGC
Assistant Judge Advocate General "

Both exhibits were received in evidence by the court for the limited purpose of showing that the court had "jurisdiction of the offense." The defense did not object to the admission of these exhibits in evidence but, with reference to Prosecution Exhibit No. 1 the defense contended that it had no bearing on the instant case, and with reference to Prosecution Exhibit No. 2 it did not concede nor admit the truth of the matters therein stated.

The trial judge advocate's belief that the directive contained in Prosecution Exhibit No. 1 had "temporarily withdrawn" jurisdiction from

court-martial as above stated was obviously erroneous. The power of conferring jurisdiction upon a court-martial and, a fortiori, the power of withdrawing such jurisdiction, is solely a legislative function vested in the Congress. Therefore, the directive contained in Prosecution Exhibit 1, as promulgated by the Secretary of War, cannot be construed as having "temporarily withdrawn" any jurisdiction theretofore vested in a court-martial and we do not construe it as being intended to do so. In CM 325200, Hightower, supra, where the effect of this directive on court-martial jurisdiction was likewise considered, the Board of Review said:

> "The authority of the Secretary of War to issue the aforementioned order to the field is not questioned, however, jurisdiction of courts-martial arises out of authorizations contained in the Constitution and Acts of Congress, more specifically Article of War 2."

Neither Prosecution Exhibit 1 or 2 was necessary to establish jurisdiction since jurisdiction is derived from the Articles of War. However, these exhibits do serve to clarify the administrative procedures which were followed in determining the forum before which trial should be had. They show that the Commanding General, Sixth Army, the officer exercising general court-martial jurisdiction in this case, acted in conformance with the directives contained in Prosecution Exhibit No. 1, by transmitting a letter containing supporting data to The Judge Advocate General, and that in reply thereto by first indorsement he was administratively authorized to effect the trial of the accused for murder before a court-martial. Since the court was in fact vested with jurisdiction to try the alleged offense under Article of War 92, as above indicated, the admission of the documents into evidence was unobjectionable as they do indicate that the officer exercising general court-martial jurisdiction performed his duties properly and in accordance with the directives of his superiors (MCM 1949, par 125a).

(2) As to the Person

Following arraignment, the accused pleaded "not guilty" and expressly denied that they were the persons named or described in the charge, conceding only that their names were William D. Barnes, Clarence E. Coons, Jr., John Lee, and Richard Spasoff. Thus the effect of the accused's plea put the burden on the prosecution to prove the identity and status of the accused. After both sides had rested, the defense made a motion

"to dismiss the Charge and Specification in this case on the ground that the Court has no jurisdiction over the persons of the Accused" (R 406). It contended that no competent proof had been adduced to show that the accused were persons subject to military law, namely, "persons under sentence adjudged by court-martial"(A.W. 2e), or that the accused are general prisoners, as alleged (R 406-409). The motion to dismiss was overruled (R 412).

In the opinion of the Board of Review the record of trial is legally sufficient to establish the jurisdiction of the court over the accused and the ruling on the motion to dismiss was proper. The testimony of the Prison Personnel Officer, Mr. Aycock, established the fact that persons known as Clarence E. Coons, John Lee, Richard Spasoff and William D. Barnes were confined in the Branch United States Disciplinary Barracks at Camp Cooke in the status of general prisoners. This fact was ascertained by the witness from records which he, as Prison Personnel Officer, had an official duty to record and which duty was imposed upon him by regulations (SR 600-395-1, 7 Jan 1949). Accordingly, it may be presumed that since he had the duty to record the facts or events pertinent to such records that he also had the duty to know or ascertain the truth thereof (MCM, 1949, par 130b). No objection was interposed to this testimony and so any objection thereto must be considered as waived (MCM, 1949, par 140d). The testimony of the witness may therefore be presumed to be based on his personal knowledge and may be considered competent circumstantial evidence from which the court could, in connection with other relevant facts in evidence, reasonably infer that the accused were in fact the persons named and described by Mr. Aycock as general prisoners in confinement at that institution (MCM, 1949, par 125b). In this connection, the evidence shows that the prison guards, the officers assigned to duty in the institution and three inmates who were confined in the institution adjacent to the scene of the alleged incident, positively identified each accused by name, which names were identical to those of the persons described in the specification and by Mr. Aycock. These witnesses, moreover, identified the accused as being in confinement in the institution at the time and prior to the alleged offense and as being the persons involved in said offense. Major Raven, Supervisor of Prisoners, not only identified the accused as the persons named in the specification but, through his duties and daily contact with them since December 1948, identified them as general prisoners. In their plea to the charge the accused conceded that their names were as alleged. Identity of name in the allegation and proof raises a presumption of identity of person although the strength of the presumption depends upon how common the name is and upon other circumstances. Accordingly, the court may presume that the accused, having names similar to those stated in the specification are the persons to whom the specification pertains, "if it deems the inference warranted by all the circumstances, from the existence of other facts which must be first established" (MCM, 1949, par 125a). While the strength of this presumption, with reference to the accused John Lee, may appear

to be of lesser probative value than it is concerning the other accused because of the recognized popularity of that name, the circumstances and facts proven connecting all the accused, including Lee, to the time, place and commission of the offense, plus the fact that all of them were identified as general prisoners confined in the institution for a long time prior to the commission of the offense, amply supports the presumption and conclusion that they are the persons named and described in the specification and by the witnesses as general prisoners. A confinement is presumed to be legal (MCM, 1949, par 157b; Dig. Op. JAG 1912-40, sec 427(5)). Proof that the accused were in confinement at the United States Disciplinary Barracks in the status of general prisoners necessarily implies that they were military prisoners undergoing punishment for previous sentences, and even if their discharge as soldiers had resulted from the previous sentences which they were serving, they remained military prisoners and were subject to military law and trial by court-martial for offenses committed during such imprisonment (Kahn v. Anderson, supra).

b. Murder

The evidence shows conclusively that at about 0800 hours on 10 June 1949, the accused Coons, Barnes and Spasoff, general prisoners confined in the Branch United States Disciplinary Barracks, Camp Cooke, California, jointly engaged in an aggravated assault on another general prisoner, Charlie W. Taylor by stabbing him with knives and by beating him with a club. This is established by the testimony of eyewitnesses to the affray who knew the accused and the deceased personally. The evidence further indicates that the assault was motivated by the accused's animosity toward Taylor because of the latter's conduct among the inmates within the cell block, but without legal provocation, justification or excuse. Evidence descriptive of the knives and the club, the manner in which they were used and the nature of the wounds sustained by Taylor, indicates clearly that the unsuspecting victim was viciously and brutally assaulted by Coons, Barnes and Spasoff without any regard for the consequences of their willful acts. We take notice that the accused, as inmates in a disciplinary barracks, are not entitled to possess instruments of the type employed by them in the assault. Therefore, the possession and description of these weapons, indicating that the knives used were probably made or obtained by the accused surreptitiously and that the club was made from three steel rods about 18 to 24 inches in length bound in cloth or tape, supplies convincing proof of prior preparation and deliberation for the commission of an unlawful preconceived design.

As concerns the accused Lee, the evidence shows that he was also a general prisoner confined on the lower tier of the same cell block in which his coaccused were confined. As an orderly at liberty within the cell block, he was unduly solicitious of the cell block commander

(Sergeant Parker) to effect the release of the accused Coons and Barnes from their individual cells immediately before the assault on the contention that they were painters. Because Sergeant Parker was not otherwise made aware of Lee's contention, he refused to release Coons and Barnes. Whether they were in fact painters and authorized to have been released at that time or whether such was but a pretext is not shown in the record. The fact remains, however, that after repeated rejection of Lee's solicitations, and immediately after Spasoff was officially released from his cell located on the upper tier of the cell block, Lee also appeared on the upper tier talking to Coons and Barnes. Coincident with Spasoff's release, Lee called to Parker to come over to Coons' and Barnes' cell because they wanted to talk to him. Parker complied. In the light of the ensuing events, Lee's presence on the upper tier of the cell block talking to Coons and Barnes at this propitious moment, his persistent solicitations for their release and his joining in with Spasoff in effecting their release after Spasoff had placed Sergeant Parker under the threat of a knife, supports the inference that Lee was acting in collaboration with Coons, Barnes and Spasoff in preconceived designs against Taylor. This inference is strongly buttressed by other significant evidence. Thus, when Spasoff joined Lee and Parker in front of Coons' and Barnes' cells right after his release, his first remark to Parker was, "Are you going to leave Coons and Barnes out?" The implication of this query clearly indicates that Spasoff had anticipated the release of Coons and Barnes and that he had presumed Lee had requested Parker to release them prior to and at that time. Accordingly, it can be reasonably inferred by virtue of Lee's status as an "orderly," his accessibility to all inmates within the cell block as well as to the cell block commander, his knowledge of the state of conditions within the cell block, his known conversation with Coons and Barnes prior to their release, and Spasoff's significant inquiry which is indicative of a preconceived plan, that Lee had prior knowledge of such preconceived plan at the time he made his numerous over-zealous efforts to have Coons and Barnes released from close confinement, and that he was acting in complicity with his coaccused pursuant to a preconceived plan. Although the record contains some evidence tending to exculpate Lee of guilt by showing that he did not participate in the actual stabbing or beating of Taylor, and further, that at one point in the affray he stepped in between Taylor and the assailants, apparently to stop the severe beating then being administered by them, other evidence of his incriminating extrajudicial admissions made shortly after the consummation of the alleged incident preeminently corroborates the foregoing acts and inference of his complicity and joint participation in the alleged offense. About 15 minutes after the affray, and while Lee was still accompanying his coaccused, he was heard by Major Hook to say, "We got that dirty *** and we'll get the rest of them." Again, at about 1100 hours, Lee was heard by Sergeant Parker saying, "This isn't the first man I've killed and it won't be the last."

Shortly thereafter, when Major Raven, the Supervisor of Prisoners, ordered all the accused to go back to their individual cells, Lee, in conjunction with his coaccused, refused to comply with the order.

In our opinion, these admissions were properly admitted and considered by the court as part of the res gestae. The test of the admissibility of evidence as part of the res gestae is whether the act, declaration, or exclamation is so intimately interwoven or connected with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself, and also whether it clearly negatives any premeditation or purpose to manufacture testimony (32 C.J.S. 21; CM 324109, Newirth et al, 73 BR 41,45; MCM, 1949, par 128b). The circumstances surrounding Lee's admissions, as disclosed by the evidence, indicate that they were made at a time when he was still consorting with his coaccused immediately after the consummation of a vicious assault and while the heat and stress of a bitter, bloody affray was still evident in the emotions of the accused. Under such circumstances the expression of his emotions through these admissions were made so spontaneously and contemporaneously with the commission and accomplishment of the common design in which all the accused were shown to be participants that they were clearly a part of the res gestae and admissible to show Lee's connection with the offense. If a statement is actually involved in, and part of, the res gestae, it is admissible even though it incriminates or tends to incriminate the accused (Green et al v. United States (C.C.A. 8th) 289 F. 236). This is true even though the acts or declarations are made after the termination of the conspiracy or unlawful design (White et al v. People, 79 Colo. 261, 245 P. 349; Fletcher v. Comm., 239 Ky 506, 39 S.W. 2d 972; State v. Roby, 106 W. Va. 427, 145 S.E. 743). Thus, where a statement made to a witness immediately after a shooting, and while leaving the scene of the crime, by one jointly charged with homicide with his father, to the effect that they had killed the deceased, was held to be admissible as part of the res gestae of the crime (Henderson v. State, 89 Tex. Crim. Rep. 21, 229 S.W. 535). (See also Hagood v. Com. 157 Va. 918, 162 S.E. 10, 601; Cox v. State, 109 Tex. Crim. Rep. 437, 5 S.W. 2d 147). Such evidence is admissible because it is deemed to be part of the transaction immediately surrounding the crime and upon the theory that the event is speaking through the instinctive words and acts of the participant, rather than the participant speaking of the event (CM 327733, Kremzier, 76 BR 169,175). Concerning the admissibility of statements or declarations made to or in the presence of Government officers while under arrest or confinement as part of the res gestae, see Green et al v. United States, supra, where the court held:

> "The evidence of the arrest of the accused, the attending circumstances, the persons in his company, the acts and conduct of the accused, his declarations, etc., are all proper as part of the res gestae, when, as here, the statements in question were made while the minds of the defendants were still acting under the excitement and influence of the immediate circumstances

of the arrest." See also, 16 C.J. 553.

While it is noted that Taylor was still alive when Lee made the incriminating admissions, namely, "We got that dirty *** and we'll get the rest of them," and "This isn't the first man I've killed and it won't be the last," the discrepancy in the true state of facts pertaining to Taylor's demise is not considered material under the circumstances shown as affecting the admissibility of such declaration as part of the res gestae or as affecting the competency of such evidence to connect him to the commission of the offense. On the contrary, the assumption of death as expressed by Lee, all the more, reflects his state of mind relating to the nature of his complicity and the intent inherent in the minds of the accused during the commission of their felonious act, notwithstanding his misapprehension of the fact that Taylor did not die immediately as might have been concluded from the severity of the wounds inflicted upon him. The fact that the evidence fails to show that Lee personally delivered any of the blows on Taylor does not render him any the less criminally responsible for the consequences of his coaccused's acts. One who voluntarily associated himself with others in the execution of an unlawful design of so desperate a character that it must ordinarily be attended with great hazard to life is responsible for a murder committed by his companions in the perpetration of such design, even though neither he nor his associates specifically intended to take life and even though he rendered no active assistance in the homicidal act or had forbidden his associates to kill (CM 324519, Davis et al, 73 BR 251,263-264, and cases therein cited). By the same token, Lee's intercession between his associates and Taylor, apparently to deter them in their vicious assault, does not serve to absolve him from guilt of the crime of murder. The initial unlawful act shown to have been contemplated by the accused in their joint venture, as implied from the description of the knives and club in their possession, and the manner of their use on Taylor demonstrates that they had, at least, planned to commit a felony, i.e., an assault with dangerous weapons. In this connection it has been held that the underlying crime or attempted crime is a fact to be looked at objectively and its beginning and end are marked by what is done rather than what is thought. To end responsibility for the consequences of the felonious joint venture where the participants therein remain in freedom and in possession of deadly weapons at the place where the fatal assault takes place, there must be at least an appreciable interval between the attempted termination of the assault and the homicide, that is, a detachment from the enterprise before the killing has become so probable that it cannot reasonably be stayed and such notice or definite act of detachment that the other principals in the attempted crime have an opportunity also to abandon it (CM 324519, Davis, supra, and cases therein cited). During and after the affray, Lee at no time disassociated himself from his coaccused and throughout remained with them. Accordingly. we do not consider Lee's attempt to deter his associates from carrying out their intended acts as ending his complicity in the initial unlawful

design. It follows that he is as guilty of the consequences of his co-accused's acts committed in the accomplishment of their common design as though he had committed such acts with his own hands (18 U.S.C. 550).

Murder is defined as the unlawful killing of a human being with malice aforethought and the essential elements of proof which must be established by the evidence to constitute the offense are:

a. That the accused unlawfully killed a certain person named or described by certain means, as alleged (requiring proof that

(1) the alleged victim is dead,

(2) that his death resulted from an injury received by him,

(3) that such injury resulted from an act of the accused, and

(4) that the death occurred within a year and a day of such act.)

b. That such killing was with malice aforethought, and

c. That the killing was premeditated, if alleged (MCM, 1949, par 179a).

The evidence, as discussed above, proves beyond a shadow of a doubt that the accused feloniously inflicted certain wounds on the deceased Taylor, which necessitated a surgical operation to save his life, and that Taylor died on the date of such act and within the hour after the operation.

It is an established principle of law that

"An unintended homicide, committed by one who at the time is engaged in the commission of some other felony, is murder both at common law and under statutes declaratory thereof, ***" (40 C.J.S. 868; Order of United Commercial Travelers v. Meinsen, C.C.A. Mo., 131 F. 2d 176; CM 284006, Wells, 55 BR 207, 218-219). See also 18 U.S.C. 452.

Paragraph 179a of the Manual for Courts-Martial, 1949, provides that the presence of malice aforethought distinguishes the offense of murder and that malice aforethought may exist when the act is unpremeditated. Thus a state of mind preceding or coexisting with the act by which death

is caused involving an intention to cause grievous bodily harm to any person; or involving knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to the person, even though such knowledge be accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused; or involving an intent to commit any felony, is sufficient to establish that such act was done with malice aforethought, and that the resulting death was murder. However, if the unlawful killing is premeditated it is a more serious offense and may be punished by death.

Therefore, if the death of Taylor was the result of the felonious act perpetrated by the accused, they will be guilty of murder punishable by death if such act was premeditated as alleged. However, before the accused can be held guilty of murder under the circumstances here presented it must be conclusively shown that Taylor's death resulted from the felonious act and injuries inflicted by the accused, or stated more specifically, that the felonious act and injuries inflicted by the accused were the proximate cause of Taylor's death (MCM, 1949, Elements of Proof, supra; CM 329321, Marinez, 78 BR 11,24).

The wounds inflicted were unquestionably of a nature to endanger life. The medical testimony shows that ragged wounds extending to the depth of the skull and contused areas over the front and parietal region of the head were found on Taylor as well as deep lacerations on the left forearm, a stab wound in the right chest near the right arm pit, and on the chest, the latter separating the breast bone from the lower part of the breast. Two stab wounds were also found on either side of the spine which were about 10 or 10-1/2 inches deep in a backward-forward direction in the region of the left kidney and spleen. These wounds necessitated a surgical operation to save the life of the victim, but due to the state of severe shock the victim was in initially, only the superficial wounds could be treated, the hemorrhage stopped, blood plasma administered and treatment for shock given. At that time the doctor attending Taylor at the hospital determined that Taylor was not in clinical condition to stand a surgical operation for a thorough exploration and treatment of the stab wounds. Taylor remained under medical observation and treatment in the hospital from about 0900 hours to 1800 hours. Shortly after the noon hour he began and continued to attempt to vomit. He developed a severe pain in the left upper abdomen and as the afternoon wore on the muscles in the left upper abdomen became rigid and tense. A "spreading peritonitis" was diagnosed as the cause and, therefore, acceleration of an abdominal operation became imminent. At about 1800 hours an operation was undertaken which disclosed the existence of peritonitis and a "through and through stab wound of the left kidney" as well as a stab wound in the liver. The operation was completed satisfactorily and there is no showing or contention of unskillfulness or negligence pertaining thereto. When the abdominal incision was being sewn, however,

the surgeon noticed that the patient's blood, which normally was red, was becoming a bit dark. The Surgeon informed the anesthetist of this occurrence and inquired of him what the blood pressure was. The anesthetist replied that "he had just checked a little while ago and it seemed *** satisfactory," but upon immediate check at that time he found that the blood pressure had very suddenly dropped. When the oxygen mask was removed from the patient's face at the conclusion of the operation it was found to contain an excessive quantity of vomit. Taylor was removed from the operating room in a definite state of shock and was alive at the time he was placed in his room at the hospital. Shortly thereafter the doctor who performed the surgery was called to Taylor's room and at that time the doctor found that Taylor had expired. The doctor testified that Taylor died on 10 June 1949. He further testified that the cause of death was due to "shock and asphyxia" and that the injuries from which Taylor was suffering gave rise to the chain of circumstances which, combined with asphyxia, caused the death. In his opinion he attributed the shock to nervous shock, loss of blood and the trauma to vital organs, liver and kidney and that the asphyxia was due to the fact that the patient aspirated some vomitus down into his lungs sometime during the operation. Since the evidence shows that death was caused by "shock and asphyxia" it is essential to inquire and determine whether the felonious acts of the accused, through a chain of natural effects, were the proximate cause of the death and as such would constitute it an unlawful killing. The general rule of law in such instances is as follows:

> "Where a person inflicts on another a wound not in itself calculated to produce death, and the injured person dies solely as a result of the improper treatment of the wound by an attending physician or surgeon, the fact that the death was caused by medical mistreatment is a good defense to a charge of homicide" (Underscoring supplied; 8 A.L.R. 520 (1918), and cases therein cited; I Wharton, Criminal Law, sec 199, note 12).

On the other hand;

> "If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offense either of manslaughter or murder, as the case may be, and he is nonetheless responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskilful or improper treatment aggravated the wound and contributed to his death" (Underscoring supplied; State v. Bentley, 44 Conn. 537, 26 Am. Rep. 486; 8 A.L.R. 516 (1918), and case therein cited; I Wharton, Criminal Law, sec 199, note 12, and cases therein cited).

"If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy and death follows as a consequence of such felonious act, it does not diminish its criminality to prove that other causes cooperated in producing death" (Commonwealth v. Giacomazza et al, 42 N.E. 2d (Mass.) 506, and cases therein cited).

"One who inflicts a dangerous wound upon another is held for consequences flowing from that injury, whether sequence is direct or through operation of intermediate agencies dependent on and arising out of original cause" (Rucker v. State, 129 S.W. 2d (Tenn.) 208).

In the light of the above authorities, the record discloses, without contradiction, that Taylor's death resulted from or was caused, in the legal sense, by the stab wounds, head injuries and other trauma feloniously inflicted by the accused with dangerous weapons and which were obviously calculated to endanger and destroy life. According to the general rule applicable in such cases, proof of death resulting therefrom, either mediately or immediately, constitutes murder even if unskillful or improper treatment had contributed to the death. However, in the instant case, while the cause of death was medically attributed to "shock and asphyxia" the record shows that that condition resulted from the surgical operation necessitated by the severity of the wounds inflicted in order to save life, and that the injuries inflicted on the deceased gave rise to the chain of circumstances which, combined with the asphyxia, caused his death. On the other hand, there is no evidence of malpractice or negligence on the part of the doctor who performed the surgical operation on the deceased or that improper treatment or practice was used. The defense strenuously argued the contention, however, that the anesthetist who attended the deceased during the surgical operation was grossly negligent in the performance of his duties and that his gross negligence, rather than the criminal agency of the accused, was the proximate cause of death of the alleged victim. Specifically, the contention raised by the defense is that the anesthetist was grossly negligent by failing to detect the presence of vomitus in the patient's oxygen mask and thereupon failed to empty it from the mask during the operation whereby the patient was permitted to aspirate a great quantity of it into his lungs causing him to choke to death. The only evidence adduced to support this contention is found in the cross-examination of the doctor who performed the surgical operation. His testimony shows that when he was about to sew the incision at the conclusion of the operation the patient's blood pressure dropped suddenly and that a large quantity of vomitus was found in the patient's mask after the operation. Because of an intervening screen which was placed over the patient between the anesthetist and the doctor during the operation the doctor could not observe the performance of the anesthetist. When the doctor was informed by the anesthetist that the patient's blood pressure had suddenly dropped he was further informed by the anesthetist that he had checked the blood pressure "a

little while ago" and that it was satisfactory. In this connection, the following pertinent testimony on cross-examination of the doctor must be noted:

> "Q. Now the regurgitation, and with the mask over his face in such manner that his nostrils were closed, then, isn't it your opinion that he also must have, necessarily, aspirated vomitus?
>
> "A. Oh, not necessarily, he could have vomited up and as soon as Doctor saw the vomit take the mask off and --
>
> "Q. Did the doctor do that?
>
> "A. I don't remember; I didn't see" (R 47).

In the absence of any competent substantial proof relative to the anesthetist's conduct in the actual performance of his duties, the defense contention appears to rest entirely upon an assumption that the anesthetist failed to properly perform his duties as concluded from the fact that a large amount of vomit was found in the patient's mask after the operation. Such testimony, however, lacks probative value to establish such fact and is legally insufficient to support any inference of the negligence claimed. Where, as in this case, it is shown that the accused inflicted the wounds on the deceased, the burden of proving that the wounds did not kill, or contribute to the death of the deceased, shifts to the defense (CM 314402, Heffner, 64 BR 119,135). This rule has been stated as follows:

> "*** if a person receives a wound wilfully inflicted by another, which might cause death, and death actually follows, the burden is on him who inflicted it to show that it did not cause the death" (Hughes Criminal Law & Procedure, Sec 87; Walker v. State, 116 Ga. 537; 67 LRA 426, at page 430, PROOF). See also Edwards v. State, 39 Fla. 753, 23 So. 537; 13 R.C.L. 747.

The evidence falls far short of sustaining the burden of proof placed on the accused in this respect.

In view of the foregoing authorities and the evidence indicating that the wounds were inflicted on Taylor by the accused in the commission of a felony and that such wounds were of a nature calculated to endanger and destroy life and as such contributed mediately or immediately to Taylor's death as a consequence of medical treatment necessitated thereby, it must be concluded that the death was the result of the wounds so inflicted thereby imposing criminal responsibility on them for the homicide.

The evidence clearly establishes the alleged homicide as murder. It reveals a brutal killing, the result of an unprovoked, deliberate, premeditated, surprise attack by several persons armed with deadly weapons upon a single unarmed individual. Such a factual situation imports conclusively malice aforethought and at once eliminates the lesser degrees of homicide, namely, manslaughter and justifiable and excusable homicide. A knife, when used as an instrument with which to stab or cut a human being, is a deadly weapon (People v. Caberera, 104 Cal. App. 414, 286 Pac. 176). Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death (MCM, 1949, par 125a) and from knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person even though such knowledge is accompanied by a wish that it may not be caused (MCM, 1949, par 179a). The proof in this case is conclusive to establish the presumption of malice aforethought in the commission of the alleged offense and to constitute it murder.

However, to sustain the sentence of death, the murder must be shown to have been premeditated, as alleged (AW 92).

> "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 existence of a deliberate purpose to kill may be inferred from the character of the weapon used, the circumstances surrounding and showing the relationship of the parties, and the acts and conduct of the accused (People v. Cook, 15 Cal 2d 507,514; 102 Pac 2d 752,756; People v. Smith, 15 Cal 2d 640,647; 104 Pac 2d 510,514). In this regard the following rule of construction, as expressed by a California court, has been long established:

> "A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own voluntary acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or great bodily harm, and in the absence of evidence to the contrary this presumption must prevail." (Emphasis by court; People v. Cornett (Sep 23, 1949), 209 Pac 2d 647, 649-650.)

In the instant case, the record affords clear and convincing proof to support the presumption of premeditation existing in the minds of the accused at the time of their willful assault on the deceased. Thus the specific thought of the accused to stab or slay the deceased and to bludgeon him to an unmerciful degree is established by the clear-cut plan in which the assault was executed, the surreptitious manner in which the weapons used were secured and prepared, the animosity existing between the accused and the deceased as disclosed by Defense Exhibits A and B, and the testimony of the inmates Johnson and Barney, the nature of the weapons used and the manner in which used, the nature of the wounds inflicted, and their (accused's) extrajudicial admissions, all of which forcefully demonstrate their total disregard for the life or bodily injury inflicted by them on the deceased. Not a scintilla of evidence was offered to negate the presumption of intent to kill. Accordingly, in the opinion of the Board of Review the evidence is legally sufficient to sustain the offense as charged.

5. The civilian and military background of the accused, as shown by the Charge Sheet and Staff Judge Advocate's review, is as follows:

a. Barnes:

(1) Civilian Background:

Single - is now 20-6/12 years old; born 2 May 1929, Nashville, Tennessee. Had two brothers, both younger, one now 17 years old, the other died when two years of age. Father deserted family when accused was eight years old; mother was sickly; her sister (accused's maternal aunt) took in boys; mother helped a little with support but abandoned them when accused was 14 years old; accused, at 16 years of age, was in the 8th grade, when aunt's husband (an ex-Marine) became seriously sick and totally disabled. He quit school to support himself and brother; worked as oiler of conveyor belt at $35 a week for a cement plant in Nashville, Tennessee, from June 1946 to October 1946, when he enlisted in the Army. His work was satisfactory; he saved some money and contributed to support of brother. FBI and police report no criminal record of any kind.

(2) Military Background:

Enlisted 11 October 1946; AGC Test score 75; 30 December 1946 sent overseas to Korea; assigned Company F, 32d Infantry, 7th Infantry Division; highest rank, private. 26 April 1947 convicted by summary court-martial--loitering on post; on 5 July 1947 shot and killed a sergeant at Yonan, Korea; was convicted of premeditated murder, sentenced to dishonorable discharge and life imprisonment by Headquarters Seventh Infantry Division General Court-Martial Order 45, 5 August 1947; sentence reduced to 20 years. (Dishonorable Discharge executed 20 July

1949.) Arrived at United States Disciplinary Barracks, Camp Cooke, 19 September 1947. Commencing 22 September 1947 to April 1949, had 27 Disciplinary Board Hearings, for disobedience of orders, insubordination, which infractions grew more serious as confinement continued. In 1948 had several fights but not with weapons. He was not separated from general prisoner population; on 5 April 1949 he, with accused Spasoff, both of whom had knives, deliberately tried to provoke and did invite a fight with negro prisoner, James W. Hairston; when negro tried to run away, Spasoff blocked his escape, whereupon Barnes stabbed him four times until guards stepped in and pulled him off. He was thereupon separated from general population and placed in Upper I Cell Block. By Headquarters Fort Ord General Court-Martial Order 38, 20 July 1949, he was sentenced for this stabbing to an additional five years confinement, making his release date 22 September 1963, instead of 24 May 1960. In 1948, The Adjutant General had remitted two years of the 20 year sentence. He would have been eligible for parole 8 March 1954. Prisoner was examined by psychiatrist 11 December 1947, 19 March 1948 and March 1949. He definitely is not psychotic. He is an "antisocial personality"; harbors a grudge and broods on it and then avenges himself at first opportunity. He probably was so predisposed before entering military service. Had he encountered situations disagreeable to himself in civilian life, as he did in the service, in all probability his reactions would have been the same. As stress of confinement continues, his hostility, and cold-blooded viciousness and vengeful attitude will increase. He is an incorrigible. He will remain a constant, potential source of great danger to the life and safety of fellow prisoners (particularly negroes), prison personnel and the general public.

b. Coons:

(1) Civilian Background:

Married, two children. (Claims wife divorced him.) Is now 30-7/12 years old; born 14 April 1919, St. Louis, Missouri. Second youngest of six children. Completed to 10th grade in school. Was reared at home, but father and brothers were all heavy drinkers; went to work at 16 years of age, worked steady, but drank and was promiscuous in sexual relations. Married when 19 to girl, aged 17, had two children, and separated from wife; wife reported him to Draft Board. Was drafted in February, 1944, because he refused to contribute to their support; when drafted was earning $50 a week as mechanic with United States Cartridge Company, St. Louis, Missouri. Was arrested for drunkenness twice. No FBI or police criminal record.

(2) Military Background:

Inducted 23 February 1944; assigned Company F, 318th Infantry,

80th Infantry Division, AGC Test score 103; arrived overseas 3 September 1944; participated in one battle; deserted his company three times; 25 November 1944, 20 December 1944; and 31 December 1944 at the battlefront to avoid hazardous service; at the court-martial one witness testified accused stated he was just a coward and could not help it and that he went absent without leave because he was scared, and would do the same thing again. By Headquarters 80th Infantry Division General Court-Martial Order Number 33, 31 January 1945, he was sentenced to dishonorable discharge and 30 years confinement. Dishonorable discharge was executed 12 September 1945. He had no previous court-martial. Accused was confined Loire, DTC, Le Mans, France; place of confinement was changed 22 May 1945 to Rehabilitation Center, Ft. Slocum, New York; 6 September 1945 to Disciplinary Barracks, Greenhaven, New York, 14 March 1946 to Disciplinary Barracks, Fort Leavenworth, Kansas; 23 May 1947 to United States Disciplinary Barracks, Camp Cooke, California. On 3 March 1946 sentence was reduced to seven years. He forfeited 70 days good conduct time prior to his arrival at Camp Cooke, California, 30 days at Fort Slocum and 40 at Fort Leavenworth. (They found a sharpened knife concealed in his mattress.) Commencing 2 June 1947 (about ten days after his arrival at Camp Cooke, California) to 4 May 1949, he had 28 Disciplinary Board Hearings, for disobedience of orders, insubordination, shirking and refusal to work, repeated, deliberate destruction of property, repeated, deliberate, filthy, foul-mouthed insults and epithets to guards and officers, which infractions grew worse in character as confinement continued; on 14 September 1948 a steel-like stiletto was taken away from him; on 9 April 1949 he fought guards with a chair to get out of cell hall; he served over 73 days in solitary on bread and water, an average of three days each month for two years; he was a constant trouble maker; hates negroes; has no regard for truth; is absolutely incorrigible; he intentionally and deliberately defies all authority. Psychiatrists classify him as antisocial personality, severe; he is completely irresponsible, self-centered; hostile, lacks good judgment, cannot profit from experience; enjoys defying authority; hope of rehabilitation is nil.

c. Lee:

(1) Civilian Background:

Divorced; no children; is now 26-4/12 years old; born 4 June 1923, Louisville, West Virginia; moved to Donora, Pennsylvania; one of five children; father died, mother remarried; got along well with stepfather; quit high school in 12th grade, when 17 years old; worked on odd jobs in mill, driving truck; was a shipping clerk in department store, Pittsburgh, Pennsylvania, when inducted 27 November 1942. FBI and police report no criminal record of any kind.

(2) Military Background:

Inducted 27 November 1942; IQ score 105; after basic at Camp Barkeley, Texas, was assigned to 143d Station Hospital, Camp Bowie, Texas, transferred to 179th General Hospital; on 4 October 1944 arrived overseas; highest rank T/5 medical technician; while stationed in Paris on 3 January 1945, he and a friend were in a fight with negro soldiers; his friend received a bad cut on the wrist; when accused found this out he went into a frenzy, grabbed a bayonet, ran into the V.D. ward of hospital shouting he would get the first negro he saw; Pfc Lawrence Taylor (coincidentally the same surname as deceased in this case), a negro, was lying on a cot. Accused stabbed Taylor in the chest and probably would have killed him if Taylor had not turned over. He was court-martialed on 10 March 1945 and sentenced to dishonorable discharge and five years confinement; on 14 August 1945, entire sentence was suspended and he was restored to duty. On 29 November 1945 he was arrested in Paris as absent without leave--confined as straggler, but escaped by overpowering military police; he became a gangster in Paris, a member of the notorious "Valerie" gang, a gang of AWOL's who terrorized Paris a short while (see May 13, 1946, issue of Life Magazine). He was recaptured, and on 27 May 1946 was court-martialed and convicted on three counts of robbery (one of which was overpowering and robbing a military policeman of his pistol and brassard), one count of assault (while in hospital being treated for bullet wound received in gangster battle with French civilian police and American military police, caught guard by surprise, hit him with a club and so escaped), one count of escape, and one count of stealing a jeep, for which he was sentenced to dishonorable discharge and 35 years confinement. Dishonorable discharge was executed 12 June 1947. Place of confinement designated was United States Penitentiary, Lewisburg, Pennsylvania, later changed to Branch United States Disciplinary Barracks, Greenhaven, New York. On arrival at the Port of New York, 2 June 1947, accused and another general prisoner overpowered two military police guards, stole their guns and uniforms, and escaped from Army transport, but were recaptured a day later at Camp Kilmer and delivered to Disciplinary Barracks, Greenhaven, New York; on 6 October 1947 was transferred to Disciplinary Barracks, Camp Cooke, California; en route from Greenhaven, New York, to Camp Cooke, he jumped from train through a window and escaped. He was recaptured by civil authorities at Selkirk, Kansas, and reached Camp Cooke 19 October 1947.

While in stockade overseas, on 7 April 1947 Lee and other prisoners broke the locks of their cell doors and of the cell block door, threatened other prisoners and created a general disturbance before being subdued; on 5 May 1947 he, with other prisoners, staged a riot in mess hall; on 9 May 1947 he and 3 other prisoners in some manner obtained sawblades and had sawed through two bars and dug a hole through the wall between cells, and when discovered armed themselves with sticks

from folding cots and threatened Prison Officer, shouting "kill Captain Sanders." They were subdued with tear gas. For this accused was given 14 days solitary and loss of 30 days good conduct time. (With 40 years to serve there was not much reason to try him again.)

On 10 October 1947 at Greenhaven, New York, he lost his temper, "blew his top", and stabbed a prisoner with a table knife which had been stoned down to a sharp pointed edge.

On arrival at Camp Cooke, 19 October 1947, a Disciplinary Board Hearing for his escape ordered forfeiture of 120 days good conduct time. Because of his record he was placed in Upper I Block, Administrative Segregation, and never was with general prisoner population. Commencing with 4 November 1947 to April, 1949, he had 11 Disciplinary Board Hearings for disobedience, open defiance of orders, insolence and insubordination, fighting with Prisoner Thompson (no weapon) 24 March 1948, besides "blowing his top", and striking Prisoner Gray on the head with an iron chair 15 December 1947 (no provocation), wrecking his cell fixtures, breaking the commode, chair, and sink in cell on 13 July 1948. Repeated psychiatric examinations found him sane, never psychotic. He is classified as not psychotic, an aggressive, intransigent, unregenerate, dangerous and hostile psychopath; asocial personality--severe--with marked emotional instability. He is further described as "dangerous," "unpredictable," a criminal psychopath. He was allowed to be an orderly and so had considerable occasion and opportunity to communicate with other "bad" prisoners, and so foster and encourage resentment to and defiance of authority, and in this case plan and execute a murder.

d. Spasoff:

(1) Civilian Background:

Single; is now either 20-11/12 or 17-6/12 years of age; accused on enlistment stated he was 18 years old and was born on 30 December 1928 at Republic, Pennsylvania; his father, on WDAGO Form R-5308 (Parent's Report), states soldier was born on 25 May 1932 and submitted notarized birth certificate showing birth date as 25 May 1932, place of birth, Claskville, Pennsylvania; (at request of father, dated 1 October 1949, Prison Personnel Officer returned this alleged notarized birth certificate without making copy thereof); at age of 3, parents moved to Grant Town, West Virginia. Father is a coal miner. Accused is third oldest of five children. His mother died in 1940; completed high school at age of 17; according to report of Bert G. Seller, Supervisor of Academic School at Fairview, West Virginia, high school diploma; this information tends to contradict the 25 May 1932 birth date submitted by the father and would verify accused's age at enlistment as being 18. The father worked nights,

accused had no home training; was always very self-willed, did as he pleased. He got into several minor fights. FBI and police verify that he had no civilian criminal record of any kind.

(2) Military Background:

Enlisted 6 January 1947; assigned to Fort Knox for training; at Fort Knox, went absent without leave three times, viz: 13 February 1947 to 9 March 1947, for which he was court-martialed by summary; 24 March 1947 to 1 April 1947; and again 8 April 1947 to 11 April 1947, for which two offenses he was tried by Special Court-Martial; each time went home to West Virginia. On 7 June 1947 he was out of uniform, for which he was fined $10 by a summary court. He was sent overseas to Korea and assigned 7 August 1947 to 7th Quartermaster Company, 7th Infantry Division, Seoul, Korea. On 27 May 1948 he was convicted by General Court-Martial for (a) taking 2½ ton Government cargo truck, (b) damaging it, (c) destroying a guard shack (N.B. tarpaulin on truck got loose and caught guard shack and caused shack to collapse), (d) breaking restrictions, (e) wilfully disobeyed order of officer, telling him to sweep guardhouse area, and was sentenced to dishonorable discharge and confinement for six years. He was received at Branch United States Disciplinary Barracks, Camp Cooke, California, 9 August 1948, and assigned to Cell Block J; from 12 October 1948 to 6 April 1949 had four disciplinary board hearings, (a) for smoking, (b) for possession of contraband (hair oil), (c) disobedience of orders and insolence to disciplinary board, and (d) tearing up his trousers in a rage. In J Cell Block he became friendly with General Prisoner Barnes (a joint accused in this case) and on 5 April 1949 he assisted Barnes to assault a negro, in that when negro tried to run away from Barnes, Spasoff blocked the negro and Barnes then stabbed and cut the negro until stopped by guards; Spasoff also had a knife (which he had not used), but in a spirit of bravado handed it to guard, saying: "You might as well take me along too." He was given a general court-martial convicted and sentenced to two years' confinement. He, with Barnes, was taken from J Cell Block and put in Upper I Block, and so met Lee and Coons, the other joint accused.

6. At a hearing held on 7 March 1950 before the Board of Review, Mr. John R. Fitzpatrick and Mr. Edward J. Lynch, Attorneys at Law, 1406 G Street, N.W., Washington 5, D.C., and Mr. Harry J. Maginnis, Legislative Assistant to the Honorable Edward Martin, U.S. Senator from Pennsylvania, presented legal argument contesting the legal sufficiency of the record of trial to support the findings of guilty and the sentence on behalf of the accused General Prisoner John Lee. A memorandum of errors submitted by Mr. Fitzpatrick and Mr. Lynch, which sets out the argument presented, and a letter from Senator Martin to The Judge Advocate General, dated 7 March 1950, personally delivered by Mr. Maginnis to the Board at the hearing, concerning the Senator's opinion of the sufficiency of the

record in regard to the accused Lee, have been attached to the record of trial. Correspondence received on behalf of the accused from Senators Francis J. Meyers, Edward Martin, Arthur H. Vandenberg, Mathew M. Neely, Harley Martin Kilgore, Kenneth McKellar, Estes Kefauver, James P. Kem, Forrest C. Donnell, Congressmen James G. Fulton, Raymond W. Karst, Clarence Cannon, Leonard Irving, Morgan M. Moulder, J. Perry Priest, M. G. Burnside, John Kee, Harley O. Staggers, E. H. Hedrick and from Governor Forrest Smith of the State of Missouri, Mr. Edward G. Rohrbough, 110 Maryland Avenue, N.W., Washington, D.C., and Mr. Meyer Bernstein, Representative CIO Veterans, United Steel Workers of America, 1500 Commonwealth Building, Pittsburgh, Pennsylvania, also have been attached to the record of trial. The Board has given due consideration to the matters presented at the hearing, as well as to the matters contained in the numerous communications referred to the Board.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. Although numerous questions of law were raised during the trial of this case, those about which there was any serious doubt were resolved in favor of the accused. Throughout the trial the court maintained an attitude of fairness which is manifested in its many rulings. 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 sentences and to warrant confirmation of the sentences. 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. Rissler, J.A.G.C.

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

JAGU CM 339254 | 20 July 1950

UNITED STATES	SIXTH ARMY
v.	Trial by G.C.M., convened at Camp Cooke, California, 7-13 September 1949. EACH: Death.
General Prisoners WILLIAM D. BARNES, R/N 1964, RA 14220661, CLARENCE E. COONS, JR., R/N 1428, 37633985, JOHN LEE, R/N 2230, 33402971, and RICHARD SPASOFF, R/N 3563, RA 15249741, all of Branch United States Disciplinary Barracks, Camp Cooke, California	

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

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1. Pursuant to Article of War 50d(1) the record of trial and the opinion of the Board of Review in the case of the prisoners named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon joint trial by general court-martial the accused pleaded not guilty to, and were found guilty of, the joint premeditated murder of Charlie W. Taylor, Jr., at Camp Cooke, California, on or about 10 June 1949, by stabbing him with knives and by beating him with a club, in violation of Article of War 92. In conjunction with their pleas of not guilty, the accused specifically denied their identity as the persons named in the specification, conceding only that their names were the same as those alleged. Evidence of one previous conviction by general court-martial was introduced as to each of the accused Barnes and Coons. No evidence of previous convictions was introduced as to the accused Lee or Spasoff. Each accused was sentenced to be put to death in such manner as proper authority may direct, all the members of the court present at the time the vote was taken concurring in the sentences. The reviewing authority approved the sentence as to each accused 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 sentences and to warrant confirmation of the sentences.

3. Evidence

The evidence, which is set forth in detail in the opinion of the Board of Review, is in pertinent substance as follows:

On 10 June 1949 the accused Barnes, Coons and Spasoff, all white, were confined in individual cells on the upper tier of Upper I Cell Block at the Branch United States Disciplinary Barracks, Camp Cooke, California, to which tier "permanent detention" prisoners were assigned. The accused Lee, white, was assigned to a cell on the lower tier of the same cell block, which tier was reserved for "administrative segregation" prisoners. The accused were all general prisoners (see par 4 below).

Sergeant First Class Oran A. Parker testified as follows: When he came on duty as Assistant Cell Block Commander at about 7:45 a.m. on 10 June 1949, Lee and two other prisoners, Charlie W. Taylor, Jr. (the deceased), negro, and Charles W. Taylor, white, were at liberty as orderlies in the cell block. Lee informed Sergeant Parker that Coons and Barnes were detailed as painters and requested him to release them so they could start painting. Parker replied that he could not do so until he was sure they were painters. Lee later repeated his request. Parker, following receipt of a telephone call, released Spasoff from his cell in the upper tier, directing him to go downstairs to the "cage" and await a guard who was to take him to the Supervisor of Prisoners. Meanwhile, Lee proceeded to the upper tier of cells. As Spasoff started down to the "cage," Lee summoned Parker to the cells of Coons and Barnes, who wanted to talk to him, and again told him to let Coons and Barnes out so they could start painting. Parker replied he would have to check. Spasoff then asked Parker if he was going to release Coons and Barnes, but he refused. After Lee and Spasoff repeated their demands, Spasoff held a knife with a crooked blade four to seven inches long against Parker's back, and Lee moved toward him, saying, "You'd better open up." Upon Parker's refusal, Lee, with his hand in his pocket, repeated the demand. Accompanied by Spasoff, knife in hand, on one side and Lee on the other, Parker thereupon proceeded to the upper tier control box, where Lee told him the numbers of Coons' and Barnes' cells. Induced by the threat of Spasoff's knife, Parker unlocked their cells. Accompanied by Lee, he then descended to the "cage" door, where he told the guard and the turnkey that Spasoff would be coming out. The other three accused followed them down. Parker saw the deceased in the doorway to the segregation section, clad in a pair of shorts. The deceased asked Parker if he was taking "these guys out to jump on me." Coons, who held a club over the deceased's head, and Barnes and Spasoff, each of whom held a dagger or knife, then "rushed" the deceased. Coons' club consisted of iron pipe wrapped in cloth and was eighteen inches to two feet long and about one inch in diameter.

Eyewitnesses, including Parker and General Prisoners Ellis K. Johnson and Shirley S. Barney, testified concerning the ensuing events substantially as follows: While the deceased tried to defend himself, Coons struck him with his club and Barnes and Spasoff threatened and punched him with their knives. The deceased backed into a ping pong table, fell to the floor on

his back, and rolled from side to side, as Coons, Barnes and Spasoff continued their attack upon him. Lee stepped between them and the deceased and held his hands up, whereupon the deceased arose and moved on. The other three accused then resumed striking him. Lee was not armed and personally did not strike the deceased. The deceased fell on his hands and knees at Cell 11, as the three accused other than Lee continued assaulting him. Witnesses observed wounds and blood on the deceased at this time. Lee endeavored to help the deceased up, and the other three accused told the deceased to "get up and get out." The latter, bleeding from his wounds, arose and trotted after Parker toward the corridor gate and collapsed just inside the outer cell block, over a hundred feet from Cell 11. Parker thereupon summoned medical aid for him.

Following the attack, Lee asked General Prisoner Johnson "how many guys" he saw stabbing, to which Johnson replied he did not see anything. Thereafter, not in Lee's presence, Barnes, Coons and Spasoff each told Johnson that he was the cause of what happened, they would get him next, and he would not leave the institution alive.

While Lee was mopping up the corridor after the assault, Barnes told General Prisoner Barney, "You're a rat, I'm going to get you," and later directed Barney to write a statement to the Supervisor of Prisoners about what happened. Because of threats by Barnes and Johnson, Barney wrote statements to Lee and the Supervisor of Prisoners to the effect that Johnson had untruthfully told the deceased that Barney accused Barnes of trying to set Barney's bed afire and that Johnson, whom Barney mortally feared, was the cause of "the trouble."

After the assault, at about 8:20 a.m., Major Harry E. Hoch, the acting Supervisor of Prisoners, heard the four accused talking among themselves in an excited manner. Lee said, "We got that dirty * * * and we'll get the rest of them," and at that time each of the other three accused said, "Yes, we did get him," or words to that effect. Parker testified that sometime before 11 o'clock, while the four accused were conversing together, Lee said, to the best of Parker's knowledge, "This isn't the first man I've killed and it won't be the last." At about 3 p.m., Barnes, Coons and Spasoff, after protracted bickering and stalling, were finally induced, by the threat of force, to return to their individual cells.

The significant portions of the medical evidence introduced by the prosecution were substantially as follows: Dr. David E. Young, Jr., testified that on 10 June 1949 while he was a member of the U.S. Army Medical Corps, he was called to perform surgery upon the deceased at the Disciplinary Barracks hospital between 8 and 9 a.m. He found the deceased upon the operating table with multiple cuts and lacerations and in a state of rather severe shock. The patient's body wounds consisted of the following: Two stab wounds in the back, on either side of the spine below the last rib, one of which wounds, to the left of the spine, was ten or ten and one-half inches in depth, in a direct anterior-posterior position in the region of the left kidney and spleen; a stab wound in the right front chest near the arm pit; a lacerated wound near the lower end

of the sternum; and a large lacerated wound of the upper right posterior chest. The head wounds consisted of several transverse lacerations, with ragged edges, across the dome of the head extending to the outer layer of the skull, and numerous bruised areas over the front of the head and parietal region. There were also deep lacerations on the left forearm.

Because the patient was in rather severe shock, the witness was unable to determine his blood pressure, and did not deem full exploration of the wounds appropriate at that time. The witness administered blood plasma, stopped the hemorrhage as far as possible, and treated the superficial wounds. The patient was kept on the operating table until 11:30 a.m. to assure satisfactory recovery from shock and then was moved to a room in the hospital. Thereafter the witness checked his condition at frequent intervals. The patient seemed to rally from shock and his blood pressure was stable, but slight bleeding continued from the left lower chest posteriorly. Shortly thereafter he began attempts to vomit and later, as these continued, the muscles in the left upper abdomen became rather rigid and tense, indicative of spreading peritonitis. The witness then decided to perform an exploratory operation to determine the cause of this serious condition. Proceeding with the operation at about 6 p.m., he made an incision near the spine, extending below the lower rib and down into the front of the abdomen. The operation disclosed stab wounds of the left kidney and the liver. Previous bleeding from that region had spread through the abdomen and caused the spreading peritonitis. The patient's condition was apparently satisfactory, and the witness felt he was going to recover until the witness started closing the incision, when he noticed that the fresh bleeding, normally red, was becoming somewhat dark. The witness mentioned this to the anesthetist, a Captain Barbanti, who was separated from him by a screen placed over the patient. Captain Barbanti's duties during the operation included keeping the witness informed as to the patient's condition. The anesthetist stated that the patient's blood pressure was normal a short time before, but made a check and informed the witness that it had dropped very suddenly. Accordingly, he administered oxygen and plasma. The witness completed the surgery and the patient returned to his room, alive but definitely in shock. He died shortly thereafter, apparently in the presence of another doctor, Captain James O. Crittenden.

The witness stated that the cause of death was shock and asphyxia. The shock could have resulted from nervous shock, trauma or physical hurt to the liver and kidney, loss of blood, anesthesia, or asphyxia, or from a combination of factors. The witness could not state definitely that the shock was not caused by the asphyxia and expressed no opinion as to the specific cause of shock in this case. Asphyxia indicates an increase in the amount of carbon dioxide in the circulating blood. During the administration of the general ether anesthesia, the patient aspirated a relatively large quantity of vomitus into his lungs. It was assumed that asphyxia resulted from this aspiration. Vomiting frequently occurs when a patient is emerging from the effects of ether. Aspiration of the

vomitus, due to the fact that the ether has somewhat dulled the patient's reflexes, is the rule in an operation of this character, but aspiration of such a large amount as in this case is the exception.

It was impossible, in the present state of medical science, for the witness to state whether shock or asphyxia was the direct cause of death, since the patient went into shock immediately before he died. The witness had never seen a case recover which had either a like amount of aspiration of vomitus or a like amount of shock.

Although death is always anticipated whenever surgery is performed, the witness was satisfied that he "was not risking an operation" in this case. In his opinion, the patient would not have survived without the operation. The witness could not say that any one of the wounds would have caused death, and "fully expected the man to recover from the aspect of purely the wounds." In the witness' opinion, the aggregate of all the wounds was not the sole cause of death, but the deceased's injuries gave rise to the chain of circumstances which, combined with asphyxia, caused the death.

For the defense, one of the prison guards testified that at about 8:15 a.m. he went to the cell block to pick up Spasoff for an appointment. There he saw Parker emerging from the cell block. From the frightened look on Parker's face, he sensed something was wrong and called the Commander of the Guard. After an explanation of their rights in the premises, each of the accused elected to remain silent.

4. Discussion

Jurisdiction. - The Judicial Council, after full consideration of arguments of counsel, concurs with the Board of Review in its opinion that the court had jurisdiction to try the accused for the premeditated murder charged against them under Article of War 92. As to jurisdiction over the persons, the evidence as a whole establishes that at the time of the alleged offense and at the time of trial the four accused were the persons named in the specification and were general prisoners, under sentences to dishonorable discharge and confinement adjudged by court-martial, and thus subject to military law (AW 2e). Moreover, the records on file in the Office of The Judge Advocate General, which include the records of former trials of persons bearing the names of the several accused and accompanying general court-martial orders, corroborate the evidence that the accused were such general prisoners at such times (GCMO No 45, Hq 7th Inf Div, APO 7, 5 Aug 1947, CM 324825, Barnes, and see GCMO No 38, Hq Fort Ord, Calif, 20 July 1949, CM 336884, Barnes; GCMO No 33, Hq 80th Inf Div, APO 80, 31 Jan 1945, CM ETO 6936 (CM 287066), Coons; GCMO No 84, Hq Western Base Section, ET, APO 513, 28 Mar 1947, CM 318095, Lee; GCMO No 16, Hq 7th Inf Div, APO 7, 24 June 1948, CM 331990, Spasoff, and see GCMO No 42, Hq Fort Ord, Calif, 12 Aug 1949, CM 337273, Spasoff).

Although the authorities are not uniform, the better judicial opinion appears to be that an appellate court may in an appropriate case take judicial notice of records of legal proceedings previously occurring before it (United States v. Pink (1942), 315 U.S. 203, 216; Wells v. United States (1943), 318 U.S. 257, 260; Morse v. Lewis (CCA 4, 1932), 54 F. 2d 1027, 1029, cert. den. 286 U.S. 557). The practice is followed where desirable in the interests of expedience and justice (Morse v. Lewis, supra; cf. Funk v. Comm. of Int. Rev. (CCA 3, 1947), 163 F. 2d 796, 800-801, and footnotes 5-6; see generally 9 Wigmore on Evidence, sec 2579, pages 569-570, and footnote 2). Boards of Review in the Office and Branch Offices of The Judge Advocate General have exercised the power to take judicial notice of records of trial on file in their respective offices (CM 320174, Gen. Pris. Holland, 69 BR 251, 252; CM 316591, Gen. Pris. Murray, Oct 1946; CM ETO 1981, Gen. Pris. Fraley, 6 BR (ETO) 63, 64; CM ETO 15080, Gen. Pris. Lawton, 28 BR (ETO) 293, 297). The Judicial Council, which is a part of the Office of The Judge Advocate General (AW 50a), takes judicial notice of the mentioned records of trial as official corroboration of the accused's status as persons subject to military law.

As to jurisdiction of the subject matter, it is clear that the alleged murder and the trial did not occur "in time of peace" within the contemplation of Article of War 92 (MCM 1949, par 179a, p 230; Kahn v. Anderson (1921), 255 U.S. 1, 9, 10; CM 325200, Hightower, 74 BR 103, 117-118), and that the alleged offense was properly triable by court-martial. The court's statutory jurisdiction was unaffected by directives issued by the War Department and the Department of the Army relative to authorization for the instant trial (CM 325200, Hightower, supra).

Admissiblity of pretrial admissions. - The evidence shows that about fifteen minutes after the alleged assault, while the four accused were talking together very excitedly, Lee said, "We got that dirty * * * and we'll get the rest of them." At this time each of the other three accused said, in substance, " Yes, we did get him." Further, over defense objection, but after limiting consideration of the evidence to the accused Lee, the court received testimony that almost three hours later, when the four accused were again conversing together, Lee said, "This isn't the first man I've killed and it won't be the last."

Exclamations and declarations of participants in a crime, substantially contemporaneous with the main fact under consideration and so closely connected therewith as to throw light upon its character, are admissible as a part of the res gestae. When the utterance is made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously, evidence thereof is admissible, as an exception to the hearsay rule, to prove not only the making of the utterance but also its truth (MCM 1949, par 128b, p 161). Lee's first

statement was made within a few minutes after the protracted assault, while he was still consorting and excitedly conversing with the other three accused, and under the continuing influence of the heat, stress and excitement of the affray. In the opinion of the Judicial Council, the statement was substantially contemporaneous with the main fact, so closely connected with it as to throw light upon its character with relation to Lee, and its maker was in such a state of shock and excitement directly connected with the attack as to show the spontaneity of the statement. Evidence of the making of the statement was, therefore, admissible to prove the truth thereof (Ibid; CM 270425, Stevenson, 45 BR 267, 284-285; CM 327733, Kremzier, 76 BR 169, 173-176; Green v. United States (CCA 8, 1923), 289 F 236, 239; Cox v. State (1928), 5 S.W. 2d (Tex.) 147; 1 Wharton's Crim. Ev. (11th Ed), secs 493, 495, pages 748-751, 755-762, and cases there cited). The statements made about the same time by the accused Barnes, Coons and Spasoff that they "did get him" were likewise admissible on the same basis, and their meaning is explained when considered in connection with Lee's statement.

The Judicial Council is further of the opinion that Lee's first statement and the statements by the other accused at the same time were admissible against the accused, as admissions, under a different exception to the hearsay rule. If it appears that the accused made a confession or admission spontaneously and without urging or request, the statement may be regarded as voluntary (MCM, 1949, par 127a, p 157; see CM 336350, Hoover, 3 BR-JC 39, 45-47, and cases there cited). Lee's first statement was made spontaneously in the presence and hearing of the other three accused. They in turn spontaneously and expressly assented to and confirmed its truth and thus in effect adopted it as their own.

Lee's second statement also was made when the four accused were conversing together, but not until some three hours after the assault. In view of the doubt as to whether the statement was substantially contemporaneous with the main fact and so closely connected therewith as to throw light upon its character, the Judicial Council prefers to rest its conclusion as to the admissiblity of this statement not upon the theory of res gestae but upon the basis that it was an admission against interest. The statement was made spontaneously and without solicitation and may thus be regarded as voluntary. The Judicial Council is of the opinion that all the mentioned statements were properly received in evidence.

Murder. - Murder is the unlawful killing of a human being with malice aforethought. Murder is premeditated when the thought of taking life was consciously conceived, a specific intention to kill someone formed, and the intended act considered for a substantial period, however brief (MCM 1949, par 179a, pages 230, 231; CM 337089, Aikins and Seevers, BR-JC, April 1950, and cases there cited). With respect to the accused Barnes,

Coons and Spasoff, the evidence convincingly establishes that they deliberately planned a concerted aggravated assault upon the deceased with an iron club and knives, apparently in retaliation for his oppressive behavior toward them. In execution of the plan, Spasoff, who had been officially released to report to the Supervisor of Prisoners, with the aid of Lee forced Sergeant Parker to release Coons and Barnes, whereupon the three accused other than Lee set upon the deceased. Coons repeatedly and mercilessly beat the deceased on the head with his club, and Barnes and Spasoff, with the same ruthlessness, stabbed him with their knives. Coupled with the statements of all four accused almost immediately following the prolonged assault, the deadly nature of the weapons used and the wounds inflicted upon the deceased, for all of which each of the three was responsible, this evidence leaves no reasonable doubt but that Barnes, Coons and Spasoff each intended their victim's death (CM 337089, Aikins and Seevers, supra; CM 336706, Pomada, 3 BR-JC 209, 215; People v. Cook (1940), 15 Cal 2d 507, 514, 102 P 2d 752, 756; People v. Smith (1940), 15 Cal 2d 640, 647, 104 P 2d 510, 514).

As to Lee, the evidence shows that, while he was at liberty in the cell block as an orderly, he twice requested Parker to release Barnes and Coons from their cells. With Spasoff, who had been officially and opportunely released and who threatened Parker with a knife after making similar demands upon him, Lee forced Parker to comply with the demands, and Barnes and Coons were freed. The assault upon the deceased, who was also at liberty as an orderly, began immediately thereafter. This evidence clearly shows Lee's collaboration with the other three accused in their plan to atack the deceased. The nature of the assault and Lee's statements immediately after its completion and especially some three hours later, fully warrant the conclusion that Lee shared the purpose of the other three accused and intended the victim's death. Declarations made after a crime may be relevant to throw light upon the state of mind and will of the accused at the time of its commission (See CM 223574, Rowe, 14 BR 29,35; Kulp v. United States (CCA 3, 1914), 210 F. 249, 251). In Lee's statement, "This isn't the first man I've killed and it won't be the last," he affirmatively identified himself with the murderous design which characterized the assault. That the victim was still alive at the time of the statement does not weaken its probative significance with respect to Lee's state of mind at and after the attack. His aiding and abetting through his overall coordination, if not supervision, of the whole affair, renders him guilty as a principal, although there is no evidence that he personally assaulted the victim (18 U.S.C. 2; CM 337089, Aikins and Seevers, supra; CM 314404, O'Neal, 64 BR 137, 142, 143). Lee's stepping between the victim and the other three accused and his subsequent attempt to help him up, assuming them to have constituted bona fide intervention on the victim's behalf, did not occur until the assault in which he had aided and abetted was in full execution. The attempted withdrawal, if such it was, therefore came too late (see CM 333860, Haynes and Lussmyer, 81 BR 375, 385-386, and case there cited). A fortiori, the same is true of

the fact that the other three accused eventually allowed the deceased to leave when he was still able to trot over a hundred feet before collapsing.

In view of the foregoing, the Judicial Council is of the opinion that the evidence is fully adequate to support the conviction of the four accused of premeditated murder, provided it is established that the victim's death resulted from the injuries caused by the accused's acts (MCM, 1949, par 179a, pages 230,232). It is sufficient, to sustain a conviction of murder, to show that death resulted from an unbroken chain of causation from the wounds inflicted by the accused, who is held for the consequences flowing naturally and logically from the injuries, whether the sequence is direct or through the operation of intermediate agencies dependent upon and arising out of the original cause (CM 329321, Marinez, 78 BR 11, 24; 1 Hale's Pleas of the Crown, 428; State v. Hambright (1892), 111 N.C. 707, 16 S.E. 411; People v. Lewis, infra; Odeneal v. State (1913), 128 Tenn. 60,62, 157 S.W. 419, 421). It is well established that the accused's acts of violence need not have been the sole cause of death, provided they were a proximate, materially contributory cause thereof (CM 314402, Heffner, 64 BR 119, 133-135, and authorities there cited; People v. Lewis (1899), 124 Cal. 551, 57 P. 470; State v. Wilson (1905), 114 La. 398, 38 So. 397). The fact that other causes cooperated with the wounds in producing death does not diminish the assailant's criminal responsibility for the death (Com. v. Giacomazzo (1942), 311 Mass 456, 42 N.E. 2d 506, 510-511). If the wounds were the primary cause of death, negligence in their treatment does not relieve the assailant of such responsibility (Crews v. State (1932), 44 Ga. App. 546, 162 S.E. 146, 149). (On the general subject, see 1 Wharton's Crim. Law (12th Ed), sec 199, pages 257-258; 1 Warren on Homicide, sec 59, pages 173-174, 181-184, and cases cited). If one inflicts upon another a wound calculated to endanger and destroy life, and death ensues, he is nevertheless responsible for the death, even though the deceased might have recovered with proper care and even though unskillful or improper treatment aggravated the wound or otherwise contributed to his death (State v. Bentley (1877), 44 Conn. 537, 540). Only where a new and independent factor intervenes, breaks the chain of causation leading from the wounds to the death, and itself causes the death, to the exclusion of the wounds, is the assailant relieved of criminal responsibility for the death (Cf. Parsons v. State (1852), 21 Ala. 300; Coffman v. Com. (1874), 73 Ky. (10 Bush.) 495; People v. Lewis, supra; Warren on Homicide, op. cit.). That the wounds in the instant case were calculated, at least in the aggregate, to endanger and destroy life is demonstrated not only by their highly serious nature but also by the surgeon's testimony that the operation he performed upon the patient was, in his opinion, necessary if the patient was to survive the peritonitis which, according to the evidence, was the direct result of the wounds.

With respect to the question of possible negligence in the conduct of the operation upon the deceased, the surgeon testified that vomiting frequently occurs and that the patient's aspiration of vomitus is the rule in an operation of the character here involved. The surgeon further testified, however, that aspiration of such a large amount of vomitus as in this case is the exception. Also, neither side called as a witness the anesthetist, Captain Barbanti, or the physician, Captain Crittenden, who apparently attended the patient at the time of his death. Neither the death certificate nor the reason why the surgeon, Dr. Young, refused to sign it appears in the evidence. Assuming, without deciding, that there was negligence in connection with the operation, it was at most a contributory cause of the death and thus could not absolve the accused of guilt. The accused's murderous violence and the resulting injuries to the victim led to the peritonitis and the operation, with their attendant dangers, which in turn led to the patient's vomiting, aspiration of vomitus, and asphyxia, as well as to his shock. The succession of these links in the causative chain was not illogical or unnatural. The asphyxia and shock together were the direct, immediate cause of death, but the violence was the primary and underlying cause. Under the cited authorities, the fact, if it were such, that negligence by others also contributed to the death, could not absolve the accused from criminal responsibility therefor. The Judicial Council is therefore of the opinion that the record of trial convincingly demonstrates that the death was proximately caused by the accused's criminal acts.

5. The Judicial Council has considered carefully the arguments advanced on behalf of the accused Lee and Spasoff, as well as the other accused. The subject matter of most of these arguments is dealt with in the preceding paragraph.

6. Data as to the accused. - Barnes is twenty-one years of age. He was convicted by general court-martial of premeditated murder and sentenced to dishonorable discharge and life imprisonment, later reduced to eighteen years. On 5 April 1949, aided and abetted by Spasoff, he stabbed a negro prisoner four times. As a result of this assault he was sentenced to an additional five years' confinement.

Coons is thirty-one years one month of age. He was tried by general court-martial for three battlefront desertions occurring in November and December 1944, convicted and sentenced to dishonorable discharge and thirty years' confinement, later reduced to seven years.

Lee is twenty-seven years of age. He stabbed a negro in the chest with a bayonet and was convicted by general court-martial and sentenced to dishonorable discharge and five years' confinement, on 10 March 1945. The entire sentence was suspended on 14 August 1945, and he was restored to duty. After escaping arrest as a straggler by overpowering military police, he became a member of a notorious terroristic gang of AWOL's in Paris. On 27 May 1946 he was tried by general court-martial for three robberies, assault, escape and stealing

a jeep, convicted and sentenced to dishonorable discharge and thirty-five years' confinement, later reduced to twenty years. With another general prisoner, he escaped from an Army transport, robbing military police guards in the process. Subsequently he stabbed a prisoner with a table knife. He committed many acts of violence while in confinement at Camp Cooke.

Spasoff is evidently twenty-one years five months of age. He was convicted by general court-martial of taking and damaging a Government vehicle, destroying a guard shack, and willful disobedience of an officer and sentenced to dishonorable discharge and six years' confinement, later reduced to two years. He aided and abetted Barnes in stabbing a negro, as mentioned above, for which he was tried by general court-martial, convicted and sentenced to two years' confinement.

Although none of the accused has a civilian criminal record, each has had numerous Disciplinary Board hearings for insubordination and various infractions of discipline. Barnes and Coons are classified as antisocial personalities; Coons, severe and incorrigible. Lee is classified as an asocial personality, severe, and a criminal psychopath.

7. The court was legally constituted and had jurisdiction over each accused and of the offense alleged against each. No errors injuriously affecting the substantial rights of any of the 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 as to each accused and the sentences and to warrant their confirmation. In view of all the circumstances of the case, including the indication that the victim, as orderly, had behaved in an abusive manner toward the accused and other prisoners in their cell block, 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
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

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

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review and the opinion of the Judicial Council in the case of General Prisoners William D. Barnes, R/N 1964, RA 14220661, Clarence E. Coons, Jr., R/N 1428, 37633985, John Lee, R/N 2230, 33402971, and Richard Spasoff, R/N 3563, RA 15249741, all of Branch United States Disciplinary Barracks, Camp Cooke, California.

2. Upon trial by general court-martial these prisoners were found guilty of the joint premeditated murder on 10 June 1949 of an inmate of the Disciplinary Barracks, in violation of Article of War 92. Each accused was sentenced to death, all the members of the court present at the time the vote was taken concurring in each sentence. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 48.

3. I concur in the opinion of the Board of Review and the Judicial Council that the record of trial is legally sufficient to support the findings of guilty and the sentences and to warrant confirmation of the sentences. The Judicial Council and I recommend that the sentences be confirmed, but in view of all the circumstances of the case, including the indication that the victim, as orderly, had behaved in an abusive manner toward the accused and other prisoners in their cell block, the Judicial Council and I further recommend that each sentence 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, and that the sentences as thus commuted be carried into execution. I further recommend that a United States penitentiary be designated as the place of confinement of each accused.

4. Consideration has been given to a "Memorandum of Errors" submitted on behalf of the accused Lee by Messrs. John R. Fitzpatrick and Edward J. Lynch, Attorneys at Law, and to numerous letters and petitions, all requesting clemency, addressed variously to the President, The Adjutant General and the The Judge Advocate General of the Army, and to correspondence received from Senators Francis J. Meyers, Edward Martin, Arthur H. Vandenberg, Mathew M. Neely, Harley M. Kilgore, Kenneth McKellar, Estes Kefauver, James P. Kem, and Forrest C. Donnell; Congressmen James G. Fulton, Raymond W. Karst, Clarence Cannon, Leonard Irving, Morgan M. Moulder, J. Perry Priest, M. G. Burnside, John Kee, Harley O. Staggers, and E. H. Hedrick; Governor Forrest Smith of the State of Missouri, and Mr Edward G. Rohrbough, Ex-Congressman from West Virginia, Mr. Meyer Berstein, Representative, CIO Veterans, United Steel Workers

of America, and Rt. Rev. Msgr. Nicholas H. Wegner, Father Flanagan's Boys' Home, Boys Town, Nebraska.

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

4 Incls
1 Record of trial
2 Op Judicial Council
3 Drft ltr to Pres sig S/A
4 Form of 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.

JAGH CM 341603

2 August 1950

U N I T E D S T A T E S v. Lieutenant Colonel RICHARD FISHER WHITCOMB (041531), 85th Ordnance Battalion (European Command), on Detached Service to Headquarters, 7822 Station Complement Unit.	))))))))))	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Augsburg, Germany, 23,24,25,27 and 28 February and 1,2 and 3 March 1950. Dismissal, total forfeitures after promulgation, and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and BARKIN
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 93d Article of War.

Specification: In that Lieutenant Colonel Richard F. Whitcomb, 85th Ordnance Battalion, on detached service with Headquarters 7822 Station Complement Unit, did, at Garmisch, Germany, during the period from 3 February 1949 to 12 August 1949, feloniously steal the following goods, chattels, and items of personal property, each of the value set forth alongside the respective items, and of a total value of more tnan $50.00, the property of Georg Wilhelm Mueller:

		Value	
1.	1 large cut glass crystal bowl	About (22 DM)	$6.60
2.	1 hors d'oeuvre plate, Krautheim Co.	About (12 DM)	$3.60
3.	1 large platter and 1 small platter set, Tattau	Some value	
4.	1 kitchen scale with weights	About (25 DM)	$7.50

5. 5 sofa pillows	About (40 DM)	$12.00
6. 2 cut glass jam bowls on silver trays, with silver lids and spoons	About (150 DM)	$45.00
7. 1 silver crumb brush and tray	Some value	
8. 2 cake plates, 1 large white China tray and 1 square vegetable dish with gold band	About (20 DM)	$6.00
9. 1 chrome cocktail shaker	About (15 DM)	$4.50
10. 1 metal cocktail recipe	Some value	
11. 2 pottery flower vases	Some value	
12. 1 picture of three horses' heads	Some value	
13. 1 picture of forest scene	Some value	
14. 1 electric buzzer with two small bears	About (20 DM)	
15. 1 wooden framed wall barometer	About (40 DM)	$12.00
16. 1 table barometer	About $4.00	
17. 1 watering pot	Some value	
18. 1 lawnmower, approximately 12"	About (25 DM)	$7.50
19. 2 shaving mirrors, one in leather case with magnifying side	About $5.00	
20. 1 watering pot	Some value	
21. 1 electric white enamel waffle iron	About (30 DM)	$9.00
22. 1 US Army blanket, dyed blue, present from Mrs. Eubank	Some value	
23. 1 gilt framed mirror, 5' x 1½"	About (40 DM)	$12.00
24. 1 metal cover for meat platter, containing 1 pair shears, 1 spatula, 1 kitchen knife, 1 piecrust maker, 1 apple corer, 1 pastry brush, 1 butter trimmer, 1 cork screw, 2 butter patters	Some value	

25. 1 cake umbrella	Some value	
26. 1 Pyrex dish	Some value	
27. 1 washboard	Some value	
28. 1 garden hose, approximately 30 feet	About $3.00	
29. 1 galvanized wash tub	About $2.00	
30. 1 ironing board and sleeve board	About (18 DM)	$5.40
31. 1 box containing assorted tools: 1 plumber's helper, 1 pair hedge sheers, 1 brace, 1 sickel, 1 pair grass shears, 1 keyhole saw, 1 coat hook, 2 muffin tins, 1 mitre saw, 1 steel brush, 1 raspwood, 2 cold chisels	Some value	
32. 1 humn book	About (7 DM)	$2.10
33. 1 box containing assorted nails, screws, two-way brass hinges, wire, chains, 1 beer can opener, 1 punch, 1 hand tool for making metal seals, 1 push drill with six drills, 1 screw driver	Some value	
34. 1 baggage rack	Some value	
35. 1 brocade tablecloth with fringe	About (40 DM)	$12.00
36. 1 lace table scarf with linen and embroidery, and 1 embroidery with hand-stitching and hand-made lace	About (150 DM)	$45.00
37. 4 Canton flannel table pads	About (40 DM)	$12.00
38. 5 pairs cotton window curtains	About $15.00	
39. 1 tulle curtain for one window, 3 pieces	About (24 DM)	$7.20
40. 16 linen pink and white dish towels, some containing initial "G"	About (40 DM)	$12.00
41. 3 hand towels with red borders and 2 white towels with initial "GM"	About $2.50	
42. 1 pillow case with lace inset and embroidered initials "HG"	About $3.00	

43. 1 linen napkin with small "WM" in corner	About (6 DM)	$1.80
44. 1 white towel with initial "W"	Some value	
45. 1 linen table cloth	About (15 DM)	$4.50
46. 1 blue and white crash table cloth	About (18 DM)	$5.40
47. 1 silk orange-stripped table cover	About (10 DM)	$3.00
48. 1 pot holder and assorted polishing cloths	Some value	
49. 1 rag rug	Some value	
50. 1 wicker clothes basket	About (24 DM)	$7.20
51. 1 rope clothespin basket with clothes pins	Some value	
52. 3 white Chine cake plates by Thomas of Bavaria	About (15 DM)	$4.50
53. 1 composition tray	Some value	
54. 1 wooden kitchen tray	Some value	
55. I enamelware slop pail	Some value	
56. 6 gold boullon cups	About (18 DM)	$5.40
57. 1 gray bowl by Kaultheim	Some value	
58. 1 Kaultheim coaster for coffee or tea pot	Some value	
59. 5 Kaultheim saucers	About (10 DM)	$3.00
60. 3 Kaultheim salad plates	About (9 DM)	$2.70
61. 1 teaspoon with initials "WM" on handle	Some value	
62. 6 Sterling silver demi-tasse spoons with floral design on handles	About (60 DM)	$18.00
63. 2 pottery flower pots	About (16 DM)	$4.80
64. 2 white Tattau salad bowls with gold band	About (24 DM)	$7.20

65. 1 rose design Meissen plate	About (25 DM)	$7.50
66. 1 Meissen plate, rose in center, rose on edge	About (20 DM)	$6.00
67. 1 Meissen bread and butter plate, red flower design	About (25 DM)	$7.50
68. 1 Rosenthal plate, roses and forgetmenot design	About (20 DM)	$6.00
69. 1 Havilland dish	About (5 DM)	$1.50
70. 1 new pair mountain climbing boots	About (80 DM)	$24.00
71. 1 pair USA type flying boots	About $11.00	
72. 1 plain white cream pitcher	Some value	
73. 1 Moorish cigar box	About (30 DM)	$9.00
74. 1 crystal cut glass flower case, approx 8" high	About (20 DM)	$6.00
75. 3 Pyrex salad dishes	About $3.00	
76. 3 glass saucers	Some value	
77. 1 cut glass mustard jar with cover	About (8 DM)	$2.40
78. 3 glass dessert bowls	Some value	
79. 1 Pyrex custard cup	Some value	
80. 1 nut grater	Some value	
81. 1 fancy liquor bottle stopper	About (5 DM)	$1.50
82. 1 liquor pourer	Some value	
83. 2 plastic napkin rings	Some value	
84. 1 basket knit doilies	Some value	
85. 1 tumbler	Some value	
86. 3 small stone jars	About (18 DM)	$5.40
87. 2 waste paper baskets, 1 Japanese	About (35 DM)	$10.50

88. 1 Christmas tree stand	About (10 DM)	$3.00
89. 1 antique beer mug	Some value	
90. 1 brass candle stick	About (30 DM)	$9.00
91. 1 bronze ash tray, figure of girl	About (30 DM)	$9.00
92. 1 glass cream pitcher	Some value	
93. 1 antique Bochara cover, 2.40 x 1.30 meters	About (1700 DM)	$510.00
94. 1 round mahogany table	About (120 DM)	$36.00
95. 1 small oblong walnut table	About (120 DM)	$36.00
96. 2 brocade upholstered mahogany chairs without arms	About (100 DM)	$30.00
97. 22 cans fish (salmon), each 1/2 kilogram	About $11.00	
98. 30 pounds lard	About $10.50	
99. 25 pounds lard and stone jar	About $8.75	
100. 3 litres hair lotion	About $3.00	
101. 10 bottles old champagnes; Schorlemer Lieser Saarsekt, Mercier, Trier, Burgaff Jahrhundertfullung, 1925, 1929, and 1937	About (180 DM)	$54.00
102. 4 bottles 1920 Oestricher Lenehon, Beeren-Auslese	About (200 DM)	$60.00
103. 6 bottles, 1933 Hallgartener Schonhell Auslese, bestes Fass, Furst Lowenstein	About (240 DM)	$72.00
104. 1 bottle Haut Brien 1922 Schlossabzug (Horitiers Larrieu)	About (50 DM)	$15.00
105. 1 bottle Chatear Bel Air 1940 Schloss-abzug	About (15 DM)	$4.50
106. 6 bottles diverse 1920 Bordeaux, Chateau, Troplong, Winkler	About (60 DM)	$18.00

107.	7 bottles 1920 Trockenbeeren Auslesen Rudesheimer Berg Bronnen - Freih. v. Ritter (2)	About (100 DM) $30.00
108.	Geisenheimer Katzenloch - Heinr, Hissenauer (2) Trocken Beeren, Auslese, 1920	About (80 DM) $24.00
109.	Rauenthaler Weishell - Preuss, Domane, Auslese, 1933	About (120 DM) $36.00
110.	Rauenthaler Weishell - Graf Eltz, Trocken Beeren Auslese, 1920	About (100 DM) $30.00
111.	Rauenthaler Wueshell Blumchen - Graf Eltz, Trocken Beeren Auslese, 1920	About (60 DM) $18.00
112.	1 bottle 1937 Forster Kirchenstuck Auslese	About (30 DM) $9.00
113.	3 bottles 1933 Rauenthaler Baikon-Ausless-Stattl. Domane	About (120 DM) $36.00
114.	2 bottles 1933 Steinberger Cabinett - Stattl. Domane	About (50 DM) $15.00
115.	1 bottle 1937 Assmannsch. Edelbeeren-Auslese-Staatl. Domane	About (75 DM) $22.50
116.	6 bottles 1938 Assmennsch. Edelbeeren-Auslese - Staatl. Domane	About (450 DM) $135.00
117.	6 bottles Winkler Hasensprung Auslense-Erben, 1934	About (150 DM) $45.00
118.	7 bottles 1934 Schloss Vollrads Cabinett	About (175 DM) $52.50
119.	5 bottles 1933 and 1934 Berncasteler Doktor Auslese	About (175 DM) $52.50
120.	13 bottles 1933 and 1934 Schloss Johannisberger Schlossabzug, Auslese, Sparlese	About (780 DM) $234.00
121.	3 bottles 1934 Schloss Johannisberger Schlossabzug	About (90 DM) $27.00
122.	Deleted	
123.	33 bottles 1926 French Burgunder Cote de Beaune, Bourgogne	About (990 DM) $297.00

124. Handpainted dinner set Lamm - Dresden, ivory with rich decor, consisting of 8 dinner plates	About (360 DM)	$108.00
125. 8 dessert plates	About (200 DM)	$60.00
126. 8 small bread plates	About (120 DM)	$36.00
127. 8 small compote dishes	About (180 DM)	$54.00
128. 1 soup tureen with lid	About (300 DM)	$90.00
129. 1 sauceboat	About (125 DM)	$37.50
130. 3 large meat dishes	About (250 DM)	$75.00
131. 12 china table cards	About (60 DM)	$18.00
132. 4 bottles French Chablis 1924	About (100 DM)	$30.00
133. 1 bottle Sauterne Guiraud Schlossabzug 1921	About (40 DM)	$12.00
134. 2 bottles 1933 Rudesheimer Hinterhaus Spatlese	About (70 DM)	$21.00
135. 24 bottles 1947 diverse Mosel and Saarwines	About (144 DM)	$43.20
136. 6 bottles apple wine and apple juice	About (9 DM)	$2.70
137. Antique Oriental rugs;		
1 Ferahan, 186/122 cm	About (1800 DM)	$540.00
Kechan (silk) 83/56 cm	About (500 DM)	$150.00
Kasak prayer rug, 185/142 cm	About (1200 DM)	$360.00
Kaschgar, 233/120 cm	About (2500 DM)	$750.00
Goltuk-Feraham, 200/125 cm	About (2500 DM)	$750.00
Bergamo high pile, 145/108 cm	About (600 DM)	$180.00
Tekke-Turkmenen Bag, 140/65 cm	About (500 DM)	$150.00
Uschak, 170/130 cm	About (1500 DM)	$450.00
Mudjur prayer, 160/130 cm	About (1500 DM)	$450.00
Mudjur prayer, 190/113 cm	About (1300 DM)	$390.00
Kircheir red niche, 150/124 cm	About (1600 DM)	$480.00
Kircheir, graveyard design, 175/115 cm	About (1200 DM)	$360.00
Bochara, 114/75 cm	About (800 DM)	$240.00
Kirman-fragment, 130/77 cm	About (500 DM)	$150.00
Samarkand-silk fragment, 100/90 cm	About (600 DM)	$180.00

138.	5 cutglass and china vases	About (260 DM) $78.00
139.	3 small round silver bowls	About (20 DM) $6.00
140.	1 Dresden handpainted mocca set	About (450 DM) $135.00
141.	1 antique Meissen flacon	About (150 DM) $45.00
142.	1 Bohemian cut glass vase	About (125 DM) $37.50
143.	1 large plate, Hutschenreuther hohenberg	About (100 DM) $30.00
144.	1 round Schierholz bowl with angelets and roses	About (225 DM) $67.50
145.	2 cut glass Val St. Lambert decanters	About (450 DM) $135.00
146.	1 Meissen writing table set	About (150 DM) $45.00
147.	1 Schlaraffia bed mattress, 4 parts	About (200 DM) $60.00
148.	2 chairs with red silk covers	About (150 DM) $45.00
149.	1 jewellery case, 1 oriental foot-stool	About (125 DM) $37.50

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

Specification: In that Lieutenant Colonel Richard F. Whitcomb, 85th Ordnance Battalion, on detached service with Headquarters 7822 Station Complement Unit, having been assigned quarters at 32 Klarwinstrasse, Garmisch, Germany, did, at Garmisch, Germany, during the period of 3 February 1949 and 12 August 1949, wrongfully fail to exercise due care in safeguarding valuable articles of personal property, of a value of more than $50.00, belonging to Georg Wilhelm Mueller which articles were present in said quarters, thereby suffering the following articles to be lost, wasted and dissipated:

		Value
1.	22 cans fish (salmon), each 1/2 kilogram	About $11.00
2.	30 pounds lard	About $10.50
3.	25 pounds lard and stone jar	About $8.75
4.	3 litres hair lotion	About $3.00
5.	10 bottles old champagnes: Schorlemer Lieser Saarsekt, Mercier Trier, Burgaff Jahrhundertgullung, 1925,1929,1937	About (180 DM) $54.00

6. 4 bottles 1920 Oestricher Lenehon, Beeren-Auslese	About (200 DM)	$60.00
7. 6 bottles 1933 Hallgartener Schonhell Auslese, bestes Fass, Furst Lowenstein	About (240 DM)	$72.00
8. 1 bottle Haut Brien 1922 Schlossebzug (Horitiers Larrieu)	About (50 DM)	$15.00
9. 1 bottle Chateau Bel Air 1940 Schlossabzug	About (15 DM)	$4.50
10. 6 bottles diverse 1920 Bordeaux, Chateau, Troplong, Mondet	About (60 DM)	$18.00
11. 7 bottles 1920 Treckenbeeren Auslesen Rudesheimer Berg Bronnen-Freih, v Ritter (2)	About (100 DM)	$30.00
12. Geisenheimer Katzenloch-Heinr, Hissenauer (2) Troken Beeren, Auslese, 1920	About (80 DM)	$24.00
13. Rauenthaler Weishell-Preuss, Domane, Auslese 1933	About (120 DM)	$36.00
14. Rauenthaler Weishell-Graf Eltz Troken Beeren Auslese 1920	About (100 DM)	$30.00
15. Rauenthaler Wueshell Blumchen-Graf-Eltz Troken Beeren Ausles, 1920	About (60 DM)	$18.00
16. 1 bottle 1937 Forster Dirchenstruck Auslese	About (30 DM)	$ 9.00
17. 3 bottles 1933 Rauenthaler Baikon-Auslese-Staatl. Domane	About (120 DM)	$36.00
18. 2 bottles 1933 Steinberger Cabinett-Staatl. Domane	About (50 DM)	$15.00
19. 1 bottle 1937 Assmannsch. Edelbeeren-Auslese-Staatl. Domane	About (75 DM)	$22.50
20. 6 bottles 1938 Assmannsch. Edelbeeren-Auslese-Staatl. Domane	About (450 DM)	$135.00
21. 6 bottles Winkler Hasensprung Auslense-Krayer Erben 1934	About (150 DM)	$45.00

22. 7 bottles 1934 Schloss Vollrads Cabinett	About (175 DM)	$52.50
23. 5 bottles 1933 and 1934 Berncasteler Doktor Auslese	About (175 DM)	$52.50
24. 13 bottles 1933 and 1934 Schloss Johannisberger Schlossabzug, Auslese, Spatlese	About (780 DM)	$234.00
25. 3 bottles 1934 Schloss Johannisberger Schlossabzug	About (90 DM)	$27.00
26. Deleted		
27. 33 bottles 1926 French Burgunder Cote de Beaune, Bourgogne	About (990 DM)	$297.00
28. Handpainted dinner set Lamm-Dresden, ivory with rich decor, consisting of 8 dinner plates	About (360 DM)	$108.00
29. 8 dessert plates	About (200 DM)	$60.00
30. 8 small bread plates	About (120 DM)	$36.00
31. 8 small compote dishes	About (180 DM)	$54.00
32. 1 soup tureen with lid	About (300 DM)	$90.00
33. 1 sauceboat	About (125 DM)	$37.50
34. 3 large meat dishes	About (250 DM)	$75.00
35. 12 chine table cards	About (60 DM)	$18.00
36. 4 bottles French Chablie 1924	About (100 DM)	$30.00
37. 1 bottle Sauterne Guiraud Schloss-abzug 1921	About (40 DM)	$12.00
38. 2 bottles 1933 Rudesheimer Hinterhaus Spatlese	About (70 DM)	$21.00
39. 24 bottles 1947 diverse Mosel and Saarwines	About (144 DM)	$43.20
40. 6 bottles apple wine and apple juice	About (9 DM)	$2.70
41. Antique Oriental rugs: 1 Fershen, 186/122 cm	About (1800 DM)	$540.00

Kerchan (silk) 85/56 cm	About (500 DM)	$150.00
Kasak prayer rug, 185/142 cm	About (1200 DM)	$360.00
Kaschgar, 233/120 cm	About (2500 DM)	$750.00
Goltuk-Ferahen, 200/125 cm	About (2500 DM)	$750.00
Bergamo high pile, 145/108 cm	About (600 DM)	$180.00
Takke-Turkmenen Bag, 140/65 cm	About (500 DM)	$150.00
Uschak, 170/130 cm	About (1500 DM)	$450.00
Mudjur prayer, 160/130 cm	About (1500 DM)	$450.00
Mudjur prayer, 190/113 cm	About (1300 DM)	$390.00
Kircheir red niche, 150/124 cm	About (1600 DM)	$480.00
Kircheir graveyard design, 175/115 cm	About (1200 DM)	$360.00
Bochara, 114/75 cm	About (800 DM)	$240.00
Kirman-fragment, 130/77 cm	About (500 DM)	$150.00
Samarkand-sild fragment, 100/90 cm	About (600 DM)	$180.00
42. 5butglass and chine vases	About (260 DM)	$78.00
43. 3 small round silver bowls	About (20 DM)	$6.00
44. 1 Dresden handpainted mocca set	About (450 DM)	$135.00
45. 1 antique Meissen flacon	About (150 DM)	$45.00
46. 1 Bohemian cut glass vase	About (125 DM)	$37.50
47. 1 large plate, Hutschenreuther Hohenberg	About (100 DM)	$30.00
48. 1 round Schierholz bolw with angelets and roses	About (225 DM)	$67.50
49. 2 cut glass Val St. Lambert decanters	About (450 DM)	$135.00
50. 1 Meissen writing table set	About (150 DM)	$45.00
51. 1 Schlaraffia bed mattress, 4 parts	About (200 DM)	$60.00
52. 2 chairs with red silk covers	About (150 DM)	$45.00
53. 1 jewellery case, 1 oriental foot-stool	About (125 DM)	$37.50

He pleaded not guilty to all Charges and Specifications. He was found "of the Specification of Charge I: Guilty, except for the items 97 through 149, both inclusive of the Specification, substituting therefor the following words and figures: '2 bottles of champagne, brand and vintage unknown,

of some value; and 1 bottle of white wine, brand and vintage unknown, of some value'; of the excepted words and figures, not guilty; of the substituted words and figures, guilty" and guilty of Charge I. He was found "of the Specification of Charge II: Guilty, except for items 1, 2, 3, 4 and 51 of the Specification, and except for the following words and figures: In item 5, the figure 10; in item 7, the figure 6; in item 10, the figure 6; in item 11, the figure 7; in item 12, the figure 2; and substituting therefor, in item 5, the figure 8; in item 7, the figure 5; in item 10, the figure 5; in item 11, the figure 2; in item 12, the figure 1; of the excepted words and figures, not guilty; of the substituted words and figures: guilty" and guilty of Charge II. 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 two 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.

On 3 February 1949, Lieutenant Colonel Richard Fisher Whitcomb, 041531, the accused, was assigned dependent quarters at 32 Klarweinstrasse, Garmisch, Germany; on 8 February he was duly "checked" into these quarters; and on 21 February he and his wife moved into them "lock, stock, and barrel" and "proceeded to live there from there on out" (R 189,190,262,499). These premises consisted of an eleven room house surrounded by a plot of land on which was also located a small shed or tool house (R 33,34,35; Pros Exs 1A-1G, 2A-2E). These having been requisitioned in 1945 by the United States Forces, the resident proprietor, a German national named Georg Wilhelm Mueller, thereupon moved his family and the bulk of his personal nonrequisitioned property into a rear room over the garage, the attic, and a cellar storeroom which he converted into a semi-independent "apartment" where he continued to live under the same roof with the American military occupants, "by the permission of the Commanders of Garmisch," till 24 February 1949 (R 35-37,39,40,42,301). The bulk of the Mueller personal property which he kept in his rear "apartment" consisted mainly of antique oriental rugs, classic paintings, valuable chinaware, and a cellar of vintage wines (R 36,37,39,41,42,48,224,302). The estimated value of his collection of rugs and paintings was about 750,000 Marks (R 152).

On 23 February 1949, several days after the accused had moved into these premises, Mueller was ordered by the American Military Governor to vacate within a few hours the rooms which he occupied (R 42,153). Inasmuch, however, as he was bedridden with diabetes, he did not leave till the following day (R 43,44,302,566). Because of the fact also that the new lodgings offered him by the German Housing Office were temporary, were

inadequate to accommodate all his possessions, and were actually at that time being occupied by other people, when he vacated the Whitcomb quarters on 24 February 1949, he perforce left behind him all his personal, non-requisitioned property, with the exception of some clothing (R 43,44,50, 178,301,566). Prior to leaving, however, the Muellers "straightened up" their small apartment, they stored and locked up in it their possessions, and they retained all the keys to the various rooms and closets wherein their property was stored, yielding to the Post Quartermaster only the keys to the rear entrance of the house (R 45,46,48,50,301). On the following day, 25 February, with the permission of the Garmisch Post Quartermaster, and accompanied by Corporal Buzzingham who represented the Quartermaster, Mrs. Mueller returned to her former rooms, and withdrew additional items of personal property. She did not remove any rugs, however, nor any tapestries, nor any valuable china, nor any of the wines or foodstuffs that were in the cellar (R 48-51,574). This time again, she locked up everything she could which belonged to her husband, and took the keys with her (R 102,103,150,152,178,179,181). In thus storing their personal property and locking it up in the requisitioned premises from which they were being evicted, the Muellers under the circumstances acted with the tacit approval and sanction of the United States military authorities (R 186,187,194,255,256,257,260,265,266,270,289,566). The accused was perfectly aware of the regularity of this arrangement (R 270,289).

After Mrs. Mueller had finally left the premises on 25 February, Corporal Buzzingham on behalf of the Post Quartermaster delivered to the accused in the presence of Mrs. Whitcomb all the keys to the rooms formerly occupied by the Muellers, with the exception, however, of the keys to the locked cabinets and wardrobes containing a portion of the Mueller property. The keys to the latter cabinets and wardrobes he permitted Mrs. Mueller to retain. Among the keys which Corporal Buzzingham delivered to the accused were the keys to the attic where the Mueller rugs were stored, as well as the keys to the cellar storeroom where the groceries and wines belonging to Mueller were stored (R 180-182). Upon handing over to the accused the keys which enabled access to the personal property of the Muellers, pursuant to instructions from the Post Quartermaster, Corporal Buzzingham conveyed to the accused on 25 February 1949, precise verbal directives prohibiting him from using any of the nonrequisitioned items which were thus left in his quarters (R 181,187,271,277). The purpose for which these keys were nevertheless delivered to the accused was to enable him to gain access to all the rooms in his quarters in case the necessity arose of extinguishing a fire which might possibly at some future time have broken out in the rear part of the house (R 182).

Soon after these events, on the evening of 28 February 1949, Mrs. Mueller with the aid of binoculars saw the accused in the rear part of the house "working at the cabinets with a hammer and screw-driver" (R 51-54). One of these cabinets on which Mrs. Mueller testified she saw the accused "working" contained some of the Muellers' "most valuable" china (R 54; Pros Ex 3G) which was subsequently found to be missing (R

54-56). During the same period, "about in March" (R 238), a German civilian employed in the Garmisch Ordnance Section, was ordered personally by the accused to go to his quarters and open some locks in the basement. The accused was present personally when those locks to the cellar storeroom were being opened (R 224,237). After the storeroom locks were opened, the same locksmith proceeded to the rear upper regions of the house where under the direction of the "housemaster" of the accused he continued to open other locks, particularly the locks to a bookcase, and to a closet upstairs in the back which contained "chinaware, Nymphenburg china and Meissen china. It was very good china" (R 224,229,237-240). The German locksmith stated, however, that after he and a blacksmith companion had opened, under the direction of the housemaster, the above-mentioned locks to the various cabinets, subject housemaster "got mad at us because we opened it; the one upstairs in the back" (R 237). The same irascible housemaster, during this period, under orders from Mrs. Whitcomb, pried open the lock on the hut or shed in the back of the house where the Muellers kept their garden equipment, and he removed therefrom the garden furniture, a lawnmower, and a bicycle, all of which were then used by the Whitcomb household (R 223, Pros Ex 84). During this same period also, the housemaster carried down from the attic about thirty oriental rugs, a sofa, two upholstered chairs, and pictures which were then used by the accused in his quarters (R 185,193-195,222). Mrs. Whitcomb stated to a lady who was visiting her that the oriental rugs in the Whitcomb quarters "came out of the attic" (R 174), and also some "lovely china" which she used had come from "upstairs" (R 175). Also used by the accused in his quarters was a rug catalogue book, property of Mueller, portraying in colored reproduction the type of oriental rugs which had been in the attic, and reflecting their value (R 235,325).

On 8 July 1949, Mrs. Mueller was invited by the military authorities of Garmisch to appear at the quarters of the accused. Upon entering the front part of the house, she promptly identified, in the presence and hearing of the accused, a number of nonrequisitioned objects which she claimed was the property of her husband, and which had been left stored in the rear part of the house on 25 February when the Muellers were evicted from the premises. Picking up a tablecloth from one table and throwing it on to another table in the living room, Mrs. Mueller exclaimed in the presence of accused and other witnesses that the accused was a "thief." To this accusation, the accused remained mute (R 199). Checking his inventory in the presence of the accused, a representative of the Post Quartermaster confirmed Mrs. Mueller's statement that the objects which she identified in use by the accused were indeed nonrequisitioned (R 201). In the presence of Mrs. Mueller, the accused acknowledged that the objects of personal property which she had identified as belonging to her husband had been taken down from where they were originally stored in the rear part of the house. "Yes, it was in their apartment," he said (R 61). Shortly previous to this occasion, the accused voluntarily admitted to the S-4 of Munich Military Post that he had improperly "taken" one carpet

while being quartered in the Mueller premises in Garmisch (R 166-168). Relative to these items of property which she identified in the quarters of the accused on 8 July 1949, Mrs. Mueller testified that neither she nor her husband had ever given anybody any permission to remove them or to use them, and that neither she nor her husband had ever to her knowledge, specifically or otherwise, ever offered to the accused or to his family the use of these properties (R 61-62,155). Mrs. Mueller further testified that a part of these items of personal, nonrequisitioned property were eventually returned to Mueller, but that some of them were never recovered (R 142-144,149,199-201,269).

Relative to Mrs. Mueller's accusations and claims occasioned by the above-outlined episode of 8 July 1949, the accused made a voluntary sworn statement to the Inspector General, to the effect that he had indeed caused the lock to the cellar storeroom to be opened, but that such a forcible entry was rendered imperative for sanitary reasons in order to remove a quantity of putrefying foodstuff which was exhaling an insalubrious and offensive odor. Whatever other doors were pried open on that occasion constituted an unauthorized act on the part of the housemaster who was duly reprimanded by Mrs. Whitcomb for his misconduct. The accused further stated that he had used several of the nonrequisitioned rugs which were stored in the attic of his quarters, but that he returned them to their original place of storage prior to 2-3 August at which time they were removed from his quarters by the Post Quartermaster together with the rest of the Mueller property (R 247,248). As for the alleged disappearance of a number of bottles of wine, the accused admitted having disposed of not more than four or five bottles. He acknowledged that he knew that the aforementioned property which he admitted using was the nonrequisitioned personal property of the Muellers (R 249).

Meanwhile on 11 August 1949, the accused moved to new quarters in Munich (R 189,262,520). On 28 August 1949 a duly authorized search was made of these quarters which revealed the existence therein, in open use, of a quantity of items which, in the presence of the accused, Mrs. Mueller identified as the nonrequisitioned personal property of herself and her husband which had been left stored in the quarters of the accused in Garmisch on 25 February 1949. These objects were the same as set forth in items numbered 1 through 96 of the specification of Charge I, excepting items 12 and 13 which were deleted. Mrs. Mueller testified in detail relative to each item, setting forth certain distinguishing marks, and describing the place in the rooms and closets at 32 Klarweinstrasse, where she had last left each object prior to its transmigration from Garmisch to the quarters of the accused in Munich (R 66-67,70-84,250; Pros Exs 6-101). The foregoing testimony was partly corroborated by a representative of the Garmisch Post Quartermaster (R 190-192,205). Mrs. Mueller stated that none of these items of property which belonged to her household had been removed by her from 32 Klarweinstrasse at any time during or prior to 24-25 February 1949 (R 572,574). She further testified that the

property recovered in the quarters of the accused in Munich on 28 August 1949 did not represent the total amount of property which according to her calculation Mueller had left behind him at 32 Klarweinstrasse on 25 February 1949 (R 110-111). It was stipulated that the total value of the Mueller property found in the possession of the accused in Munich, namely Items 1 through 96 of the specification of Charge I, if appraised by certain experts proposed by the defense, would be 320 Deutsche Marks (R 104-106).

Relative to certain items of Mueller property which were recovered in the Munich quarters of the accused, the prosecution brought out in evidence that the accused personally supervised the loading of the truck which transported his household goods from Garmisch to Munich. A witness who helped load the truck identified a certain lawnmower (Pros Ex 84) as similar to one which the accused personally directed him to load upon the truck, and which he duly loaded in the presence of the accused. The same witness also identified two chairs (Pros Exs 28 and 29) as similar to the ones which either the accused or Mrs. Whitcomb directed him to load upon the truck. He added that these objects were later that day unloaded and delivered by him to the quarters of the accused in Munich (R 334-336,340,342,344).

After a number of futile attempts to obtain an inventory "with American witnesses" (R 303) of their property stored at 32 Klarweinstrasse (R 49,62,153,183,187,216,217,303), the Muellers sometime in March 1949 drew up such a list as well as they could based upon an "official inventory" made in 1943 (R 156), photographs (Pros Exs 3A through 3J), notes and memory (R 37,136-137,304-305). On 2-3 August 1949 the Garmisch Post Quartermaster under guard hastily inventoried and removed from the quarters of the accused in Garmisch what purported to be the entire personal property of Mueller; and deposited it in a private warehouse which went under the name of "Hartenstein's." (R 63,64,86,201,204,211,272,275,324). In connection with this move, Mrs. Mueller was not permitted by the Post Quartermaster to come into the house and check the property, but was granted the right to make an inventory in the yard while the property was being moved. She was not present, however, during this removal of her husband's property (R 63,201,273). Although this moving operation was under the nominal supervision of the Garmisch Post Quartermaster, in reality it was the accused and Mrs. Whitcomb who indicated what belonged to them and what to the Muellers (R 273,274). On 4 August 1949, the Muellers began drawing up a detailed inventory of their property which was deposited in Hartenstein's warehouse (R 65). By comparing these two inventories, namely, the earlier inventory of March 1949 with the later inventory of August 1949, the Muellers arrived at a list of objects which allegedly were missing and not accounted for (R 65,66,87-90). It was this list (Pros Ex 102) which they submitted to the Inspector General (R 87) in support of their complaint against the accused, and upon which the Inspector General predicated his search of the Munich quarters of the accused on 28 August 1949 (R 66). It was this list also which enabled the Muellers, after the fruitful search of the quarters of the accused in Munich, to determine which objects were

recovered and which were apparently lost forever. Never recovered, according to the partly corroborated testimony of Mueller and his wife, were 13 oriental rugs, a quantity of chinaware, a number of bottles of wine, and sundry other objects as set forth particularly in the specification under Charge II as well as under Charge I (R 91-103,203,204,213,274,307,309-314, 319-321,323-326; Pros Exs 108A through 108G). The total value of all these missing items amounted to a sum of more than $50.00 (R 159-165,322; Pros Ex 109).

Upon request of the Trial Judge Advocate the court took judicial notice of the fact that during the period involved in this case the official value of the Deutsche Mark was thirty cents (R 107).

b. For the defense.

The accused, Lieutenant Colonel Richard F. Whitcomb, elected to testify under oath on his own behalf. He stated in substance that by 21 February 1949 he and his wife had moved into the house at 32 Klarweinstrasse, Garmisch, which had been assigned to him on 3 February; that he thereupon checked the property in his quarters which was charged to him on a Memorandum Receipt; that there was no Quartermaster property in the house at that time; and that he discovered, as a result of his checkup, that there was more property in the front part of the house than was indicated on the Memorandum Receipt issued to him by the Post Quartermaster (R 500-501,541). Relative to this excess of property which was not included on his Memorandum Receipt, the accused discussed it with an officer of the Post Quartermaster who "told us that we were responsible for the items that we had signed for on the Memorandum Receipt. That property left in the house was no responsibility of ours, and that it was left there at the risk of the owners" (R 509). Hence he felt that all the items of property in the front part of his quarters were for his own use, regardless of whether they were listed on his Memorandum Receipt or not, and regardless of whether they were requisitioned or not. And he used all these items intentionally throughout his residence at 32 Klarweinstrasse (R 541-542). Upon cross-examination, the accused denied that he ever received in conjunction with his Memorandum Receipt a letter advising him that although the property not included in the Memorandum Receipt was the responsibility of the owners thereof, nevertheless existing regulations prohibited their use by military personnel (R 509,555).

Continuing his testimony, the accused stated that on 25 February 1949, pursuant to a telephone call from his wife to the effect that Mrs. Mueller, the wife of the German proprietor of the requisitioned quarters occupied by the accused, had arrived with a truck, he returned to his quarters at about 4:15 p.m., and beheld about 8 or 10 people carrying out of the house, boxes, hampers, cartons, baskets and similar containers, some of which were taken to a neighboring house occupied by a German. No inventory was made by Army personnel throughout this operation which lasted until about 9:30 p.m. (R 506-507). At about 9:30 p.m., after the moving was completed,

Corporal Buzzingham, a representative of the Post Quartermaster, delivered to the accused in the presence of his wife, about 6 or 8 house-door type keys, with perhaps one cabinet key (R 507,550). On the previous day, meanwhile, Mrs. Whitcomb had obtained from Frau Mueller about five or six cabinet type keys which fitted the various locks to the pieces of furniture in the front part of the house (R 507). The keys which Corporal Buzzingham gave the accused operated every door in the house, including all the doors in the rooms formerly occupied by the Muellers, with the exception of that to the cellar supply room (R 507,508). Accompanied by his wife and Corporal Buzzingham, the accused made "a very quick trip" through the upper rear part of the house which until 24 February had been occupied by the Muellers. He noticed that "it was an art museum ... of various antiques ... filled with paintings, rugs, art objects, china cabinets -- there was just everything that you could think of that we could see" (R 509,364). In the course of this hasty inspection, the accused moved aside on the second floor, a very large wardrobe, by pushing it against a window, thus almost completely blocking the window (R 510, Pros Ex 2D). Upon cross-examination, the accused stated that although Corporal Buzzingham did not tell him so, he "assumed" that the property he saw in the rear part of the house belonged to the Muellers since they had left it there, and that there was "no question at all" about the fact that this property did not belong to him (R 532,534). He also testified in effect that the purpose of his making a quick trip through the rear part of the house with Corporal Buzzingham on 25 February was to learn from the corporal what objects in the house fell under his control, and what he was not entitled to use (R 532). He added that no one had made any request to him at that time for an inventory of the unrequisitioned property in the house, and that no signs were posted on any of the rooms indicating that the property therein was not to be used (R 505).

Denying that he had ever opened any cabinet that was locked, or that he had ever used a screwdriver to open any cabinet in the house (R 511), the accused admitted on cross-examination, however, that in conjunction with his wife he opened certain locked cupboards and closets, including the china closet in the room above the garage, by means of keys from the front part of the house. He added that most of the cabinets and closets were opened during his absence, but when he returned in the evening he was "apprised" of the fact, and he recognized things that were removed from those closets and from other storage places (R 535-537). An officer who moved into 32 Klarweinstrasse a few days after the accused vacated these premises, testified that he saw no scratches or marks on certain of the cabinets and closets in the house (R 484-486).

Relative to the opening of the lock to the cellar storeroom, the accused testified that that was done under his direct orders because of the fact that foul odors were emanating from the cellar and it became necessary to gain access thereto in order to dispose of the unsanitary

stuff that was putrefying there. He did not, however, authorize the opening of any other locks at that time (R 513-515,547). A new lock was substituted for the original one which was removed from the cellar storeroom door, and the key thereto, with his approval, was hung on a hook in the kitchen, rendering it available to any member of the Whitcomb household (R 516,548). Concerning the new key to the cellar, however, the Whitcomb housemaid testified for the defense that the door to the cellar storeroom was kept locked, and that no one could gain entry thereto except with Mrs. Whitcomb's permission (R 406).

The accused added that when he entered the cellar storeroom after directing the removal of the lock, in addition to the rotting foodstuff he saw about 100 bottles filled with wine, as well as a number of empty ones (R 514; also R 405-407). He stated in this connection that while neither he nor Mrs. Whitcomb were drinkers "in the commonly accepted usage of the term" (R 515; also R 367), he did serve to some guests several bottles of champagne and white wine taken from the Mueller cellar, and which he knew belonged to the Muellers (R 515-516,551; also R 367). The Whitcomb family housemaid testified that on her own authority she gave to the German fireman and his laundress wife some of the wine from the Mueller cellar (R 336,369-371, also R 388,403,540).

As for the rugs which were allegedly missing, the accused testified that he "condoned the use of rugs and articles of furniture from the back part of the house because we, in fact, used them" (R 516). Although he did not recall that he himself ever "directed or brought down" these items, nevertheless he discussed with his wife the matter of bringing down from the attic and using about 12 or 16 rugs (R 516,542-544). Also put to his daily use was a dining room table which, as in the case of the rugs, he knew or presumed that it belonged to the Muellers, that it was not requisitioned, and that it was not listed on his Memorandum Receipt (R 539,543). The housemaid, a witness for the defense, identified a group of exhibited objects as having been in use in the quarters of the accused (R 371,372, 390-392,394-396,399,404). She stated that the accused and Mrs. Whitcomb had told her that the rugs which were in their daily use were the property of the Muellers (R 390-391), and she added that the small attic where the Mueller rugs were kept was always locked and had to be opened with a key which Mrs. Whitcomb kept in her possession (R 389-390).

The accused testified that from 26 June till 11 August 1949 he commuted daily from Garmisch to Munich, a distance of about 60 miles (R 517-518). During that period, while he was absent on duty in Munich, Mrs. Whitcomb replaced in the back upper part of the house all the objects which previously had been brought down. By 8 July everything belonging to the Muellers, with the exception of a heavy piece of furniture, had been returned upstairs to its original place of storage (R 519-520,537,543; also R 372). However, between 8 July and 11 August, the accused knew that some items of the Mueller property still remained in the house, such as two tables (Pros Exs

57 and 58), two chairs (Pros Exs 28 and 29), a washing machine in the basement, the grandfather clocks, and a kitchen table -- "those things that were plainly visible in the house." Relative to these items, the accused stated that he never did anything to withhold them from Mrs. Mueller, that no one ever requested them in any way, and that no complaint was ever made to him by anybody. "I thought, well most of those things are needed in the house, and they may just stay there. I made no attempt to return them to the Muellers. They were in the house when we came there, and it was my thought to leave them there when we left" (R 521,558).

Meanwhile, during this same period, the Whitcomb household goods were being packed preparatory to moving from Garmisch to new quarters in the city of Munich. This packing "was all done by Mrs. Whitcomb and the housemaid. It was not done in the evening. It was done during the day over a gradual period of time. I would come home and ask her how far they had gotten each day, but I had no part in the packing myself" (R 521). Although the Garmisch Military Post maintained a Packing and Crating Service, the accused did not request their assistance (R 559-560). Neither did he call upon the Post for transportation; instead he used a truck from his own Ordnance unit (R 521). The accused stated that he was virtually absent all the time on 11 August 1949 that the truck was being loaded (R 520,522). He testified, however, that he was sure that when the truck left Garmisch there was nothing on it that did not belong to him, "but if there was, that was not my doing. As far as I knew, no. Everything that was on requisition when I came into the house was still there" (R 523).

Brigitte Lindner, the housemaid of the accused, testified for the defense to the effect that all the packing preparatory to moving to Munich was done by her jointly with Mrs. Whitcomb during the absence of the accused, that she packed and crated everything that she found in the house, that she was under the impression that everything she packed belonged to the Whitcombs, and that neither Mrs. Whitcomb nor the accused warned her against packing the articles which she packed, and which she in part identified as being listed on Prosecution Exhibits 6 through 101, and present in the courtroom (R 376-381,393). She also identified a lawnmower as having been in Garmisch, and stated that "it must have gone on the truck" (R 381-382). The witness stated further that the accused was absent during most of the time that the truck was being loaded, and that it was "mostly" Mrs. Whitcomb who indicated which items should be loaded on the truck (R 382,398). Another witness for the defense, Corporal Lufcy, testified that he participated in the loading of the truck, that the accusedwas absent part of the time during the operation, and that he did not see any lawnmower being loaded, nor did he see any chairs on the rear of the truck (R 351-352A).

The accused did not arrive at his Munich quarters on 11 August 1949 till after his truck had been unloaded there and gone. Nothing, however, had as yet been uncrated. Upon entering the living room, the accused testified, "as a matter of fact, the first thing I saw in the house ... were

those two chairs and these two tables." Whereupon he exclaimed, "they certainly should not have come ... what have we here?" "I asked my wife what else we had brought that did not belong to us. She said there were some other things." He stated that that was "positively" the first he knew of it (R 523,562). In addition to the chairs and tables, the accused also saw "the mirror (Pros Ex 32) which was in the hall upstairs, and that Bokhara rug (Pros Ex 33)" (R 523). He testified that he decided that very evening, 11 August 1949, to return these objects. "I knew I had some things that didn't belong to me, and I just couldn't keep them" (R 563). The next day, and possibly within a week, various additional items which he knew belonged to the Muellers, came to the attention of the accused (R 523-524,546-547,561-562). He discussed with Mrs. Whitcomb what was to be done about these items of Mueller property, and they decided "that it would all go back to Garmisch." "My thought was to get a 3/4 ton truck, and have it taken down at some convenient time ... as soon as it could be arranged" (R 524). Nevertheless, between 11 and 28 August 1949, the accused did not inform anybody, or arrange for transportation, or make any effort to return these things to their proper owner. "I was in no particular hurry," he stated on cross-examination (R 560,564). However, he did not think of them as his own property, and he decided and knew that they were going back to Garmisch (R 561-562). He added that except for a few items which he acknowledged as having seen in his quarters, at the time of the Inspector General's investigation on 28 August 1949, he had no idea that the objects listed in Prosecution Exhibits 6 through 101 were in his Munich quarters (R 525), and he knew nothing about them (R 540). He denied also that the lawnmower was put upon the truck in Garmisch at his express order (R 562). Likewise he denied any knowledge of the Mueller rugs. "I did not send them away, I did not give them away; I did not ship them to the States. I just don't know anything about them" (R 526). Similarly about other articles which were missing and not recovered, such as are itemized in the specifications of the charges, he testified that he knew nothing about them (R 525-528).

Sergeant William C. Wilson, a CID Agent, testified on behalf of the defense that in an official capacity he made a thoroughgoing effort to trace the disposition or the whereabouts of the Mueller property which allegedly was missing, but all to no avail (R 412-414). To a similar effect was the testimony of the Whitcomb housemaid who stated that she never saw either the accused or Mrs. Whitcomb mail any packages of any size, nor did she ever see any rugs leave their quarters (R 383,384,400).

Corporal Buzzingham who had previously testified as a witness for the prosecution was called by the defense on its behalf, and testified in effect that he told the Muellers on 24-25 February 1949 that the government would not be responsible for their personal nonrequisitioned property which they were leaving behind in the quarters of the accused; that this property of the Muellers was "under lock and key most of them," and that upon Mrs. Mueller's query as to what he meant by his warning,

he replied that he meant that the government would not be responsible for the Mueller property "in case of fire and the things burned." He added that he made this statement to Mrs. Mueller "on his own" without instructions from anybody (R 415-416). He further testified that when he turned over to the accused the keys to the Mueller apartment he did so "in case of fire" (R 416-417).

Colonel W. L. Hunter, Commanding Officer of Garmisch Military Post, testified in substance that under his command it was not so much a policy as a "custom" to permit the German proprietors of requisitioned houses, upon their eviction therefrom, to store their personal nonrequisitioned belongings in an attic or other storeroom on the premises, and that "normally" no action was taken to remove such nonrequisitioned property "unless the space was needed for our purposes" (R 471,474,479). However, he continued, this custom did not apply to the Muellers in this instance because "the Muellers were living there, a section of the house was devoted to that purpose, it was not a storeroom and a room not necessary to the rest of the house, and the situation was not the same as the ones I knew about and have heard about" (R 475). Consequently he directed that the Mueller property be removed from the quarters of the accused (R 472,475,481), and this was done with the approval of Headquarters, EUCOM (R 473). Relative to the status of the Mueller property prior to its removal from the quarters of the accused, the Commanding Officer of Garmisch Military Post stated that although he was unaware of any custom or policy of posting signs prohibiting the removal of stored nonrequisitioned property, nevertheless, instructions were issued to military officers in charge of requisitioned property that personal property left there by Germans would not be molested. He added that he never specifically or in general authorized the use of nonrequisitioned property by military occupants of requisitioned houses (R 476-480,482). The witness testified further that the accused was his Post Ordnance Officer from early in 1949 till June 1949, that he gave him what he considered "a good efficiency report," and that upon the transfer of the accused to Munich Military Post he submitted to General Sebree a good report, stating that he thought "he was getting a good officer" (R 469).

Mr. William J. Garlock, United States Resident Officer for Kreis Trannstein, Bavaria, Germany, testified in substance that through the German Housing Office he obtained for Mueller an "adequate" place to which to move in order to vacate the Whitcomb quarters by 23 February 1949 (R 419-420), that at that time no mention was made of Mueller's personal property, but that later the witness was requested to assist in locating a warehouse in which to store Mueller's property, and that together with the Post Quartermaster he determined that Hartenstein's warehouse, being an "insured and licensed concern," would be satisfactory (R 424). However, Mueller refused to permit the transfer of his property to this warehouse, on the ground that it was unsafe, whereupon part of it was dumped on the lawn in front of his residence, on 2 August 1949. Present, while

the property consisting of "quite a lot of valuable oriental rugs" was thus piled on Mueller's lawn, were some military personnel as well as Mueller or his representatives. Later that afternoon, however, Mueller "capitulated" and permitted his property to be sent to Hartenstein's warehouse (R 427,436).

William Ehrich Zeiss-Best, a German assistant of the Military Governor, testified to the effect that on a certain morning of "January or February 1950" (meaning apparently 23 February 1949), he delivered to Mueller a letter ordering him to vacate the premises at 32 Klarweinstrasse by 5:00 p.m. that evening, and that Mueller protested saying that he had been promised quarters where he could accommodate his whole collection (R 438-439,443). He stated that at a later date he brought Mueller a letter requesting him to move his furniture to Hartenstein's warehouse, that he was present when the Mueller furniture was being moved, that he saw it delivered to the "garden of Brandstrasse 11," and that present at the "garden" to receive this property were Herr and Frau Mueller, a lady, several MP's, the drivers of the trucks, and Mr. Garlock. The MP's and the drivers "stood by" till sunset (R 440-441).

Major Howard L. Felchlin testified that he was quartered at 32 Klarweinstrasse from 8 July 1948 till 10 January 1949, that during that period the Mueller family also lived in that house, that most of the furnishings in the house were requisitioned property reputedly belonging to the Muellers, and that they were issued to him on a Memorandum Receipt. Among those articles were 13 rugs, believed to be oriental, which went with the house, and were reputedly the property of the Muellers (R 463-467). The witness identified a number of items listed in Prosecution Exhibits 6 through 101, which were present before the court, as items which he saw at 32 Klarweinstrasse while he was quartered there (R 464-467). He stated that at the time he checked out of these premises, all the Mueller property for which he had signed was still in the front part of the house (R 465-566), and that no claims for shortages were made against him (R 464,467). He also stated that he had seen the Mueller wine cellar, and estimated that there were about 200-250 bottles of wine there, and about 100-150 empty bottles (R 464).

Brigadier General Edward E. MacMorland, Lieutenant Colonel George H. Levitt, Lt Colonel Arthur L. MacKusick, Lieutenant Colonel Edward A. King, testified to the effect that the accused enjoyed an excellent reputation and that his performance of duty was superior and outstanding (Def Ex H, admitted at p.362, attached to end of Vol. III; R 353-355; R 357-359; R 361).

4. Discussion.

The accused is charged with two separate and distinct offenses: (1) with larceny, under Article of War 93, and (2) with wrongfully suffering

property belonging to Georg Wilhelm Mueller to be lost and dissipated, under Article of War 96.

As to Charge I and the Specification thereunder.

The first question which solicits our attention is whether the corpus delicti of the offense has been established. The record shows that on 25 February 1949, with the tacit approval of the proper authorities, Mueller left the bulk of his personal property stored under lock and key in the attic and other delimited areas of the house occupied by the accused and his wife in Garmisch. The accused knew that this alien property was stored there, and by virtue of his status as a military occupant of this duly requisitioned house, to these areas where the Mueller property was stored he had free access continuously from about 25 February till about 4 August 1949. On 2-3 August 1949, the Mueller property was removed and transferred under guard from the quarters of the accused to Hartenstein's storage warehouse. An inventory made by Mueller at Hartenstein's on 4 August revealed the absence of a number of items of property which since 25 February had been left stored in the quarters of the accused. By means of photographs and other documents, as well as by circumstantial evidence, Mueller plausibly substantiated his allegations that the missing articles, prior to their disappearance, had last been stored under the roof of the accused, and that Mueller had had no access to them and had not authorized their removal between 25 February and 4 August 1949. Pursuant to a complaint predicated on the foregoing facts and circumstances, the Inspector General instituted an authorized search of the quarters of the accused in Munich on 28 August 1949, and there he did indeed discover a substantial portion of the Mueller property which had allegedly not been transferred to Hartenstein's warehouse in Garmisch. On the evidence hereabove outlined it seems plain beyond a reasonable doubt that the Mueller property was missing under such circumstances as to render it highly probable that it had been stolen. We, therefore, conclude that the corpus delicti of the offense charged has been established (Par. 127a, MCM, 1949, p.159; Wharton's Criminal Law, Sec. 352, 12th Ed., pp.456-457; 16 C.J. 766).

Our next consideration revolves about the fact that these items of Mueller property which probably had been stolen were found in the personal, conscious, and exclusive possession of the accused in Munich. This fact is established conclusively by the sworn testimony of the accused himself. Unexplained, it gives rise to the presumption that he was the person who stole it (Par. 125a, MCM, 1949, p.151). This presumption, of course, is a rebuttable one; but in the absence of a plausible explanation accounting for his affirmative possession of the recently stolen goods, it attaches to the accused. The only testimony which we can find in the record which purports to explain the incriminating possession are statements by the accused to the effect that he found these items of Mueller property among his household effects soon after arriving in Munich, that he had no part in removing them from Garmisch, and that he was at a total loss to explain how they got into his possession. It seems to us that in the light of the

total record this does not constitute a satisfactory explanation as required by law. The presumption of guilt which was raised by the evidence in the record has not yet been rebutted. We still have to examine whether each and every element of the offense charged has been proved beyond a reasonable doubt.

That in Garmisch continuously from the beginning of March till at least 8 July 1949, the accused knowingly and deliberately appropriated to his own use many items of property which he knew belonged to the Muellers cannot be doubted. He himself admits under oath having participated actively in the removal from the locked attic and other locked storage places, of many items of furniture and furnishings owned by the Muellers, and using them in his own household. It is granted also that he took from the Mueller wine cellar without authorization a certain number of bottles of wine and served them to his guests on various occasions. From this evidence it seems fair to conclude, therefore, that the accused manifested toward the Mueller property which was stored under his roof, as well as toward the Mueller property rights, a chronically wanton and callous disregard. It also seems fair to conclude that he personally did commit and was responsible for definite acts of wrongful appropriation and of larceny relative to certain items of the Mueller property in his Garmisch quarters. We are not sure, however, as to how much, if any, of this property which he wrongfully appropriated to his own use in Garmisch was actually found in Munich.

We are still faced by the problem of determining whether the accused may be said to have been guilty of wrongfully taking and appropriating the Mueller property which was actually found in his possession in Munich. The accused himself testified, and his testimony was corroborated, that he had no part whatsoever in the actual packing and crating of his household goods preparatory to their removal to Munich. He also swore that he was thoroughly unaware of the fact that any property not belonging to him was on the truck which transported his effects to Munich, and that the first inkling he had of any wrongful taking of the Mueller property was when he first entered his new quarters in Munich and there beheld some of the items of property which he recognized at once as belonging to the Muellers. Upon questioning his wife relative to this property, he learned that it was she who had caused it to be packed and transported to Munich.

Tending on the other hand to controvert the evidence pointing toward the complete aloofness of the accused from any wrongful appropriation of the Mueller property which was actually recovered in his Munich quarters, is the testimony of one of the truck drivers to the effect that the accused personally directed him to load upon the truck and transport to Munich a certain lawnmower which the record clearly indicates was known to the accused to belong to Mueller. Taken together with the other bits of evidence previously set forth which reflect on the part of the accused an attitude of contempt toward the Mueller property, the last mentioned fact assumes a probative quality out of proportion to its material aspect, and tends

to enmesh the accused within the coils of the network of his wife's wrongful behavior to such a degree that it ceases to be possible to determine where the unlawful activities of the one end, and where those of the other begin. It serves to bolster the implication that the accused cooperated with his wife in the wrongful appropriation of the Mueller property, and that he participated to some extent in the felonious intent which may have motivated her behavior. It tends, in a word, to imply on the part of the accused a particeps criminis.

Does the record include evidence, direct or circumstantial, sufficient to confirm the hypothesis that a conspiracy in fact existed between the accused and his wife to steal the Mueller property which was found in Munich? Germane to this question are the following considerations: (a) the accused and his wife together inspected the Mueller premises in Garmisch, they mutually discussed the advisability of accepting them as their quarters, and jointly they decided to move into them; (b) jointly they examined the personal property which was left stored in their quarters by the Muellers, and jointly they became aware of its general nature and value; (c) jointly they were warned by a representative of the Post Quartermaster that the Mueller property was not to be molested; (d) they both had equal access to the Mueller property; (e) they both knowingly appropriated the Mueller property for their joint use in Garmisch; (f) they both manifested a callous disregard of the Mueller property rights at least up to 8 July 1949; (g) they were both put on notice by Mrs. Mueller and the events of 8 July 1949 that they were wrongfully using the Mueller property without authorization; (h) they both participated in returning some of the Mueller property to its original place of storage in the attic and the rear part of the house; (i) they both pointed out to the Post Quartermaster which items of property were theirs and which belonged to the Muellers on 2-3 August 1949 when the Mueller property was finally removed to Hartenstein's warehouse; (j) they discussed periodically the packing of their household goods preparatory to moving to Munich; (k) they both directed the loading of the truck which transported their household effects to Munich; (l) they both jointly transported some of their property from Garmisch to Munich in their own car; (m) they both exercised dominion over numerous items of Mueller property in their Munich quarters on and after 11 August 1949; (n) they both refrained from making the slightest effort indicative of an intent to return the Mueller property between 11 and 28 August 1949.

In addition to the foregoing circumstances cumulatively implicative of joint participation in a larcenous conspiracy, we find evidence in the record of definite overt acts by the accused himself which are relevant and material to the issue under discussion: (a) soon after moving into the Mueller house in Garmisch, he personally drew from the quartermaster, household furniture and furnishing "in all instances," thus indicating that he had from the outset a clear notion in his mind concerning the distinction between the nonrequisitioned Mueller property and his own legitimate household goods; (b) after carefully checking the property in his quarters, he personally signed a memorandum receipt for his quartermaster

property, thus assuming consciously, deliberately and actively, personal responsibility for his household goods; (c) he personally obtained a locksmith and ordered him to break open at least the cellar storeroom door, thus indicating an active participation in the management of his household, and it was at his express orders that the rotten foodstuffs were removed from the cellar, thus again reflecting on the part of the accused an interest in the details of, and an exercise of mastery over, his household affairs; (d) he was promptly informed when the locks to cabinets containing Mueller property were opened apparently without his authorization, which fact implies that he consciously maintained, and was respected in, his status as master of the household. It is significant also in this connection that although he protested that various locks had been opened without his approval, he made no effort to have the locks replaced; (e) he left his post of duty on at least three different occasions, on 25 February, 8 July and 2-3 August 1948 when problems involving the Mueller property arose, and returned home to be by the side of his wife in the solution of those problems relative to his household effects. No derogatory implication is here intended relative to his leaving his post to aid and comfort his wife under those circumstances -- the emphasis is rather on the implication that by these acts he showed an ever alert, continuing and active participation in all matters involving his household and his property. The implication also arises that he who was so quick to aid and comfort his wife in relation to the Mueller property, would not have been too laggard in aiding and abetting her in wrongfully carrying off the Mueller property; (f) on 2-3 August 1949 when the total balance of the Mueller property was removed by the post quartermaster from the quarters of the accused in Garmisch, it was the accused personally who indicated to the representatives of the quartermaster which property belonged to him and which to the Muellers. He thus demonstrated not only a properly active participation in the management of his household, but also a deliberate and aggressive awareness of the distinction between his own property and that of the Muellers; (g) preliminary to his move to Munich, the accused obtained the crates and boxes necessary for the packing of his household effects, and on 11 August 1949, it was the accused personally who not only arranged for a truck from his own Ordnance unit to transport his household effects to Munich, but he also personally checked on the truck and drivers along the road to make sure that they accomplished their mission expeditiously. This also tends to show a more than passive attitude toward his domestic and household responsibilities; (h) indicative also of an active participation in the details of his household is the fact that the accused personally went through the involved and time-consuming procedure of arranging with the military authorities for the transfer of his German maid from Garmisch to the relatively distant and independent post of Munich; (i) the official formalities of "clearing" Garmisch Military Post constituted on the part of the accused an overt and conscious act whereby he affirmed, by implication if not directly, on the honor of an officer, that he was leaving the post after having duly complied with all the rules and regulations to which he was subject. The act of clearance must be interpreted as an act of acknowledgement by

the accused that he was aware of his responsibilities as head of his household and that he had fulfilled these responsibilities to the best of his ability. These responsibilities certainly included a reasonable effort on the part of the master of a household to ascertain that he was not carrying away with him the property belonging to another; (j) and finally it should be noted that at every stage of his residence at Garmisch, in the very nature of his status as head of a household within the framework of the Army of Occupation in Germany, the accused was actively put upon notice, even if he should have tended to forget it, that he was and continued to remain individually responsible and accountable for the property under his control in his quarters, as well as for the general management of the household of which he was the head.

Envisaging the foregoing facts and circumstances from a synthetic point of view, in terms of their mutual inter-relationships and implications, the deduction seems imperative that the accused could not have participated so intimately and actively in every significant detail of the management of his household, and yet have found himself in the center of a mysterious vacuum so far as his wife's and his own disposal of the Mueller property was concerned. It may well be true, and we do not for a moment doubt it, that the accused did not deliberately discuss with his wife the merits of the detailed selection of each and every item of the Mueller property which was wrongfully taken away, nor that he manually assisted in the actual packing of each of the articles belonging to the Muellers which subsequently were recovered in the quarters of the accused in Munich. These circumstances of abstention, however, even if true, cannot serve to weaken or to contradict the ultimate inference emerging from the facts in their organic relationship, that the accused was not only aware that a larcenous trespass was being committed by his wife upon the Mueller property, but that he knowingly concurred therein, and that he impliedly sanctioned it even though possibly he did not overtly cooperate in each and every physical detail of it. At some point prior to 11 August 1949, the accused became an accomplice with his wife in the felonious act of which the court found him guilty under Charge I. An accomplice, he became in legal contemplation liable as a principal.

The specific intent on the part of the accused permanently to deprive the Muellers of their property can also be established by direct evidence. The accused was found exercising dominion over the Mueller property in his Munich quarters 17 days after it was removed with the rest of his household goods from Garmisch. During these 17 days, he admittedly knew that this property belonged to the Muellers, and he made not a single effort, not even an empty gesture, to return it. During these 17 days, in the course of which he cumulatively became aware of the presence in his household of more and more items of Mueller property, and continued to exercise dominion over them, he did not even communicate by telephone with the Garmisch Post Commander and/or the Quartermaster, to inform them of the fact that he had possession of many items of Mueller property and that he wished to return them. It is true that "once larceny is committed, a

return of the property .... is no defense" (Par. 180g, MCM, 1949, p.239). Such an effort promptly to return the property, however, would tend to negative the inference of a specific intent to steal. The failure to return the stolen property, on the other hand, serves to strengthen the inference that larceny in all its elements was indeed intended.

The fact of the wrongful taking is established primarily by inference from circumstantial evidence, but the specific criminal intent of the accused is established not only by inference from the larcenous conspiracy in which he was shown to participate, but also by direct evidence of omission and commission. In vain do we comb the record for any plausible hypothesis of innocence on which to predicate a rejection of the inference of guilt which is derived to a large extent, although not entirely, from circumstantial evidence. Not only was the accused properly present at his quarters throughout the entire period in question, but the inference is strong from the evidence before us that between the accused and his wife there prevailed a degree of connubial unison which is as admirable as in this instance it was unfortunate. Far from habitaully shirking his domestic responsibilities, the record indicates that the accused manifested throughout an eager interest and participation in his household problems and duties. Thus, ironically, his very virtues rise up and militate against him in the effort to extricate himself from the incriminating mesh of circumstances in which the record shows him to be entangled, and which in their cumulative effect tend to establish his guilt beyond a reasonable doubt.

The value of the stolen property was properly established by the testimony of qualified experts. Besides, the property in question was exhibited before the court, and it was justified in concluding from its own experience that the testimony relative to the value of the articles before it was correct (Par. 180g, MCM 1949, p.241).

That the property recovered in the quarters of the accused at Munich was in fact owned by Mueller, as alleged, was also established beyond any reasonable doubt.

We are compelled to conclude therefore that each and every element of the larceny averred under Charge I has been proven beyond a reasonable doubt, and that the finding of the court relative to this charge and the specification thereunder was sufficiently justified by the evidence in the record.

As to Charge II and the Specification thereunder.

When the Muellers on 25 February 1949 left their personal property stored in the quarters of the accused, and the accused impliedly acknowledged custody thereof by accepting the keys to the rooms where this property was stored and by knowingly permitting it to remain on his premises, he thereby assumed an obligation. He ipso facto became involved in a relation

of bailment, and he automatically became a "gratuitous bailee for the bailor's sole benefit" (Williston on Contracts, secs. 1032-1038, Vol. IV, Rev. Ed., (1936), pp.2888-2902). The obligation which thus automatically attached to him was none the less real and binding even though it may have been predicated on a "relation" rather than a "contract." In Foulke v. N.Y. Consolidated Ry. Co., the court said:

> "Bailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not" (228 NY 269,275; 127 NE 237; 9 ALR 1384).

It should also be noted that on 25 February 1949 the accused was told explicitly by the representative of the Post Quartermaster that he was not supposed to use the Mueller property. That the accused under the circumstances of the case assumed an obligation and incurred a "duty to account for the things as the property of another," seems clear by established legal standards.

The obligation which devolved upon the accused, however, was exceedingly light; it was minimal. It consisted only of the duty to exercise that degree of care which "ordinary prudence" would dictate to preserve the property in case of an emergency, such as fire or flood or similar rare occurrence. "A bailee who undertakes the care of goods without reward is liable for injuries to them caused by his gross negligence" (Williston on Contracts, supra, p.2897). In other words, the duty which the accused assumed to care for the Mueller property which was stored under his roof, was not only slight, it was for all practical pruposes purely negative. It was a duty merely to refrain from molesting the alien property of which circumstances made him, not without his implied consent, the gratuitous bailee.

Having incurred the far from onerous duty, in the words of the specification, "to exercise due care in safeguarding valuable articles of personal property .... belonging to Georg Wilhelm Mueller," did the accused wrongfully fail to abide by his obligation? To ask the question is to answer it. From his own sworn testimony it is clear that the accused aggressively entered the various locked rooms and closets where the Mueller property was stored, that he appropriated to his own use a number of articles in the category of property mentioned in the specification under discussion, and that he neglected to resecure the rooms and containers which he opened and caused to be opened. He unjustifiably laid covetous and meddling hands upon the property which it was his duty to refrain from molesting. The Mueller property which was left in his quarters properly secured subject only to his negative care, he wrongfully unsecured to such an extent that it became the prey of any potential thief that passed. His behavior under the circumstances constituted gross negligence.

That the various items of Mueller property listed in the specification under Charge II were not found in the Munich quarters of the accused seem obvious, and that they were never recovered by Mueller appears credible. Is it reasonable to infer that this property was "lost and dissipated" as alleged, through the wrongful negligence of the accused? No other hypothesis presents itself, in the light of the record, to explain otherwise the conditions which rendered possible and probable the disappearance of the property in question. Had the accused complied with his bounden duty to leave intact, as originally secured, the property of which he was a gratuitous bailee, then had a trespass occurred upon it, no rational association of ideas in the mind would have arisen connecting the bailee with the loss which might have occurred through no fault of his own. The gross negligence of the accused, however, in opening the locked storage places and removing and rearranging the property therein, stands out beyond any reasonable doubt as the proximate cause and the condition precedent for the ultimate "loss and dissipation" of the Mueller property as set forth in the specification.

It is established that through his gross negligence in failing to exercise due care, the accused suffered certain specified articles of the Mueller property to be lost and dissipated. Does this constitute an offense under Article of War 96 as charged? Does it not sound in contract or tort rather than criminal law?

> "Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers, which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a special relation, or in private business." (Smith v. Whitney, 116 U.S. 167).

If the gross negligence of the accused resulted in consequences which tended "to bring disgrace and reproach upon the service," then he committed a military offense which falls under the jurisdiction of courts-martial regardless of the intrinsic nature of the wrong within the general framework of our jurisprudence.

That the undisciplined and irresponsibly negligent behavior of the accused which resulted in the loss and dissipation of the Mueller property tended to bring "disgrace and reproach" upon the United States Army is patent. The wanton and callous disregard which the accused by his behavior manifested toward the Mueller property of which he was the bailee, and the resultant loss thereof, not only cast an opprobrious shadow upon the personal honor of a high ranking officer, it also reflected negatively upon, and tended to lower the corporate prestige of, the whole military establishment in occupied Germany. It indubitably constituted a wrongful act falling within the purview of Article of War 96, as "directly prejudicial to

good order and military discipline," and "of a nature to bring discredit upon the military service" (Pars. 183a and b, MCM, 1949, pp.255-256). In the apt phraseology of the Judge Advocate General, "members of the occupational forces of the Army, particularly officers, are expected to conduct themselves in occupied areas in such a manner as to give the enemy inhabitants not the slightest cause to reproach the victor for lack of rectitude" (CM 310446, Ruppel, 61 BR 291,307).

That the property which was lost and dissipated belonged to Mueller, and that its value was over $50.00 as alleged, was properly established.

All the elements of the offense charged were proved beyond a reasonable doubt, and the evidence sustains the finding of the court.

5. Records of the Department of the Army show that the accused is 47 years of age, married, and has one son. He graduated from Classical High School, Worcester, Massachusetts in 1920, and from Worcester Polytechnic Institute with a B.S. degree in 1924. In civilian life he was employed as a chemist by the Heywood Wakefield Company of Gardner, Massachusetts, and as a chemist, production control assistant, and production supervisor by E. I. DuPont DeNemours & Company. He was commissioned as a Second Lieutenant, Officers' Reserve Corps on 18 May 1938, and entered upon active duty in that grade on 12 January 1940. He was promoted to First Lieutenant on 5 June 1941, to Captain on 1 February 1942, to Major on 3 August 1944, and to Lieutenant Colonel on 31 October 1946. He was separated on 13 January 1947, and on 19 June 1947 was appointed a Major in the Regular Army to date from 19 May 1945. He was promoted to Lieutenant Colonel on 2 January 1949. He is entitled to wear the Army Commendation Ribbon, the American Theater Ribbon, the American Defense Ribbon, and the World War II Victory Medal. His efficiency ratings of record are seven excellent, four superior, and numerical ratings as follows: two of 094, and one each of 099, 093, 078, 059, 054. The last two ratings were given after the discovery of the offenses for which he was tried.

Consideration has been given to representations for and on behalf of the accused, orally and in writing by his civilian counsel, Mr. John J. Bohan; in affidavits of Mrs. Ruth M. Whitcomb, the wife of the accused, and Captain James F. Morey, the Executive Officer of the battalion commanded by the accused. Consideration has also been given to letters on behalf of the accused submitted directly or addressed to The White House and referred for consideration and to certain members of Congress, and forwarded by them to The Judge Advocate General, and to similar letters presented by Mr. Bohan.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed 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 to dismissal, total forfeitures after promulgation, and confinement at hard labor for two years is authorized upon conviction of an officer of violation of Articles of War 93 and 96.

C. P. Hill, J.A.G.C.

C. J. Hauch, Jr., J.A.G.C.

Robert Bakemann, J.A.G.C.

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

JAGU CM 341603

[illegible] 1950

UNITED STATES v. Lieutenant Colonel RICHARD FISHER WHITCOMB (041531), 85th Ordnance Battalion (European Command), on Detached Service to Headquarters, 7822 Station Complement Unit.	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Augsburg, Germany, 23,24,25,27 and 28 February and 1, 2 and 3 March 1950. Dismissal, total forfeitures after promulgation, and confinement for two (2) years.

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

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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 the larceny of 94 items of property of Georg Wilhelm Mueller, as alleged, not guilty of the larceny of the remaining items of the specification, but guilty of the larceny of two bottles of champagne, brand and vintage unknown, and of one bottle of white wine, brand and vintage unknown, in violation of Article of War 93, and of wrongfully failing to safeguard other property of Georg Wilhelm Mueller, thereby suffering the said property to be lost and dissipated. 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 two years.

3. Evidence

a. For the Prosecution

The residence of Georg Wilhelm Mueller and his wife at 32 Klarweinstrasse was requisitioned by the United States military authorities in June 1945, and at the time of trial the Muellers were receiving a rental

of 400 marks a month for their residence (R 33,35). When first requisitioned, the residence was occupied by a detachment of 15 officers and enlisted men. After the detachment left, the residence was utilized as a "V.I.P. house" until July 1946 (R 37,39). At this time, a Colonel Eubank and his family took possession. Successive occupants were a Captain Muellem and family, and a Major Felchlin and family who vacated on 10 January 1949. The Muellers, nevertheless, retained quarters in the house until 24 February 1949 (R 42, 262). The joint occupancy of living facilities by "the U.S. Forces and the indigenous population (other than domestic)" was continuously forbidden after 6 October 1947 (Sec 4F, Part II, EUCOM SOP 37, 11 June 1947, and changes thereto). The Muellers retained for their occupancy a second story room and hall located in an ell at the rear of the house, the entire attic, and a storage room in the cellar. During Colonel Eubank's occupancy and at his suggestion, the Muellers installed a partition with a door on the first floor, setting off the front part of the house from the ell in the rear (R 117,151). With this door locked, from within the front part of the house there was no access to the stairway leading to the Muellers' rooms on the second floor or to the attic. In the same manner the fuse box, a rear toilet, and the garage were inaccessible (R 117-118). The room and hall utilized by the Muellers on the second floor were accessible from the front part of the house by a door. When the Muellers left in February 1949, the door was blocked by a wardrobe (R 118). Some of the Muellers' personal property was requisitioned by the military authorities along with the house, but the bulk of their personal property was kept in the portion of the house of which they retained possession (R 37). According to Mrs. Mueller, the house was furnished with their personal furniture (R 39-40).

When the Muellers first moved into the house in 1937 they brought with them 3500 bottles of vinous liquors. Mueller maintained an inventory of these liquors and checked it every three months until the number of bottles was below 300 some time in November or December 1948, and thereafter "carried them in his head" (R 327-328). In 1948, Mueller acquired 50 more bottles; no testimony was adduced showing that those bottles were added to the inventory (R 327).

In 1943, the Muellers had an inventory made of their rugs and paintings, and in the fall of the same year had pictures taken of the various rooms of the house and the personal property therein. Mrs. Mueller identified Prosecution Exhibit 3A-3J inclusive as the pictures so taken, and testified that the items of personal property therein depicted were all in the house when it was taken over by occupation personnel in 1945 (R 37-39).

In January 1949, John L. Renander, administrative assistant in the Post Engineers Office, Garmisch Military Post, wrote a letter to

the Muellers directing that they vacate the quarters occupied by them at 32 Klarweinstrasse. Renander identified Defense Exhibit A as the letter to which he referred (R 121,262).

The letter, which was dated 26 January 1949 and addressed to Wilhelm Mueller, stated that the quarters occupied by Mueller were to be vacated "effective with the notification." It also stated, however, that the German housing authority was to be notified and that it was the responsibility of that office to secure adequate accommodations for the Muellers Until such quarters were found, the Muellers were to be allowed to remain where they were (Def Ex A).

Renander testified that he directed his secretary to send the letter. He added that if the letter went through "Deutsch Post" it might take a few hours to reach its destination, but that if it went through "occupation Post" it might "take longer" (R 263,264).

Alfred Hammer, chief of the German housing office, Garmisch, received orders on 26 January 1949 to secure housing for the Muellers. According to Mrs. Mueller, it was intimated to her on 25 January that she and her husband were going to have to vacate the premises at 32 Klarweinstrasse (R 108).

On 28 January 1949, the accused and his wife visited the house to inspect it and were shown through the house by Mrs. Mueller. The accused said he would like to have the house but added that it did not look very comfortable or clean. He inquired about rugs and was told that there were rugs in the house which were not requisitioned. After learning that the accused had no children or dogs, Mrs. Mueller intimated that she would talk to her husband and maybe they would help make the house more comfortable. When she next saw the accused and his wife, she promised the accused she would make the house more comfortable if "we could trust each other." In turn, she asked if her daughter would be able to practice on the grand piano in the front part of the house at times prearranged for the convenience of the accused's wife. The accused and his wife assented to this arrangement (R 41).

Mrs. Mueller admitted that on 2 February 1949 she received an eviction order from Mr. Renander who she knew as the real estate officer in Garmisch (R 43). Upon receiving this notice, Mrs. Mueller tried to find living quarters by writing letters to the States. Otherwise she thought it was all right to disobey the letter because she "got several advices --[she] didn't think it would work --" (R 121-122). Mueller "tried personally to turn the order down, by writing letters to *** two Colonels in the United States [and] one to Major General White ***" (R 302).

The Mueller residence was assigned to the accused on 3 February 1949 (R 262), and on or about 8 February 1949, Peter Von D. Soeren, an employee of the Post Quartermaster, checked the accused into the house (R 189-190). This consisted of checking the inventory of the requisitioned property which went with the house (R 190). At the time, the accused had not as yet occupied the house. Soeren was aware during the process that an unrequisitioned mirror was in the front part of the house, and was not sure that there were no other items of unrequisitioned property there. In any event, he did not mention to the accused anything concerning unrequisitioned items (R 207).

The accused and his wife moved in to the Mueller house on 21 February 1949 (R 42). At 10:30 on that morning, while the Muellers were still living in the house, workers began to change the locks in "the between door and the house door." Coincidentally thereto, Mrs. Mueller told the accused's wife that she "would be responsible for the things she was doing to us." The quoted words were "meant in a Christian way" (R 108,111,152).

In February, the local German authorities obtained a room for the Muellers on Leitenfeld (R 565) and on 23 February a German policeman informed them they had to move. Since Mueller was sick in bed and since they did not have living quarters, the Muellers did not move that day, but moved the following day to a hospital (R 42-43). On the day they moved out they were assisted by Private First Class Richard E. Buzzingham, who was sent by the Quartermaster to move them out (R 177-178). On the 24th, the Muellers moved out just what they could handle themselves in a taxi. They took six "special" cases full of clothing, underwear, shoes, utensils, towels, soap, and other such things (R 178-570). In addition, Mueller took along two or three bottles of his wines (R 328). Buzzingham recalled that the door in the partition on the street floor was locked from the accused's side. In order to satisfy Mrs. Mueller, he put a candle wax seal on the lock. He also obtained the main entrance key and gave it to the accused (R 180, 183). Pursuant to instructions from Lieutenant Balcom, Buzzingham told the Muellers to get their property out as soon as they could get storage. He was supposed to move them out on the 24th. He called the office and told Lieutenant Balcom they were unable to get a truck. Lieutenant Balcom gave them an additional 24 hours to get out the things they wanted (R 182-183). These instructions were also passed on to the Muellers. According to Buzzingham, with enough trucks and help the Muellers would have been able to remove all their property on either the 24th or 25th, and nothing was done to prevent them from so doing (R 183). The Muellers asked Buzzingham to take an inventory of their property. He, in turn, called the office for instructions and was told it was not the Quartermaster's responsibility to inventory nonrequisitioned property.

Buzzingham then told the Muellers that he could not take an inventory. He estimated it would take him four or five days to accomplish an inventory (R 184).

Sometime after "three o'clock" on the 25th, Mrs. Mueller called Buzzingham and returned to the house. On this occasion, Mrs. Mueller had obtained a small truck. Buzzingham removed for her a large trunk containing clothing for her daughter. Also removed were a suitcase of food, four suitcases of clothing, the contents of five wardrobes, all household linen except that which was in the laundry, three pillows, some blankets, the stove, kitchen utensils, bedding, small pieces of furniture, chickens, all silverware and six cups and plates of Kaultheim china from their "kitchen-bedroom combination" (R 570-572). Some of the items so removed were stored by neighbors. Mrs. Mueller estimated that the truck took two or three loads from the house, but added that on no occasion was the truck full. The move was completed by about 8:15 in the evening (R 573). Buzzingham observed that the Muellers left an "awful lot of property" in the house (R 181), the value of which according to Mrs. Mueller's estimate was 800,000 marks (R 110). The vast bulk of the unrequisitioned property was left in that part of the house which had been occupied by the Muellers (R 45,47). Mrs. Mueller was informed that the property was left at her own risk (R 288). Mrs. Mueller recalled that one item of nonrequisitioned property, a Bochara cover (Item 93, Specification of Charge I) was left in the accused's portion of the house (R 122).

After the Muellers left, Buzzingham locked the door in the Mueller part of the house and gave the keys, six or eight in number, to the accused (R 180-181). None of these keys was for cabinets, but Buzzingham had not tried any of them to see if they would open cabinets (R 182). Upon giving the keys to accused, the latter invited Buzzingham to join him and his wife in a cup of coffee. Over their coffee they discussed what the Muellers had left behind. Accused wanted to know if he could use some of their rugs. At this time, Buzzingham passed on instructions from Lieutenant Balcom that the Muellers' property was not to be used by any "tenant" in the house (R 181).

It had been the custom at the Garmisch Military Post that when owners of a requisitioned house left unrequisitioned property in the house, the property so left was locked in an attic or basement room, the door to which was posted with a sign forbidding the use of the property to the tenants (R 186, 256, 260). During Renander's tenure as real estate officer, this policy was applied only to nonresidential property (R 264).

On the evening of 28 February, Mrs. Mueller was walking near her home when she observed a light in what had been her quarters. She

went to a neighbor and procured a spy-glass and went to the rear of the house. She assumed a stand about 25 or 30 meters from the house and observed accused in what had been the second story room of her quarters working at a cabinet with a hammer and screwdriver. Since the room was lighted by a chandelier and the windows had no curtains, it was easy for Mrs. Mueller to watch. After working on the cabinet, accused tried to open a wardrobe with a "key or something" but finally resorted to the screwdriver and hammer. He took something from a built-in cabinet and handed it to his wife who appeared at the door. He closed the cabinet and the lights were extinguished. A light then appeared in the attic. Although the attic windows were closed, Mrs. Mueller heard him working near the attic bedroom, and then she heard him hammering in the large attic and finally she heard a sound recognized by her as the opening of a cabinet which she had used every day she was in the house. It was the door of her china cabinet in which was kept a Lamm Dresden, handpainted dinner set, a substantial portion of which was never recovered (R 51-56, 149, 154).

Thereafter Mrs. Mueller kept the house under her observation and subsequently saw items of unrequisitioned property in use by the accused, china, and cutglass in the dining room, table lamps and rugs in the living room, and curtains (R 83, 149). The rugs which she observed in use were all recovered (R 149-150).

After their eviction from the house in February, the Muellers, while at the hospital, compiled an inventory of what was left in the house. The inventory was completed early in March 1949. In compiling this inventory, they utilized the 1943 inventory and pictures made in the same year, and their memory. Actually, according to Mueller it would have been possible to make the inventory by memory alone (R 57, 304). Mrs. Mueller admitted that she had no personal knowledge of the wines which were entered on the inventory (R 125-126) and Mueller admitted that he did not know whether or not he entered on the inventory the three bottles of wine which he removed on 24 February (R 328-329). The Muellers identified Prosecution Exhibit 4 as the inventory which they had compiled in February and March 1949 and it was admitted in evidence (R 58,59,306). Mrs. Mueller denied that she made a list of the property between 2 February and the day on which she moved out, and could not remember so stating in the presence of Colonel Evans (R 138). It was stipulated that Colonel Andrew J. Evans would testify that at the Article of War 46b investigation, Mrs. Mueller testified that she and her husband made a list in the 22 days preceding their move (R 449).

Sometime in March 1949, Wilhelm Moehring, an employee in the Ordnance Section, U.S. Army, Garmisch, of which accused was Chief, was directed by the accused to open a storage room in the cellar at

32 Klarweinstrasse (R 237,240). It was the Mueller storage room and mixed odors of rotten potatoes and rotten sauerkraut were emanating therefrom (R 223, 233-234, 237, 238). Moehring opened the door, subsequently repaired the lock and returned the next day with the lock and keys for it (R 238). Accused who was present when Moehring started to open the lock left before Moehring finished (R 224). Heinrich Bleeker, accused's housemaster, took a part of the potatoes to his home, and threw the sauerkraut away. When Bleeker entered the storage room he observed a large number of wine bottles stored on shelves and also lemonade and canned foods (R 224-225). Moehring was told by the housemaster to have the locks in the cabinets in the house opened, and at his direction Moehring opened a lock in the bookcase on the second floor, and a closet in the back of the second floor. Later, Bleeker "got mad" at Moehring for opening this cabinet (R 233, 237). He also opened a lock in a chest of drawers in the attic. The only thing which Moehring observed in the chest was a big box of medicine. All the wardrobes in the attic were already open, and in the kitchen cabinet was a key. Moehring examined the doors of the wardrobes and they appeared "normal" with nothing broken (R 238).

Moehring also made keys for an open buffet on the second floor (R 238). Moehring was subsequently "scolded" by the accused for opening the locks which he had been directed to open by Bleeker (R 240).

Upon cross-examination, the defense interrogated Mrs. Mueller concerning legal action which she had instituted against Bleeker for stealing things from her house after she had moved. Upon objection by the prosecution, the defense was forced to adopt Mrs. Mueller as its own witness in this field of examination (R 112-114).

Mrs. Mueller thereupon testified that on the 8th or 9th of March 1949 she interviewed Natalie Lang, accused's maid. In the course of the interview, Natalie admitted stealing clothes, electric cooking plates, and some curtain material. Natalie, however, returned what she had stolen. Natalie also gave Mrs. Mueller information concerning Bleeker, the housemaster, but at the time no action was taken concerning him. In June, however, Mrs. Mueller made complaint to the German police that Bleeker had taken away things that belonged to her husband and herself. Mrs. Mueller claimed that Bleeker had taken 45 meters of white material which had been locked in the "small attic" on the 25th of February, and some food (R 114-117). Mrs. Mueller also admitted that she sent a message to Brigitte Lindner, another maid in accused's quarters, to come and see her before Mrs. Mueller went to the German Police (R 109).

According to Bleeker, he was employed by the Civilian Personnel Office as housemaster for accused from the beginning of March until

May (R 221, 231). He recalled that on two or three Monday mornings following the opening of the storage room in the basement, he observed three or four empty wine bottles on the stairway leading to the cellar. The bottles which he saw resembled Prosecution Exhibit 106, "a bottle of 1947 diverse Moselle wine" (R 225, 227). Bleeker, during his employment removed property of the Muellers from the attic downstairs to the accused's quarters. Specifically, he moved rugs which with "small strips" were around 30 in number. These were spread all over the rooms and the staircase in the accused's quarters. The rugs were "very good" and included were some Oriental prayer rugs. Also taken from the attic were a sofa, two upholstered chairs and pillows. On another occasion, at the direction of accused's wife, a hut in the rear of the house was opened by Bleeker. In the hut, were garden furniture which was placed on the porch, a lawn mower and a bicycle which were used, and some wood which accused's wife permitted Bleeker to take away (R 222, 223).

Bleeker identified Prosecution Exhibits 106 and 107 as bottles of wine which were received from the accused's wife on account of laundry done by his wife, but qualified this statement by stating that accused's wife was not present when his wife acquired Prosecution Exhibit 106. He was of the opinion that Prosecution Exhibit 106 was similar to wines which he had seen in the cellar storage room but was of the contrary opinion with reference to Prosecution Exhibit 107 (R 225-226, 230).

Bleeker's wife also received foodstuffs from the cellar storeroom. These would be placed on the kitchen table and the housemaid would say, "This was for doing the laundry." Other foodstuffs in the cellar were used by the housemaid (R 227-228). Sometime in June, Bleeker was punished by a German court for taking items from the house (R 231).

During Bleeker's employment in accused's household, his wife did the household laundry on Mondays and Tuesdays. On rainy days, she hung the laundry in the attic and on these occasions observed a quantity of household furnishings which the housemaid, Brigitte, informed her belonged to the Muellers (R 241). On one occasion when Mrs. Bleeker was in the attic, accused's wife opened a cabinet and showed her some china. In addition to doing laundry, Mrs. Bleeker sometimes assisted in washing dishes. She recalled washing wine glasses and observing what appeared to be dried up wine in the glasses. She also observed empty wine or champagne bottles in the kitchen or on the staircase. As recompense for her work Mrs. Bleeker received foodstuffs from accused's wife and on one occasion received a bottle of wine (Pros Ex 106) from the housemaid. Shortly before Whitsunday, Mrs. Bleeker asked accused's wife, through Brigitte, if she could borrow some china from the attic. Later, she saw some dishes on a table, and Brigitte told her, "this is the dishes you asked for." It was ordinary china "which had been used downstairs in the kitchen." Mrs. Bleeker kept the dishes until some

time in May when the accused sent the driver to pick them up. Later, Mrs. Mueller asked Mrs. Bleeker to see her and they talked about the dishes (R 242-245).

Some two weeks after the Muellers moved from the house, Buzzingham and Soeren went there to stencil Quartermaster furniture and property of the Muellers which had been requisitioned. Buzzingham observed some nonrequisitioned rugs and Soeren observed a nonrequisitioned rug and lamp and related his observations to Lieutenant Balcom (R 185, 194-195).

During the period in which the accused and his wife resided at 32 Klarweinstrasse, an occasional visitor was Mrs. Muriel Francis Brown, wife of Lieutenant Colonel Gerald Frank Brown. On her first visits, Mrs. Brown observed that accused's quarters were sparsely furnished. On subsequent visits, however, rugs, furniture, and other personal things appeared. The rugs were of oriental pattern and according to accused's wife came from the attic along with some "lovely china" upon which accused's wife had served some refreshments to Mrs. Brown. Accused's wife also took Mrs. Brown through the attic and showed her a rug collection and also china, silverware, and cutglass. Mrs. Brown understood that she was being shown the property of some third person (R 172-176).

On or about 15 June, a German attorney representing the Muellers came to see Major Alfonso D. Hall, Post Quartermaster, Garmisch Military Post. Later, in July, Hall received a letter written in March from another German attorney, Doctor Hill. In the 15 June conference, the object of the Mueller's attorney was to obtain their unrequisitioned property from the house at 32 Klarweinstrasse. Permission was granted by Hall for the furniture to be taken out on 8 July (R 267, 279), and for Mrs. Mueller to remain outside of the house and to inventory the property as it was brought out (R 280).

Sometime in June or July 1949, the accused was transferred to the Munich Military Post as Chief of the Ordnance Section in which capacity he would be responsible to Colonel E. F. Beruski "S-4." Prior to meeting accused, Colonel Beruski in response to a call from the office of Military Government of Bavaria had a conference with Doctor Augustus Hill at the latter's office. Subsequent to the conference, Colonel Beruski summoned accused to his office to discuss with him the matter which had been the subject of the conference with Doctor Hill. After informing accused that he had certain rights under the 24th Article of War, he queried accused concerning property of the Muellers which was alleged to have been taken improperly. Specifically, he asked accused, "Did you, Colonel Whitcomb, deal in properties in the house in Garmisch to which you are assigned improperly?" According to Colonel Beruski, accused admitted that he did, but upon objection by the defense stated that the text of accused's answer was as follows:

"Yes, I took one carpet." Colonel Beruski did not receive from the accused the impression that accused had removed the rug from the house (R 166-168, 170).

Beruski discussed the matter with his commanding general and subsequently received a call from Colonel Hunter, Commanding Officer at Garmisch Military Post. As a result of the conversation, Beruski went to Garmisch "to see that the action stated by Colonel Hunter to [him] was actually going to take place" (R 169).

On or about 1 July Major Hall visited accused at 32 Klarweinstrasse, and, as a result of what he was told by accused's wife, was sure that accused was using unrequisitioned property. This was subsequently verified by the accused. He did not, however, ask accused to desist (R 268, 277-279). With reference to his approval of accused's conduct he testified:

> "Q. As a matter of fact on two or three occasions you told the Colonel that you didn't blame him a bit, didn't you -- or words to that general effect?
> "A. I don't know. I don't recall that exactly" (R 278).

According to Mrs. Mueller, she was informed by Beruski that an inventory was to be taken on 8 July at 32 Klarweinstrasse (R 60). She had been otherwise advised by Major Hall to get her property out on that day (R 142).

On the morning of 8 July, Mrs. Mueller went to 32 Klarweinstrasse with Captain Shea, Judge Advocate at Garmisch Military Post. When Captain Shea announced to the others who were there that Mrs. Mueller was present, Beruski ushered her into the presence of Hall, Soeren, and the accused. Mrs. Mueller said to Beruski: "I am here. We can make the inventory." Beruski had a talk with the officers. According to Hall, Beruski told him he was there to represent Mrs. Mueller and the Army and to see that everybody obtained a fair deal. Beruski asked Mrs. Mueller the location of the property to be inventoried (R 60-268). In the meantime, Hall who was puzzled as to Beruski's role called Colonel Leonard, who asked to speak to Beruski. After speaking on the phone, Beruski left. When he did not return, Hall called Colonel Hunter who told him he did not think Beruski would be back (R 269).

Mrs. Mueller observed in the front part of the house a number of the unrequisitioned items and pointed them out. She told Hall, "You can ask Van Soeren; he knows this is not requisitioned." In response to a question by Hall, Soeren said, "No, it is not on requisition" (R 61, 201). Hall received further assurance to the same effect from accused (R 61, 269).

Mrs. Mueller testified that the unrequisitioned items which she saw were as follows: A dining room table, chairs (otherwise undescribed), about 70 "drinking glasses, whiskey glasses;" a bucket for ice, a brass tray, a silver coffee set which included a coffee pot and sugar basin, two table cloths, an hors d'oeuvre platter, two chairs (Pros Ex 28), "china ware; other china ware, vases, bowls, table lamps." She further testified that of the 70 "drinking glasses, whiskey glasses" at most 12 had been recovered, and that the bucket for ice, brass tray, and silver coffee set, and the vases had not been recovered (R 142-144).

Mrs. Mueller told Major Hall that she had no place to store the unrequisitioned property and, therefore, could not take it out (R 269, 280). Major Hall told her to leave and finally asked "would she leave or would it be necessary for [him] to call the M.P.'S" (R 281). An inventory was not taken (R 62).

Hall was thereafter instructed by Colonel Hunter to have the Post Engineers and Military Government locate a storage place for the Mueller property. Such a place, Hartenstein's, which, according to Soeren, had stored other art objects, was located, and on 13 July notification was sent to the Muellers through Military Government (R 209-210, 215, 281-282).

On 19 July, there was a meeting concerning the Mueller property attended by Mr. Hall, Mr. Garlock, Director of Military Government, Mrs. Mueller, and Captain Shea. A day or two later, Hall told accused in the presence of accused's wife that "if the Muellers could take an inventory in the house that, according to [his] information, that everything would not only be forgotten or forgiven, but she was willing to start over from the beginning." Accused made no reply, but his wife said that "Mrs. Mueller couldn't come into the house as long as she lived there" (R 271-272).

On 29 July, Hall received a letter from Mrs. Mueller, and subsequently on 2 August he sent her a confirming letter that their property was to be moved that morning (R 283-284, 291).

Mrs. Mueller admitted that she had been notified that arrangements had been made to store her husband's property at Hartenstein's, but the arrangement was unsatisfactory to her. She also admitted that on 2 August she was notified that the property was to be delivered to her then address, 6 Brandstrasse, that very day (R 146).

Preparatory to moving the Mueller property, Major Hall asked Mrs. Mueller for a list of the property which she claimed was in the house. Although the Muellers promised such a list, it was not supplied (R 285).

On 2 August, Soeren, Lieutenant Bastnagel, a sergeant from the M.P.'s, Major Hall, and eight laborers from the Quartermaster Labor

Post, together with a two and one-half ton, six by six truck, assembled at 32 Klarweinstrasse to move the Mueller property (R 201, 284). Although Mrs. Mueller had been granted authority to be outside the house to inventory the property as it was brought out, she was not present (R 284). Accused was present on and off the first day of the move, but not on the second (R 202, 211, 212, 273).

Soeren was ordered to go into the house and supervise the laborers and to check the inventory of requisitioned and Quartermaster property. Soeren worked only in the rear of the house. From there were removed rugs, paintings, furniture, wine, soda water, vegetables, chinaware, glassware, and some clothes (R 202). While the inventory being taken was not particularly accurate, Soeren was certain as to the count of rugs, having counted them separately to the number of 87 (R 212-213). Soeren did not recall that the accused identified or pointed out the things which were being moved out (R 202). Hall had gone to the Muellers and was there when the first two truck loads were unloaded. After the first two loads were unloaded at 11 Brandstrasse, the rest were taken to Hartensteins, and the Muellers also arranged to have the first two loads moved there (R 65, 272). In all, 11 two and one-half ton truck loads of property were removed on 2 and 3 August (R 272). An "M.P." and an officer accompanied each truck load (R 298). By stipulation, Defense Exhibit G, the items of property moved, listed by truck load, was admitted in evidence (R 299).

According to Hall, the accused and his wife pointed out the items not carried on either the Quartermaster or requisitioned list, and also pointed out the property which belonged to them (R 273). Hall recalled that the accused pointed out certain items of furniture and paintings in the front part of the house as being property which should be taken. Hall agreed with the accused that there was no necessity of first taking those items back upstairs (R 287). Hall was unable to recognize among Prosecution Exhibits 6 to 101 inclusive (items of the specification of Charge I) any objects which he saw on 2 or 3 August or which either the accused or his wife claimed to be their own (R 286). To the best of Hall's knowledge, only three pieces of nonrequisitioned property were left in the house. There were a washing machine, a table, and a clock. The washing machine and table were purposely left, but the clock was overlooked (R 273-274). He admitted that the inventory taken on 2 and 3 August was not an accurate inventory (R 284, 291) and added that an accurate inventory could not be taken either within or without the house (R 289, 295-296). The limitations of time, space within the house, and lack of familiarity with the property were the circumstances which rendered it impossible to take an accurate inventory within the house (R 295-297). Nonetheless, Hall received an official reprimand "for the way it was handled" (R 296).

When the move was terminated, the accused's wife asked Hall how many rugs there were, to which Hall responded "87." Hall testified that the accused's wife then requested Hall to increase the inventory to a specified number which Hall was reluctant to state. The law member admitted this testimony "For the purpose of showing that such a statement was made. But to prove the truth of the statements made is not admissible, and would not be considered as such" (R 292). Three weeks later, the accused's wife telephoned Hall and again requested that he increase the inventory (R 292-293).

The Muellers, after their property had been placed in Hartenstein's, repaired there to take an inventory. When they had completed it and compared it with their February-March 1949 inventory, they found that the items listed in the Specification of Charge II, and 70 of the items of Charge I were missing (R 65-66, 311, 572). Of 67 bottles of wines returned on 2 and 3 August, seven were found to have been opened and were full of dirty water (R 306-307). After compiling a list of shortages, Mrs. Mueller took the list to Colonel Lane, the Inspector General, in Heidelberg. As a result, an investigation was held by Colonel Eugene R. Cowles (R 66).

In the meantime accused's quarters at 32 Klarweinstrasse were terminated on 11 August and he moved to Munich (R 66, 262). The move to Munich was accomplished by a 2-1/2 ton truck manned by two enlisted men of the "569 Ordnance," Dachau, Germany. The two enlisted men were Corporal Richard W. Purifoy and Corporal Walter Lufcy who drove. Purifoy thought that some of the items he moved for the accused on 18 August were similar to some of the items included in Prosecution Exhibits 6-101, inclusive, particularly Prosecution Exhibit 84, a lawn mower, and testified that he loaded the lawn mower at the accused's direction. He added that two chairs, Prosecution Exhibits 28 and 29, were loaded at the direction of either the accused or his wife (R 335). He admitted that at the investigation prior to trial a cabinet containing Prosecution Exhibit 84 was shown to him and he was asked if he recognized any of the contents to which he replied that he knew they carried a lawn mower but could not say "this is the same one." Purifoy knew that during the loading of furniture the accused left the house at least once (R 343). The truck which was covered by a "tarp" was fully loaded to the top and had the end gate down when it left Garmisch (R 340). A German civilian accompanied Purifoy and Lufcy to Munich where they unloaded the truck at the accused's quarters and entrusted the property to a German who was working around the place (R 336).

On 27 August the accused was directed to see Colonel Cowles at the Excelsior Hotel (R 247, 250). The following day accused came to the Excelsior and was interrogated by Colonel Cowles who first apprised him of his rights under Article of War 24. In response to Colonel Cowles'

questions accused admitted that he had used not more than four or five bottles of the Mueller wines; that he had used a few of the Mueller rugs but that all had been returned to their storage place and were taken out with the other unrequisitioned property, that he had given a can of lard, some onions and some old wormy potatoes to the Bleekers; that he had caused the cellar storeroom to be opened because of sanitary reasons. Accused claimed that other rooms upstairs had been opened by Bleeker for which accused's wife had reprimanded him. Colonel Cowles received accused's permission to search his quarters. Colonel Cowles, accompanied by an unnamed Assistant Provost Marshal, a Department of the Army civilian employee, Mrs. Barrett, and Mrs. Mueller proceeded to the accused's quarters where a search was conducted. In the entrance hallway were found two chairs, Prosecution Exhibits 28 and 29, which Mrs. Mueller claimed as her property. The chairs were marked with "U. S. requisition numbers" but the accused stated that they were not on his memorandum receipt. Colonel Cowles subsequently was not able to find out whether or not the chairs had ever been derequisitioned. The search proceeded through the house and Mrs. Mueller indicated various items as hers. Outside, were found some garden tools and a lawn mower which Mrs. Mueller claimed. Accused, in Colonel Cowles' presence, never objected to any of the identifications made by Mrs. Mueller (R 247-253). As a result of the search, Items 1-11 and 14-96, inclusive, of the specification of Charge I were recovered (R 72). Not all the items recovered had been entered in the February-March inventory (R 128), and some unrequisitioned property was still at 32 Klarweinstrasse at the time of trial (R 127-128). Unrecovered were the items of the Specification of Charge II. Mueller was unable to state whether or not the rugs which had been damaged by a prior occupant of the house were among the missing (R 330-331).

Colonel Cowles in seeking to locate the missing property of the Muellers turned the matter over to the CID, and personally checked two Army post offices to find out if any personal packages had been mailed to the States or elsewhere by accused (R 252). He found out, however, that the post offices maintained records only of registered matter (R 253).

In December, Mrs. Mueller talked with "CID" Agent Wilson and told him because she was "very tired" that she "would forget all this that [her] sole desire was to get back into the house" (R 148, 149).

b. For the Defense

Accused elected to be a witness in his own behalf and testified substantially as follows:

He is 46 years of age, married, and has one son, a 4th Classman at the United States Naval Academy. He was brought up in Massachusetts

and graduated from Worcester Polytechnical Institute, Worcester, Massachusetts. He applied for a commission in the Officers' Reserve Corps in 1936 or 1937 and after taking a series of special courses was commissioned in the grade of second lieutenant in May 1938. He entered on active duty in January 1940, and was on continuous active duty until December 1946, being promoted to lieutenant colonel upon separation. He had also been awarded the Army Commendation ribbon. He entered the Regular Army as a major in June 1947, and was promoted to lieutenant colonel in January 1949. He came overseas in October 1947 and was assigned to the office of the Chief of Ordnance Division, Headquarters, EUCOM, where he remained until he was transferred to Garmisch Military Post as Post Ordnance Officer. He departed from Heidelberg for Garmisch on 19 January 1949. His wife was overseas with him and they had some household items with them. It required twenty boxes which were later consolidated to twelve or thirteen, to move their personal possessions from Heidelberg to Garmisch (R 489-494).

Upon their arrival in Garmisch they were initially assigned quarters in the Alpenland Officers' Hotel. Later, they inspected houses but their inspections did not include the house at 32 Klarweinstrasse. They had been told that that house was being considered by the post commander. On 28 or 29 January, however, they were told that the post commander was no longer interested. They went to 32 Klarweinstrasse and were admitted at the front door by Mrs. Mueller who showed them through the house. The house was adequately furnished although there were only two or three small rugs in evidence. There was very little conversation although accused recalled being asked by Mrs. Mueller if he had any small children. The following day, accused and his wife decided to drive by the house to see how it appeared in day time. They slowed down as they were going by the house, and Mrs. Mueller, who was standing by the gate, beckoned to them. She came over to their car and told them she and her husband would be delighted if accused would take the house, especially as they had no small children. During the conversation, her 12-year old daughter came out and Mrs. Mueller asked if her 12-year old daughter could practice on the requisitioned piano in the front part of the house for approximately one hour daily. Accused and his wife saw a rooster and eight hens running up and down the front porch, and, after they drove off, accused's wife commented that she would not want to live there with the chickens running around so freely. While they liked the house, they did not want to live there if the hens were running around, and if the daughter was to practice on the piano in their part of the house. The accused decided to discuss the matter with Colonel Hunter and on 2 February did so. At this time, he learned from Colonel Hunter that action had already been initiated to remove the Muellers from the house, and that he could move in immediately or wait until the Muellers got out.

On 31 January, the accused had moved from the Alpenland Hotel to the House Tannenberg, and on 3 February the Mueller house was assigned

to him, and he was given a key to the front door of the house. On the evening of 17 February the accused and his wife drove out to 32 Klarweinstrasse with some of their belongings. The accused inserted the key, turned it, and then could not open the door as it was apparently bolted on the inside. They rang the bell but received no response. They drove back to the House Tannenberg but immediately returned. This time upon turning the lock with the key he was able to open the door. Upon entering, they noticed that some paintings which had been hanging in the front hall, and a chandelier in the dining room, had been removed. The accused, in March, saw the chandelier in the Muellers' bedroom. They next came to Klarweinstrasse on 19 February on which occasion they stayed overnight. Prior to moving in completely accused had the front rooms of the house washed and painted. They moved in completely on 21 February. The accused had previously noted that the partition door on the first floor, and the door on the second floor leading to the rear of the house were both locked from the Mueller side. He had also been told by Colonel Hunter that on one occasion he had found the Muellers in the front of the house. Accused, therefore, decided to have some locks changed to protect his own property. On 21 February, at accused's direction the locks on the partition door and two exterior locks were changed. The lock on the door used as an entrance by the Muellers was not changed. On 21 February the accused completed checking the memorandum receipt of leased property and found in the front of the house a number of items which were not listed on his memorandum receipt and which were not Quartermaster property (R 494-501). These items were a washing machine in the basement, two chairs (Pros Exs 28 and 29) in one of the bedrooms upstairs; a Bochara cover (Pros Ex 27) on the piano; a mirror (Pros Ex 32); kitchen scales (Pros Ex 26) in the back hall (R 501,540-541,546). Although the accused was aware that these items belonged to the Muellers he used them during his occupancy of the house (R 541,547). There was no Quartermaster property in the house and accused drew a set of Rosenthal china, a small set of china for the maid, and a set of bedroom furniture (R 500-501). Requisitioned items of furniture in the dining room, the buffet and china closet, were locked as was the piano keyboard and everything else which could be locked. Accused's maid, at his direction, secured from the Muellers five or six cabinet type keys with which these locks could be opened (R 501-507).

The accused had been informed that on 23 February the M.P.'s were going to come to put the Muellers out. At 10:30 a.m. that day he received a telephone call at his office from his wife who informed him that Mrs. Mueller had threatened her. While he was eating lunch at the house at noon, the maid told him that Mrs. Mueller was at the door. Accused told the maid to tell Mrs. Mueller he had nothing to say to her. Although the maid conveyed that information to Mrs. Mueller, the latter brushed by her and pleaded with the accused to let her stay in the house. The accused had had nothing to do with Mrs. Mueller's eviction and told her so, and suggested to her that she take the matter up with the

Military Government. He closed the door on her. He denied laying a hand on her and denied saying "Heraus" (R 502-503, 529-530).

A short time after the accused returned to the house the same evening, Mr. Pierce from Military Government, Lieutenant Heiser of the Military Police, and a Military Police sergeant came to the house and asked for and received directions from the accused as to the entrance to the Muellers' quarters. Later, they returned and summoned Mr. Garlock, the Military Governor of Garmisch. Although invited by Garlock, the accused refused to take part in their conversation. Finally, a German doctor was called and he examined Mueller, and stated that Mueller was sick. Garlock tried unsuccessfully to obtain an ambulance. The accused, in answer to Garlock, stated that he had no objection to the Muellers staying overnight. The following morning Mueller moved out in an ambulance (R 503-504).

That evening Corporal Buzzingham arrived about five o'clock and told the accused he was there to help move out the Muellers and help take an inventory, but added that it was impossible to take an inventory. At about 6:30, a taxi, which Buzzingham had called, arrived. At this time, Buzzingham told the accused that he had given the Muellers an additional twenty-four hours to remove their property. However, six or seven suitcases plus some corrugated cardboard boxes were taken. Buzzingham also told the accused that he had sealed the Mueller side of the partition door. No sign, however, was posted on the door. Nobody had made a request of accused for an inventory of the unrequisitioned property in the house. Before leaving on the night of 24 February, Buzzingham gave to the accused the key to the outside door used as an entrance by the Muellers (R 504-505). On 25 February the accused went to his office and returned home to lunch. Up to this time, the day was uneventful at the house. At four o'clock in the afternoon the accused received a call from his wife to the effect that Mrs. Mueller had arrived with a truck. Since his wife was very much upset over the entire situation, the accused returned to the house immediately, arriving at about 4:15 p.m. From within the house he observed what was like a 3/4 ton vehicle and about eight to ten men and women carrying boxes, hampers, cartons, boxes and baskets of clothing. His wife informed him that these activities had been going on since two o'clock. He observed some things being carried into Dr. Peipper's house, and also observed the truck leave loaded four times. At about seven o'clock, Buzzingham told him that the Muellers had said they could not complete the move by seven o'clock and had asked for an extension of time. Accused said nothing; Buzzingham went out and the moving continued until 9:30 in the evening. There was no listing by Army personnel of the things taken out. After the moving had been completed, Buzzingham brought to accused six or eight keys. The accused was not sure, but thought there was one cabinet key, the rest being door keys. The accused subsequently found out that with the keys every door in the house, except the cellar supply room door, could be opened (R 505-507).

Accused invited Buzzingham in for coffee and afterwards Buzzingham took accused and his wife through the Mueller portion of the house. According to accused, "It was an art museum. It was a museum of various antiques. It was filled with paintings, rugs, art objects, china cabinets, ***. There were [however] many cabinets locked into which they could not see" (R 509). The room in which the rugs were located was opened with a key which was furnished by Buzzingham, and the rugs were inspected by looking at them from the doorway. Although Mrs. Mueller had, on the accused's second visit to the house, offered to lend him some oriental rugs, accused had no idea that the Mueller rugs were of great value. They also inspected the other rooms in the Mueller portion of the house, opening them with the keys furnished by Buzzingham. Cupboards and cabinets, however, were not opened during the tour since the accused had no keys for them. In one room a barometer (Pros Ex 22, evidently Item 15, Spec of Chg I) was hanging. The accused surmised that this and the other property viewed by him belonged to the Muellers although he did not recall being informed to that effect by Buzzingham, nor did he recall that Buzzingham told him what to use and what not to use (R 508-509, 532-535). On the second floor the back part of the house was blocked by a "familiar German-type three-sectional wardrobe" backed against the door. It was about 5-1/2 to 6 feet in width and 7 to 7-1/2 feet in height. It was open and contained personal clothing. It was immediately moved by swinging it around in a 90° arc blocking completely windows through which Mrs. Mueller claimed she saw accused working with a hammer and screwdriver (R 33, 52, 510, 535; Pros Ex 20). The wardrobe remained in that position until it was removed by the Quartermaster on 2 August (R 510).

On approximately 9 March, Lieutenant Balcom of the Quartermaster's Office stopped in with a new consolidated memorandum receipt which he asked the accused to sign and return within the usual length of time. Accused's wife asked Balcom what responsibility devolved upon the accused and herself with reference to the Mueller property. The accused's recollection was to the effect that Balcom replied they would be responsible only for the items on the memorandum receipt; that the other property was not his responsibility, but was there at the risk of the owner (R 508-509). The accused checked the new memorandum receipt within a day or two and returned it. The same articles of unrequisitioned property in the front part of the house which were omitted from the former memorandum receipt were omitted from this one (R 511,555). Further, he was informed to this effect by Lieutenant Balcom (R 541).

Quite early during their occupancy, the accused and his wife decided to use some of the rugs, and accused recalled that a total of eleven rugs were utilized (R 516, 542-543, 547). The accused had tried unsuccessfully to draw a dining room table from the Quartermaster and moved down a dining room table and chair of the Muellers (R 516,539,547). He

admitted looking at Morton's History of Oriental Rugs before 1800, but made no study of it, and was unable to determine from it the value of the Mueller rugs (R 544).

In the latter part of March, the accused received a complaint from his wife that there was an odor in the house coming from the cellar. The accused investigated the cellar and determined that the odor came from the locked room. He had a man come from the Ordnance shop and open the door. The accused did not direct him to open any other door in the house. When the accused returned to his home on the night in question the door had been opened. It had been determined that the odor came from rotting potatoes and sauerkraut, which were removed. A new lock and key was provided for the door and the key was hung in the kitchen (R 514,516, 547-548). Unknown to the accused and his wife the man from Ordnance opened all the locked cabinets in the house. The accused then saw the contents of these cabinets and later saw objects which had been removed from them (R 536-537).

The accused also inspected the Mueller storage room and was amazed at the number of bottles of wine in the room, but upon closer examination found that not over 100 bottles were full. Accused was unaware of the vintages of the various wines. He admitted taking and using two bottles of champagne and one bottle of white wine for the entertainment of guests (R 514,516,548-549,551). He admitted that at the Article of War 46b investigation Captain Bachman, his defense counsel, stated:

> "The only things [accused] ever used were some two or three bottles of wine of no particular value, which he used as a matter of curiosity. So far as the remaining items of property are concerned, it is obvious that not all the items belonging to the Muellers were in fact returned to them" (R 552).

The accused was transferred to Munich Military Post effective 26 June, but left Garmisch three days earlier. He was unable to get quarters immediately and so received permission to commute to and from Munich, a distance of 60 miles each way. He would leave Garmisch prior to 8:00 a.m. and arrive back there at 6:00 p.m.

On 30 June, Colonel Beruski had accused report to him. Colonel Beruski advised accused of his rights under Article of War 24 and then told accused that he was conducting an investigation of the accused's occupancy of 32 Klarweinstrasse and that a full report would be submitted to General Sebree. The accused did not tell Colonel Beruski he had not used any unrequisitioned property, but admitted that he had used some of the rugs. He definitely did not state he had used only one rug (R 519, 544-545).

On the 1st of July, the accused learned from his wife that the Muellers were going to take their property out not later than possibly 5 July. Prior to this, after the accused had reported to Munich, his wife had started to replace some of the items taken from the back upper part of the house. The rugs had been returned but Major Hall had told her there was no need to return the dining room table because it would only have to be brought down again. Prior to 8 July everything had been moved back except a sofa, some pictures, the dining room table and chairs, and two other tables (Pros Exs 57 and 58). (R 519)

The accused remained at home on 8 July and did nothing to prevent Mrs. Mueller from entering the house or going through it. He admitted that on that day Mrs. Mueller identified in his quarters articles which belonged to her (R 520, 556). He also recalled that after Colonel Beruski left the house that day Mrs. Mueller kept insisting that Colonel Beruski return, claiming that he represented her (R 520).

The Mueller property was moved out on 2 and 3 August, but the accused was present only on the first day and was not particularly helpful as the Quartermaster people devoted their entire attention to the back part of the house where none of his property was located (R 520, 557).

The accused was assigned quarters in Munich sometime within the first ten days in August and he moved from Garmisch on 11 August. The packing for the move was all done gradually by his wife and the housemaid over a period of time. The accused procured a 2-1/2 ton truck and two enlisted men from his Ordnance Section to move his possessions. He did not utilize the Garmisch Post engineers for packing and did not request transportation. The truck and its crew of two enlisted men arrived at the house at about 10:00 o'clock, and the accused told them where to start. The accused left to procure some additional help at the Ordnance Section and took along the maid to make her clearance. He left the maid downtown, procured two German laborers and took them to the house. He again left to make his own clearance and picked up the maid. He finally returned to the house at about 12:15, at which time the loading was completed and they were lashing the last things on the back. The only things visible from the rear were some lawn settees which he had procured and in back of them nothing but boxes. He admitted in court that he recognized the lawn mower in issue (Pros Ex 84) and that he used it in Garmisch and Munich, that he assumed it belonged to the Muellers, and that his wife had paid for its repair. He denied, however, that it was put on the truck at his express order or direction (R 522, 559, 562).

The accused, however, did not leave Garmisch until about 4 o'clock in the afternoon, and when he arrived at Munich the truck had been unloaded and departed. Nothing was unpacked, but upon entering the house

he saw two tables and two chairs (Pros Exs 28 and 29), and exclaimed, "They should not have come. What have we done?" By 28 August he had become aware of the presence of the following additional items: the mirror (Pros Ex 32), the Bochara rug (Pros Ex 33), and some garden tools and the lawn mower (Pros Exs 84 and 86), a clothes basket and wash tub in the basement (Pros Exs 54,55), a Moorish cigar box (Pros Ex 9), shoes (Pros Ex 81), air boots (Pros Ex 82), and a set of kitchen scales (Pros Ex 26) (R 523-524, 561,564). These items had been moved without the accused's knowledge and prior to 28 August the accused had no knowledge that other items of Mueller's property had been similarly moved. Although he and his wife had discussed getting the items he saw back to Garmisch no action toward that end had been taken by 28 August (R 524,525,560). On 17 August, the accused was told by Colonel Hunter that an investigation was going to take place concerning the Mueller property, but, at this time, the accused did not tell Colonel Hunter that he had inadvertently moved some of the Mueller property to Munich (R 525, 560).

The accused reported to Colonel Cowles at the latter's direction, which was given the preceding evening on Sunday morning, 28 August, at the Excelsior Hotel. Prior to reporting to Colonel Cowles, the accused made no effort to hide or dispose of any of the articles in the courtroom. (R 525)

Colonel W. L. Hunter, Commanding Officer, Garmisch Military Post, testified that he was familiar with the house at 32 Klarweinstrasse and visited it during Major Felchlin's occupancy. After Major Felchlin departed, Colonel Hunter inspected the house again as he considered using it for his quarters. When he inspected it, he found the house occupied by the Muellers, who were apparently occupying the entire house. Mrs. Hunter noticed that one of the bedrooms had different beds than when the Felchlins lived there and called Colonel Hunter's attention to the change. Lieutenant Balcom explained that the Muellers had let the Felchlins take some beds which were changed when the Felchlins moved out. The Muellers told Colonel Hunter they had to live in the house, which was contrary to Colonel Hunter's ideas. Mueller suggested that he had better write a letter to General Clay, to which Hunter responded that he was following General Clay's directions. At the time, action had already been taken to move Germans from houses which they were occupying illegally and the military government had been asked to get accommodations for them. When Colonel Hunter assumed command of the Post there was a custom for setting aside a portion of a requisitioned house for storage of unrequisitioned property of the evicted owner. Colonel Hunter did not change this policy. Sometime after the Muellers left this house Colonel Hunter's attention was called to the fact that their property still remained there. He gave the Quartermaster instructions to have the property inventoried and removed. The Quartermaster recommended

to Colonel Hunter that, because of the disorganized state of the property and the limitation of space, the property be inventoried as it was moved. Colonel Hunter agreed to this procedure. The Muellers refused to cooperate in the removal of their property so Colonel Hunter asked for and received instructions from Major Bristol at EUCOM to the effect that if the Muellers refused to accept storage deemed suitable by the Government to deposit the property at their then place of residence (R 468-473).

Major Howard L. Felchlin, who occupied 32 Klarweinstrasse from 8 July 1948 until 10 January 1949, testified that the house was adequately furnished, and that the major portion of the furniture including 13 oriental rugs of the Muellers were on requisition . Other items which were used were lent by the Muellers who were occupying quarters in that house at this time. Shortly after Felchlin and his family moved in, Mrs. Mueller offered to work for them as housekeeper. Felchlin agreed, although he presumed that the motive for the offer was to look after her own property. The Felchlins acquired a dog which "wasn't exactly housebroke" and the Muellers immediately objected to the dog living in the house. Felchlin insisted that he was going to keep the dog and train him, and added that he would try to clean the rugs of any marks. After this incident relations between the Felchlins and Muellers cooled. They did, however, exchange Christmas gifts and Felchlin called on the Muellers when he left the house. On several occasions, not specified as to time, Felchlin was in the cellar storeroom and saw a considerable quantity of wine and discussed the wines with Mueller. He estimated that about 200 to 250 bottles were full and about 100 to 150 were empty. He testified that Prosecution Exhibits 28 and 29 were on his memorandum receipt. He also recognized some chinaware in the court room as being similar to some which the Muellers had lent him. He added that the barometer was in the house, although it was not on his memorandum receipt. Some of the items for which he had not signed were still present in his house when he moved out (R 463-468).

Corporal Buzzingham, recalled as a witness for the defense, testified that on 24 February he told Mrs. Mueller that anything she left in the house was left at her own risk; that in case of fire the Government was responsible for the house and requisitioned property but not for the unrequisitioned property (R 414-415).

William J. Garlock, then Area Commander for Military Government in the Garmisch Area, testified that in January 1949 he was informed by Garmisch Military Post that the Muellers were "illegally jointly occupying" requisitioned quarters and that the Post desired them evicted. Garlock was requested to arrange with the "Wonungshausenant" the assignment of quarters for the Muellers. German families were allowed "8 Quadrat Meters" for living space. Quarters were assigned to the

Muellers, and Garlock wrote a letter to them in the latter part of January informing them of the assignment and that they would have to move out. No specified time was stated for the move to take place. When the Muellers did not move out, Garlock sent them another letter requiring them to be out on 20 or 23 February. On the 23rd, Garlock went to the Muellers and found Mueller in bed. A physician was summoned who advised that Mueller be moved to a hospital in an ambulance. Arrangements were made to take Mueller to a hospital in an ambulance on the following day, but Mueller voluntarily left the premises. Around 1 March Garlock received a letter from Mueller which he considered as insulting and for which he compelled Mueller to apologize. Subsequently, Garlock was visited by Mrs. Mueller who told him that she had heard the accused was going to vacate 32 Klarweinstrasse and that she could probably succeed in making an arrangement with the incoming officer to go back into the house and keep her possessions there. She then requested that she be allowed to make an inventory of all the property in the house. Garlock took that matter up with Major Hall, but the next thing he heard was the obtaining of a satisfactory warehouse for the Mueller property. Hartenstein's was selected as being such a place.

On 2 August, Garlock went to see Mrs. Mueller to have her agree to have the property placed in Hartenstein's; he told her that any damage done the property by leaving it on her lawn would not be the responsibility of the American Government. Mrs. Mueller's response as stated by Garlock was to the effect that she had talked to General Richards at Heidelberg the preceding day; that the General had told her that everything being done at Garmisch was absolutely wrong; that she was not to worry as it would be taken care of by Heidelberg. She said she did not care what happened to the property. Garlock went to 32 Klarweinstrasse and related the conversation to the accused who said he hoped nothing would interfere with the move. One truckload had already gotten away. It was decided to suspend operations until Garlock saw Colonel Hunter. Garlock went to Colonel Hunter and related his conversation with Mrs. Mueller. The Colonel telephoned Heidelberg and an hour later told Garlock to go on with the move. Garlock returned to the Muellers and told Mr. Mueller that the move was going to continue. Mueller had an insolent attitude, would not assent to moving the property to Hartenstein's, and insisted that his interests were being taken care of in Heidelberg. Later, however, the Muellers capitulated and their property was taken to Hartenstein's (R 417-436).

Second Lieutenant William Moody, Commander of the 85th Ordnance Battalion, Dachau, Germany, testified that the records of the battalion, extending from 25 June to 31 December 1949, which he had in his possession, show that the accused joined the battalion on 27 June 1949, and was absent on official duty at Ordnance Company, Garmisch, on 18 and 19 August, and was otherwise absent one day in July and one day in

August (R 409-410).

Brigitte Lindner testified that she started to work for the accused and his wife on 7 March 1949, and was paid therefor by the American Civilian Personnel Office. The house at 32 Klarweinstrasse where she worked was to Brigitte more like a storehouse than a home. About 14 or 15 rugs stored in the attic were brought into the accused's part of the house and scattered around. When they were brought out they were filthy and Brigitte had to clean them (R 363-365, 372). Other things brought down included a dining room table and chair and pictures (R 371).

An odor was coming from a room in the cellar and after the room was opened it was found that the odor came from rotten potatoes and sauerkraut which were put into the garbage. Brigitte, when she first went into the room observed what appeared to be all empty bottles, but inspection showed that some were full of wine. Brigitte gave one bottle of the wine to Bleeker, and also gave to Bleeker a quantity of the foodstuffs stored in the cellar room (R 365-366, 379). On one occasion she saw Bleeker take some lard from the room (R 370-371). Prior to the accused and his wife moving to Munich, Brigitte and the accused's wife packed the personal belongings of the household. The packing was done over a period of days and was done only when the accused was absent. Brigitte remembered definitely and identified some 22 items of the Specification of Charge I, which she packed, and was not sure that she had not packed other items. Some were in the kitchen and others were in other parts of the house (R 378-381). Some of the items packed were in daily use in the house and visible to the accused (R 394-398). On the day of the move, the accused took Brigitte to the employment office and the "refuge" office. When she observed the accused at the house he was doing nothing about loading the truck. Since she was not at the house all the time she could not say that he did not give any assistance (R 382, 397-398). She identified Prosecution Exhibit 84, Item 18, as a lawn mower which was repaired at the accused's expense. It was used around 32 Klarweinstrasse (R 399). She never saw any rugs or china go out of the house and never saw the accused take any packages therefrom. (R 383-384)

On 28 August, after moving to Munich with the accused, she visited Garmisch. Before leaving the house in Munich she locked her room and took the key with her. The only things in the room not her property were the bed, the closet, and the furniture (R 385-386).

Upon cross-examination, she testified that she was still working for the accused; that he was an excellent employer; that he was good to her, and that she would not want anything "bad" to happen to him. Prior to trial, Captain Bachman had asked her questions, and she talked

with the accused and his wife but they did not try to influence her, and she did not tell them her expected testimony (R 386-387).

Corporal Walter R. Lufcy, 569 Ordnance MCM Company, Dachau, testified that he was sent to Garmisch with Corporal Purifoy to move the accused's possessions to Munich. The accused was around when the truck was loaded but left once. Lufcy did not recall loading a lawn mower. When the truck was loaded, beach chairs and a bicycle were visible from the back. No chairs or tables were visible from the rear, and Lufcy loaded similar items on the truck but did not recall that the accused was present when they were loaded (R 351-352a).

Heinrich Reuss testified that in August 1949 he was employed in the Ordnance Field Maintenance Shop and that once at the beginning of that month he was visited by the accused. At the time, the accused asked him for help to load a truck which was to bring his belongings to Munich. The accused had to wait from 9:30 a.m. to approximately 10:15 a.m. before some laborers became available (R 461-462).

Major Allen C. Schuler, then residing in the Mueller home, testified that he moved in four days after the accused moved out. When he moved in only 3 or 4 items of unrequisitioned property of the Muellers remained. Schuler had examined built-in cabinets in the house and found that none had any marks or scratches (R 484-487).

Sergeant First Class William C. Wilson, Agent, 13th CID, testified that on 1 September he was directed to assist Colonel Cowles in an attempt to locate property which Mrs. Mueller claimed was missing from her home. Mrs. Mueller was claiming a lengthy list of property including a sterling silver service set, oriental prayer rugs, and a set of expensive chinaware. Wilson checked the air freight offices of every air line operating in the United States Zone of Germany, the shipping offices of American lines. He had records searched for names of the accused and his wife, and their friends trying to determine what mail, freight, or shipments, may have been made, and all "parcels post, parcels post insurance and registered mail receipts were checked." The post offices checked were 172 at Garmisch and 407 at Munich. The records checked were for registered packages and insured packages, and covered the period from which accused first occupied the Mueller house. The registered mail records were very accurate, but the records for insured packages were not too complete. No records were maintained of packages which were neither insured nor registered. Wilson, however, made particular inquiry of the postal authorities as to packages which might meet the purposes of this investigation. The services of a confidential agent were employed to buy the property, particularly the rugs, in the black market. Wilson visited all antique dealers throughout Germany in an attempt to find the goods. His efforts were unsuccessful. In addition,

Colonel Cowles made a search of customs declarations of members of the accused's family and of friends of the accused (R 411-414, 452-453).

The testimony of Lieutenant Colonels G. H. Levitt, A. L. McKusick and E. A. King, the stipulated testimony of Colonel A. J. Evans, and the deposition of Brigadier General Edward E. McMorland pertained to the accused's good reputation for truth and veracity and his excellence as an officer.

4. Discussion

a. As to Charge I and the Specification thereunder

The accused was charged with the larceny of some 149 items of property of Georg Wilhelm Mueller. Items 12 and 13 of the Specification of Charge I were deleted, and accused was found guilty of the larceny of the remaining items except for Items 97 through 149, inclusive, for which exception was substituted two bottles of champagne and one bottle of white wine, otherwise undescribed, of some value, in violation of Article of War 93.

The material evidence relating to the larceny of Items 1-11 and 14-96, inclusive, of this Specification may be briefly summarized, as follows:

On 28 August 1950, a search of the accused's quarters in Munich disclosed the presence therein of 94 items of unrequisitioned property of Georg Wilhelm Mueller which had been taken from Mueller's house in Garmisch. The Mueller residence in Garmisch and some of Mueller's personal property had been requisitioned in 1945 for the use of United States Army personnel. The house was occupied by the accused and his wife from 21 February 1949 until 11 August 1949 when they moved to Munich. The unrequisitioned property of the Muellers was stored in the house during the accused's occupancy. In June 1949, the accused was transferred to Munich and thereafter commuted between Garmisch and his place of duty in Munich, a total of 120 miles daily. The packing of his possessions for the move to Munich was done by his wife and by the housemaid, Brigitte Lindner. The accused's possessions were moved to Munich on 11 August by a truck which together with its crew of two enlisted men, Corporals Lufcy and Purifcy, had been procured from accused's organization in Munich. On the day of the move, the accused brought Purifcy and Lufcy to his quarters in Garmisch, gave them general directions as to where to begin working, and then went downtown in Garmisch with the maid Brigitte Lindner. After leaving Brigitte at the refugee office, the accused went to secure additional help for loading his possessions, and upon securing some laborers transported them to his quarters. He returned downtown to accomplish his clearance,

picked up Brigitte and returned to his quarters. At this time, loading of the truck had been accomplished except for securing its contents, and all that was visible at the rear of the truck were some settees and boxes. According to Purifoy, a lawn mower (Item 18, Spec of Chg I), subsequently found in the accused's quarters at Munich, was loaded on the truck by him at accused's direction. Lufcy, the other enlisted man, had no recollection of the incident and accused denied it. When the accused arrived at his quarters in Munich the contents of the truck had been placed in his quarters and the truck had departed. Upon entering the house, the accused found therein two tables and two chairs (Items 94, 95 and 96 of the Spec of Chg I), which he recognized as the property of the Muellers. By 28 August, he had become aware of the presence in his quarters of the following additional articles of Mueller property which are itemized in the Specification of Charge I: a mirror, a Bochara rug, some garden tools, the lawn mower, a clothes basket, a wash tub, a Moorish cigar box, shoes, air boots, and a set of kitchen scales.

On 17 or 18 August, the accused learned that an investigation had started pertaining to the Mueller property, and, on the evening of 27 August, he was notified that Colonel Cowles who had been detailed to conduct the investigation wanted to interview him. The interview was conducted on the following day and at its termination the accused gave his permission to Colonel Cowles to search his quarters, and the ensuing search conducted by Colonel Cowles disclosed the presence in the accused's quarters of Items 1-11 and 14-96, inclusive, of the Specification of Charge I.

This evidence in our opinion is insufficient to establish beyond a reasonable doubt that the accused unlawfully appropriated the property here in question. As to the Mueller property found in the accused's quarters in Munich, the evidence shows that persons other than the accused consciously or unconsciously caused this property, except the lawn mower, to be transported from Garmisch to the accused's quarters in Munich. Except for Purifoy's testimony connecting the accused with the lawn mower, there is no direct testimony that the accused either had advance knowledge of or knowingly participated in the moving of the property. To impute guilty knowledge to the accused resort must be had to circumstantial evidence of the most tenuous character. This we are unwilling to do. Furthermore the accused's conduct after his discovery of some of the property in his quarters in Munich is not inconsistent with innocence. While the accused did not take any immediate steps to return the property, he did not make any attempt to conceal it after he knew that there was to be an investigation. Also, he voluntarily consented to a search of his quarters.

With respect to the lawn mower, we also entertain substantial doubt that it was placed on the truck at the accused's direction. While Purifoy

testified that he loaded the lawn mower on the truck pursuant to the direction of the accused, Lufcy, the other soldier involved in the move could not recall any such incident and the accused denied having given any such direction.

Accused, in his testimony, admitted that during his occupancy of 32 Klarweinstrasse he took and consumed two bottles of champagne and one bottle of white wine which were otherwise undescribed, and the findings of guilty of larceny pertaining to the larceny of vinous liquors corresponds with his testimony. In the Specification of Charge I, the vinous liquors alleged to have been stolen were meticulously described, but for reasons hereinafter set forth we are of the opinion that there is substantial doubt that the meticulously described vinous liquors alleged to have been stolen were in fact in the cellar storeroom at the times accused took the three undescribed bottles of vinous liquors.

For the reasons stated, we are of the opinion that the evidence fails to establish beyond a reasonable doubt that the accused unlawfully appropriated the items alleged in the Specification of Charge I.

b. As to Charge II and the Specification thereunder

The accused was charged with failing to exercise due care in safeguarding 53 items of Mueller property (also alleged as the last 53 items of the Specification of Charge I) thereby causing the said items to be lost and dissipated. He was found guilty of the Specification with exceptions not here pertinent and of Charge II.

In our view of the case it is unnecessary to decide whether or not the Specification states an offense or to consider all of the evidence. Suffice it to say, the findings of guilty of the Specification may not be sustained unless the evidence establishes that the Mueller property alleged to have been lost or dissipated by the accused was in fact in the house during the accused's occupancy thereof.

The material and relevant evidence on this point may be briefly summarized, as follows:

The Muellers were evicted from their quarters at 32 Klarweinstrasse on 24 February 1949, but left in the part of the house in which they had lived the bulk of their personal property. Subsequent to their eviction, the Muellers by memory, aided by an old inventory and pictures of their property, made up a new inventory in the latter part of February and the first few days of March 1949. According to Mueller, he could have compiled the inventory by memory alone. Mrs. Mueller kept the house under close surveillance and observed numerous articles of unrequisitioned property in use in the house. Some of such articles were subsequently recovered, others were not.

On 2 and 3 August, the unrequisitioned property of the Muellers, including 60 bottles of vinous liquors and 7 bottles in which water was substituted for liquor, was removed from the house, and placed in storage. Immediately upon their property being placed in storage, the Muellers repaired to the storage place in order to inventory their property. By comparing the inventory then compiled with their February - March 1949 inventory the Muellers determined that the items alleged in the Specification of Charge II were missing.

A reading of the record of trial will convince any fair-minded person that the Muellers entertained considerable ill-will and malice toward the accused and his wife. We consider much of the Mueller testimony to be incredible. In this connection, reference is made to "the hammer and screw driver and cabinet with a distinctive squeak" testimony narrated at pages 5 and 6 of this opinion. More pertinent to the issue of the verity of the February-March 1949 inventory is the testimony of Mrs. Mueller that in the twenty-two days intervening between her receipt of notice to quit the premises and her departure no list of property was made by her and her husband. Mrs. Mueller's testimony in this respect was impeached by her prior contradictory statement made at the Article of War 46b investigation, in which she asserted that such a list was then made. We can only conjecture that such a list was not as favorable to the Mueller interests as the latter inventory. We make reference also to Mueller's compendious memory which unaided could have itemized his various priceless possessions, but which could not recall if rugs damaged by a previous occupant were among the missing, and which could not recall if the three bottles of vinous liquors taken by him on 24 February 1949 were entered on the February-March 1949 inventory. The weight to be assigned the inventory in issue may best be gauged against the statement of Mrs. Mueller made in December 1949, to Wilson, the CID Agent, that she "would forget all this -- that [her] sole desire was to get back into the house." We also consider extremely significant the fact that the exhaustive investigation by Army investigation agencies failed to discover any of the items of property, listed in the Specification of Charge II.

For the reasons stated, we are of the opinion that the evidence is insufficient to establish beyond a reasonable doubt that the items of the Specification of Charge II were in the house at 32 Klarweinstrasse during the period in issue.

5. It follows from our views hereinbefore expressed that the record of trial is legally insufficient to support the findings of guilty and the sentence.

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

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 Lieutenant Colonel Richard Fisher Whitcomb, 041531, 85th Ordnance Battalion (European Command), on Detached Service to Headquarters, 7822 Station Complement Unit, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence are disapproved.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

NOV 1 9 1950

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

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

16 Nov. 1950

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

JAGZ CM 341636

UNITED STATES v. Recruit MARVIN C. COLEMAN (RA 11142898), Company B, 36th Armored Infantry Battalion, 3d Armored Division, Fort Knox, Kentucky.	FORT KNOX Trial by G C M, convened at Fort Knox, Kentucky, 4 April 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
WHIPPLE, MICKEL and BYRNE
Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. Upon trial by general court-martial convened by the Commanding General, Fort Knox, Kentucky, on 4 April 1950, the accused was tried upon the following charge and specification:

CHARGE: Violation of the 54th Article of War.

Specification: In that Recruit Marvin C. Coleman, Company B, 36th Armored Infantry Battalion Combat Command "B", 3d Armored Division, Fort Knox, Kentucky, did, at Cleveland, Ohio, on or about 10 October 1949, by willfully concealing the fact that on or about 21 June 1948, he was discharged from the Army through sentence of a Military Court, procure himself to be enlisted in the Military Service of the United States by John G. Lucas, Captain, FA, Detachment #3, 2326 Army Service Unit, Cleveland, Ohio, and did thereafter at Fort Knox, Kentucky, receive pay and allowances under the enlistment so procured.

The accused pleaded not guilty to, and was found guilty of, the charge and specification and 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 one year. The Commanding General, Fort Knox, Kentucky, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. Evidence.

a. For the Prosecution.

The accused was identified by his Platoon Sergeant as being in the military service. The witness further testified that the accused wore the uniform of a soldier and that he observed him, prior to 2 March 1950, "eating with the company".

It was stipulated between the prosecution, the accused, and his counsel that if Major Clayton T. Hathaway, Post Finance Officer, Fort Knox, Kentucky, were present in court he would testify that he was the official custodian of Military pay records of the personnel of the Third Armored Division, that examination of the pay records of Recruit Marvin C. Coleman (RA 15292729), Company B, 36th Armored Infantry Battalion, Third Armored Division, disclosed that he was paid $50 on voucher # 19707, on 31 December 1949; and that the certificate appearing on the pay roll was signed by First Lieutenant Charles A. Pick as Class A Agent Officer indicating payment to the individual shown on the voucher in the amount indicated.

Major John W. Hancock, Assistant Adjutant General, Division Personnel Officer, Headquarters Third Armored Division, Fort Knox, Kentucky, identified a letter, Headquarters Third Armored Division, subject: Request Verification of Prior Service, dated 17 October 1949 with an attached fingerprint card, to the Adjutant General, Department of the Army, and a first indorsement from The Adjutant General's Office, Department of the Army, dated 30 November 1949, as having been dispatched from his office on the date indicated and received by his office through normal channels. With the permission of the court the original of first indorsement from The Adjutant General was removed, and a true copy thereof attached to the record. This indorsement, among other things, states that the inclosed fingerprints of Marvin C. Coleman are identical with those of Marvin C. Coleman (RA 15292729), who enlisted 10 October 1949 claiming no prior service; Marvin C. Coleman, AF 11142898 (Service No. changed from 11078-799), who enlisted 30 October 1945 and was dishonorably discharged 21 June 1948 per GCMO No. 246, Headquarters Technical Division, Air Training Command, Scott Air Force Base, Belleville, Illinois, dated 21 June 1948; and Marvin C. Coleman (RA 15257949), who enlisted 22 March 1948 and was dropped

from his enlistment per paragraph 4a(1) AR 615-366 and held to unterminated enlistment of 30 October 1945. The foregoing basic letter, first indorsement and fingerprint card constituted Prosecution's Exhibit 1. There also was received in evidence without objection by the defense a letter, dated 30 January 1950, to The Adjutant General, Department of the Army, from Major James H. Patterson, Investigating Officer, with one inclosure, a fingerprint card signed by Marvin Coleman and identified by Master Sergeant Thomas R. Hartsell as fingerprints taken by him of an individual whom he is unable to identify. As part of this exhibit (Pros Ex No. 2) appears a duly authenticated certificate of identity dated 27 February 1950, signed by Edward Klein, Adjutant General, and properly sealed, identifying the attached fingerprints of Marvin Clarence Coleman, taken 27 January 1950, as being identical with those of Marvin C. Coleman, Army Service No. 11142898 (Service No. changed from 11078799) who enlisted 30 October 1945 at Burlington, Vermont, and Marvin C. Coleman, Army Service No. RA 1114-2898 (Service No. changed from RA 15257949), who enlisted 22 March 1948 at Elizibethtown, Kentucky.

The Enlistment Record of a Marvin C. Coleman, RA 15292729, (NME Form 4) was admitted in evidence as Prosecution's Exhibit 3 by stipulation. The stipulation, however, specifically provided that the defense did not admit thereby that the enlistment record pertained to the accused. This enlistment record bore the signature of "Marvin C. Coleman" in two places and the applicant named therein declared that he had no prior service.

b. For the Defense.

Accused having been advised of his rights as a witness by the law member elected to remain silent. No evidence was offered by the defense.

4. The accused is charged with fraudulent enlistment which is an enlistment procured by means of either a willful, i.e., intentional misrepresentation in regard to any of the qualifications or disqualifications prescribed by law, regulation or orders for enlistment, or a willful concealment in regard to any such disqualification (Par. 142, MCM, 1949). The elements of proof necessary to establish this offense constitute

a. The enlistment of the accused in the military service as alleged;

b. That the accused willfully, i.e., intentionally misrepresented or concealed a certain material fact or facts regarding his qualifications for enlistment as alleged;

c. That the enlistment of the accused was procured by such intentional misrepresentations or concealment; and

d. That under the enlistment the accused received either pay or allowances, or both, as alleged (Par. 142, MCM, 1949).

The enlistment of accused and his receipt of pay and allowances are sufficiently established by his enlistment record, testimony of his Platoon Sergeant, and the stipulated testimony of Major Hathaway in connection with receipt of pay by the accused.

The identity of the accused as the person named in the specification was established by the testimony of his Platoon Sergeant who had known the accused for five months and also was admitted by the accused's plea to the general issue whereby he admitted his identity as the person charged (CM 296303, Burdick, 58 BR 103, 104; CM 318728, Chmura, 68 BR 23, 24). The identity of accused as the person whose fingerprints were taken by Master Sergeant Thomas R. Hartsell on 27 January 1950, and which appear on the fingerprint card attached to Prosecution's Exhibit 2, is not positively established by parol testimony, but it is believed that since the fingerprint card and the enlistment record (Pros Ex No. 3) were before the court bearing signatures "Marvin Coleman" and "Marvin Clarence Coleman" respectively, the court could competently determine that both signatures were made by the same person (MCM, 1949, par 129b; CM 330506, Forsythe, 79 BR 69, 76; CM 330698, Bryan, 79 BR 137, 146). It is further established that all of the records introduced in evidence bear the name of "Marvin Coleman", "Marvin C. Coleman" or "Marvin Clarence Coleman", although there is a dissimilarity of serial numbers, and the Manual for Courts-Martial, 1949, specifically provides that identity of name raises the presumption of identity of person (MCM, 1949, par 125a). The foregoing, together with the certificate of identity of The Adjutant General, prepared in accordance with paragraph 129a, Manual for Courts-Martial, 1949, justified the court in its conclusion that the accused and the person named in the enlistment record claiming no prior service were one and the same person.

It remains incumbent upon the prosecution to establish elements (b) and (c) of the proof, i.e., that accused misrepresented or concealed certain material facts regarding his enlistment and that his enlistment was procured by such intentional misrepresentation or concealment. The misrepresentation alleged was the willful concealment of previous [dishonorable] discharge from the Army on 21 June 1948 by sentence of military court. The only proof of such discharge is contained in paragraph 1 of first indorsement from the Office of The Adjutant General, dated 30 November 1949, to the Commanding General, Third Armored Division, Fort Knox, Kentucky, which states in pertinent part that the accused was "dishonorably discharged 21 June 1948, formerly a private, per GCMO 246, Hq Technical Division, Air Training Command, Scott Air Force Base, Belleville, Illinois, dated 21 June 1948, having been convicted of a violation of the 58th Article of War * * *." This statement constitutes a resume of information which no doubt appeared in other official records but which is generally inadmissible in evidence (MCM, 1949, par 129a).

The Manual for Courts-Martial, 1949, specifically provides that in any case in which the identity of the accused as a member of the Military Service is in issue, his identity may be established, prima facie, by the certificate of The Adjutant General, or one of his assistants, that a duly qualified fingerprint expert on duty as such in his office has compared the fingerprints submitted as those of a person in the military service, described by name, organization and serial number, and that such fingerprints have been found to be those of one and the same person (MCM, 1949, Par. 129a). There is no provision therein that a prior discharge may be established in this manner.

Paragraph 142a of the Manual for Courts-Martial, 1949, specifically provides that if concealment of dishonorable discharge is alleged, the final indorsement on the service record is competent evidence of the dishonorable discharge.

The mere fact that a document is an official writing or report does not in itself make it admissible in evidence for the purpose of proving the truth of the matters therein stated. An official writing may be admitted in evidence only when it comes within one of the recognized exceptions to the hearsay rule. (MCM, 1949, Par. 130a).

Since the indorsement of The Adjutant General was introduced specifically to establish the fraud charged and the identity of the accused, to be admissible, it must conform to the statutory exceptions to the hearsay rule. As stated by the Board of Review in CM 318685, Sustaite, 67 BR 389, 391, "A certified copy must in the absence of statutory authority to the contrary * * * be a transcription in the literal terms, an exact duplication of the original. A mere summary by the certifying officer is inadmissible (Wigmore on Evidence, 3rd ss 2108, 1678; in re Kostchris Estate, 96 Mont. 226, 29 P (2d) 829, 835)."

The Board of Review confronted with a similar situation in CM 186992, Gentry, stated:

> "* * * other direct, though incompetent evidence of identity, consisting of the purported copy of the purported indorsement from the Office of The Adjutant General, containing statements with respect to the identity of James L. Gentry, William J. Roan and Robert J. Sylvester, was received in evidence. Even if genuine this paper was not the certificate of comparison and identity described in paragraph 129 of the Manual for Courts-Martial and was at best hearsay. Its admission was error. Counsel stated that the defense had no objection to its introduction but the record contains nothing to show that either counsel or accused knew of the incompetency of the paper or of its possible legal effect, or that the trial judge advocate, counsel, or the accused considered the question of its competency.

Under the circumstances, it cannot be said that the action of the counsel amounted to a waiver of objection or a stipulation that the recitals therein were true (C. M. No. 156186, Potter)." (Underscoring supplied).

It was unnecessary for the Board of Review in the Gentry case, supra, to comment on this type of evidence as proof of discharge since that element of the offense was established by photostatic copies of the final indorsement on the service record as provided by the Manual for Courts-Martial.

We conclude from the foregoing that the writing here offered as proof of prior dishonorable discharge is hearsay and not admissible in evidence and that under the circumstances it cannot be said that the action of defense counsel amounted to a waiver of objection or a stipulation that the recitals therein were true. The record of trial is devoid of other competent proof to establish that this accused misrepresented or concealed material facts regarding his qualifications for enlistment, and that his enlistment was procured by such intentional misrepresentation or concealment.

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

Edward R. Dolippole, J.A.G.C.

On Leave, J.A.G.C.

Robert E. Byrne, J.A.G.C.

AUG 4 1950

JAGZ CM 341636 1st Ind.

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

TO: Commanding General, Fort Knox, Kentucky

1. In the foregoing case of Recruit Marvin C. Coleman (RA 11142898), Company B, 36th Armored Infantry Battalion, 3d Armored Division, 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 the sentence are hereby vacated. You have authority to direct a rehearing.

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

CM 341636).

E. M. Brannon

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

2 Incls
1. Record of trial
2. Opinion of Board of Review

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

AUG 9 1950

JAGQ SP CM 2570

UNITED STATES v. Private BILLY J. COMBS (RA 14297188), Company A, 4th Reconnaissance Battalion.	)	UNITED STATES FORCES IN AUSTRIA Trial by SP CM, convened at Camp McCauley, Linz, Austria, 23 May 1950. Bad Conduct Discharge, forfeiture of fifty dollars ($50.00) pay per month for six (6) months, and confinement for six (6) months. Branch United States Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SEARLES, CHAMBERS and SITNEK
Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

2. The accused was arraigned and tried before a special court-martial convened at Camp McCauley, Austria, by the Commanding Officer, 4th Reconnaissance Battalion, on 23 May 1950, on a specification alleging the assaulting of a sentinel who was in the execution of his office, in violation of Article of War 96. He pleaded not guilty to, and was found guilty of, the Specification and the Charge. Evidence of three (3) previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars ($50.00) pay per month for six (6) months and to be confined at hard labor at such place as proper authority may direct for six (6) months. The convening authority approved the sentence and forwarded the record of trial under Article of War 47d. The reviewing authority, the Commanding General, United States Forces in Austria, approved the findings of guilty with minor modifications, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The special orders appointing the court which tried the accused designated Warrant Officer (JG) William S. Kenty as assistant trial judge advocate. Said warrant officer was duly sworn as a member of the prosecution, together with the regularly appointed trial judge advocate, a commissioned officer. Both were present throughout the trial.

4. The only problem presented and which will be considered by the Board is the effect on the legality of the court of the appointment of a warrant officer as assistant trial judge advocate.

5. The same problem was presented to this Board in SP CM 2490, Goodluck, 4 August 1950, in which it was held that a warrant officer is not competent for appointment as assistant trial judge advocate and that the appointment of a warrant officer as assistant trial judge advocate constitutes fatal error. In that case the Board stated:

> "5. The Congress has provided that the trial judge advocate of a court-martial shall be a commissioned officer (Articles of War 1 and 11), and has also provided that assistant trial judge advocates 'shall be competent to perform any duty devolved * * * upon the trial judge advocate' (Article of War 116). There is no express provision in the Articles that an assistant trial judge advocate shall be a commissioned officer. Such provision does exist by necessary implication, however, in the requirement of Article 116 that an assistant trial judge advocate shall be competent to perform any duty devolving upon the trial judge advocate. Any other interpretation necessarily would result in the absurd conclusion that the Congress intended that a convening authority might, by the appointment of a warrant officer as assistant trial judge advocate, circumvent the requirement that the person appointed to prosecute in the name of the United States (AW 17) be a commissioned officer (AW 11). '* * * A literal construction which would lead to absurd consequences will be avoided' (Sutherland, Statutory Construction (3d Ed, 1943) sec. 1929, and cases cited therein). Considered by itself Article 116 is clearly an enabling statute but considered with Article 11 it also must be construed as embodying in its provisions the requirement that an assistant trial judge advocate, as well as the trial judge advocate, shall be a commissioned officer.
>
> "6. The foregoing interpretation is supported by the legislative history of the pertinent Articles of War and is sanctioned by usage of the service uninterrupted and unquestioned subsequent to the 1920 revision of the Articles of War."

* * * *

"7. Inasmuch as the Board holds that a warrant officer is not qualified for appointment as an assistant trial judge advocate of a court-martial, the effect on the legality of the court of the appointment of such unqualified person must be resolved.

Article of War 11 provides in pertinent part:

'* * * For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: * * *.' (Underscoring supplied)

By purporting to appoint an assistant trial judge advocate, the convening authority expressed his determination that an assistant trial judge advocate was 'necessary'. The appointment of a competent person as assistant trial judge advocate, in addition to the required trial judge advocate, thereupon became mandatory. The assistant trial judge advocate purportedly appointed was a warrant officer and, therefore, was ineligible for such appointment. In SpCM 1770, Ness, 27 April 1950, it was held that the regularly appointed defense counsel must be a commissioned officer and that the designation of a warrant officer as defense counsel did not meet the requirements of Article 11 and was tantamount to appointing a court that was without a defense counsel. The Board in that case further held that the provision of Article 11 directing the appointment of a defense counsel is mandatory and that failure to comply therewith constitutes fatal error. By the same process of reasoning the attempt to appoint as a 'necessary' assistant trial judge advocate an individual who did not meet the requirements of Articles of War 11 and 116 was equivalent to appointing a court-martial that was without a required assistant trial judge advocate. Such failure constituted fatal error."

6. The holding in the Goodluck case (supra) is controlling in the instant case. The purported appointment of a warrant officer as assistant trial judge advocate of the court which tried the accused constituted fatal error.

7. 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. Searles, J. A. G. C.

Laurel L. Chambers, J. A. G. C.

William G. Sitnek, J. A. G. C.

JAGE SP CM 2570 1st Ind

JAGO, SS USA, Washington 25, D. C. 16 AUG 1950

TO: Chairman, Judicial Council, Office of The Judge Advocate General

In the foregoing case of Private Billy J. Combs, RA 14297188, Company A, 4th Reconnaissance Battalion, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. 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.

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
Washington 25, D. C.

JAGU Sp CM 2570

U N I T E D S T A T E S	)	UNITED STATES FORCES IN AUSTRIA
	)	
v.	)	
	)	Trial by Sp CM, convened at
Private BILLY J. COMBS,	)	Camp McCauley, Linz, Austria,
RA 14297188, Company A,	)	23 May 1950. Bad conduct
4th Reconnaissance Battalion	)	discharge, forfeiture of $50.00 pay per month for six months and confinement for six months. Disciplinary Barracks.

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

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1. Pursuant to Article of War 50e(4) the record of trial and the holding by the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of assaulting a sentinel in the execution of his office at Camp McCauley, Austria, on or about 21 May 1950, in violation of Article of War 96. Evidence of three previous convictions, one by special and two by summary court-martial, was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $50.00 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 47d. The officer exercising general court-martial jurisdiction approved the finding of guilty of the specification with a minor modification, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the Board's holding.

3. The only question the Judicial Council deems necessary to consider is whether the fact that the appointed assistant trial judge advocate was a warrant officer invalidates the proceedings. Both the appointed trial judge advocate, a commissioned officer, and the appointed assistant trial judge advocate, a warrant officer, were present at the trial and sworn (R 2, 4). The record does not disclose the extent that the assistant trial judge advocate participated in the trial.

4. The question here presented has been decided by the Judicial Council this day in Sp CM 2432, Ferwerda. It was there concluded that since the record did not disclose the extent and nature of the participation by the assistant trial judge advocate, who was ineligible because of his status as a warrant officer, the Judicial Council could not presume that his participation was not prejudicial to the substantial rights of the accused. The Judicial Council concluded that it was therefore necessary that the findings of guilty and the sentence be disapproved.

5. For like reasons as stated in the Ferwerda case, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

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

(352)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

SP CM 2570

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Billy J. Combs, RA 14297188, Company A, 4th Reconnaissance Battalion, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

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

SEP 2 1950

I concur in the foregoing action.

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

21 September 1950

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

JAGV Sp CM 2571

26 SEP 1950

UNITED STATES v. Private ARTIE L. ABBOTT (RA 34833535), Company C, 4th Reconnaissance Battalion	UNITED STATES FORCES IN AUSTRIA Trial by Sp CM, convened at Camp McCauley, Linz, Austria, 14 June 1950. Bad conduct discharge, forfeiture of $40 pay per month for six (6) months and confinement for six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GUIMOND, BISANT and OEDING
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 Charges and Specifications:

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

Specification: 1: In that Private Artie L Abbott, Company C, 4th Reconnaissance Battalion, did, at Steyr, Austria, on or about 12 May 1950 feloniously steal one (1) Camera (WICA), value more than $50.00, the property of of Private First Class Charles L Lewis, Company C, 4th Reconnaissance Battalion.

Specification 2: In that Privat_ Artie L Abbott, Company C, 4th Reconnaissance Battalion, did, at Steyr, Austria, on or about 1 June 1950, feloniously steal one (1) pocket watch, (CYMA), value about $5.00, the property of Private First Class Frank L Hovendick, Company C, 4th Reconnaissance Battalion.

CHARGE II: Violation of the 61st Article of War

Specification: In that Private Artie L Abbott, Company C, 4th Reconnaissance Battalion, did, without proper leave, absent himself from his station at Enns, Austria, from about 1 June 1950, to about 2 June 1950.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of two previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $40 pay per month for six months and to be confined at hard labor for six months. The convening authority approved, as to value, only so much of the findings of guilty of Specifications 1 and 2 of Charge I as found the property alleged in each Specification was of some value not in excess of $20, approved the sentence and forwarded the record of trial for action under Article of War 47d. The reviewing authority, the Commanding General, United States Forces in Austria, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement, and pursuant to Article of War 50e withheld the order directing execution of the sentence.

3. By paragraph 2, Special Orders Number 4, 8 June 1950, the Commanding General, Troop Command Linz Sub-Post, appointed a special court-martial to meet at Camp McCauley, Austria on or about 8 June 1950, or as soon thereafter as practicable. Warrant Officer Junior Grade William S. Kenty was designated the assistant trial judge advocate of this court. The accused was brought to trial on 14 June 1950 before the court so appointed and Warrant Officer Kenty was sworn as assistant trial judge advocate and was present throughout the trial, though the record fails to disclose the extent and nature of his participation in the proceedings. The regularly appointed trial judge advocate, a commissioned officer, was also sworn and present in court throughout the trial.

4. The only question presented and which need be considered is the effect of the regularly appointed assistant trial judge advocate being a warrant officer, present at the trial, and whose participation therein was not disclosed by the record of trial. This identical situation was considered by the Judicial Council in Sp CM 2572, Wurst, 20 September 1950. In its opinion in that case the Council stated in pertinent part:

> "4. The question here presented has been decided by the Judicial Council this day in Sp CM 2432, Ferwerda. It was there concluded that since the record did not disclose the extent and nature of the participation by the assistant trial judge advocate, who was ineligible because of his status as a warrant officer, the Judicial Council could not presume that

JAGV Sp CM 2571

his participation was not prejudicial to the substantial rights of the accused. The Judicial Council concluded that it was therefore necessary that the findings of guilty and the sentence be disapproved."

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

J. H. Guimond, J.A.G.C.

Lucas McBride, J.A.G.C.

Ernest C. Dodge, J.A.G.C.

JAGV Sp CM 2571 1st Ind

Department of the Army, JAGO, Washington 25, D. C. 3- OCT 1950
TO: Commanding General, United States Forces in Austria, APO 777,
c/o Postmaster, New York, New York

1. In the foregoing case of Private Artie L. Abbott (RA 34833535), Company C, 4th Reconnaissance 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 Article of War 50e(3), this holding and my concurrence therein vacate the findings of guilty and the sentence. You are authorized to direct a rehearing.

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 2571).

E. M. Brannon
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.

JUL 28 1950

JAGI SP CM 2572

U N I T E D S T A T E S	)	UNITED STATES FORCES IN AUSTRIA
v.	)	Trial by SP CM., convened at Camp McCauley, Linz, Austria, 22 June 1950. Bad Conduct Discharge, forfeiture of fifty dollars ($50.00) pay per month for six (6) months, and confinement for six (6) months. Disciplinary Barracks.
Private JOSEPH W. WURST (RA 33286732), Company B, 4th Reconnaissance Battalion.	)	

HOLDING by the BOARD OF REVIEW
JOSEPH, McDONNELL 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, Troop Command, Linz Sub-Post, APO 174, United States Army, on 22 June 1950, the accused was arraigned and pleaded not guilty to two specifications, alleging absence without leave, in violation of Article of War 61, in that he absented himself from his organization at Camp McCauley, Austria, from about 27 March 1950 to about 5 June 1950, and from about 5 June 1950 to about 16 June 1950. He was found guilty of both Specifications and the Charge. Evidence of three previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $50.00 pay per month for six (6) months and to be confined at hard labor at such place as proper authority might direct for six (6) months. The convening authority approved the sentence and forwarded the record of trial under Article of War 47d. The reviewing authority, The Commanding General, United States Forces in Austria, APO 777, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army might direct, but not in a penitentiary, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50g.

JAGI SP CM 2572

3. The only question which need be considered is whether the court had authority to try the accused because of the fact that the assistant trial judge advocate was a warrant officer.

4. By paragraph 2, Special Orders Number 4, dated 8 June 1950, The Commanding General of Troop Command, Linz Sub-Post, APO 174, appointed a Special Court-Martial to meet at Camp McCauley, Austria, on or about 8 June 1950 or as soon thereafter as practicable. Warrant Officer (JG) William S. Kenty was designated assistant trial judge advocate. The accused was brought to trial before the court so appointed and Warrant Officer (JG) Kenty was sworn as assistant trial judge advocate (R. 4). The appointed trial judge advocate, a commissioned officer, was sworn and was present in court throughout the trial. The question is presented whether the regularly appointed assistant trial judge advocate for a general or special court-martial is required to be a commissioned officer in order to comply with the provisions of the Articles of War, and the effect of a failure to so designate a commissioned officer.

The question presented in the instant case is but one phase of the problem considered in the recent case of SP CM 2432, Ferwerda, 26 July 1950, 7 BR-JC 307, wherein the question was considered whether the regularly appointed assistant trial judge advocate and assistant defense counsel for general and special courts-martial are required to be commissioned officers. The following is quoted from the opinion of the Board of Review:

> "Since under the Ness case, supra, regularly appointed counsel must be commissioned officers in order to comply with the mandatory provisions of Article of War 11, and as the duty of trial judge advocate or defense counsel may devolve upon assistant counsel as provided in Article of War 116, the assistant counsel must likewise be commissioned officers. Because of the failure to comply with the mandatory provisions of Article of War 11, the court which tried the accused was without jurisdiction and all acts in connection therewith are void" (SP CM 1770, 27 April 1950, unpublished, supra).

In view of the holding in the Ferwerda case, supra, we are of the opinion that the court which tried the accused was without jurisdiction and all acts in connection therewith are void.

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

Robert W. Kraft, J. A. G. C.

Harold F. McDonnell, J. A. G. C.

[illegible], J. A. G. C.

JAGE SP CM 2572 1st Ind

JAGO, SS USA, Washington 25, D. C. 16 AUG 1950

TO: Chairman, Judicial Council, Office of The Judge Advocate General

In the foregoing case of Private Joseph W. Wurst, RA 33286732, Company B, 4th Reconnaissance Battalion, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. 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.

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
Washington 25, D. C.

JAGU Sp CM 2572

U N I T E D S T A T E S	)	UNITED STATES FORCES IN AUSTRIA
	)	
V.	)	Trial by Sp CM, convened at
	)	Camp McCauley, Linz, Austria,
Private JOSEPH W. WURST,	)	22 June 1950. Bad conduct discharge,
RA 33286732, Company B,	)	forfeiture of $50.00 pay per month
4th Reconnaissance Battalion	)	for six months and confinement for
		six months. Disciplinary Barracks.

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

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1. Pursuant to Article of War 50e(4) the record of trial and the holding by the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of two absences without proper leave from his organization at Camp McCauley, Austria, from about 27 March 1950 to about 5 June 1950 and from about 5 June 1950 to about 16 June 1950. Evidence of three previous convictions, two by special and one by summary court-martial, was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $50.00 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 47d. The officer exercising general court-martial jurisdiction approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the Board's holding.

3. The only question the Judicial Council deems necessary to consider is whether the fact that the appointed assistant trial judge advocate was a warrant officer invalidates the proceedings. Both the appointed trial judge advocate, a commissioned officer, and the appointed assistant trial judge advocate, a warrant officer, were present at the trial and sworn (R 2, 4). The record does not disclose the extent that the assistant trial judge advocate participated in the trial.

4. The question here presented has been decided by the Judicial Council this day in Sp CM 2432, Ferwerda. It was there concluded that since the record did not disclose the extent and nature of the participation by the assistant trial judge advocate, who was ineligible because of his status as a warrant officer, the Judicial Council could not presume that his participation was not prejudicial to the substantial rights of the accused. The Judicial Council concluded that it was therefore necessary that the findings of guilty and the sentence be disapproved.

5. For like reasons as stated in the Ferwerda case, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

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

(362)

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 Joseph W. Wurst, RA 33286732, Company B, 4th Reconnaissance Battalion, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved.

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

I concur in the foregoing action.

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

21 September 1950

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

JAGZ SP CM 2573

UNITED STATES v. Private RALPH H. MAINES (RA 13292457), Company A, 4th Reconnaissance Battalion.	UNITED STATES FORCES IN AUSTRIA Trial by Sp. C. M. convened at Camp McCauley, Linz, Austria, 23 May 1950. Bad conduct discharge, forfeiture of $50 pay per month for six (6) months and confinement for six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
WHIPPLE, MICKEL and BYRNE
Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

2. The accused was tried by a special court-martial convened by the Commanding Officer, Fourth Reconnaissance Battalion at Camp McCauley, Linz, Austria, on 23 May 1950. He was arraigned and pleaded not guilty to a specification alleging larceny of two pairs of boots and one pair of low quarter shoes, total value $24.87, the property of two soldiers, in violation of Article of War 93. He was found guilty of the Charge and Specification. Evidence of four previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $50 per month for six months and to be confined at hard labor for six months. The convening authority approved the sentence on 31 May 1950 and forwarded the record of trial for action under the provisions of Article of War 47d. The reviewing authority, the Commanding General, United States Forces in Austria, APO 777, U. S. Army, on 5 July 1950, approved only so much of the findings of guilty of the Specification of the Charge as involved a finding of guilty of larceny of the property alleged of some value not in excess of $20, approved the sentence and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army might direct, but not in a penitentiary, as the place of confinement and forwarded the record of trial pursuant to Article of War 50e.

3. The only question which is presented for consideration is whether the court had jurisdiction to try the accused since the regularly appointed assistant trial judge advocate was a Warrant Officer.

4. The trial court was appointed by paragraph 1, Special Orders No. 50, Headquarters Fourth Reconnaissance Battalion, APO 174, U. S. Army, dated 20 May 1950, "to meet at Camp McCauley, Austria on or about 22 May 1950 or as soon thereafter as practicable for the trial of such persons as may be properly brought before it." Warrant Officer (J. G.) William S. Kenty was designated as assistant trial judge advocate. The accused was brought to trial before the court as appointed and Warrant Officer (J. G.) Kenty was sworn as assistant trial judge advocate (R 4). The regularly appointed trial judge advocate, a commissioned officer, was sworn and was present in court throughout the trial. The question thereby presented is whether the regularly appointed assistant trial judge advocate of a general or special court-martial must be a commissioned officer to comply with the provisions of the Articles of War and the effect of designating other than a commissioned officer as trial counsel.

The question presented in this case is one of the phases heretofore considered in the recent case of SP CM 2432, Ferwerda, 26 July 1950, and is identical with the question considered in SP CM 2572, Wurst, 28 July 1950, neither of which has been published. The Board of Review in considering the problem in the Ferwerda case, supra, stated as follows:

> "Since under the Ness case [SP CM 1770, 27 April 1950] * * * regularly appointed counsel must be commissioned officers in order to comply with the mandatory provisions of Article of War 11, and as the duty of trial judge advocate or defense counsel may devolve upon assistant counsel as provided in Article of War 116, the assistant counsel must likewise be commissioned officers. Because of the failure to comply with the mandatory provisions of Article of War 11, the court which tried the accused was without jurisdiction and all acts in connection therewith are void."

Based on the authorities cited above, we are of the opinion that the court which tried the accused was without jurisdiction and all acts in connection therewith are void.

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

Howard P. Whipple, J.A.G.C.

On Leave, J.A.G.C.

Robert P. Byrne, J.A.G.C.

JAGE SP CM 2573 1st Ind

JAGO, SS USA, Washington 25, D. C. 16 AUG 1950

TO: Chairman, Judicial Council, Office of The Judge Advocate General

In the foregoing case of Private Ralph H. Maines, RA 13292457, Company A, 4th Reconnaissance Battalion, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. 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.

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
Washington 25, D. C.

JAGU Sp CM 2573

UNITED STATES v. Private RALPH H. MAINES, RA 13292457, Company A, 4th Reconnaissance Battalion	UNITED STATES FORCES IN AUSTRIA Trial by Sp CM, convened at Camp McCauley, Linz, Austria, 23 May 1950. Bad conduct discharge, forfeiture of $50.00 pay per month for six months and confinement for six months. Disciplinary Barracks.

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

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1. Pursuant to Article of War 50e(4) the record of trial and the holding by the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of the larceny of two pairs of boots and one pair of low quarter shoes, total value about $24.87, on or about 18 May 1950 at Steyr, Austria, in violation of Article of War 93. Evidence of four previous convictions by summary court-martial was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $50.00 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 47d. The officer exercising general court-martial jurisdiction approved only so much of the finding of guilty of the specification as involves a finding of guilty of larceny of the property alleged, of some value not in excess of $20.00, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the Board's holding.

3. The only question the Judicial Council deems necessary to consider is whether the fact that the appointed assistant trial judge advocate was a warrant officer invalidates the proceedings.

Both the appointed trial judge advocate, a commissioned officer, and the appointed assistant trial judge advocate, a warrant officer, were present at the trial and sworn (R 2, 4). Beyond a fortuitous indication that on one occasion the assistant trial judge advocate interposed oral objections during the defense cross-examination of a prosecution witness (R 13), the record of trial does not disclose the extent of the assistant trial judge advocate's participation in the trial.

4. The Judicial Council this day in Sp CM 2432, Ferwerda, expressed the opinion that inasmuch as the record did not disclose the extent and nature of the participation by the assistant trial judge advocate, who was ineligible because of his status as a warrant officer, it could not be presumed that his participation was not prejudicial to the substantial rights of the accused. The Judicial Council concluded that it was therefore necessary that the findings of guilty and the sentence be disapproved. For all the record shows in the instant case, the ineligible assistant trial judge advocate may have conducted the entire proceedings for the prosecution. On the authority of the Ferwerda case, and apart from the question of the effect of such participation by the assistant trial judge advocate as the record fortuitously shows, the findings of guilty and the sentence must be disapproved.

5. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

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

(368)

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 Ralph H. Maines, RA 13292457, Company A, 4th Reconnaissance Battalion, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved.

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

SEP 20 1950

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

I concur in the foregoing action.

E. M. BRANNON
Major General
The Judge Advocate General

21 September 1950

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

JAGN-SpCM 2793

30 OCT 1950

UNITED STATES v. Private THOMAS SMITH, JR. (RA 18299425), 74th Transportation Truck Company, APO 503.	)	YOKOHAMA COMMAND Trial by SpCM, convened at Yokohama, Honshu, Japan, 28 August 1950. Bad conduct discharge (suspended), forfeiture of $50 pay per month for six (6) months and confinement for six (6) months. Eighth Army Stockade.

HOLDING by the BOARD OF REVIEW
YOUNG, MICKEL and MOBERLEY
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 upon the following Charge and Specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Thomas Smith Junior, 74th Transportation Truck Company, APO 503, Yokohama, Honshu, Japan, being on guard and posted as a sentinel at Yokohama, Honshu, Japan, on or about 18 August 1950, was found sleeping upon his post.

He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing the execution of the sentence, to be confined at hard labor for six (6) months, and to be reduced to the lowest enlisted grade. Evidence of two previous convictions was considered by the court in adjudging the sentence. The convening authority

approved only so much of the sentence as provides for discharge from the service with a bad conduct discharge, confinement at hard labor at such place as the proper authority may direct for six (6) months, forfeiture of fifty ($50.00) dollars per month for a like period and reduction to the lowest enlisted grade, and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction, the Commanding Officer, Yokohama Command, approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging a bad conduct discharge until the soldier's release from confinement and designated the Eighth Army Stockade as the place of confinement. The result of the trial was promulgated in Special Court-Martial Orders No. 210, Headquarters, Yokohama Command, dated 29 September 1950.

3. The accused was tried at Yokohama, Japan, by a special court-martial appointed by the Commanding Officer, Yokohama Motor Command, who was not an officer authorized to appoint a general court-martial (A.W. 8). The record of trial does not show that the trial of the case by special court-martial was caused or directed by an officer exercising general court-martial jurisdiction or that such an officer directed that the case be treated as not capital (MCM, 1949, para. 14), and the Office of The Judge Advocate General has been advised by the officer exercising general court-martial jurisdiction over the Yokohama Motor Command that he did not direct the trial of this case by special court-martial.

4. The only question necessary to discuss is whether the special court-martial had jurisdiction over the offense charged. The pertinent Articles of War provide (MCM, 1949, pp 296,277):

> "ART. 86. Misbehavior of Sentinel.--Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, <u>if the offense be committed in time of war, suffer death</u> or such other punishment as a court-martial may direct; * * *." (Underscoring supplied)
>
> "ART. 13. Special Courts-Martial.--Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made by these articles: <u>Provided</u>, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed.
>
> "* * * * *"

On 31 December 1946, the President of the United States declared that "a state of war still exists" (Proclamation 2714, 12 Fed. Reg. 1). On 25 July 1947 a Senate Joint Resolution providing for the termination of certain "wartime" legislation was approved (61 Stat. 449; see Cir. 2, DA, 1947). This joint resolution, as it relates to the instant case, provides in pertinent part:

> "Sec. 3. In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective [25 July 1947] shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941 * * *.
>
> "Chapter II, articles 2(d), 48, 58, 59, 74, 75, 76, 77, 78, 79, 104 and 119 of the Act of June 4, 1920 (41 Stat. 759, ch. 227) * * *."

Thus, the Congress did not, by this enactment, terminate the then existing war, with respect to Article of War 86, and no further legislation on the subject has been enacted. The offense of sleeping on post set out in the specification is shown to have occurred on 18 August 1950, and, consequently, a sentence of death was authorized in this case for the reason that the Table of Maximum Punishments (MCM, 1949, para. 117c) was suspended on 8 August 1950 "as to offenses hereafter committed by persons under the command of, or within any area controlled by, the Commander in Chief, Far East, or any of his successors in command * * * upon punishments for violations of Articles of War 58, 59, 61, 64, 65 and 86, relating, respectively, to * * * misbehavior of sentinels." (E.O. No. 10149, 8 August 1950; 15 Fed. Reg. 5149).

The case being capital, and no directive having been issued by an officer exercising general court-martial jurisdiction that it be treated as not capital or that it be tried by special court-martial, it follows that the special court-martial which tried the case was without jurisdiction, the proceedings were a nullity, and the findings of guilty and the sentence are wholly illegal and void ab initio. Since the court was without jurisdiction over the offense at the outset, no subsequent action of the reviewing authority or of an officer competent to appoint general courts-martial could legally vest jurisdiction in the court or constitute a ratification of the null and void sentence (SPJGJ/250.413, 20 Jul. 1942, 1 Bull. JAG 103; id. 1942/4913, 20 Oct. 1942; id. 1943/865, 14 Jan. 1943; id. 1943/16074, 13 Oct. 1943; id. 1943/19314, 18 Dec. 1943; JAGJ 1948/1393, 9 Apr. 1948; MCM, 1949, para. 14).

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

Thos. H. Young, J.A.G.C.

Geo. B. McGinnis, J.A.G.C.

Lieb E. Moseley, J.A.G.C.

JAGN-SpCM 2793 1st Ind
JAGO, Department of the Army, Washington 25, D.C.

TO: Commanding Officer, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California

1. In the case of Private Thomas Smith, Jr. (RA 18299425), 74th Transportation Truck Company, APO 503, 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 Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. It is requested that you publish a special court-martial order in accordance with the said holding and this indorsement vacating the findings of guilty and sentence and restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated. A draft of a special court-martial order designed to carry into effect the foregoing is attached. Further trial before a court-martial having jurisdiction is authorized.

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

(SpCM 2793).

2 Incls
1. Record of Trial
2. Draft of SpCMO

Of
Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

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

JAGV Sp CM 2892

7 DEC 1950

UNITED STATES v. Recruit STANLEY FLEISCHMAN (RA 14329621), Detachment #1, Japan Replacement Training Center, APO 613, then Eighth Army Replacement Training Center	)	YOKOHAMA COMMAND Trial by Sp CM, convened at Camp Drake, (Tokyo) Japan, 11 October 1950. Bad conduct discharge, forfeiture of $45 pay per month for six (6) months and confinement for six (6) months. The Japan Stockade.

HOLDING by the BOARD OF REVIEW
GUIMOND, BISANT and OEDING
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 a Special Court-Martial appointed by the Commanding Officer, Eighth Army Replacement Training Center, upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Recruit Stanley Fleischman, Detachment #1, Eighth Army Replacement Training Center, APO 613, did, without proper leave, absent himself from his organization at Camp Drake, Japan, from about 1300 hours, 8 August 1950 to about 12 September 1950.

He pleaded guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit $45.00 pay per month for six months and to be confined at hard labor for six months. The convening authority, by redesignation the Commanding Officer, Japan Replacement Training Center, approved the sentence and forwarded the record of trial for action under Article of War 47d. The reviewing authority, the Commanding General, Yokohama Command, approved only so much of the findings of guilty of the Specification of the Charge as found the accused, at the time and place alleged, absent without leave from 8 August 1950 to 5 September 1950, approved the sentence, designated The Japan Stockade, APO 503, or elsewhere as the Secretary of the Army may direct, as the

place of confinement, and pursuant to Article of War 50e withheld the order directing execution of the sentence.

3. The record of trial is legally sufficient to support the findings of guilty, as modified by the reviewing authority. The only question requiring consideration is whether the record of trial is legally sufficient to support the sentence.

4. The answer to the foregoing question is dependent upon whether the offense of which the accused stands convicted was committed after the issuance of Executive Order 10149, dated 8 August 1950, which order suspended "*** until further order, as to offenses hereafter committed by persons under the command of, or within any area controlled by, the Commander in Chief, Far East, or any of his successors in command, the limitations prescribed by the Table of Maximum Punishments, paragraph 117c, of the Manual for Courts-Martial, U. S. Army, 1949 * * *, upon punishments for violations of Articles of War 58, 59, 61, 64, 65, and 86, * * *." In earlier cases, relating to suspensions of maximum punishments by Executive Order, it has uniformly been held that such suspensions were applicable only to offenses committed after the Executive Order was issued (CM 221662, Knight, 13 BR 211, I Bull JAG 17; CM 229031, Heine, 17 BR 25; CM 324075, McNish, 73 BR 21; CM 390082, Boland, 78 BR 263).

Executive Order 10149 was issued at Washington, District of Columbia on 8 August 1950, under the authority vested in the President by Article of War 45, and was filed in the Federal Register Division of the National Archives Establishment at 4:40 o'clock P.M. (1640 hours), 8 August 1950 (15 FR 5179).

In sections 5 and 7 of the Federal Register Act (49 Stat 501, 502; 44 U.S.C. 305, 307), it is stated in pertinent part:

> "(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive Orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; *** Provided, That for the purposes of this Act every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.
>
> * * *
>
> "No document required under section 5(a) to be published in the Federal Register shall be valid as against

any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this Act and the regulations prescribed hereunder relative to such document have been complied with. * * *."

In view of the foregoing statutory provisions, constructive notice of the contents of Executive Order 10149 was given to all persons not having actual knowledge thereof as of the hour and date of its filing in the Federal Register Division of the National Archives Establishment, namely 4:40 o'clock P.M. (1640 hours), 8 August 1950.

5. In the present case it was alleged and proved, by the prosecution's evidence as well as the accused's plea of guilty, that he absented himself without proper leave from his organization at Camp Drake, Honshu, Japan, as of 1300 hours (1 P.M.), 8 August 1950. The Board of Review has taken judicial notice that Camp Drake, Honshu, Japan, is geographically located in the vicinity of Tokyo, Japan.

With respect to the time element, it should be noted that 1300 hours, 8 August 1950, in Tokyo was 2300 hours, 7 August 1950, Washington time, and that 1640 hours, 8 August 1950, Washington time was 0640 hours, 9 August 1950, in Tokyo. (p 793, The World Almanac and Book of Facts for 1950). From the foregoing, it is evident that the inception of the accused's unauthorized absence was prior to 1640 hours, 8 August 1950, Washington time. Consequently, at the time of the offense he could not be charged with either actual or constructive knowledge of the provisions of Executive Order 10149.

It has been held that absence without leave is not a continuing offense for the purpose of computing time under the statute of limitations, for the purpose of determining whether the offense was committed in time of war, or for the purpose of authorizing the imposition of an additional penalty by a court not previously empowered to impose it

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simply because the absence extended more than sixty days beyond the date of the law granting the court the authority to impose the increased penalty. (CM 298315, Stevens, 58 BR 277; CM 313057, Siwy, 63 BR 5; Sp CM 102, Dillenbeck, 3 BR-JC 365; Sp CM 256, Lightfoot, decided 5 October 1949; Sp CM 2735, King, decided 19 September 1950; par. 67, MCM, 1928; par. 67, MCM, 1949). Consequently, as in this case the offense was committed at 1300 hours, 8 August 1950, at Camp Drake, Honshu, Japan, it follows that the limitations upon punishments prescribed by the Table of Maximum Punishments (par. 117c, MCM, 1949) were applicable with respect to the offense of which the accused stands properly convicted.

6. 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 two months and twenty-four days and forfeiture of $45.00 pay per month for a like period.

J. A. Guimond, J.A.G.C.

Thomas McBride, Jr., J.A.G.C.

Emit C. Dowling, J.A.G.C.

JAGV Sp CM 2892 1st Ind

JAGO, Department of the Army, Washington 25, D. C. 1415
TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California

1. In the case of Recruit Stanley Fleischman (RA 14329621), Detachment #1, Japan Replacement Training Center, APO 613, then Eighth Army Replacement Training Center, 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 two months and twenty-four days and forfeiture of forty-five dollars pay per month for a like period. Under Article of War 50e(3), this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for two months and twenty-four days and forfeiture of forty-five dollars pay per month for a like period. Under the provisions of Article of War 50, you now have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

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:

(Sp CM 2892).

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

1 Incl:
Record of trial

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