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JUDGE ADVOCATE  
GENERAL  
OF THE ARMY

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BOARD OF REVIEW  
AND  
JUDICIAL COUNCIL

HOLDINGS  
OPINIONS  
REVIEWS

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VOL. 12

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JUDGE ADVOCATE GENERAL'S CORPS

# BOARD OF REVIEW AND JUDICIAL COUNCIL

HOLDINGS, OPINIONS AND REVIEWS



VOLUME 12

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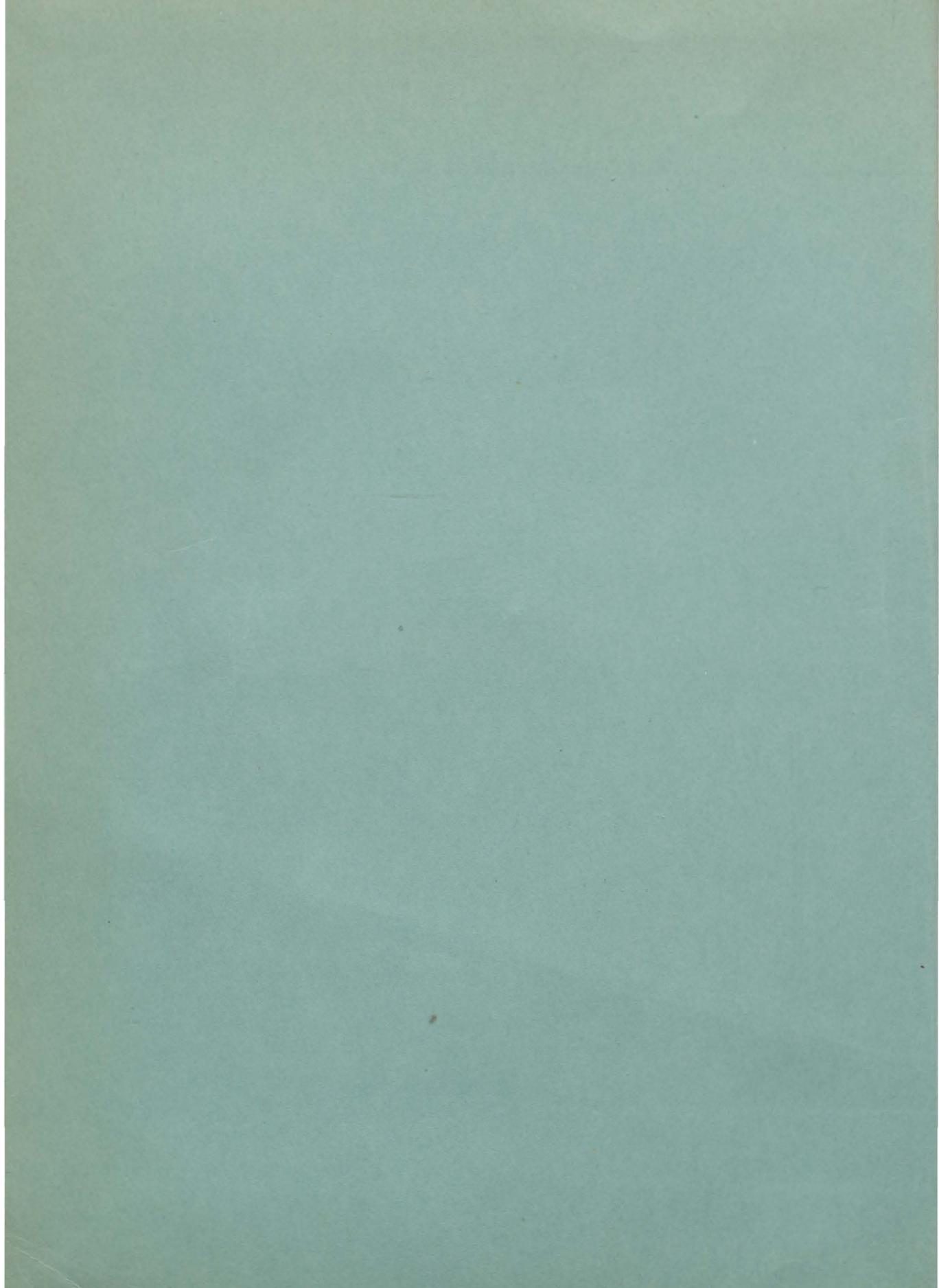
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Judge Advocate General's Corps

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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 343576

29 NOV 1950

UNITED STATES )

KOBE BASE

v. )

Trial by G.C.M., convened at  
Kokura, Kyushu, Japan, 28 and  
29 August 1950. Death.

Recruit JAMES L. CLARK )  
(RA 14267271), Company B, )  
11th Engineer (C) Battalion, )  
APO 24. )

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

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

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

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

**Specification 1:** In that Recruit James L. Clark, Company "B" 11th Engineer Combat Battalion, APO 24, did, at Kokura, Kyushu, Japan, on or about 4 July 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Kaki, Magojiro, a human being, by stabbing him with a knife.

**Specification 2:** In that Recruit James L. Clark, Company "B" 11th Engineer Combat Battalion, APO 24, did, at Kokura, Kyushu, Japan, on or about 4 July 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Kaki, Shizu, a human being, by stabbing her with a knife.

**Specification 3:** In that Recruit James L. Clark, Company "B" 11th Engineer Combat Battalion, APO 24, did, at Kokura, Kyushu, Japan, on or about 4 July 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Kaki, Katsukaza,

a human being, by stabbing him with a knife.

Specification 4: In that Recruit James L. Clark, Company "B" 11th Engineer Combat Battalion, APO 24, did, at Kokura, Kyushu, Japan, on or about 4 July 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Kaki, Kyo, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the charge and all specifications. Evidence of three previous convictions was introduced. He was sentenced to be put to death in such manner as proper authority may direct. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

### 3. Evidence

(The record of trial in this case and this opinion follow the procedure of stating Japanese names wherein the family name precedes the given name.)

A diagram of the Kaki home and the area in the general vicinity thereof, including the bridge and stream where accused was seen shortly after the alleged crimes were committed, was shown on a blackboard during the trial of this case, and witnesses referred to this diagram in pointing out the places wherein the various events about which they testified occurred. This diagram was, at the conclusion of the trial, transferred to paper by counsel for the prosecution and defense and admitted in evidence without objection as Prosecution Exhibit 13 (R 69).

#### a. For the Prosecution

At approximately 0600 hours, 4 July 1950, Murakami, Mamoru, a Japanese national who lives in the City of Kokura, Japan, was on the second floor of his house when he heard "hollering" outside the house. Looking out the window he observed two persons "in terrible condition" at the door of the house across the street. He immediately went downstairs, proceeded across the street, and saw an "elder brother" lying on his back on the ground and a "younger one" on his knees at the door. Both were covered with blood. The "younger one," whom he observed was injured "on the right cheek and above the hip," vomited blood, and crawled inside the house. The "elder brother" turned over face down and remained motionless. The police arrived shortly thereafter. The "younger one" was removed from the house to the hospital, arriving there at about 0800 hours (R 10-13).

Murakami, Masanobu, younger brother of Murakami, Mamoru, the previous witness, testified that on 4 July 1950, after observing the scene above described in front of the house occupied by the Kaki family, his brother sent him to the hospital for a doctor. Masanobu ran up the road to the hospital and approached a narrow bridge, unevenly surfaced with stone, which spans a stream of water, about 23 meters from his home. There, at about 0620 hours, he saw a man, whom he identified as the accused, lying apparently asleep on a path on the other side of the stream, dressed in "ordinary fatigues," the upper portion of which were torn, and "ordinary big shoes" about the size of combat boots. Suddenly accused arose, hesitated an instant, jumped the stream which was about two feet wide at that point, and staggered to the bridge toward Masanobu. Accused stood on the bridge in a crouching position holding a knife, "which appeared to be like a jack knife" about six or seven inches long, in his right hand, its blade pointed toward Masanobu. Accused said, "Stop," and Masanobu stopped. Accused turned toward camp which was within sight, nodded in that direction, and said, "house," indicating to Masanobu that accused apparently wanted him to take accused to camp. Masanobu apprehensively stepped back and accused staggered towards him and fell on the ground near the approach to the bridge. Masanobu ran to the hospital where he reported the carnage he had seen near his home. He was on his way to the police station when he encountered a policeman and informed him also of the incident. Returning to his home, Masanobu again saw accused being pulled out of the stream below the bridge by a young man (R 13-23).

Shigematsu, Yuichi, a police inspector of the Kokura Municipal Police Station, testified that at about 0620 hours, 4 July 1950, about 50 meters from the Kaki residence, he saw accused, dressed in fatigues, with no head covering, lying on his back in a stream which was about 10 or 12 inches deep, his face above the water. There was no hat nearby. Three boys were trying to pull accused out of the stream, on both sides of which are rice paddies. Shigematsu saw that accused appeared to be limp, his eyes were open, and he did not speak (R 23, 26-28, 30, 32). Shigematsu then proceeded to the Kaki residence, which is a "lone house." There he saw Kaki, Katsukaza, naked except for a loin cloth, lying lifeless in the front yard. He heard groans within the house and entered the kitchen in the rear of the house. There he saw Kaki, Shizu, "the lady of the house," a woman about 44 or 45 years of age, lying in a pool of blood on the earthen floor apparently dead. Wounds on her back and throat were visible. On the left side of the kitchen, Shigematsu saw a helmet stained with blood. "The interior of the house was full of blood everywhere." On the kitchen floor, wet from "much use of water," was a large footprint made by a shoe outlined in a mass of mud and blood. In the "inner room" adjoining the kitchen, Shigematsu saw Kaki, Magojira, "the master of the house," lying apparently lifeless on his back. In this room also he saw

large bloody footprints made by shoes, but observed no shoes in the house large enough to make them. In another adjoining room, Shigematsu saw Kaki, Kyo, who was groaning, lying on the floor clad only in a loincloth. He was holding a pencil in his right hand, his face held above a writing pad or tablet upon which there was writing. Kyo was bleeding profusely from cuts on his face, right thigh and back (R 23-26, 29,32-33,59). All four victims were barefoot (R 32). Kaki, Magojiro, Kaki, Shizu, and Kaki, Katsukaza, were dead when taken to the Municipal Hospital and Kaki, Kyo, was alive when taken to the Kokura National Hospital (R 29,32). The contents of the aforementioned writing tablet, identified by Shigematsu as the one he had seen in front of Kyo, was, on or about 15 July 1950, translated from the Japanese into English by Roland Nose, a qualified Japanese language interpreter. It was also translated twice orally on the witness stand by Nose and Shigematsu. All three translations are similar in context except for minor variations, and are to the effect that at about six o'clock someone suddenly entered the house through the kitchen entrance and stabbed the declarant's mother. When the declarant attempted to stop him, the assailant stabbed him, his father and his elder brother in turn (R 60,67; Pros Ex 12). The writing tablet was admitted in evidence over defense objections (R 60, Pros Ex 11). The aforementioned translations were admitted without objection (R 60,67,69).

Dr. Kubota, Shigenori, testified that he is a medical doctor, that he graduated from Mukden Medical University in 1941, and that he has practiced medicine continuously since that time (R 52-53). Kaki, Kyo, who was admitted to the Kokura National Hospital at about 0700 hours, 4 July 1950, was examined by Dr. Kubota, a member of the staff of that hospital (R 53). Dr. Kubota described Kyo's face wound as being "ghastly, very big," and measured approximately 8.2 centimeters long, 2 centimeters wide, and 7.5 centimeters deep. His back wound, similar in shape to the face wound, was 4.5 centimeters long, 2 centimeters wide and 22 centimeters deep. The thigh wound was 3 centimeters long, 1 centimeter wide and 12 centimeters deep (R 54). Kyo's wounds were apparently made by a sharply pointed weapon with a very sharp double edge (R 55,56). Kyo's condition became critical at 1900 hours, 4 July, and he died at 0500 hours, 5 July (R 54), the cause of death being "the wound on his right back" (R 54) and loss of blood (R 56).

At 1400 hours, 4 July, Shigematsu Yuichi requested permission from Dr. Kubota to talk with Kaki, Kyo, was refused, and was told to return in an hour. He returned at 1500 hours and Dr. Kubota reluctantly gave him permission to talk with Kyo. At that time, Dr. Kubota did not inform Kyo that he might die, and Dr. Kubota "could not say definitely whether he would survive or die." Dr. Kubota was present during the interview. As Shigematsu entered the room, a blood transfusion was

being administered to Kyo, who was conscious but appeared to be weak (R 56,63). Shigematsu described Kyo's condition at that time as follows:

"When I went into the room all his wounds were dressed and his face was bandaged because he had a big cut on his face. His face was all bandaged and all the wounds dressed and treated but on the scene there was a pool of blood and since he had bled so much and the wounds were so severe, I knew that he would not survive but when I went into the patient's room in the hospital he was conscious -- conscious enough to reply to my few questions." (R 63)

The defense objected to Shigematsu's testimony relative to Kyo's statements as hearsay, but the objection was overruled and the law member admitted them as a dying declaration (R 64). Kyo's voice was clear and he appeared to be excited as he related the events of the morning to Shigematsu. He stated that he was asleep at 0600 hours, 4 July 1950, when he was awakened by "a big scream coming from his mother." Kyo rushed to the kitchen and observed a "big Occupation Forces soldier" bending over his mother who was lying on the ground. As he approached the soldier, the soldier stabbed him in the back with a dagger about 10 inches long. He retreated to another room and saw the soldier stab his father. He staggered outside with his older brother who fell to the ground. Then he watched the soldier run out of the house in the direction of the "noodle factory." Kyo then reentered the house and wrote a few lines on a writing tablet until his strength gave out. After about five minutes the doctor warned Shigematsu to stop and Shigematsu, observing Kyo's condition, ended the interview (R 56-57,59-65).

Kawashima, Masimichi, testified that he is a medical doctor, that he graduated from Fukuoka Medical College in 1945, and that since that time he has practiced medicine at the Kokura Municipal Hospital. On 4 July 1950, before going on duty at the hospital, he was informed by the "MP's" to proceed to the Kaki residence. There he found the dead bodies of Kaki, Magojiro, Kaki, Katsukaza, and Kaki, Shizu (R 49-50). At about 0800 of that day, he performed an autopsy on each body and stated his findings as follows:

As to Kaki, Magojiro:

"The first wound was on his back; depth approximately 15 centimeters and it penetrated and cut a big breast artery. Second wound, right shoulder. This was a cut. It penetrated as deep as to the flesh and muscles. The third wound, right back of the head. The depth approximately 1.5 centimeters.

Fourth wound, right thumb. Length approximately 2.5 centimeters -- was also a cut. The cause of death according to my examination was the cut on the breast artery."

As to Kaki, Shizu:

"\*\*\* I shall start from the first wound which was on the right stomach. It was a stab, had penetrated to her liver and there was excessive internal bleeding. The second wound, left neck; also a stab and the cut was from top to bottom turning right down and had penetrated \*\*\* The upper part of the right lung. \*\*\* Third wound, on the back. The depth approximately 5 centimeters, also a stab. \*\*\* her death was caused by the stab on the right liver."

As to Kaki, Katsukaza:

"Katsukaza's first wound was on the right neck and it penetrated to the other side and had cut a big jugular vein. This was the cause of his death" (R 50-51).

The wounds of all three deceased appeared to have been made by the same weapon which had a double edged blade and was probably metal (R 51-52). As to all three deceased (except for a history of pleurisy as to Shizu), a complete examination revealed that, except for the wounds inflicted and their effects upon the bodies, the physical condition of each body was normal (R 51).

Sakagami, Masao, a photographer employed by the "Provost Marshal," took six pictures of the three deceased, Magojiro, Shizu and Katsukaza, at the Kaki residence, all of which were admitted in evidence without objection as Prosecution Exhibits 5 to 10, inclusive (R 57-59).

Richard L. Baustian, an agent for the 7th Criminal Investigation Detachment, testified that, on 4 July 1950, pursuant to instructions, he, accompanied by Agent Samuel S. Thurston, proceeded to the Kaki residence (R 33-34). Arriving there at 1000 hours, he observed three bodies, one lying on the ground outside in front of the house, and a woman and an old man inside the house (R 33-34,40). Inside the house, he also observed a portion of the heel and toe of a footprint which, although incomplete and blurred, was sufficiently visible to show that it had been made by a shoe and not by a naked foot (R 48). Just inside the gate of the fence inclosing the front of the house, he found five or six sheets and mattress covers stuffed in another mattress cover. The sheets and mattress covers were bloodstained (R 39,41). In a shed adjacent to the kitchen, he found a helmet liner lying in a trash box (R 41). A writing tablet, which he identified as Prosecution Exhibit 11,

was also turned over to him at that time. Before leaving, he made a sketch of the area, took some photographs, and obtained the names and addresses of witnesses (R 34). Baustian first saw accused in the afternoon of 5 July at the 118th Station Hospital (R 34). Combat boots, removed from accused's feet at the hospital, were turned over to Baustian. Prior to questioning accused, the 24th Article of War was read to him, its meaning explained, and accused was asked if he knew his rights thereunder, to which he replied in the affirmative (R 34-35). Accused was informed that he was not required to make a statement but that if he did so it could be used against him in a trial by court-martial. No promises or threats were made, or force or coercion used, and no privileges were withheld or hardships imposed (R 34-35, 42-43). Accused thereafter answered questions and volunteered information "of his own free will and accord" (R 35, 37, 42). At 1015 hours, 7 July, after talking to accused at the 24th Division Stockade, Baustian and accused, accompanied by a military policeman and a Japanese interpreter, visited the Kaki residence, where accused, after being warned of his rights under the 24th Article of War, made additional oral statements (R 35, 37). They then proceeded to the Provost Marshal's Office where Baustian again reminded accused of his rights under the 24th Article of War. He informed accused that he did not have to make any statement but that he had nothing to gain and "couldn't get in any more trouble than what he was in" by refusing to make a written statement which he had already made orally (R 42-43). Accused, after a moment's hesitation, sat down and began writing a statement. Before accused had finished, Baustian interrupted him in order that accused would not be late for lunch at the stockade (R 36, 42-44). They arrived at the stockade at 1230 hours where accused had lunch, after which Baustian asked accused to finish his statement. Accused replied that "he did not want to write anymore" and did not thereafter do so (R 43-44). Relative to the voluntary nature of accused's statements, Baustian stated on cross-examination that he did not ask accused leading questions "for the most part" although he might have asked one or two questions which implied the answer, and that on one or two occasions he repeated a question before accused answered (R 36). In reply to a question as to whether, at the stockade, he had pounded on the table and insisted on an answer, he stated, "Not that I remember -- I might have -- I don't recall that now" (R 36). He believed he remarked to accused that he was going to stay there until he "got the whole story" (R 36). Baustian testified, without objection, that accused told him he is from Mississippi, is 22 years of age, and completed five grades of public school (R 37). At the Kaki residence, accused pointed out to Baustian the door by which he had entered the house with a bundle of sheets for the purpose of selling them. Accused thought he placed them on the dirt floor of a small shed "built onto the side of the house." After doing so, he looked into the kitchen and saw a Japanese woman. She saw him at the

same time and said something in Japanese to someone else in the house. Accused then stated: "I reached into my pocket for something; I don't know what and the next thing I remember I was striking down with it at the woman." Several people appeared and he "remembered striking out at several of the people." At this time accused stated "his body felt numb and he felt faint at the same time and at the same time he told me he felt strong." Then he left the house "in a straight line." He remembered being wet and asking where the "MP's" were but he did not remember riding in an ambulance (R 38-40).

Accused's incomplete written statement, written in accused's handwriting, admitted over defense objection that it was incomplete and unsigned, is as follows:

"When I left camp this pitlear (sic) nite (sic) I had some sheets with me. My entchentas (sic) was to sell them to the Japness (sic) for yen. I stumble trough (sic) rice patties (sic) for quite some time it seamed (sic). then I came to a house to I thought that I would go in side (sic) and try to sell the sheets. It stills (sic) seems kind of fanty (sic) and blure (sic) I had some kind of desire to do something I don't know what. When I seen (sic) this women (sic) there something went wrong. I don't know what happen (sic) then. I remember something about asking for the M.P. I don't know when they got there. The next time I remember any thing I awoke in the hospital sometime that afternoon when some one by the name of Browner was calling to me Clark, Clark, this is Browner. What the hell are you doing in here. I said I don't know. When I entered this house it was through the side door by the kitchen. I entered first outer dore (sic) I walked through a small hallway then come to a inter (sic) door went in the kitchen where I saw this woman she look (sic) at me and started to say something in Japness (sic) I don't know what. I reached in my pocket (sic) for scathing (sic) Then I had a feeling" (R 46, Pros Ex 1).

The sheets, mattress covers, and shoes of accused were admitted in evidence without defense objection (R 46,47; Pros Exs 2 and 4). The helmet liner and writing tablet were admitted in evidence over defense objection (R 46,60; Pros Exs 3 and 11).

It was duly stipulated that the names of the deceased involved in the present case are those stated in the Specifications of the Charge (Certificate of Correction, dated 21 September 1950).

b. For the Defense

Murakami, Masanobu, recalled as a witness for the defense, testified that at about 0100, 4 July 1950, he heard the noise of a motor vehicle outside the window of his home (located across the street from the Kaki residence), and upon looking out observed three American soldiers alight from an automobile. One of the soldiers returned to the automobile and the other two walked toward the Kaki residence. They were about "4 meters 50" from the Kaki residence when Murakami turned away and did not observe them thereafter. Murakami never saw the two soldiers again (R 70-71).

Sasaki, Matsue, who lives near the Kaki residence, testified that about midnight, 3 July 1950, she heard someone calling, "Mama-san, mama-san," and, looking out of the window, saw three or four persons resembling Americans. She never saw them again (R 71-72).

Murakami, Mamoru, recalled as a witness for the defense, testified that as he stood in the front yard of the Kaki residence he observed his brother, Masanobu, and his father running toward the bridge, about 30 meters away. When they reached the bridge, the witness saw a soldier, whom he could not recognize because of the distance, stagger toward his brother and say something to him. Then he saw the soldier fall into a rice paddy, crawl out of it to the bank of a stream and slip into the stream. The witness sent some people to pull the soldier out (R 76-78, 80-81).

Miyashita, Gentaro, testified that in the early morning of 4 July 1950, as he approached the bridge near the Kaki residence, he saw a soldier who resembled accused, lying on his back in the stream below the bridge, "making movements with his arms and hands." A young man came by and dragged him out of the stream. He did not appear to move thereafter. About fifteen minutes later a "red cross ambulance" arrived and the soldier was placed on a stretcher and carried to the vehicle (R 81-82).

Chure, Terashi, testified that he saw the accused, dressed in fatigues, fall into a stream and lie there on his back. He and some other persons pulled accused out and laid him on the bank. Accused did not appear to be "altogether conscious," and smelled "rather strong/ly" of alcohol (R 82-84).

Captain Mildred Ores Conin, 24th Medical Battalion, testified that in the morning of 4 July 1950 she observed accused, apparently unconscious, in the dispensary of her organization. Two doctors attempted to revive him and he stirred slightly, moving his head and lips. He seemed to be "foaming at the mouth" and made "bubbling" sounds. He

shook for a very short while and then became quiet. As her organization was "moving out," accused was transferred to the 118th Station Hospital (R 85-87).

It was duly stipulated that if the laboratory custodian of the 118th Station Hospital were present in court he would testify that a blood sample taken from accused at 1050 hours, 4 July 1950, disclosed the presence of "2 m.g. of alcohol per 100 c.c. of blood" (R 86, Def Ex A).

It was further duly stipulated that if Major R. B. Dickerson, Medical Corps, Chief Medical Service, 118th Station Hospital, were present in court he would testify that he graduated from the Washington School of Medicine in 1941; that he has been a practicing physician since that time; that he is an internist certified by the American Board of Internal Medicine; and that his exclusive duties in the Army during the past three years have been in psychiatry. Assuming that the analysis of a blood specimen taken from a person at 1050 hours disclosed a blood alcohol content of 2 m.g. per 100 c.c., in his opinion, at 0615 hours prior thereto (four hours and 35 minutes prior to the taking of the blood specimen), no alcohol having been imbibed in the interim, the blood alcohol content of that person would have been above 3 m.g. and below 5 m.g. per 100 c.c., which would definitely impair reasoning power (R 88, Def Ex B).

Agents Richard L. Baustian and Samuel S. Thurston testified that between 4 and 8 July 1950 they were part of a group of 10 to 14 persons who searched the Kaki home, the entire area around the house, the road, bridge, stream and rice paddies in the area, and were unable to find any weapon which might have been used in the commission of the alleged crime at the Kaki home. Baustian further stated that on 7 July accused orally told him that between 1700 and 1830 hours, 3 July 1950, he had "a couple of beers" shortly after supper; that he went to a movie that evening; that at about midnight or 0100 hours he had "two shots of whiskey"; and that prior to this incident accused had never been in the Kaki home before (R 74-76).

Accused was advised of his rights as a witness by the law member and elected to remain silent (R 89).

#### 4. Discussion

##### a. Miscellaneous Matters

##### (1) Dying Declarations of Kaki, Kyo

The evidence shows that Kaki, Kyo, made two statements, admitted in evidence as dying declarations, one written shortly after he was mortally wounded, and the other made orally to Shigematsu, Yuichi, about seven hours later and about thirteen hours prior to his death.

The following rules of law relative to dying declarations are well established:

"In trials for murder and manslaughter. - The law recognizes an exception to the rule rejecting hearsay by allowing the dying declaration of the victim of the crime concerning the circumstances which have induced his present condition, and especially concerning the person by whom the violence was committed, to be detailed in evidence by one who has heard them. For testimony of this character to be competent, it is necessary - and must be proved preliminary to proof of the declaration - that the person whose words are repeated by the witness should have been in extremis and under a sense of impending death, that is, in the belief that he was to die soon; but the victim need not himself state that he is under this impression, provided the fact is otherwise shown. If this belief of the victim is established, it is not essential for admissibility of his words that death should have followed them immediately. \*\*\* It is no objection to their admissibility that the words were in answer to leading questions, or upon urgent solicitations of other persons. \*\*\* If the declaration was put in writing at the time made, the writing should be produced. \*\*\*" (MCM, 1949, par 179a).

Dying declarations are admissible only when the death of the declarant is the subject of the charge (People v. Cox, 340 Ill. 111, 172 N.E. 64,66).

To render his statements admissible, the declarant must have uttered them under a sense of impending dissolution, with a realization and consciousness of the occasion (Carver v. United States, 160 U.S. 553, 554-555). In the absence of a statement in words to this effect by the declarant himself, this may be proven by any competent evidence which shows the declarant's state of mind in reference to apprehension of death. Mere belief in the possibility, or even the probability, of death, is not sufficient. There must appear a certainty of its eventuality which is not affected by the fact that death does not ensue immediately or that before or after the statement is made a subsequent fluttering of hope of recovery intervened (Carver v. United States, supra; CM 313545, Hogue, 63 ER 153,158). Despair of recovery may be gathered from the circumstances and may appear from the physical and mental condition of the deceased, from what he

said, and from the fact that the nature and extent of the wounds inflicted were obviously such that he must have felt or known that he would not survive, as well as from his conduct at the time (26 Am. Jur., Sec 416). The question of consciousness of approaching death is one of fact, wherein all the circumstances of the particular case are to be considered (Sullivan v. Com., 93 Pa. 284; State v. Monich, 74 N.J.L. 522, 64 Atl. 1016; Wharton's Criminal Evidence, par 563).

The admission of a written dying declaration is not affected by the fact that it was not signed by the declarant (Freeman v. State, 112 Ga. 48, 37 S.E. 172). The fact that dying declarations do not identify the accused as the assailant will not make them inadmissible, where there is other testimony connecting accused with the alleged crime (Diamond v. State, 219 Ala. 674, 123 So. 55, 56). The presence or absence of the accused when they were made is of no significance (State v. Manganello, 113 Conn. 209, 155 Atl. 74, 77).

Dying declarations are admissible which include facts relative to the murder of persons other than the declarant where accused stands charged of homicide of all persons mentioned (State v. Wilson, 23 La. Ann. 558, State v. Terrell, 19 S.C. 106, 108).

As to the written declaration made shortly after Kyo was mortally wounded, the direct evidence in the record of trial is that Kyo, vomiting blood and bleeding from several gaping wounds, crawled inside his house. He was shortly thereafter observed lying in a reclining position, a pencil in his right hand and a writing tablet before him on which was written the statement in issue. It may be deduced from these facts that after the assailant left the house, realizing that he might be the sole survivor and that he was about to die, Kyo went outside the house in search of someone to whom he could report the incident, and, being unsuccessful, crawled back into the house, procured a pencil and paper and wrote as much of a description of the grisly event he had just witnessed as his strength would permit, so that if he died before anyone arrived, his written statement would remain to show what had happened.

In addition to the inferences above drawn as to Kyo's sense of impending death, it is further shown that, prior to Kyo's oral declaration to Shigematsu at the hospital, Dr. Kubota, his attending physician, refused to grant Shigematsu permission to interview Kyo on one occasion, gave his reluctant consent an hour later (apparently so as not to appear uncooperative with the local police authorities), and abruptly terminated the interview after five minutes.

Both declarations are similar in context. Although neither declaration identified the accused as the assailant, they are corroborated by

the statements of accused connecting him to the crime, the corpus delicti, and the other evidence found at the scene of the crime (Diamond v. State, supra).

It is the opinion of the Board, therefore, that, from the evidence and attendant circumstances hereinabove recited, both declarations of Kyo are admissible as dying declarations (CM 313689, Davis, 63 BR 215, 223-223).

## (2) Pretrial Statements of Accused

Agent Richard L. Baustian, as a witness for the prosecution, was the only person who testified relative to the voluntary nature of accused's pretrial statements which accused made to him on 5 and 7 July 1950. Neither accused nor other witnesses testified for the defense in this connection. Baustian testified that prior to his first interview with accused and on numerous occasions thereafter accused was read and explained his rights under the 24th Article of War. He was further informed that he was not required to make a statement, and that, if made, it could be used against him in a trial by court-martial. Baustian admitted on cross-examination that, although he could not recall the incident, he might have pounded on the table and insisted on an answer to a question, that he believed he "made a remark [he] was going to stay there until [he] got the whole story," and that he informed accused that, having made an oral statement, he had nothing to gain by not reducing it to writing nor could he get into any more trouble by doing so. On 5 and 7 July, accused made oral statements, and on 7 July, at the Provost Marshal's office, he made an incomplete written statement in his own handwriting which he later, at the stockade, refused to complete. Defense made no objection to the admissibility in evidence of the oral statements but objected to the written statement as incomplete and unsigned. All were admitted. There is no merit to defense's objections as stated. However, Baustian's remarks, as hereinabove set forth, were improper, at least in part, and the question to be determined is whether they rendered accused's pretrial statements involuntary and were prejudicial to his substantial rights.

Article of War 24 provides in pertinent part as follows:

"The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make

any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

It is well settled that a confession or admission may not be admitted in evidence if it is not voluntarily made. An accused must be preliminarily warned of his rights under the 24th Article of War and no force, duress, coercion or unlawful influence used or promises or threats may be made in its procurement (MCM, 1949, par 127a).

Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible. Where on the other hand from all the facts and attendant circumstances, improper influence was not present at the time accused made the statements, the statements of accused are admissible. The determination of the extent of the influence exerted at the time the statements were made rests upon attendant circumstances. The question is whether, considering the degree of intelligence of the accused, the nature and degree of the influence, and the time intervening between the alleged improper influence and the statements of accused, it can be said objectively that the accused was not compelled to make the statements by reason of the pressure or inducement antedating the making of the statements.

It is undisputed that no force, violence or hardships were imposed upon accused, no privileges withheld, or promises of immunity, clemency or other rewards offered or made. Other than Baustian's statement to accused on one occasion at the stockade that he would not leave until he got the whole story, his remarks were innocuous. However, although Baustian's remark that he would stay until he got the whole story was improper, accused's statements were not induced by it. On occasion, accused volunteered information and his replies to questions were generally responsive. The evidence further shows that accused's inculpatory statements were made at the Kaki residence and the Provost Marshal's office and not at the stockade where Baustian's objectionable remark was made. While accused was writing a statement on 7 July at the Provost Marshal's office, Baustian interrupted him so that accused would not miss the regular noon meal at the stockade. After eating, accused refused to comply with Baustian's request that he complete the written statement. These circumstances negative the exercise by Baustian upon accused of coercion or undue influence and prove that accused was not only aware of his rights to refuse to make a statement but also to desist from completing a statement already begun. Although Baustian's remarks were improper as hereinabove stated, there is no showing that they had any substantial effect upon accused, or that they were the procuring cause of accused's statements or resulted in any compulsion or intimidation. On the contrary, the proof

of record shows that accused made his statements freely and voluntarily.

In addition, the fact that accused's statements were admitted in evidence was not conclusive upon the court as to their voluntary nature. The question of admissibility on this ground is a question of fact for the court to decide after considering all the circumstances (CM 337089, Aikins et al, 5 ER-JC 331,368). By its findings, the court arrived at the conclusion that accused's statements were voluntary. The sum of all the testimony adduced upon the voluntary nature of the pretrial statements of accused justifies such a conclusion and the Board of Review concurs therewith (CM 337089, Aikins et al, supra).

### (3) Drunkenness

There is evidence that between 1700 and 1830, 3 July 1950, accused had "a couple of beers" shortly after supper and that at 0100, 4 July, he had "two shots of whiskey"; that witnesses who pulled accused out of the stream shortly after the incident stated that he smelled rather strongly of alcohol; that his actions thereafter resembled those of a person under the effects of alcohol or drugs; that upon his arrival at the 118th Station Hospital, he appeared to the nurse on duty to be in a comatose condition; that a blood sample taken from accused at 1050 hours, 4 July 1950, disclosed the presence of 2 m.g. of alcohol per 100 c.c. of blood; and that a qualified medical officer would state that such a person, about four hours earlier, no alcohol having been imbibed in the interim, would have a blood alcohol content of above 3 m.g. and below 5 m.g. per 100 c.c. which would definitely impair reasoning power. This latter opinion is based upon a stipulation as to what a qualified medical officer would testify to if he were present and upon the assumption that accused had not drunk any alcohol between the incident and the taking of the blood specimen. It may be stated that alcoholic blood content is not conclusive on a question of intoxication, as resistance of accused to alcohol must be considered as well as the possible error in laboratory procedure (CM 329972, Griffin, 78 ER 221,228). Taken at face value, however, it falls short of proving that accused was so intoxicated as to render him incapable of forming an intent to commit the crimes charged. Even if, as a result of voluntary intoxication, accused's intellect was so impaired that his actions were governed by passion and hysteria, this fact alone would not serve to reduce to manslaughter his impulsive but nevertheless intentional taking of human life when such violence was committed without provocation (CM 320690, Reusch, 70 ER 153,157). Thus, voluntary intoxication will not excuse murder, but it may negate the ability of accused to form a specific intent to kill, or the deliberation and premeditation necessary to constitute murder premeditated, in which event there is a reduction to murder unpremeditated (Bishop v. United States, 107 F. 2d 297, 301). The question of the degree of accused's intoxication and its effect on

his volition is generally one of fact. In the instant case, it is apparent from the findings of guilty of murder premeditated that the court did not consider accused's intoxication to be of such a degree as to negative the intent requisite to premeditated murder. Just before the incident, accused entered the Kaki home to sell sheets which he carried with him for that purpose. Immediately after the incident, he left the scene of his crimes. When he returned to the scene three days later with Agent Baustian, he was able to recall clearly the events prior to the incidents at issue up to and including the initiation of his murderous onslaught upon persons whom the record shows to have been the victims alleged in the Specifications of the Charge. These circumstances are such as to justify the conclusion of the court, implicit in its findings, that accused's intoxication was not such as to render him unable to entertain premeditation and malice prepense requisite to murder premeditated.

b. Murder

Accused was found guilty under four specifications of Article of War 92 of having killed with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, Kaki, Magojiro (Spec 1), Kaki, Shizu (Spec 2), Kaki, Katsukaza (Spec 3), and Kaki, Kyo (Spec 4), by stabbing each of them with a knife.

The evidence, both direct and circumstantial, and the voluntary pretrial statement of accused, show that accused, at the time and place alleged, stabbed to death the four victims named above, without provocation or excuse. The proof of the corpus delicti is undisputed. All victims except Kaki, Kyo, expired immediately or shortly after the attack, Kyo dying the following morning. The evidence as to the nature and extent of the wounds inflicted on the deceased, the description of the scene and the dying declarations of Kyo wherein the unprovoked attack is succinctly stated, proves not only the corpus delicti but also the fact that the vicious conduct of the person who committed the cruel and deliberate acts hereinabove described manifested an utter disregard for human life (CM 330963, Armistead, 79 BR 201, 231).

The evidence that accused was the assailant, although circumstantial, links him inseparably to the commission of the crimes. Accused's presence in the vicinity of the crime just after the crimes were committed, seen by one witness with a knife in his hand which he held in a threatening manner, and by others in a stupor, either assumed for the purpose of preparing a defense for his heinous acts or imposed by drunkenness or other voluntary act of accused, placed him near the crime under very suspicious circumstances.

The following cumulative evidence in addition to the aforementioned

proof are further corroborative of this fact.

(a) The sheets with which accused admitted he entered the Kaki residence for the purpose of selling them were found there in a bloodstained condition.

(b) A helmet liner similar to those worn by American soldiers was found in the Kaki residence. Accused wore no headgear when seen near the scene and no headgear was found there.

(c) Bloody footprints found in the Kaki residence, although indistinct and incapable of identification with any particular shoes, were shown to have been made by large shoes. All of the victims were barefoot. Accused wore combat boots.

Accused's pretrial statements, voluntarily made as hereinbefore discussed, proved beyond any doubt that he was the wrongdoer. Accused's statements, when considered in the light of Kyo's dying declarations and the appearance and location of the victims as testified to by apparently impartial witnesses (law enforcement officers and Japanese persons in the area), paint a consistent picture throughout.

The specifications alleged that a knife was the lethal weapon. Accused was observed near the scene shortly after the commission of the crimes with a knife in his hand. Although no knife was found in the vicinity thereafter, the fact that he had a knife at this time is nowhere refuted. The medical testimony as to the nature of the wounds on the victims shows that the lethal weapon was a sharply pointed double edged metal weapon. It was proper for the court to have concluded, as no doubt they did, that the weapon used was a knife, which although not inherently a deadly weapon, becomes one when, as in the instant case, it is so wielded as to cause death or serious bodily injury (CM 329972, Griffin, 78 ER 221,228).

Malice aforethought and premeditation were proved beyond a reasonable doubt. Malice is shown where accused assaulted his victims with a weapon in a manner likely to result in death, and especially where the circumstances show that he has superior strength, and the fatal blows are delivered to helpless victims (CM 322487, Dinkins, 71 ER 185, 195, 198; MCM, 1949, par 125a). Malice is not confined to ill will toward one or more individual persons but includes circumstances which plainly indicate an evil heart fatally bent on homicide (CM 237543, Silvarez, 24 ER 57). Although the evidence in the instant case does not show the specific motive behind accused's acts, other than a sudden desire to take human life, it is immaterial how suddenly or recently before the killing such predetermination was made (CM 324701, Stevenson, 75 ER 399, 406). Premeditation is established even when it occurs a moment before killing (CM 314402, Heffner, 64 ER 119,133).

From all the facts and circumstances in the instant case, it is the opinion of the Board of Review that accused was properly found guilty of the four specifications of murder as charged.

5. Mental Responsibility

No question was raised at the trial as to accused's mental responsibility. However, due to the seriousness of the charges and the actions of accused after the incident, the papers accompanying the record disclose that accused was examined and treated by Major James M. Bailey, a neuropsychiatrist of the 118th Station Hospital, on 4, 5 and 6 July and 5 August 1950, and found to be mentally competent both at the time of the offenses and at the time of trial.

6. Department of the Army records show that accused was born 21 March 1929 at Crowder, Mississippi, that he completed six grades at grammar school, and that his civilian occupation is farming. He enlisted in the United States Army on 11 August 1947 at Keesler Field, Mississippi, for three years. Three previous convictions introduced into the record of trial show that he was found guilty on 9 August 1949 of violating standing orders by failing to repair for bed check and sentenced to forfeit \$50 and to be restricted for one month; on 14 January 1950, of sleeping on sentinel duty and sentenced to confinement at hard labor for three months and forfeiture of \$50 per month for a like period; and on 27 June 1950 of being absent without leave for ten days, breach of restriction, and wrongfully disobeying the lawful order of a noncommissioned officer, and sentenced to confinement at hard labor for five months and forfeiture of \$50 per month for a like period.

The Staff Judge Advocate's review shows that his efficiency and character ratings list six of excellent, three very satisfactory, one satisfactory, one poor and one unsatisfactory.

7. At a hearing held 2 November 1950 before the Board of Review, Mr. Lomax B. Lamb, Marks, Mississippi, appeared and presented oral argument on behalf of accused. He furnished the Board with a certified copy of accused's record of birth showing his birth date as 21 March 1931, and a letter signed by Mrs. Helen Thompson, County Welfare Agent, Quitman County, Marks, Mississippi, in which is inclosed a "Social Case History" of accused, both of which have been attached to the record of trial. The Board has given due consideration to the matters thus presented.

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

to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of death is authorized upon conviction of murder in violation of Article of War 92.

Robert Barker, J.A.G.C.

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

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

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

1951

JAGU CM 343576

UNITED STATES )

KOBE BASE

v. )

Trial by G.C.M., convened at  
Kokura, Kyushu, Japan, 28 and  
29 August 1950. Death.

Recruit JAMES L. CLARK,  
RA 14267271, Company B,  
11th Engineer (C) Battalion,  
APO 24 )

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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 soldier 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 premeditated murder of Kaki, Magojiro (Specification 1), Kaki, Shizu (Specification 2), Kaki, Katsukaza (Specification 3), and Kaki, Kyo (Specification 4), at Kokura, Kyushu, Japan, on or about 4 July 1950, by stabbing each with a knife, in violation of Article of War 92. Evidence of three previous convictions, two by special court-martial and one by summary court-martial, was introduced. He was sentenced to be put to death in such manner as proper authority may direct, all members of the court present at the time the vote was taken concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The evidence, which is reviewed at length by the Board of Review in its opinion, is substantially as follows:

a. For the prosecution.

At about 6:00 a.m. on 4 July 1950, Mamoru Murakami, a resident of Kokura City, Japan, while upstairs in his home, heard "hollering" emanating from the outside. Upon looking from his window and noticing two persons across the street who appeared to be in a

"terrible condition," he proceeded immediately to this scene where he found "the elder brother," subsequently identified as Katsukaza Kaki, lying on the ground and the "younger brother," subsequently identified as Kyo Kaki, standing by the entrance to their home. Each appeared to be injured and was "covered with blood." Kyo Kaki uttered a few words, vomitted blood and later crawled into the house from which he was subsequently removed to the hospital. Katsukaza Kaki appeared to be in agony and continued to remain on the ground.

At about 6:20 a.m. on 4 July 1950, Yuichi Shigematsu, a police inspector of Kokura City, Japan, arrived at the Kaki house. He discovered Katsukaza Kaki lying on the ground at the front entrance and heard groans coming from within the house. Upon entering through the kitchen he found in this room Shizu Kaki, a woman approximately forty-four or forty-five years of age, lying on the earthen floor, a pool of blood around her. She appeared "to have been wounded on her back and throat." In the inner room he saw Magojiro Kaki lying on the floor. Each of these persons was dead when the inspector arrived. Upon proceeding to the room from which the groans were emanating he found Kyo Kaki lying on the floor with wounds on his thigh, back and face. A writing pad with "sketching" thereon was in front of him and he had a pencil in his hand. He appeared "to have no more strength to write." The inspector noticed that "the house was full of blood everywhere" and that there were several large footprints made with shoes. The three deceased and Kyo were barefoot. He discovered "by the entrance of the kitchen on the left hand side close to the wall" a helmet stained with blood.

In the meantime, Masanobu Murakami, a younger brother of Mamoru Murakami, appeared at the scene and was told by the latter "to run to the hospital." When Masanobu arrived near a bridge over a stream, about twenty meters from his house and about twenty-three meters from the Kaki house, he noticed an American soldier identified as the accused. The accused, who was stretched on the ground, arose, jumped with difficulty across the two-foot stream, and started towards him. (Inspector Shigematsu testified the stream was about two meters in width and that the place in the stream where he saw the accused was about fifty meters from the Kaki house.) The accused had a knife in his hand which appeared to be like a jack knife, approximately six or seven inches in length. The accused, who was in a "crouched" position with the knife pointed forward, directed Masanobu to stop and indicated to him that he desired to be taken to camp, which was within view. Masanobu, frightened, retreated a few steps. The accused appeared to be shivering, was staggering, and upon starting towards Masanobu, fell to the ground. He was dressed in dry fatigues, the upper part of which was torn. He had on shoes about the height of combat boots and was wet below the knees. Masanobu rendered no aid to the accused but continued on to the hospital. Upon his return he noticed the accused being pulled from the stream but did not see a knife at this time.

Inspector Shigematsu, when proceeding to the Kaki home on 4 July, had noticed the accused lying in the stream near the bridge. His body with the exception of his head was submerged and three boys were trying to pull him out. The accused, dressed in fatigues, was without headgear. There were rice paddy fields on each side of the stream.

At about 10:00 a.m. on 4 July 1950, Richard L. Baustian, an agent of the 7th Criminal Investigation Detachment, together with Agent Samuel S. Thurston, arrived at the Kaki residence. They made a sketch of the scene and took some photographs but did not see the accused on this date. In their investigation they discovered several sheets and mattress covers stained with blood in a small fenced enclosure attached to the house. They also found a helmet liner and a writing tablet.

On 4 July 1950 Masamichi Kawashima, a medical doctor, after arriving at the scene of the alleged offenses and finding Magojiro, Shizu and Katsukazu Kaki to be dead, began at 8:00 a.m. to perform an autopsy on each of the bodies. He stated his findings as follows:

As to Magojiro Kaki:

"The first wound was on his back; depth approximately 15 centimeters and it penetrated and cut a big breast artery. Second wound, right shoulder. This was a cut. It penetrated as deep as the flesh and muscles. The third wound, right back of the head. The depth approximately 1.5 centimeters. Fourth wound, right thumb. Length approximately 2.5 centimeters - - was also a cut. The cause of death according to my examination was the cut on the breast artery." (R 50)

As to Shizu Kaki:

"\* \* \* the first wound \* \* \* was on the right stomach. It was a stab, had penetrated to her liver and there was excessive internal bleeding. The second wound, left neck; also a stab and the cut was from the left shoulder down toward the right portion of the chest and penetrated the upper part of right lung. \* \* \* Third wound, on the back. The depth approximately 5 centimeters, also a stab. This is all for Shizu. \* \* \* her death was caused by the stab on the right liver." (R-50-51)

As to Katsukazu Kaki:

"Katsukazu's first wound was on the right neck and it penetrated to the other side and had cut a big jugular vein. This was the cause of his death." (R 51)

In his opinion all the wounds were inflicted by a sharp-edged instrument.

Shigenori Kubota, a medical doctor, practicing at Kokura National Hospital Kokura City, Japan, was on duty on 4 July at about 7:00 a.m. when Kyo Kaki was admitted to the hospital. Kyo Kaki was in a "half-unconscious" state with a wound on his face extending from the left temple to the center of the left cheek. The length of the wound was approximately 8.2 centimeters, the width 2 centimeters, and the depth 7.5 centimeters. His left cheek bone was cut sharply downward but the interior of the mouth was not cut. He had a wound on his right back, just below the 12th rib very similar to the wound on his face. He had a third injury on his thigh. His condition became critical about 7:00 p.m. on 4 July and he died the next day at 8:00 a.m. His death resulted from the "stab on his right back" and loss of blood through long excessive bleeding. In the opinion of Dr. Kubota the wounds were caused by a "very sharp double edge" weapon with a sharp point.

Inspector Shigematsu was permitted by Dr. Kubota to question Kyo Kaki for about five minutes at about 3:00 p.m. on 4 July, after having been refused permission on several prior occasions. Dr. Kubota was of the opinion that at that time Kyo had about a fifty-fifty chance of surviving. The doctor further testified he had not informed the patient he might die and that the patient talked in a normal patient's voice.

The Inspector was permitted to relate to the court the answers given him by Kyo Kaki in response to the questions asked. The defense objection to the admission of this evidence was overruled on the grounds that the statements were dying declarations. The inspector testified that the deceased stated he was wounded by an "Occupation Forces soldier" with an instrument similar to a dagger and which was about ten inches long; that he was first stabbed in the back; that he was sleeping in a 4½-matted room when at about 6:00 a.m. he heard his mother scream; that he rushed into the kitchen where he saw a big Occupation Forces soldier on top of his mother who was bending down; that he was stabbed in the back when he started to drive the soldier away; that he and his father, followed by the soldier, proceeded into the interior part of the house, where his father was stabbed; that he did not know when his brother, Katsukazu, was stabbed, but when he and his brother tried to escape and reached the outside his brother fainted and fell to the ground; that he saw a soldier running in the direction of the "noodle factory" and jump near the fence of that factory; that he then went into a 3-matted room to enter in a notebook what took place and that he had no strength after writing a few lines. Upon observing the condition of the patient after these statements, the inspector refrained from further interrogation.

The writing tablet together with the writing thereon found in front of Kyo Kaki by Inspector Shigematsu on 4 July 1950 was admitted into evidence over objection by the defense. A translation of the writing

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by Roland Nose, translator and interpreter for the 7th Criminal Investigation Detachment, made approximately two or three days after the alleged offenses, also admitted into evidence, was as follows:

"At about 0600 hours an Occupation Forces soldier came suddenly and gaining entrance through the kitchen, first killed the mother, and as I attempted to stop him, he inflicted injuries on me like this. Then he attacked the father and then the elder brother." (R 69)

The translations of the writing attempted by Mr. Nose and Inspector Shigematsu during the trial, although incomplete as a result of bloodstains on the writing, were in substance the same as the original translation. Mr. Nose testified he had no difficulty making the original translation.

In the afternoon of 5 July 1950, at the 118th Station Hospital at Fukuoko, Agents Baustian and Thurston first saw and talked with the accused. After an explanation of his rights under the 24th Article of War, they questioned him as to his whereabouts during the period between the evening of 3 July and the time he was found in the stream.

On 7 July Agent Baustian reminded the accused of his rights under the 24th Article of War and again questioned him. The interrogation began at about 10:15 a.m. at the 24th Division Stockade and continued after proceeding to the Kaki residence. At the scene of the alleged offenses Baustian requested the accused to indicate by which door he entered the house and his actions after entry. The accused stated he entered the "side door located by the kitchen" and to the best of his memory he "thought" he had a bundle of sheets and "thought" he set the bundle on the dirt floor inside the little shed built onto the house. His intentions were to sell the sheets. He then looked in the kitchen and saw a Japanese woman. They saw each other about the same time whereupon she turned around and said something in Japanese to someone else. The accused added, "I reached into my pocket for something; I don't know what and the next thing I remember I was striking down with it at the woman." He continued, "it seemed to [him] like [he] was being surrounded by people and remember[ed] striking out at several of the people." After that was "finished" he remembered walking out of the door and "it seemed like [he] walked in a straight line out of the house." He also told Baustian he remembered being wet and asking about the military police but did not remember being in an ambulance.

On cross-examination Agent Baustian admitted with reference to the oral statements made on 7 July that he "believed" he made a remark at the stockade that "I was going to stay there until I got the whole story."

After leaving the Kaki residence Agent Baustian and the accused proceeded to the Provost Marshal's office, where Baustian, after reminding the accused that he did not have to make a written statement, requested him to do so. Baustian said to the accused that inasmuch as he had given an oral statement "he had nothing to gain by refusing to make a written statement. I told him if he would write it down I would appreciate it." He also told the accused "he couldn't get in any more trouble than what he was in." The accused began to write, but at about 12:30 p.m. Baustian interrupted him as it was getting late for lunch. Upon their return from lunch the accused said he did not "want to write anymore."

The incomplete statement admitted into evidence over the objection of the defense on the ground that the accused's action indicated the statement was involuntary and in "effect repudiated the statement," is as follows:

"When I left camp this pitlear (sic) nite (sic) I had some sheets with me. My entchentas (sic) was to sell them to the Japness (sic) for yen. I stumbled trough (sic) rice patties (sic) for quite some time it seamed (sic). Then I came to a house so I thought that I would go in side (sic) and try to sell the sheets. It stills (sic) seems kind of fanty (sic) and blure (sic) I had some kind of desire to do something I don't know what. When I seen (sic) this women (sic) there something went wrong. I don't know what happen (sic) then. I remember something about asking for the M.P. I don't know when they got there. The next time I remember any thing I awoke in the hospital sometime that afternoon when some one by the name of Browner was calling to me Clark, Clark, this is Browner. What the hell are you doing in here. I said I don't know. When I entered this house it was through the side door by the kitchen. I entered first outer dore (sic) I walked through a small hallway then came to a inter (sic) door went in the kitchen where I saw this woman she look (sic) at me and started to say something in Japness (sic) I don't know what. I reached in my poket (sic) for somthing (sic) Then I had a feeling" (R 46; Pros Ex 1).

Agent Baustian testified that no force, violence or coercion was used in obtaining the accused's statements or answers to his questions.

b. For the defense.

Around midnight, 3 July 1950, Matsue Sasaki, who resided near the Kaki residence, was awakened by hearing someone calling to her "Mama-san, mama-san." Upon looking up she observed three or four persons who appeared to be Americans. They departed, proceeding around the corner of the building where they conversed with each other. She did

not see them after that.

At about 1:00 a.m. on 4 July 1950, Masanobu Murakami, while at home (across the street from the Kaki residence) noticed from a window three American soldiers emerging from an automobile. One of the soldiers returned to the car and the other two went in the direction of the Kaki residence. He saw them approach to within "4 meters 50" of the Kaki residence and did not see them thereafter.

Mamoru Murakami, recalled as a witness, testified that on 4 July 1950 when his brother, Masanobu, was running for a doctor and reached the bridge, a soldier came up on the bridge. He observed the soldier "trying to say something" to his brother. He also saw the soldier, bent forward and holding his stomach with his hands, later fall face downward in a paddy field. The soldier was staggering and although he could see the soldier's hands he was unable to state positively whether or not he had anything in them, but saw nothing in his hands.

Terashi Chure, age sixteen, testified that he hastened to the stream when he heard that the accused had fallen in and with the aid of some others pulled him from the water. The accused smelled strongly of alcohol, was dressed in fatigues and his underwear was torn. Terashi, although unable to understand English, heard him say something when the former first reached the scene but did not hear him say anything after the arrival of the ambulance.

Gentaro Miyashita observed the soldier lying on his back in the stream moving his arms and hands and saw him being pulled out. She remained at this scene approximately fifteen minutes during which time she did not see the soldier move.

Captain Mildred Ores Cronin was on duty at the dispensary on the morning of 4 July 1950 and saw the accused lying on a table where a doctor was attempting to arouse him. The patient had been in a stiff stupor but began to stir his head and move his lips. It "seem~~ed~~ to her" as though he was foaming at the mouth." He started to shake and had a tremor which lasted a very short while. Since the battalion was moving out the accused was sent to the 118th Station Hospital.

It was duly stipulated that if the custodian of analysis reports of the 118th Station Hospital were present in court and sworn as a witness, he would testify that a blood sample drawn from the accused at 10:50 a.m. on 4 July 1950 disclosed the presence of "2 m.g. of alcohol per 100 c.c. of blood."

A series of questions submitted to Major R. B. Dickerson, MC, Chief, Medical Service, 118th Station Hospital and his answers thereto was introduced into evidence by stipulation. The substance of the evidence was that in the opinion of Major Dickerson a person who at 10:50 a.m. had a blood alcohol content of 2 milligrams per 100 cubic centimeters would have had a blood alcohol content of more than 3 milligrams per cubic centimeter and less than 5 milligrams per 100 cubic centimeters at 6:15 a.m. of that

day provided no alcohol had been imbibed during that period. He was of the further opinion that such an alcoholic content as indicated at 6:15 a.m. would definitely impair reasoning power. (Where "100" is mentioned in the record of trial with reference to cubic centimeters it is assumed to be the result of a clerical error and should be "1." This assumption is based upon a statement in the "Clinical History" filed with the report of the Board of Medical Officers, dated 23 February 1951 and presently accompanying the record of trial.)

Agent Baustian, recalled as a witness, stated that on 5 July 1950 the accused told Samuel S. Thurston, also an agent of the 7th Criminal Investigation Detachment, and him, that on 3 July he had a "couple of beers" between 5:00 and 6:00 p.m., shortly after the evening meal, and then proceeded to a movie. On 7 July the accused informed these agents that in addition to the beer he had "two shots" of whiskey between 12:00 p.m. 3 July and 1:00 a.m. 4 July. No indication was given by the accused during his interrogation on 7 July that "he knew the Kaki family."

At about 11:00 a.m. on 4 July 1950 Agent Thurston, aided by approximately ten to fourteen persons, began a search for a sharp, double-edged instrument. This search together with others made on 6, 7 and 8 July, all of which covered the area surrounding the scene of the alleged offenses, failed to reveal such an instrument.

The accused after being advised of his rights as a witness elected to remain silent.

#### 4. Discussion.

##### a. Preliminary matters.

The evidence clearly establishes that at about 6:00 a.m. on 4 July 1950 in Kokura City, Japan, Magojiro, Shizu, Katsukaza and Kyo Kaki each, while at their home, received wounds resulting in their deaths in a manner suggestive of murder. The first three named persons died almost immediately and the fourth died about twenty-six hours later. One deceased was found in the kitchen, one in a bedroom and one was found outside the Kaki house, near the front door. The wounded Kyo Kaki was discovered in another room in the house. Blood was "everywhere" in the dwelling. All the wounds of the individuals were inflicted with a sharp double-edged instrument. The evidence further establishes that within a very short time after the mortal wounds had been delivered the accused, without headgear, was seen near the Kaki house. One witness testified that the accused had a knife in his hand. A helmet liner similar to those worn by American soldiers was found in the Kaki residence. A bundle of sheets and several mattress covers stained with blood were found in a small fenced enclosure attached to the house, where the accused indicated he had placed them. This admission and other circumstances surrounding the infliction of the wounds are contained in the accused's extrajudicial statements and the dying declarations of the deceased, Kyo Kaki. The conditions under which the extrajudicial admissions were obtained and the admissibility of the dying declarations warrant some discussion.

## (1) Admissibility of accused's extrajudicial statements.

The evidence discloses that prior to trial, Richard L. Baustian, an agent of the 7th Criminal Investigation Detachment, interrogated the accused at the hospital, stockade, provost marshal's office and at the scene of the alleged offenses. He testified that prior to the questioning he advised the accused of his rights under the 24th Article of War and informed him that he was not required to make a statement and that, if made, it could be used against him in a trial by court-martial, and that at no time were any force, violence, threats or coercion used in the obtaining of statements. Agent Baustian admitted in his testimony, however, that he "believed" he did make a remark at the stockade that "I was going to stay there until I got the whole story." He also admitted requesting the accused to make a written statement, telling him that "if he would write it down I would appreciate it," and that he told the accused "he couldn't get in any more trouble than what he was in." The accused then began a written statement which was not completed because, as he stated, "he didn't want to write anymore."

The Judicial Council concurs with the Board of Review in its opinion that the accused's statements were freely and voluntarily made. It is undisputed that no force, violence or hardships were imposed upon accused, no privileges withheld, nor promises of immunity, clemency or other rewards made. Although Baustian's remarks may be subject to criticism, there is no showing that they had any substantial effect upon the accused, or that they were the procuring cause of the accused's statements or resulted in any compulsion or intimidation. The court ruled that the statements were voluntary and admissible in evidence and we are unable to find any cogent reason for disagreement with that decision (See CM 337089, Aikins and Seever, 5 BR-JC 331, 367, 380-390).

## (2) Admissibility of dying declarations of deceased, Kyo Kaki.

The evidence discloses that almost immediately after receiving mortal wounds Kyo Kaki proceeded to place in writing a purported account of the details and circumstances of the attack perpetrated upon himself and three other members of his family. Approximately nine hours later and about seventeen hours prior to his death he reiterated orally an account of these details and circumstances. The writing and a translation thereof and the oral statements were admitted into evidence as dying declarations. For testimony of this character to be competent it is necessary that the person whose words are repeated by the witness should have been in extremis and under a sense of impending death, that is, in the belief that he was to die soon; but the victim need not himself state that he is under that impression, provided the fact is otherwise shown (MCM, 1949, par 179a, p 232).

The evidence does not disclose an affirmative statement by Kyo Kaki that he was under the impression he was to die soon but the fact of such an impression is clearly shown. The writing itself, when viewed in the light of the attendant circumstances, refutes any

contrary conclusion. When it is considered that he had received wounds obviously serious; he had been vomiting blood; he had "crawled" into the house; he had obtained pencil and paper; he had, while lying on the floor, begun writing an account of the incidents but had stopped as a result of physical weakness, no hypothesis is reasonable but that as a result of his belief of impending death he desired to record for others the tragic circumstances of the multiple homicides. His physical condition in the hospital and the circumstances under which he was permitted to be questioned by an inspector of the police indicate to us a belief that when he made the oral statements received in evidence as dying declarations he was still under a sense of impending death. We therefore concur with the Board of Review in its conclusion that the written and oral statements made by Kyo Kaki were admissible as dying declarations. Dying declarations, however, according to the weight of authority, are only admissible where the death of the one making them is the subject of the trial, and the circumstances of that death are the subject of the declaration (*People v. Cox*, 540 Ill. 111, 172 N.E. 64; *Johnson v. State*, 63 Fla. 16, 58 So. 540; *State v. Bohan*, 15 Kan. 407; 2 Am. Crim. Rep. 278, 69 A.L.R. 1215 and cases cited therein; Wharton's *Criminal Evidence*, 11th ed. sec. 544 p 886). A few decisions are to be found which express a contrary view (*State v. Wilson*, 23 La. Ann. 558; *State v. Terrell*, 46 S.C.L. (12 Rich) 321). The court, in *State v. Bohan*, *supra*, discussing these two cases, stated:

"The cases do not, in our judgment, rest on authority, and no satisfactory reasons are given for the ruling. These cases stand alone in this country, and we prefer to adhere to well-established rules, rather than follow decisions for which no reason is given, and which seem dangerous in their tendency."

The Manual for Courts-Martial, 1949, paragraph 179a at page 232 provides:

"The law recognizes an exception to the rule rejecting hearsay by allowing the dying declaration of the victim of the crime concerning the circumstances which have induced his present condition, and especially concerning the person by whom the violence was committed, to be detailed in evidence by one who has heard them."

We prefer not to extend this principle and therefore adhere to the majority view. It follows that in our opinion the dying declarations of Kyo Kaki were admissible with reference to his homicide but are not as to those of the other three deceased.

#### b. Murder

The competent evidence clearly establishes that at about 6:00 a.m. on 4 July 1950, in Kokura City, Japan, the accused entered the

home of a Japanese family with the intention, according to his admission, of selling some sheets. He placed the sheets on the floor and then looked into or entered the kitchen where he observed a Japanese woman. She saw him at about the same time and said something in Japanese to another person, whereupon the accused reached into his pocket for "something" and began striking at the woman. When it "seemed" to him he was "surrounded" by people he started striking out at them. He then left the house. A short time thereafter Magojiro, Shizu and Katsukaza Kaki were found dead as a result of numerous wounds inflicted by a sharp double-edged instrument. Kyo Kaki as a result of the wounds died about twenty-six hours later.

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse (MCM 1949, par 179a, p 231). That the accused was the criminal assailant and that there was no legal justification or excuse for the homicides requires no discussion. Malice is a technical word "including not only anger, hatred, and revenge but every other unlawful and unjustifiable motive" (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 179a, p 231) and may be presumed from cruel and deliberate acts manifesting an utter disregard for human life (CM 330963, Armistead, 79 BR-JC 231). The nature and extent of the wounds and the savage and brutal manner in which they were inflicted with a sharp double-edged weapon upon helpless victims, clearly establishes malice.

Each specification alleges that the murder was with premeditation. 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, p 231; CM 337089, Aikins and SeEVERS, 5 BR-JC 331, 375, 390 and cases there cited; CM 344372, Davis, BR-JC, Apr 1951).

It is a general rule of law that voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent or state of mind, when a particular intent or state of mind is a necessary element of the offense (MCM 1949, par 140a, p 188). Thus voluntary intoxication may negative the accused's ability to form the specific intent to kill, or the deliberation and premeditation necessary to constitute premeditated murder, in which event there is a reduction to murder unpremeditated (Bishop v. United States, 107 F 2d 297, 301).

The accused, according to his extrajudicial statements, consumed "a couple of beers" during the early evening hours of 3 July 1950 and had "two shots" of whiskey around midnight of 3 July. The testimony indicated that shortly after the alleged homicide he was staggering near a stream and subsequently fell into the water. When

pulled therefrom he smelled strongly of alcohol and, while lying on the bank of the stream prior to his removal by ambulance, remained motionless most of the time. For a period after his arrival in a dispensary he remained in a stiff stupor but later stirred his head and moved his lips. He appeared to one witness to be foaming at the mouth. A sample of his blood taken at about 10:50 a.m. on 4 July after his removal to a station hospital, revealed an alcohol content of 2 milligrams per cubic centimeter. The substance of a stipulation admitted into evidence was that in the opinion of a qualified medical officer a person who at 10:50 a.m. had a blood alcohol content of 2 milligrams per cubic centimeter would have had a blood alcohol content of more than 3 milligrams per cubic centimeter and less than 5 milligrams per cubic centimeter at 6:15 a.m. of that day provided no alcohol had been imbibed during that period. He was of the further opinion that such an alcoholic content as indicated at 6:15 a.m. would definitely impair reasoning power.

The accused, however, at no time maintained he was intoxicated nor did he admit or claim having consumed a sufficient quantity of alcoholic beverages to warrant such a state. In his pre-trial admissions he was able to recall the purpose and method of entry into the Kaki residence and the route by which he reached the kitchen. He was able to recall his first view of the deceased Shizu, that she said something to another person in the house and that he drew something from his pocket and began striking at the persons around him. He also remembered leaving the premises. Such facts as these tend to indicate that the accused was not intoxicated to such a degree as to deprive him of the ability to form the specific intent to kill or the deliberation and premeditation necessary to constitute premeditated murder. The question of the degree of the accused's intoxication and the effect of his imbibing on his volition is generally one of fact for the court. The Judicial Council does not feel that it is warranted in concluding that the court erred in its implied finding that the accused was not so intoxicated as to deprive him of the ability to commit premeditated murder (CM 338314, Schanks, 4 BR-JC 239, 247; see CM 334570, Morales, 1 BR-JC 197).

The evidence in detail as to what occurred within the Kaki residence culminating in the murder of the four Japanese is necessarily sparse. Why the accused chose this particular house for entry, not being acquainted with the occupants therein, and what particular desire of his was thwarted is not explained. His admission, however, that he reached into his pocket for "something" and then began striking down at Shizu Kaki, an apparently defenseless woman, when she "said something" to another person, and thereafter began striking out at the other occupants of the house under the circumstances indicated warrants the conclusion that the thought of taking life was consciously conceived and of the formation of a specific intent to kill. The fact that the killings followed very shortly after the formation of the intent does not preclude premeditation. The authorities are in agreement that no particular length of time is necessary for deliberation (*Bostic v. United States*, 68 App. D. C. 167, 94 F (2d) 636).

The existence of deliberation and premeditation is to be determined by the court from all the facts and circumstances in each case (1 Wharton's Criminal Law (12th ed), sec 507, p 739 and cases cited therein) No justification here appears warranting the disturbing of the court's findings in the affirmative.

The failure of the law member to advise the court that the dying declarations of the deceased, Kyo Kaki, were admissible only with reference to his homicide did not, in the opinion of the Judicial Council, injuriously affect the substantial rights of the accused. Although some of the facts contained therein tended to explain in greater detail the circumstances surrounding the other homicides, the other competent evidence coupled with the accused's admissions establishes beyond reasonable doubt the guilt of the accused of the offenses charged.

5. Mental Responsibility of Accused.

The papers accompanying the record of trial disclose that Major James M. Bailey, M.C., Neuropsychiatrist, studied the accused during the period between 4 and 6 July 1950, inclusive, and again on 5 August 1950 and found him to be mentally responsible at the time of the alleged offenses and at the time of the examinations and to possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct and cooperate in his defense at the latter time. No question was raised during trial as to the accused's mental responsibility.

At the request of the Office of The Judge Advocate General and in compliance with orders issued by The Adjutant General in December 1950 the accused was evacuated from the Far East Command and on 31 January 1951, he was admitted to Letterman Army Hospital, Presidio of San Francisco, California, for the purpose of a thorough psychiatric examination. The Board of Medical Officers convened at Letterman Army Hospital in a report dated 23 February 1951, set forth their conclusions. They found that at the time of the alleged offenses the accused was so far free from mental defect, disease or derangement as to be able concerning the acts charged to distinguish right from wrong and to adhere to the right. They further found that at the time of trial the accused possessed sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct and cooperate in his own defense, which condition still obtained on the date of the report. The Surgeon General concurred in the findings of the Board of Medical Officers.

The Judicial Council is of the opinion that the record of trial supports the conclusion inherent in the court's findings that the accused was mentally responsible both at the time of the alleged offenses and at the time of trial. The findings of the Board of Medical Officers serve only to substantiate this conclusion.

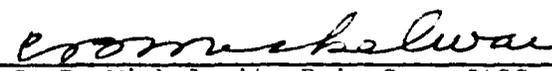
6. Careful consideration has been given to oral argument presented on behalf of the accused.

7. The charge sheet indicates the accused to be twenty-two years and four months of age. A certified copy of accused's birth certificate dated 8 September 1950, incorporated with the record of trial, shows that the accused became twenty years of age on 21 March 1951. He enlisted for three years on 11 August

1947 at Keesler Field, Mississippi.

8. The court was legally constituted and had jurisdiction of the accused and the offenses alleged. No errors injuriously affecting the substantial rights 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 and the sentence and to warrant confirmation of the sentence. However, in view of all the circumstances in the case, including the youth of the accused and his intoxication, which although insufficient to warrant a reduction of premeditated murder to a lesser offense does merit consideration in connection with the sentence, the Judicial Council recommends that the 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. A sentence to death or imprisonment for life was mandatory upon the court following a conviction of premeditated murder in violation of Article of War 92.

  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

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

JAGU CM 343576

1st Ind

JAGO, Department of the Army, Washington 25, D. C. MAY 22 1951

TO: 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 Recruit James L. Clark, RA 14267271, Company "B," 11th Engineer (C) Battalion, APO 24.

2. Upon trial by general court-martial this soldier was found guilty of the murders of Kaki, Magojiro; Kaki, Shizu; Kaki, Katsukaza; and Kaki, Kyo, at Kokura, Kyushu, Japan, on or about 4 July 1950 by stabbing each of them with a knife, in violation of Article of War 92. He was sentenced to be put to death in such manner as proper authority may direct, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Records of the Department of the Army show that the accused enlisted in the Army at Clarksdale, Mississippi, on 11 August 1947, for a period of three years and is 22 years of age, his birth date being stated therein as 21 March 1929. A certified copy of his birth certificate furnished this office by Mr. Lomax B. Lamb, Jr., Attorney at Law, Marks, Mississippi, shows accused's age as 20, his birth being stated therein as 21 March 1931. Although the evidence shows that the accused committed four murders as charged, without any provocation whatever, it tends to establish that the accused was intoxicated at the time the offenses were committed but not sufficiently to reduce the degree of his crime. I concur in the opinions 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 sentence and to warrant confirmation of the sentence. The Judicial Council and I recommend that the sentence be confirmed, but in view of all the circumstances in the case, including the youth and intoxication of the accused, the Judicial Council and I further recommend that the 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 sentence as thus commuted be carried into execution. I also recommend that an appropriate United States penitentiary be designated as the place of confinement.

4. Careful consideration has been given to oral argument presented on behalf of the accused by Mr. Lomax B. Lamb, Jr., civilian defense attorney, and to communications from Senator James O. Eastland, Senator John C. Stennis, Congressman Will M. Whittington and a letter addressed to the President from Mrs. N. L. Whitwell, Jr., Marks, Mississippi.

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 recommendation hereinabove made, should such recommendation meet with your approval.



FRANKLIN P. SHAW

Major General, USA

Acting The Judge Advocate General

5 Incls

- 1 Record of trial
- 2 Op Bd of Review
- 3 Op Judicial Council
- 4 Drft ltr sig S/A
- 5 Form of action



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

(37)

JAGK - CM 343752

JAN 1 8 1951

U N I T E D S T A T E S )

NEW YORK PORT OF EMBARKATION

v. )

First Lieutenant SIDNEY  
SCORATOW (O-1592037), Trans-  
portation Corps, 9201 Tech-  
nical Service Unit-Transpor-  
tation Corps. )

Trial by G.C.M., convened at Headquarters,  
New York Port of Embarkation, 5 June,  
10-14,17,19-21,25,28,31 July and 1-3  
August 1950. Dismissal, total forfeitures  
after promulgation, and confinement for  
four (4) years.

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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 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. Accused was tried upon the following charges and specifications:

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

Specification 1: In that First Lieutenant Sidney Scoratow, Transportation Corps, 9201 Technical Service Unit-Transportation Corps, New York Port of Embarkation, Brooklyn, New York, did, on or about 21 December 1949, with intent to deceive, wrongfully and unlawfully make and utter to Peel Richards Ltd. a certain check, in words and figures, as follows, to wit:

Brooklyn, N.Y., December 21, 1949  
Colonial Trust Company  
Kingsboro Office  
69th Street and Fifth Avenue  
Pay to Peel Richards Ltd.

\$500.<sup>00</sup>/<sub>XX</sub>

Five Hundred <sup>00</sup>/<sub>XX</sub> Dollars

Sidney Scoratow

as a part payment of his indebtedness to said Peel Richards Ltd.

he the said First Lieutenant Sidney Scoratow then well knowing that he did not have and not intending that he should have sufficient funds in the Colonial Trust Company, Kingsboro Office, Brooklyn, New York, to meet payment of said check when presented for payment.

Specification 2: In that First Lieutenant Sidney Scoratow, \*\*\*, did, between the dates of 1 September 1949 and 3 January 1950 sell to Michael A. Maglino, a civilian employee of the Department of the Army, intoxicating liquor on the military post of Brooklyn Army Base, Brooklyn, New York, in violation of a Federal statute prohibiting the sale of intoxicating liquor on an Army reservation (Laws, February 2, 1901, Chapter 192; 38; 31 Stat 758; 10 USCA 1350).

Specification 3: Nolle Prosequi.

Specification 4: (Finding of not guilty).

ADDITIONAL CHARGE I: Violation of the 96th Article of War. (R 39)

Specification 1: In that First Lieutenant Sidney Scoratow, \*\*\*, at the New York Port of Embarkation, Brooklyn, New York, did, from on or about 15 November 1949 to on or about 20 December 1949 knowingly and wilfully apply to his own personal use and benefit, the services of a civilian employee of the Department of the Army, to wit, Mr. James DiPaola, during hours that the United States paid for, and was exclusively entitled to, the services of the said James DiPaola.

Specification 2: (Finding of not guilty).

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

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

Specification 1: In that First Lieutenant Sidney Scoratow, \*\*\*, did, on or about 29 December 1949, with intent to deceive, wrongfully and unlawfully make and utter to Schenley Industries, Inc., a certain check, in words and figures as follows, to wit:

No. \_\_\_\_\_

Brooklyn, N.Y. Dec 29 1949

COLONIAL TRUST COMPANY  
Kingsboro Office  
69th Street at Fifth Avenue

1-779  
250

Pay to the  
 Order of Schenley Ind. Inc. \$594  $\frac{18}{100}$   
 18  
 Five Hundred ninety four  $\frac{18}{100}$  DOLLARS

/s/ Sidney Scoratow  
 as a part payment of his indebtedness to said Schenley Industries, Inc., he the said First Lieutenant Sidney Scoratow then well knowing that he did not have and not intending that he should have sufficient funds in the Colonial Trust Company, Kingsboro Office, Brooklyn, New York, to meet payment of said check when presented for payment.

Specification 2: In that First Lieutenant Sidney Scoratow, \*\*\*, did, on or about 5 December 1949, with intent to deceive, wrongfully and unlawfully make and utter to Schenley Industries, Inc., a certain check, in words and figures as follows, to wit:

	1-8	THE NATIONAL CITY BANK OF NEW YORK	1-8
	<u>210</u>	Bush Terminal Branch	<u>210</u>
Check No. _____		Third Avenue at Thirty-Fifth Street	
		Brooklyn, N.Y.	
		NEW YORK	Dec 5 19 49

Pay to the  
 Order of Schenley Ind. Inc \$577  $\frac{00}{100}$   
 00  
 Five hundred seventy seven  $\frac{00}{100}$  DOLLARS

Ft. Hamilton Rec Group  
 Brooklyn, N.Y. /s/ Sidney Scoratow  
 O-1592037

as a part payment of his indebtedness to said Schenley Industries, Inc., he, the said First Lieutenant Sidney Scoratow then well knowing that he did not have and not intending that he should have sufficient funds in the National City Bank of New York, Bush Terminal Branch, Brooklyn, New York, to meet payment of said check when presented for payment.

Specification 3: (Finding of not guilty on motion).

Specification 4: In that First Lieutenant Sidney Scoratow, \*\*\*, being indebted to the Haublein Sales Company, Inc., at New York City in the sum of \$3054.80 for balance due on

merchandise purchased, which amount became due and payable as follows:

\$112.13 on or about 17 November 1949; \$1058.93 on or about 17 November 1949; \$384.74 on or about 6 December 1949; \$785.11 on or about 9 December 1949; \$1545.48 on or about 19 December 1949; and \$168.41 on or about 23 December 1949, and on which part payments were made as follows:

\$500.00 on or about 27 December 1949; and \$500.00 on or about 3 January 1950, leaving said balance of \$3054.80, did, at New York City, from the due date of each amount due after on or about 17 November 1949 to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

Specification 5: In that First Lieutenant Sidney Scoratow, \*\*\*, being indebted to Julius Wile Sons & Company, Inc. at New York City in the sum of \$587.00 for merchandise purchased, which amount became due and payable on or about 25 December 1949, did, at New York City, from on or about 25 December 1949 to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

Specification 6: In that First Lieutenant Sidney Scoratow, \*\*\*, being indebted to Hiram Walker Distributors, Inc. at New York City in the sum of \$3262.85 for balance due on merchandise purchased, which amount became due and payable on or about 28 November 1949, did, at New York City from on or about 28 November 1949 to on or about 19 April 1950 dishonorably fail and neglect to pay said debt.

Specification 7: In that First Lieutenant Sidney Scoratow, \*\*\*, being indebted to the Standard Food Products Corporation at New York City in the sum of \$2711.37 for balance due on merchandise purchased, which amount became due and payable as follows:

\$652.45 on or about 22 November 1949; \$1567.50 on or about 25 November 1949; and \$548.16 on or about 28 November 1949, and against which amounts credits were issued as follows:

\$4.40 on or about 30 November 1949; and \$52.34 on or about 18 December 1949, leaving the said balance of \$2711.37, did, at New York City, from the due date of each amount to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

Specification 8: In that First Lieutenant Sidney Sooradow, \*\*\*, being indebted to the Fleischmann Distilling Corporation at New York City in the sum of \$2937.78 for merchandise purchased, which amount became due and payable as follows:

\$801.27 on or about 15 December 1949; \$320.51 on or about 15 December 1949; \$85.37 on or about 15 December 1949; \$464.68 on or about 16 December 1949; \$801.27 on or about 19 December 1949; and \$464.68 on or about 20 December 1949, did, at New York City, from the due date of each amount, to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

Specification 9: In that First Lieutenant Sidney Sooradow, \*\*\*, being indebted to Distilled Brands, Inc. at New York City in the sum of \$6661.05 for merchandise purchased, which amount became due and payable as follows:

\$1819.85 on or about 1 November 1949; \$1048.73 on or about 10 November 1949; \$843.86 on or about 17 November 1949; \$136.86 on or about 28 November 1949; \$2164.34 on or about 1 December 1949; \$576.12 on or about 6 December 1949; \$239.04 on or about 7 December 1949; and \$681.55 on or about 20 December 1949, did, at New York City from the due date of each amount to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

Specification 10: In that First Lieutenant Sidney Sooradow, \*\*\*, being indebted to National Distillers Products Corporation at New York City in the sum of \$4601.10 for balance due on merchandise purchased, which amount became due and payable as follows:

\$286.75 on or about 1 October 1949; \$1100.20 on or about 1 October 1949; \$145.25 on or about 20 October 1949; \$37.80 on or about 24 October 1949; \$731.05 on or about 2 November 1949; \$969.40 on or about 15 November 1949; \$1616.60 on or about 30 November 1949; and \$1314.45 on or about 19 December 1949, and on which part payments were made as follows:

\$550.20 on or about 14 November 1949; \$550.20 on or about 28 November 1949; and \$500.00 on or about 10 January 1950, leaving the said balance of \$4601.10, did, at New York City, from the due date of each amount <sup>due</sup> after on or about 20 October 1949 to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

Specification 11: In that First Lieutenant Sidney Scratow, \*\*\*, being indebted to Peel Richards, Ltd. at New York City in the sum of \$2039.74 for balance due on merchandise purchased, which amount became due and payable as follows:

\$977.84 on or about 16 November 1949; and \$1317.23 on or about 26 November 1949, and on which a part payment in the sum of \$255.33 was made on or about 25 November 1949, leaving said balance of \$2039.74, did, at New York City, from the due date of each amount to on or about 19 April 1950, dishonorably fail and neglect to pay said debt.

He pleaded not guilty to the charges and specifications. As to Specification 3 of Charge I, a nolle prosequi was entered subsequent to arraignment by direction of the reviewing authority. He was found not guilty of Specification 4, Charge I, Specification 2, Additional Charge I, Additional Charge II and its Specification, and of Specification 3, Additional Charge III, and guilty of the other charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for four years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

### 3. Evidence

#### a. For the Prosecution

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

Accused is in the military service and since February 1948 had occupied room 38 in "Building BOQ 219" at Fort Hamilton. In the period extending from July 1949 to sometime after Christmas of 1949 shipments of liquor were received at the above address by the orderly, Private First Class John Henry, who signed for them. Pursuant to direction from accused, Henry had the liquor placed in accused's room, in a storage room in the "BOQ" and in batteries opposite the officers' club (R 558-560,569). Officers and others would come for liquor which Henry would make available to them after calling accused (R 560-563). Among those who picked up liquor frequently were a Lieutenant Stalens and a Mr. Schneider. Schneider picked up liquor on an average of three times a week. Henry recalled a dispute between Stalens and Schneider which he reported to accused. Accused told Henry "to always ring him, \*\*\* that

he was the boss, he was giving instructions." On one occasion Henry talked to a Captain Van Eck about "this liquor business," and when Henry informed Van Eck that he had received nothing for his services, Van Eck promised to take care of him. Henry had been informed by Schneider that he worked in Van Eck's office (R 563-567).

During the fall of 1949, James Di Paola was a civil service employee in the Port Procurement Section, New York Port of Embarkation, under the immediate supervision of accused as a requisition control clerk. In the period from 15 November 1949 to shortly before Christmas, DiPaola, on occasions, at accused's directions, during normal working hours, picked up liquor at Fort Hamilton and brought it to the Port, and also took accused's automobile to Marathon Motors for servicing (R 52-67).

In November 1949, at Building A, Brooklyn Army Base, Michael Magliano, an employee of the Port Procurement Division, New York Port of Embarkation, gave accused \$48.00 or \$49.00 for a case of liquor and was told by accused to go to Fort Hamilton to pick up the case. Magliano believed that he obtained the case of liquor in barracks, 219 at Fort Hamilton (R 377-379, 486).

Prosecution Exhibits 1, 2, 15, 23, 38 and 60 were respectively identified as records kept in the regular course of business of Distilled Brands, Inc. (R 77), Heublein Sales Company, Inc. (R 103), Fleischmann Distilling Corporation (R 116), Hiram Walker Distributors, Inc. (R 310), National Distillers Products Corporation (R 350), and Standard Food Products Corporation (R 576), and were admitted in evidence (R 87, 105, 117, 311, 351, 579).

Prosecution Exhibit 1, a ledger account of Distilled Brands, Inc., pertaining to "Lt Sidney Scoratow - OFFICERS REC. Bldg 219", shows that from 19 September 1949 through 20 December 1949, inclusive, deliveries of a value of \$8,496.56 were made, against which payments totaling \$1,835.51 were received, leaving a balance of \$6,661.05. The account otherwise shows that at no time did payments equal the value of the deliveries (Pros Ex 1). Some three or four months prior to 10 July 1950, Edward E. Freitag, Vice-President of Distilled Brands, Inc., talked with accused and told him he owed the balance shown on the above ledger, and asked for payment. Accused assured Freitag that everything would be straightened out, and explained that he had not been purchasing liquor for himself but for a Captain Van Eck. Freitag's credit manager had similarly been informed by accused and had passed that information on to Freitag. Freitag had assumed that accused had been buying for the Officers Club (R 89-100).

Prosecution Exhibit 2, a ledger account of Heublein Sales Company, Inc., pertaining to "Scoratow, Lt. Sidney Officers Club Bldg. 219 Fort Hamilton, Brooklyn, N Y" shows that from 17 November 1949 to 23 December

(14)

1949, charges totaling \$4,054.80 were entered and that subsequent to 25 December 1949 two payments totaling \$1,000.00 were made, leaving a balance of \$3,054.80 (Pros Ex 2).

Prosecution Exhibit 15, a ledger account of Fleischmann Distilling Corporation, Inc., pertaining to "Commissioned Officers Mess Officers Recreation Committee Bldg. 219, Fort Hamilton Brooklyn New York," shows, in the period 15 December 1949 to 20 December 1949, debit entries amounting to \$2,937.78, but no credit entries. Six accounting department copies of invoices and six corresponding notices (Pros Exs 3-14, incl) of shipments were identified as the sources of the debit entries entered upon Prosecution Exhibit 15 (R 115-117). The invoices and notices of shipments indicate that the merchandise listed therein was sold to "Officers Recreation Committee Bldg. 219, Fort Hamilton B'klyn, New York" and shipped to the same organization "Att: Lt S. Scoratow" (Pros Exs 3-14, incl). Normally, Fleischmann's expected payment ten days after sale (R 123-126).

Prosecution Exhibit 23, a ledger account of Hiram Walker Distributors, Inc., pertaining to "FORT HAMILTON OFFICERS RECREATION BOQ 219 ATT LT S SCORATOW," shows that on 9 and 28 November 1949, there were entered charges totaling \$4,342.63, against which credits in the amount of \$1079.78 reduced the net charge to \$3262.85. The charges were also evidenced by transit receipts of date even with those of the charges (R 311-312, Pros Exs 24 and 26). The transit receipt of 9 November bears the signature "S. Scoratow," and that of 28 November, the signature "John Henry." Although the 9 November receipt was labeled "COD," at the time of delivery, on the basis of a promise to send a check by a person assumed to be accused, the order was left "open" (R 325).

In a telephone conversation with a person assumed to be accused, Thomas J. Lynch, a representative of Hiram Walker, was told that "there was some trouble at the Post with Captain Van Eck." The person talking to Lynch told him that he had dealings with Van Eck to the sum of \$20,000.00 and that he wanted "the court to tell him whether he ac- cused / or Capt. Van Eck was responsible for paying the indebtedness." Lynch responded that he was not at all interested in Van Eck, that when the liquor was sold to accused there was a definite understanding that no merchandise was to be delivered to Van Eck except on a "strict cash basis." Shipment to Van Eck had been refused by Hiram Walker for various reasons (R 335).

Prosecution Exhibit 38, a ledger account card of National Distillers Products Corporation pertaining to "OFFICERS RECREATION GROUP BOQ BLDG 219 ROOM 38 FORT HAMILTON BROOKLYN NEW YORK," shows that between 1 October 1949 and 19 December 1949, inclusive, debits in the amount of \$6,201.50 were entered. From 14 November 1949 through 30 December 1949

credits totaling \$1600.40 were entered. Under date of 6 January 1950 is a debit entry of \$500.00 with the legend "CK RETND." Under date of 10 January 1950 is a credit entry of \$500.00, and under date of 20 March 1950, a debit entry of \$0.20. The resulting balance is \$4,601.30.

Invoices supporting the debit charges on the ledger card up to and including the debit charge of 17 December 1949 pertain to sales of liquor to "Officers' Recreation Group BOQ Building #219, Room 38, Fort Hamilton Brooklyn, New York" and shipment thereof to the above "Attn. 1st/Lt. Sidney Scoratow" (R 351, Pros Exs 30-37, incl.).

In January (1950), Gilbert H. Busch, Divisional Credit Manager of National Distillers Corporation, had a conversation with accused and "told him what he owed." Accused admitted that he owed the money but added that "all of his affairs were being handled by his attorney in Pittsburgh, Judge Samuel Wise" (R 347,356).

Prosecution Exhibit 60, a ledger account of Standard Food Products Corporation pertaining to "Scoratow Sidney, Lt. Officers Mess Bldg 219 Ft Hamilton Bklyn NY" shows that on the basis of debit entries extending from 4 October 1949 to 23 December 1949, inclusive, and credit entries from 7 November 1949 to 27 December 1949, inclusive, there exists a balance of \$2,711.37 (Note: Independent computation by the Board of Review shows that the debit entries amount to \$6,292.38, and the credit entries to \$3,581.01, with a resulting balance of \$2,711.37).

In telephone conversations with Samuel Langsam, credit manager of Standard Food Products Corporation, accused never denied that he owed "this money" and, in fact, said he would pay "it" (R 590).

One or two days before Christmas weekend (1949), Robert Reade, credit manager of Julius Wile Sons and Company, had a telephone conversation with accused in which the latter stated that he "needed this merchandise." Reade told him to send a check and the merchandise would be forthcoming. Accused explained that he needed the merchandise right away before Christmas, that the "General" wanted "this whiskey." Reade allowed accused to place the order, but told him to send a check right away and if he needed additional time to date the check thirty days later. Reade identified Prosecution Exhibits 17 and 18, copies of invoices and signed receipts for merchandise, as pertaining to the transaction, and explained that two sets of documents were prepared for the transaction because the merchandise listed in the two sets of documents had different terms. Prosecution Exhibit 17 is comprised of a shipping record copy of invoices and delivery receipt copy, and pertains to the sale of \$323.70 worth of liquor to "Officers Recreation Club Fort Hamilton Bldg BOQ 219 BROOKLYN NY." Penciled in on Prosecution Exhibit 17 as an additional description of vendee is "Lt. S SCORATOW." Prosecution Exhibit 18 is comprised of a Shipping Record copy of invoice and

a bill of lading. The invoice pertains to the sale of \$266.60 worth of liquor to "OFFICERS MESS REC CLUB BLDG BOQ 219 FORT HAMILTON BROOKLYN NY LT. SID SCORATOW." The bill of lading pertains to a shipment of liquor to "Officers Mess Recreation Club Bldg BOQ 219 Fort Hamilton Bklyn NY Att Lt Sid Scoratow" and the legend "prepaid" thereon refers to freight charges. According to Reade, payment was not received for the liquor sold pursuant to accused's order, although demand was made upon accused (R 100, 209-217, 221).

Dr. M. L. Raffael, one of the owners of Peel Richards, Limited, identified Prosecution Exhibits 48, 49 and 50 as bills of Peel Richards, Limited, rendered for liquor shipments and they were admitted in evidence without objection (R 475-478). In fact, each of the foregoing exhibits consists of an invoice and transit receipt. The invoices of Prosecution Exhibits 48 and 49 pertain respectively to the sale of \$746.67 and \$977.84 worth of liquor to "OFFICERS RECRE CLUB BLDG 219 FT HAMILTON NY." The invoice of Prosecution Exhibit 50 pertains to the sale of \$1,317.23 worth of liquor to "LT. SCORATO OFFICERS RECRE CLUB BLDG 219 FT HAMILTON NY." The transit receipt of Prosecution Exhibit 48 bears the signature "S Scoratow 1st Lt," and the other two transit receipts bear the signatures "John Henry." Private First Class Henry acknowledged these signatures to be his (R 561-562). Two five hundred dollar payments had been made to the account, and the balance, according to Dr. Raffael, is \$2,041.74 (R 477,480).

Doctor Raffael identified Prosecution Exhibit 55 as a check which was received as part payment upon accused's account (R 476). The check under date of 21 December 1949 is drawn upon the Colonial Trust Company payable to "Peel Richards Ltd" in the amount of \$500.00 and bears accused's purported signature. The check was presented to the drawee bank for payment on 28 December 1949 and was "returned, insufficient funds" (R 545-546).

Prosecution Exhibit 16 was identified as a record of Schenley Industries, Inc., kept in the regular course of business (R 149,152). The record, a statement of account, pertaining to "OFFICERS RECREATION CLUB FORT HAMILTON BKLYN NY ATT LT SIDNEY SCORATOW," begins with a debit entry dated 15 July 1949. The following entries are extracted therefrom:

<u>Date</u>	<u>Detail</u>	<u>Debits</u>	<u>Credits</u>
Dec 5, 1949	"ret ch"		\$577.00
Dec 8, 1949	"ret ch"	\$577.00	
Dec 12, 1949	"redep"		\$577.00
Dec 20, 1949	"ret ch"	\$577.00	
Dec 30, 1949	"N G"		\$594.18
Jan 5, 1950	"ret ch"	\$594.18	

Prosecution Exhibit 56 was identified as a photostatic copy of a check which was given to Sidney Rosenfeld, associate individual defense counsel, by Charles Pickett, a lawyer representing Schenley Industries, Inc. (R 131-133). The photostat reflects a check dated 29 December 1949 drawn upon the Colonial Trust Company, payable to "Schenley Ind. Inc." in the amount of \$594.18, and bearing the purported signature of accused (Pros Ex 56). The original check was presented to the drawee bank for payment on 30 December 1949 and was dishonored because of "insufficient funds" (R 544-545).

Prosecution Exhibit 52, a check dated 5 December 1949 drawn on the National City Bank of New York payable to "Schenley Ind. Inc." in the amount of \$577.00 and bearing the purported signature of accused was identified as being the subject of the entries of 5, 8, 12 and 20 December 1949, appearing upon Prosecution Exhibit 16.

Prosecution Exhibit 82, a statement of account with the National City Bank of New York pertaining to the account of "Lt. Sidney Scroratow P.P. TCJD N.Y.P.E. 58th Street & 1st Avenue Brooklyn 20, N.Y.," was admitted in evidence without objection (R 866). The statement shows that the account was in existence from 28 June 1949 to 12 December 1949, inclusive, and that the total deposits made to the account (excluding those items listed as deposits which were in fact the return of checks) amounted to \$23,284.50. In the period extending from 1 October 1949, the date of inception of the earliest debt alleged, to 12 December 1949, the statement shows that deposits totaling \$17,571.18 were made to the account. The account further shows that at the close of business on 5 December there was a balance of \$107.06. The entries for 6 December 1949 are as follows:

	<u>Checks</u>	<u>Deposits</u>	<u>Balance</u>
\$23.46	577.00	145.70	
50.00	50.00	700.00	
15.24			
		577.00 RT*	
		330.00	
		667.25	
		82.40	202.31

(\*Returned Item)

Thereafter, until the account was closed on 12 December 1949, the balance never exceeded \$263.77.

A military pay order dated 1 July 1949 bearing accused's purported signature shows that at that time accused's monthly pay and allowances amounted to \$337.00 and that his Class E allotments to three recipients

amounted to \$235.00 (R 254, Pros Ex 20).

Ninety checks drawn upon the National City Bank of New York and bearing accused's purported signatures, designated as Prosecution Exhibit 53, and 13 checks drawn upon the Colonial Trust Company and bearing accused's purported signatures, designated as Prosecution Exhibit 57, were admitted in evidence over objection by the accused (R 602).

Prior to the final admission in evidence of the two groups of checks there was a voir dire examination of accused concerning the circumstances under which the prosecution obtained the checks.

Accused testified that on an afternoon in the first part of March "50" he was told by Major Kraisel to report to the Criminal Investigation Division office on the first floor of the Administration Building. As directed, accused reported to the Criminal Investigation Division office where he saw Calvin Roffus. Roffus told accused that he wanted to help him and also that he wanted accused's help "to expedite this case as quickly as possible." As a result of the conference, accused gave to Roffus the checks comprising Prosecution Exhibits 53 and 57. There was no one else present other than Roffus prior or subsequent to the time accused handed Roffus the checks. Roffus did not advise accused of his rights under Article of War 24, but had he done so, and had he told accused that the checks were to be used against him in a court-martial, accused would not have given over the checks. In the spring of 1949, however, accused took a course in Military Justice at the New York Port of Embarkation and received a grade of "93 plus." In March 1950 "he" had an understanding of "his rights under Article of War 24. Major Kraisel told accused, "it would help if accused gave him the papers, it would help, and it wouldn't make a police matter out of it, and wouldn't have a big investigation." Major Kraisel "advised accused to turn them over to him." Accused, "after considering what Roffus said and what Major Kraisel did, \*\*\* turned them over" (R 593-600).

The checks which were for a total amount in excess of \$5500.00, were payable to other than the creditors listed in Specifications 4-11, inclusive, of Additional Charge III, and in so far as appears thereon were not payable to any liquor purveyor. Those checks of dates of 1 October 1949 and later amount to approximately \$4000.00.

Olaf Dahl, Chief Clerk of the Bush Terminal Branch, National City Bank, testified that, in the regular course of business, the bank photographed on microfilm all checks against the account of a depositor. He identified Prosecution Exhibit 69, five photographs, as being identical copies of microfilm retained by the Bush Terminal Branch, National

City Bank, and they were admitted in evidence over objection by the defense (R 516,523,622). The photographs reflect checks drawn upon the National City Bank over the purported signature of accused, of dates, amounts and payees as follows:

<u>Dates</u>	<u>Amounts</u>	<u>Payees</u>
Dec 5 '49	\$157.50	National Air Coach
Sept 7 '49	\$100.00	Alma Thomas
Sept 19 '49	\$100.00	Alma Thomas
Nov 21 '49	\$110.00	Alma Thomas
Nov 28 '49	\$280.50	Russeks

On or about 27 September 1949, accused rented the apartment of Mrs. Lillian Miller at 165 West 20th Street, Manhattan, for \$150.00 a month. Mrs. Miller told accused that she thought the rent was exorbitant for Army personnel, but accused responded that she "didn't have to worry because he makes enough money off the liquor that he didn't even require his salary" (R 382-383,395). On 1 October 1949, accused gave Mrs. Miller two checks for \$150.00 each, one for rent and the other for security deposit (R 385). Miss Alma Thomas, accused's fiancée, who occupied the apartment, claimed that, except for the first month's rent, she, and later on, a girl friend who occupied the apartment with her, reimbursed accused for rent which he paid (R 270,272-273). At the time of trial, Miss Thomas, who has three children, was an office worker earning \$9.00 a day (R 280).

On 4 October 1949, accused purchased a Plymouth convertible from Marathon Motors. The consideration given by accused consisted of a Chevrolet automobile for which he was credited with \$1,600.00, and a check for \$894.00 (R 514). On 15 November 1949, accused turned in his Plymouth convertible to Marathon Motors on a 1949 DeSoto convertible. The sale price of the DeSoto was \$2,904.79 and accused was allowed \$1,578.79 for the Plymouth, leaving a balance of \$1,326.00. Payments of \$300.00 and \$345.55 were made, respectively, on 14 November 1949 and 17 February 1950. In addition, Marathon Motors in 1950 received \$240.00 worth of liquor to be credited against the account, leaving a balance outstanding of \$440.45 (R 507-508).

Prosecution Exhibits 58 and 59 were identified as a ledger account of the Mallon Flower Shop kept in the regular course of business and they were admitted in evidence over objection by the defense. The ledger indicated that from 10 October 1949 to 12 February 1950 accused ordered in excess of \$91.00 worth of flowers from the Mallon Flower Shop, of which \$23.98 remains unpaid (R 551-557). Prosecution Exhibits 53 #48 and 57 #3 reflect that on 31 October 1949 and 16 December 1949 payments totaling \$67.91 were made to the flower shop by checks.

Prosecution Exhibits 64-67, inclusive, were identified as records of the National Air Coach Company (defunct at the time of trial) which had been kept in the regular course of business, and were admitted in evidence over objection by the defense (R 608). The four exhibits reflect the issuance of tickets of date of "12/5" to "Lt S. Scoratow" and "Mrs. S. Scoratow" for air travel to Miami from Newark and to Newark from Miami, and payment therefor in the amount of \$161.00. In the early part of December 1949, approximately the second week, at Miami Beach, Florida, Sheldon Rodbell of the Marathon Motors met accused with a Miss Thomas, whom accused introduced as his fiancée (R 505-506,515).

By deposition (R 470, Pros Ex 46), Charles Gersch testified that he is the auditor of the Surfside Hotel, Miami Beach, Florida, and custodian of the records of the hotel. One of the records of which he is custodian is the guest register which is kept in the regular course of business. He produced the original guest registration card dated 7 December 1949 pertaining to Sidney Scoratow, and annexed an identical copy of the card to the deposition. The identical copy reflects the registration at the hotel on 7 December 1949 of:

"Lt Sidney Scoratow Mr. and Mrs.  
165 W 20th St.  
N.Y. N.Y."

and further indicates a room assignment of the registrants at a rate of \$8.00 a day, and the registrants' departure on 13 December 1949.

Prosecution Exhibit 68 was identified as a copy of bill of sale of the Cortlandt Company which was issued in the regular course of business and was admitted in evidence without objection (R 612-613). The bill reflects the sale on 15 December 1949 of a television set to "Mr. Scoratow" for \$261.84 and payment therefor (Pros Ex 68). A cashier's check of the National City Bank dated 13 December 1949 payable to accused in the amount of \$263.77 bears accused's indorsement and that of the Cortlandt Company (R 538, Pros Ex 54).

In the first part of January 1950, Captain Herbert L. Oerter was detailed by the Post Commander, Fort Hamilton, to inventory a store of liquor which was cached in Battery Johnson in the rear of the Officers Mess at Fort Hamilton, and to remove the liquor from Fort Hamilton. The liquor was being removed because of "a newspaper column published by Drew Pearson in January of 1950 which stated that the Fort Hamilton Officers Mess was selling liquor in violation of an act of Congress of 1901." Captain Oerter knew that accused was keeping liquor illegally on the post and also knew if one needed liquor it could be obtained from accused (R 488,495).

Captain Oerter with accused and a Lieutenant Thurmund proceeded to the casemate in the rear of the bar of the Officers Mess. The door was barred with two locks. Accused unlocked one lock with a key which he had in his possession and Captain Oerter opened the other with a key which was given him by the Post Executive Officer. After completion of the inventory, Captain Oerter refused to sign a certificate which had been prepared for his signature because the certificate contained a statement which he did not know to be true, that the liquor was the property of accused. Accused, on the other hand, claimed the liquor to be his. Captain Oerter thereupon drew up another certificate in which it was stated that accused claimed the liquor to be his. Captain Oerter then signed the latter certificate at accused's request. Accused and Lieutenant Thurmund also signed the certificate. Accused's signature was not requested by Captain Oerter. Captain Oerter identified Prosecution Exhibit 51 as the certificate which was signed by accused, Thurmund and himself and it was admitted in evidence over objection by the defense. The exhibit certifies that the signers thereof inventoried an enumerated quantity of liquor claimed by accused as his property and further claimed by accused to have cost him a total of \$2,394.37 (R 489-503).

Joseph P. McNally, whose qualifications as a handwriting expert were conceded by the defense, testified that he had examined the signature "Sidney Scoratow" appearing upon Exhibits 19-22, inclusive, 24, 28, 29, 39, 41, 51, 52, 54, 55, and 56, and found that they were all written by the same hand (R 625-627).

The signature "Sidney Scoratow" executing the receipt upon Prosecution Exhibit 22 was written by accused in the presence of Mrs. Audrey Aaronson (R 258-259).

b. For the Defense

Accused, after being apprised of his rights therein, elected to testify in his own behalf with reference to Specification 1 of Charge I, and Specifications 1, 2, 4 through 11, inclusive, of Additional Charge III (R 800-802).

He testified that he was presently and at all times mentioned in the Charges and Specifications had been in the military service of the United States (R 802).

Accused had first met Captain Van Eck when he relieved the latter as "assistant OIC, P&C Officer" at the New York Port of Embarkation on 3 September 1948 (R 802-803). In addition, Van Eck was official liquor officer for the New York Port of Embarkation (R 814). Accused became very friendly with Van Eck and in May or June 1949 accused helped him

paint his house (R 881). Accused used to frequent Van Eck's office and was there on occasions when Van Eck ordered liquor from a Mr. Gilbert Fillet, a salesman for Jardine Distributors. On or about 14 July 1949, accused was in Van Eck's office when Fillet was trying to collect "better than twenty-five hundred dollars" which Van Eck owed Jardine. At the time, accused learned that Van Eck was greatly indebted to "Schenley's, Jardine, Hiram Walker, National for well into twenty thousand dollars" and all the liquor companies had cut off his credit. Accused knew that Van Eck owed Schenley \$8,000.00 which he had arranged to pay off at \$300.00 a week. Van Eck wanted to negotiate a loan from the bank and prevailed upon accused to act as "co-signer." Van Eck and accused went to the National City Bank of New York which refused to accept accused as "co-signer" because his real property was located out of the state. On 15 July accused went to Van Eck's office pursuant to a call from Van Eck. There, accused met a Mr. George Simons, Fillet and Van Eck. Simons said he would loan Van Eck \$2,000.00 if accused would act as "co-signer." Accused did and a check was endorsed by Van Eck and turned over to Fillet. Van Eck and Fillet "got together on an idea \*\*\* to get the liquor in to Fort Hamilton under [accused's] name to be used at the New York Port by Capt. Van Eck." Van Eck claimed that since he was "duly appointed" at the Port he could appoint an agent "to handle Fort Hamilton." It was arranged that liquor would come in under accused's name, i.e., "attention Lt. Sidney Scratow, Officers Recreation Group at Fort Hamilton." Van Eck would pick up the liquor at Fort Hamilton and sell it to the officers at the New York Port of Embarkation, charging a 20 percent markup. Van Eck was to utilize the proceeds to pay off the old indebtedness and the new indebtedness, too (R 803-809, 885). With reference to the phrases "Officers Recreation Group" and "Officers Recreation Committee," accused testified as follows:

"Q. Can you give any evidence as to the official existence of an organization referred to in testimony before this court as 'Officers Recreation Group' or 'Officers Recreation Committee'?

"A. No, sir, the only evidence I have is that Captain Van Eck was the one who used that name and when the initial order was placed by Mr. Fillet and Captain Van Eck to Schenleys Incorporated, that name was given to them to deliver under that name and that's the only name that I ever knew of as being in existence in the past" (R 886).

Fillet immediately called up Schenley and placed an order for 30 cases of liquor for accused to be shipped to "Officers Recreation Group, Fort Hamilton, Brooklyn, New York, BOQ 219," attention: accused. Thirty cases were delivered to accused on Friday of that week. He went to

Pittsburgh over that weekend and when he returned found out that Van Eck had been to his room and had taken twenty cases of the liquor. A week later 30 more cases came in, of which two-thirds went to New York Port, having been picked up either by Van Eck or a civilian by the name of "John" who worked for Van Eck, and the other third to the bunker at Fort Hamilton. "This situation" existed until approximately the end of September. Van Eck was paying up his indebtedness from the liquor he obtained from accused, but was not paying off any of accused's indebtedness, nor was he paying any money to accused. Accused made demands for payment upon Van Eck to no avail and by the end of September Van Eck owed accused over \$10,000.00 and had made no payment upon any part of it (R 810-815). On cross-examination, however, accused admitted that he had received from Van Eck \$750.00 in cash and \$378.00 worth of liquor (R 845). In October, accused told Van Eck that he would not give him any more whiskey until he paid off his indebtedness. Accused had been selling about one third of the liquor being shipped to him and had been turning over the proceeds to the liquor companies. Nevertheless, the bills were getting "way ahead of" him. Van Eck introduced accused to a Mr. Schneider and stated that Schneider was his partner who would "finance the deal and \*\*\* would pay /accused/ for the new liquor /accused/ would give him plus, and then Van Eck, from the profit, went back to his old story he was going to pay /accused/ off the old indebtedness also." Schneider "OK'd" the arrangement and accused started giving Schneider whiskey for Van Eck. In turn, Schneider was supposed to pay accused in cash for the whiskey he took. Whatever money accused received from Schneider was used to pay the liquor companies, but by 29 December 1949 Schneider owed accused over \$20,000.00, and, at the time of trial, Schneider and Van Eck owed accused approximately \$30,000 (R 814-816, 820, 826, 828). Accused identified Defense Exhibit P as a photostatic copy of a check which he received from Schneider on 29 December (R 827). The exhibit reflects a paid check drawn by Brett Schneider upon the Colonial Trust Company payable to accused in the amount of \$250.00. On the reverse side is the handwritten legend:

"On a/c  
Bal-due-~~\$3,250~~<sup>00</sup>"

Beneath is the admitted indorsement of accused, who also admitted running a line through the statement "balance due \$3,250.00," because "that wasn't the correct amount" (R 826).

On cross-examination, accused identified Prosecution Exhibit 83 as a check he received from Schneider (R 872). The check dated 16 December 1949 was drawn by Schneider upon the Colonial Trust Company payable to accused in the amount of \$1,006.12 and was stamped paid. On the reverse side above accused's indorsement, appears the following legend:

"Bal 12/16/9	4,082.99	
check for	<u>623.13</u>	
	4706.12	
12/16 1006.12	<u>1006.12</u>	
Bal on 12/16	\$3700.00"	(Pros Ex 83)

Accused explained that the balance was not lined out on this check as he needed the money. He could not recall if the correct balance was shown on the check as Schneider would not show him the books which Schneider kept (R 872).

Also on cross-examination, accused admitted that on 6 January 1950 he, accompanied by Lieutenant Thurmund, went to Mr. Schneider's store and demanded that Schneider pay him what was due. Accused could not recall what was owed him and did not recall that he mentioned any specific amount to Schneider. Accused admitted that a half hour previous to this testimony he talked to Lieutenant Thurmund and "asked him if he remembered that conversation that I had with Mr. Schneider, about Mr. Schneider wanting to pull a gun on me when I requested the monies he owed me." Accused also admitted that Thurmund told him that the specific amount mentioned was about \$3,400.00. Accused immediately demurred to the court that the amount owed him by Schneider and Van Eck was a great deal more (R 871-872).

With reference to the various creditors alleged in Specifications 4-11, inclusive, Additional Charge III, accused ascribed upon direct examination the following reasons for nonpayment.

Heublein - Three-fourths of the shipments of liquor from Heublein went to the New York Port of Embarkation. Accused gave to Heublein the proceeds of what he sold, and whatever he received from Schneider. The indebtedness to Heublein of \$3,054.80 represented what he in turn was owed by Schneider and Van Eck on Heublein liquor taken by Van Eck (R 820).

Wile - The indebtedness of \$587.00 to Wile represented a special order of Dawson's Scotch for Van Eck made around Christmas time. The entire shipment went to Van Eck and accused received no payment on this order (R 820-821).

Hiram-Walker - The indebtedness of \$3,262.85 was not paid "for the same reason that the other ones weren't paid, that [accused] never got any money from Capt. Van Eck or Mr. Schneider after a certain date" (R 821).

He ascribed the same reason to the nonpayment of the indebtedness

of \$2,011.37 due the Standard Food Products Corporation, the indebtedness of \$2,937.37 due to Fleischmann Distilling Corporation, the indebtedness of \$6,661.05 due to Distilled Brands, the indebtedness of \$4,601.10 due to National Distillers Products Corporation, and the indebtedness of \$2,039.74 due to Peel Richards, Ltd. (R 821-823). He did not have any intent to deceive any of the above listed creditors (R 823-824). On cross-examination, he admitted that he promised to pay the various creditors when he could collect from the persons obligated to him (R 861).

Accused identified Prosecution Exhibits 70-81, inclusive, as his personal checks with which he had made payment for liquor received at Fort Hamilton. These checks, many of which antedate the earliest debt alleged in Specifications 4-11, inclusive, Additional Charge III, total \$23,223.16. Those of dates of 1 October 1949 and later total \$20,743.34. He admitted there was nothing on them to show that he was acting as agent for Van Eck. His capacity as an agent for Van Eck was not indicated on the checks "Because \*\*\* at the time the liquor was sent to Hamilton, attention accused, Van Eck was in bad standing with credit with the liquor companies and \*\*\* did not want them to know that accused was getting the liquor for him" (R 860-861, 887,888).

On 21 December 1949 he sent a check for \$500.00 (Pros Ex 55, described at page 10 of this opinion) to Peel Richards in payment of a bill for merchandise owed by him and Van Eck. He would not have mailed this check if he had not had enough money in his account for its payment. When it was returned for insufficient funds he offered to make the check good (R 816-817). On cross-examination, he testified that the reason he did not leave the \$500.00 as payment on account of his bill was that he referred the matter to his attorney (R 863-864).

On 28 December 1949, he made a deposit of approximately \$1600.00 in his account with Colonial Trust Company. The following day he issued a check (Pros Ex 56, described at page 11 of this opinion) in payment of an indebtedness to Schenley of \$594.00 and at that time had sufficient funds in the bank to cover the same (R 817-818).

Defense Exhibit O, accused's ledger account at the Colonial Trust Company (R 776), shows that in the period 16 December 1949 to 4 January 1950, inclusive, accused made deposits totaling \$9,399.39. The ledger also shows that accused's balance in the Colonial Trust Company was \$2,890.71 on 20 December 1949, \$2,283.39 on 22 December, and up to and including 27 December was in excess of the latter balance. On 28 December the debit entries included checks in the amount of \$512.81 and \$500.00 and the credit entries included two sums in the same amounts indicating the return of the two checks debited against his account. After the return of these two checks there was a balance of \$46.01. Immediately thereafter

a credit entry in the amount of \$1,650.25 increased the balance to \$1,696.26. On 29 December his account was reduced to \$746.80 and increased to \$959.16 on 30 December 1949. The next entries on the record appear under date of 3 January 1950. Debit entries including two checks in the amount of \$500.00 each and one in the amount of \$594.18 resulted in the account being overdrawn \$1,437.38. The return of the three mentioned checks resulted in a credit balance of \$150.80. This balance was increased the same day to \$1,083.33 by a subsequent deposit. On 4 January the balance increased to \$1,353.33, fell to \$753.33 on 6 January, to \$19.58 the same day, and, until closed on 12 January 1950, was thereafter overdrawn.

Accused recalled that the check designated Prosecution Exhibit 52 (described at page 11 of this opinion) was given in payment of a bill to Schenley. The check was returned marked insufficient funds because monies which were supposed to be forthcoming from Schneider did not materialize. Later, when money was obtained from Schneider the check was made good (R 818-819).

A civilian had torn up and removed papers from accused's desk, one paper of which accused claimed "was an affidavit signed by Mr. Brett Schneider \*\*\* saying he would assume the obligation of Captain Van Eck on and after a certain date in September 1949." On 3 January 1950, accused informed Colonel Currier of the incident "plus what had been transpiring up to then between himself and Captain Van Eck and Mr. Schneider." Colonel Currier and accused then went to Colonel Hayford, the Chief of Staff at the New York Port of Embarkation, and accused informed him of the situation as it existed. Colonel Hayford turned the case over to the Inspector General. Accused did not sell any liquor from that time on (R 878,882-883).

The cross-examination of accused pertained in large part to his income and expenditures coincident to the period in which he was admittedly dealing in liquor. With reference thereto, accused testified that his pay, "all told," amounted to \$430.00 a month. In addition, he owned two houses in Pittsburgh, from one of which he obtained an income of \$135.00 a month. His father lived in the other house in consideration of his paying the mortgage payments amounting to \$107.00 per month on both houses. In addition, accused's parents were supporting his minor children. Accused was sending to his parents an allotment of \$150.00 a month which was being returned to accused. He identified Prosecution Exhibits 53 #14, 15 and 16 as checks totaling \$45 which he sent his mother during this period. He admitted that he made out Prosecution Exhibit 20, Certificate for Increased Allowances dated 1 January 1950. Over his signature thereon accused stated that in the preceding six months he had contributed \$200.00 for dependent support. He testified that he thereby meant that he had contributed at least \$200.00. Accused was unable to state the amounts of the allotments

from his pay being sent to the Braddock National Bank or to his former wife. Accused estimated that his average monthly income, "military and external," in the period 1 July 1949 to 1 July 1950, was about \$550.00 to \$575.00. He was unable to recall how much of his pay he banked (R 837-838, 845-846, 866A-867, 871, 881).

In response to prosecution's query as to the source of the funds required to pay the 108 checks comprising Prosecution Exhibits 53, 57 and 69, accused stated the source to be his pay plus his income from his houses. The checks in question are of dates including and between 28 June 1949 and 3 January 1950 and total in excess of \$6300.00. A loan from the "City National Bank" was identified as the source of one check in the amount of \$894.00 payable to Marathon Motors. This check and a 1948 "Chevy" was the consideration on a Plymouth. On 3 October 1949, accused borrowed approximately \$1600.00 or \$1700.00 from the National City Bank. This was used to pay the former loan and the remainder together with the Plymouth was applied to purchase a DeSoto automobile (R 838, 850-851).

He identified Prosecution Exhibit 53 #46 as a check he gave to Miss Thomas for which she paid him back \$92.00 (R 839). Three other checks, Prosecution Exhibits 69 #2, 3, 4 amounting to \$310.00 were given to Miss Thomas in repayment of loans. Money which accused received from Miss Thomas was usually put in the bank to help pay off some of the indebtedness (R 839, 873). Three other checks (not in evidence) payable to Miss Thomas, for a total of approximately \$75.00 were also for repayment of loans (R 854).

With reference to Prosecution Exhibit 69 #5, a check drawn on the National City Bank payable to "Russeks" in the amount of \$280.50, accused testified that it was used by Miss Thomas, since "she didn't have that amount of cash on her." In effect, accused temporarily loaned her the money "until she got home to get the money" (R 840, 854).

In December 1949, accused went with Miss Thomas to Ben Dranow Furs, Inc. and made a deposit of approximately \$66.00 on her purchase of a coat. The total cost of the coat was approximately \$800.00 and accused advanced that amount as a loan to Miss Thomas which was subsequently paid up. Accused utilized Miss Thomas' payments of the advances to reduce some of his debts, but which debts accused could not recall other than they were not the debts in question (R 842-843).

Accused received "money from the occupants of 165 West 20th Street to pay to the landlord," from approximately October 1949 to April 1950. Accused made payments by checks and by money order (R 854-855).

He admitted "laying out" by check \$113.00 to Viking Airlines when Miss Thomas was "in bed" so that her sister could come from California

and take care of her. Miss Thomas repaid accused a week or ten days later (R 856-857).

Accused purchased clothes at Newman Brothers and on 3, 27, and 29 December gave them checks in the respective amounts of \$145.20, \$54.00 and \$95.00 (R 855-856, 870-871).

Accused maintained that his living expenses were \$5.00 to \$6.00 a week, \$10.00 at the most. He owned a car for the last four months of 1949 but could not estimate the expenses it entailed. The repair bill for a car which he wrecked was more than \$100.00 but he could not state the exact figure (R 867-868).

He admitted doing some traveling during the second half of 1949 by car and by air, but could not recall the number of trips nor the cost thereof (R 868-870).

Accused admitted that the liquor found in the casemate on 6 January 1950 was part of the shipments of liquor consigned to him at Fort Hamilton. He claimed that he returned ten cases worth \$558.00 to one company, and about \$1500.00 worth to another. He was unable to state the name of the company to which he returned the \$1500 worth of liquor but did state it was not one of the companies concerned in the trial. The rest of the liquor found in the casemate was consumed by accused and he denied giving any of the liquor to Marathon Motors in payment of his account with them (R 832-835).

Captain Nicholas Van Eck, a member of New York Port of Embarkation, testified that he first met accused about a year and a half earlier when accused was assigned to Procurement Division. At the time Van Eck was assigned to that division and in addition was handling liquor on his own time. He identified Defense Exhibit L as a copy of an original of the letter of authority dated 20 October 1947 given him to act as liquor officer. Defense Exhibit L stated in effect that the Commanding General, New York Port of Embarkation, had no objection to Van Eck receiving orders for liquor from officers of the command subject to provisions not pertinent to this case. Pursuant to the "letter of authority," Van Eck "contacted the divisions" to appoint an officer to transmit orders to Van Eck who, in turn, consolidated the orders and placed them with salesmen who would call, or with the distilleries direct. Van Eck recalled that one of the salesmen with whom he did business was a Mr. Fillet (R 716-719).

Van Eck established credit with some distillers and merchandise was billed to the "Officers Recreation Committee, New York Port of Embarkation," and was shipped, attention of Van Eck (R 719). The name "Officers Recreation Committee" was inherited from another officer

who "had handled it previously" (R 740-741). The source of the name was unknown to Van Eck, and to his knowledge there was no such organization (R 759).

On a date which Van Eck could not recall, accused was appointed as his agent at Fort Hamilton. The officer who had that position, a Lieutenant Stalens, was taking leave and Colonel Ruddell asked Van Eck to designate another officer. Since accused "wanted to take that over" Van Eck received Colonel Ruddell's permission to appoint him (R 720, 727, 752, 755). Van Eck denied that accused was appointed pursuant to any representations made by Fillet (R 734). He likewise denied telling accused, "You buy the liquor and I'll dispose of it" (R 744). He could not, however, deny that he had stated to the Inspector General that "he would order and the goods were shipped to accused and accused would turn it over to him" (R 754). He successively testified that he was receiving shipments of liquor from distillers after accused's appointment (R 727), that he could not remember if he was getting shipments after accused's appointment (R 732), and that he received shipments of liquor until he was ordered to stop selling at the beginning of 1950. He could not state the amount of the shipments, or whether they were large or small (R 735). With reference to his credit standing with the distilleries at the time of accused's appointment, Van Eck testified, "There was no difficulty, all they wanted was the cash payment." Some companies were shipping on credit and some were not (R 752-753). After accused's appointment, Van Eck continued getting shipments on a credit and "COD" basis. He could not recall what companies were shipping on credit (R 753), and could not remember if he was getting any shipments of liquor on credit after August 1949 (R 733).

A ledger account of Schenley Distillers pertaining to Captain N. Van Eck, Officers Recreation Committee, New York Port of Embarkation, had previously been admitted in evidence (R 443, Pros Ex 44). It shows that on 25 April 1949 Schenley was due \$8,527.04. By 24 August 1949, the debt was liquidated and Van Eck had a credit of \$500.00. There were no debit entries during that period. Debit entries of 24 August 1949 resulted in a debit balance of \$2,069.52. This was satisfied by 10 October 1949 when there was a small credit balance. Thereafter, debit balances were of short duration, and the account was terminated on 3 January 1950 by payments amounting to \$3290.50.

Van Eck had no recollection of his transactions with Schenley and upon being proffered Prosecution Exhibit 44 by the defense counsel for the purpose of refreshing his recollection made the following statement to the court:

"If it pleases the court, this is my private affair, sir, and the payment of my personal debts I don't think has anything to do with the accused. These are my personal debts" (R 731).

He refused to see if Prosecution Exhibit 44 refreshed his recollection and was indulged in his refusal by the law member (R 730-731, 736). He did not recollect paying approximately \$2000.00 to Schenley on 3 January 1950 (R 740).

Van Eck refused to answer the following question: "Where did you get the money to pay your debts to the distillers subsequent to the time that you were receiving merchandise COD?" The law member acquiesced in the refusal (R 732-733).

Van Eck first became aware that accused was having merchandise shipped to him when accused told him that he was "stuck" with an "off brand." Van Eck had told accused when he was appointed that he was to order only through Van Eck and was not to sell to anybody but authorized officers. Nevertheless, to help accused out, Van Eck decided to try and get rid of the brand, and asked accused to stop his outside transactions. He denied taking any liquor from accused so that he could sell it and pay his debts to the distillers. He became distrustful of accused and refused to take liquor from him direct because of things he had heard about him and because of the large amounts of liquor accused had in his room despite the fact that Van Eck had constantly told him not to buy liquor on his own account (R 724-726, 741, 742-743). Van Eck was unable to fix the date on which he became so distrustful that he would deal only with accused through an intermediary. He admitted, however, that in September accused had by check paid Van Eck's bill to the Utility Brass and Copper Company, Van Eck having previously given accused the money (R 749-751). Accused also indorsed Van Eck's note for \$2,000.00 to a Mr. George Simon, but Van Eck was unable to state whether this occurred before or after he became distrustful of accused. Van Eck refused to state what he did with the \$2,000.00 he obtained on the note (R 747).

At the time Van Eck's distrust finally motivated his desire for an intermediary in his dealings with accused, he owed accused money. He could not recall the amount but asserted that it was less than \$2,000. The debt was due to liquor transactions had with accused (R 746).

Accused introduced Van Eck to a Mr. Schneider who thenceforth acted as intermediary. Schneider picked up liquor from accused and Van Eck, in turn, paid Schneider who paid accused. On occasions, how many he could not recall, Van Eck picked up liquor at Fort Hamilton with accused's knowledge. He paid the money therefor to Schneider, although quite frequently accused came to Van Eck's office for payment (R 738-741). Van Eck was unable to estimate the total amount of his transactions with accused (R 744). He could not recall receiving payment for liquor which accused sold to officers (R 744-745).

Gilbert Fillet testified that he met accused in Captain Van Eck's office the last part of the winter season of 1949. At the time, Fillet was employed as a liquor salesman by Melrose Whiskey Company, a subsidiary of Schenley. Fillet had been selling liquor to Van Eck who was liquor officer at New York Port of Embarkation. Subsequent to this meeting, Melrose stopped extending credit to Van Eck because of nonpayment of his prior bills. Fillet went to see Van Eck to collect the money Van Eck owed Melrose. Van Eck asked Fillet in accused's presence to recognize accused as liquor officer at Fort Hamilton. Liquor would be shipped to accused at Fort Hamilton, and Van Eck would get a portion of it for the New York Port of Embarkation. Accused and Fillet assented to the arrangement. Pursuant to Van Eck's direction, Fillet shipped liquor to accused at Fort Hamilton and billed accused for the liquor. During the time that accused was receiving merchandise, Fillet did not ship any merchandise to Van Eck on credit (R 667-674, 683).

It was stipulated that Lieutenant Colonel Richard J. Dial would testify that it was general knowledge on "the Post" that accused was acting as agent for Captain Van Eck in procuring alcoholic beverages for officers. When Colonel Dial paid accused for liquor it was with checks payable to Van Eck (R 786).

Miss Edna Cristi testified that she had been employed in the salvage section under Captain Van Eck, whom by repute she also knew as the liquor officer. On occasion, Van Eck had her call accused to see if he had liquor which Van Eck needed to fill orders. If accused had the liquor, a person named "John" who was then employed in the salvage section would be told to pick it up. On a few occasions when accused called at the office, Miss Cristi gave him \$50.00 pursuant to Van Eck's instructions. Miss Cristi also recalled occasions on which accused called Van Eck and asked for liquor. Toward the end of December 1949, Miss Cristi became aware that liquor dealers were pressing Van Eck for payment of bills (R 788-795).

Mrs. Ruth Kahn, credit manager for Peel Richards, Ltd. testified that around February 1950 accused offered to make good the check designated as Prosecution Exhibit 55, but wanted the check. His offer was refused because she "wanted the entire amount from him" (R 799).

Alexander Yelton, Assistant Vice President of the Colonial Trust Company, upon examining the check designated as Prosecution Exhibit 55, testified that the check went through the New York Clearing House on 27 and 30 December 1949, and that on 28 December 1949 there were sufficient funds on deposit in accused's account to cover the check (R 775-780).

Mrs. Evelyn Rosenblum testified that prior to her marriage she roomed with Alma Thomas at 165 West 20th Street, New York, from 1 December 1949 to the end of March 1950. She and Miss Thomas shared the rent for the apartment. Because accused had a checking account and they wanted a receipt, Mrs. Rosenblum and Miss Thomas each gave accused \$75.00 monthly for him to pay the rent by check (R 686, 690-693). Mrs. Rosenblum's husband was a friend of long standing of accused (R 704,707).

The testimony of Lieutenant Colonels Alex Kaminskie and William R. Patterson and the stipulated testimony of Colonel Charles H. Vohlor and Lieutenant Colonel William Miller pertained to accused's good reputation (R 711-712,714,782,797-798).

It was stipulated that "during all of the time of the accused's commissioned service in the Army of the United States for the period in which efficiency ratings were entered upon the Form 66-1 [the Form 66-1 pertaining to accused] would reflect rating only in the degree of superior" (R 713).

It was also stipulated that the accused was inducted into the Army of the United States on or about 15 October 1941 and had enlisted service until 13 May 1943 when he was commissioned as a second lieutenant in the Quartermaster Corps; that he was subsequently promoted to the grade of first lieutenant and was separated from the service in that grade in February 1946; that he returned to active duty in August 1948 and has been on extended active duty since that time, and that in the period September 1942 through November 1945 accused had tours of foreign service in Panama and in the European Theater (R 768-769).

c. Rebuttal for the Prosecution

It was stipulated that Anthony J. DeVito, "Provost Marshal-Investigator," would testify substantially as he did in a sworn statement dated 30 January 1950 as follows:

"On three separate occasions in the past several months \*\*\* [accused] volunteered the information to [DeVito] that Captain Van Eck owed him approximately Two Thousand Dollars, Four Thousand Dollars, and Fifteen Thousand Dollars."

The last amount was stated in the latter part of December 1949 (R 905).

Second Lieutenant James F. Thurmund testified that on 6 January 1950 he accompanied accused from the Army Base to Fort Hamilton. En route, at accused's request, they stopped at a cleaning establishment

for the purpose of accused collecting some money from a man. Prior to entering, accused said he was going to collect "Thirty-four Fifty." When they entered the store, the woman behind the counter told accused to get out. Accused responded that he wanted to know where Mr. Schneider was. Schneider appeared from the back of the establishment and told accused "to get out, and he didn't want to see him." Accused answered that he wanted "Thirty-four hundred" and also mentioned the amount "Thirty-four Fifty." Schneider told accused he did not owe him any money and threatened accused, stating that he had a gun in the drawer and was not afraid to use it. Schneider also threatened to call the military police and accused told him to "go ahead" (R 893-895).

#### 4. Discussion

Accused has been found guilty of eight offenses of dishonorably failing to pay debts of an aggregate total in excess of \$25,000.00 in violation of Article of War 96 (Add'l Chg III, Specs 4-11, incl). Records of the creditors alleged in the several specifications in issue show that an "Officers Recreation Group" or "Officers Recreation Committee" at Fort Hamilton, New York, for which accused was, in some capacity, a representative, became indebted to the several creditors in an amount in excess of \$25,000.00.

Accused testified in his own behalf, and substantially admitted that the several debts alleged were incurred by him and were due and payable. He seeks to avoid criminal liability upon whatever rationale can be attached to his testimonial claims which follow.

A Captain Nicholas Van Eck with whom accused was very friendly had been liquor officer at the New York Port of Embarkation but had become greatly indebted to the various distilleries, had his credit cut off and could obtain no liquor to sell. Van Eck and accused agreed to have accused order liquor and have it shipped to the Officers Recreation Committee or Group, Fort Hamilton, attention, accused. Accused was to turn over the liquor to Van Eck who would sell it at a 20 percent mark-up, pay his indebtedness to the distilleries, and keep current on the bills incurred by accused. This plan was put into operation. Accused substantially admitted the nonexistence of any Officers Recreation Committee or Group, and that he concealed from the companies from whom he was ordering the fact that he was ordering for Van Eck. He further claimed that all monies which he secured from sales made by him personally of the liquor furnished him by the creditors alleged, and that all monies which he received from Van Eck and an intermediary of Van Eck, Schneider, for liquor from the creditors alleged had been paid to the creditors alleged. We here accept these testimonial claims as fact.

The rationale of the defense based upon the foregoing summary of

the accused's testimonial claims appears to be that the accused is not liable for the debts, but, if he is, his failure to repay was not dishonorable.

It would appear that the defense was seeking to avoid liability for the debts on two grounds: That accused had represented himself as an agent for a fictitious principal, the Officers Recreation Committee or Group, Fort Hamilton, New York; and that, in fact, he was an agent for an undisclosed principal, Van Eck. It is, of course, axiomatic that an agent for a fictitious principal and an agent for an undisclosed principal are liable as principals.

The alternative ground of defense, that accused's failure to pay the debts is not dishonorable, is apparently based on his claims that all liquor proceeds which came into his hands were paid over to the distilleries, the alleged creditors; and that what is owed the distilleries is represented by liquor sold to him by the creditors and given to Van Eck and for which payment has not been made by Van Eck. This appears to us to be a rather novel proposition. It is in effect contended that if a wholesaler sells to a retailer and the latter sells to a consumer on credit, the retailer does not have to pay the wholesaler until he has received payment from the consumer. This proposition is untenable. The retailer has to pay his debt to the wholesaler with whatever funds he lawfully owns. Thus, in the instant case if it has been shown that accused was possessed of funds of his own but failed to apply such funds to his liquor debts then he has dishonorably failed to pay such debts. It is not necessary to show that he had funds to pay the entire debts. If it be shown that he had funds with which to cancel a substantial portion of the debts but has dissipated such funds by extravagant living then he has dishonorably failed to pay the debts (CM 230678, Leeper, 18 ER 1, 15-16).

The ledger pertaining to accused's account in the National City Bank shows that during the period of the account, 28 June 1949 to 12 December 1949, inclusive, deposits were made totaling \$23,284.50 and that in the period 1 October 1949 (the date of inception of the earliest debt alleged) to 12 December 1949 his deposits amounted to \$17,571.18. He likewise maintained an account at the Colonial Trust Company from 16 December 1949 to 12 January 1950, inclusive, to which account he made deposits totaling \$9,399.39. Thus his total bank deposits during the period in question extending from 1 October 1949 amount to \$26,970.57. Checks in evidence of date of 1 October 1949 and later, payable to ostensible purveyors of liquors, including those alleged as creditors, total \$20,743.34. We have no way of knowing whether the checks whose total is given above comprise all checks made payable to liquor dealers by accused, but if there were others, the additional number if any was a matter within the knowledge of accused. Since he

did not see fit to mention others we may conclude that the checks whose total is given were the only ones drawn by accused payable to liquor dealers on and after 1 October 1949 (CM 232227, Bernard, 21 ER 341). It may be seen, therefore, that during the period in question accused dissipated \$6,227.53.

Accused claimed that during the period 1 July 1949 to 1 July 1950 his monthly net income from his military pay and allowances and from his real estate investments amounted to in excess of \$550.00 a month, that his living expenses did not exceed \$10.00 a week, that he banked some of his income, but that he could not estimate the amount of income he banked. It is thus apparent that in addition to his bank deposits accused had other funds during the period in question.

There were introduced in evidence 108 checks drawn by accused against his accounts in the National City Bank and Colonial Trust Company, payable to other than liquor dealers. Of the 108 checks in question those dated on and after 1 October 1949 amount to over \$4,000.00.

Other evidence tends to show that accused in the period 1 October 1949 through December 1949 was living somewhat beyond the means of a first lieutenant of the Army, whose pay was supplemented by outside income of \$130.00 per month. It was proved that accused purchased an automobile in each of two successive months (Oct and Nov 1949), which involved, in addition to the value of the trade-in of his old cars, a total cash consideration of \$2220; that he purchased a television set for \$261.84 which he paid for on 15 December 1949; that he purchased flowers in the sum of \$91 from October 1949 to February 1950; that he made numerous trips to Pittsburgh, Pennsylvania, by air and car; and that he made an expensive vacation trip to Florida. He installed his fiancée, Miss Alma Thomas, in an apartment, the rent for which was \$150.00 a month. Miss Thomas claimed that accused was reimbursed by her for all but the first month's rent, and that for a period of time the rent was shared by a Mrs. Rosenblum. This was corroborated by Mrs. Rosenblum, the wife of a friend of years standing of accused. We, and evidently the court, do not believe that accused was so reimbursed. Miss Thomas, in addition to being accused's fiancée, was also debtor and creditor to accused at the latter's convenience. Accused explained that his checks payable to Miss Thomas were in payment of loans by her. Checks to Ben-Dranow Furs, Inc., of approximately \$800.00, not in evidence, were explained as advances for which she subsequently reimbursed accused. It should not be overlooked that Miss Thomas asserted to the court that she was a nine-dollar a day office worker with three children. Accused also claimed to have been reimbursed by Miss Thomas for air travel from California performed by Miss Thomas' sister. The financial transactions affording the appearance of Miss Thomas and accused in Miami Beach in

December 1949 were not before the court and as to the nature thereof we may only conjecture, unfavorably to accused.

In addition to the financial ability of accused to make substantial payment of his debts as evidenced by his banking transactions, there is evidence that on 6 January 1950 accused was possessed of liquor which he claimed to be worth \$2400.00. Accused testified that approximately \$2,000.00 worth of the liquor was used in payment of his debts to two companies whose names to the record are unknown, and to the accused unremembered. We are satisfied that whatever disposition was made of the liquor, other than the \$240.00 worth of liquor paid to Marathon Motors, none was used in satisfaction of any of accused's just debts.

Accused, as has been noted, claims a net income of over \$550.00 per month, living expenses which do not exceed \$10.00 a week, and, hence, which do not attain \$50.00 a month, and is the owner of two pieces of real estate in Pittsburgh, Pennsylvania. Nonetheless, the record shows that accused has made no effort to apply any of his surplus income to the payment of his debts which were admittedly fraudulently incurred, nor has he indicated any willingness to convert his real estate into cash with which to satisfy or partially satisfy the debts.

Accepting as fact, therefore, accused's claim that he is owed by Van Eck and Schneider an amount in excess of \$30,000.00, we find that subsequent to 1 October 1949, the date upon which the earliest debt alleged was incurred, the accused dissipated approximately \$6,000.00 of his funds in callous disregard of his creditors; that subsequent to 6 January 1950, after the debts alleged had been incurred, he disposed of over \$2,000.00 worth of liquor without applying any portion thereof to his liquor debts; that his monthly income since the incurrence of the debts has been sufficient to allow him to make substantial payments against his debts, but that he has failed so to do, and that he is possessed of property which could be applied to his debts but has disregarded his obligation so to do. The foregoing summary of accused's conduct, evidencing as it does, the ability to satisfy a substantial portion of his debts, and his failure so to do warrants, in every respect, the findings of guilty of the eight offenses alleged of dishonorable failure to pay debts in violation of Article of War 96.

In this view of the case it is unnecessary, in the Board's opinion, to consider rulings adverse to the defense in connection with the testimony of Van Eck.

Paid checks of accused payable to others than the creditors alleged, to the number of 103, comprising Prosecution Exhibits 53 and 57, were admitted in evidence over objection by the defense. The purpose of the checks was to evidence the profligate manner of living of accused coincident to the period within which he was a liquor dealer. The defense claimed and the accused testified, without contradiction, that at an interview with Criminal Investigation Division agent Calvin Roffus, the interview not being prefaced by the warning prescribed by Article of War 24, Roffus promised to help accused, and in reliance upon the promise accused secured the checks in question and gave them to Roffus. Accused also testified that Major Kraisel, his superior, advised him to turn over the checks in order to avoid an investigation with the attendant publicity. Whether the mentioned advice was volunteered by Kraisel or sought by accused is not shown. It was also shown that in the spring of 1949 accused took a course in Military Justice and attained a grade of "93 plus." The defense contends that since prior to handing over the checks accused was not apprised of his rights under Article of War 24, and as he was induced to give the checks to Roffus by virtue of the latter's promise of help, it was error to admit the checks in evidence. We do not agree. Presupposing that the evidentiary situation outlined is within the purview of Article of War 24, it is shown that although accused was not advised of his rights under Article of War 24 he had been an officer since 1943 and was otherwise aware of such rights having taken a course in Military Justice in 1949, presumably a course prescribed by Training Circular No. 7, Department of the Army, 14 March 1949. If an accused person is aware of his rights under Article of War 24 other than by warning by the person to whom his statement is made the statement is competent (MCM, 1949, par 127a, p 157). The circumstances of Roffus' vague promise of help, and the advice of Major Kraisel are not of such nature as to render involuntary the accused's act of giving to Roffus the checks in issue (CM 335052, Venerable, 2 ER-JC 19,36).

We further are of the opinion that the warning prescribed by Article of War 24 does not apply to the evidentiary situation disclosed by the record of trial. The paid checks constituting Prosecution Exhibits 53 and 57 are not statements or admissions within the meaning of Article of War 24. Otherwise, it does not appear that any unlawful means were employed by Roffus to obtain the checks.

The defense also objected to the admission in evidence of the inventory of liquor taken on 6 January 1950 at Fort Hamilton on the ground that accused was not apprised of his rights under Article of War 24 prior to his signing the inventory. The evidence shows that accused was most anxious to inventory the liquor and to arm himself with a receipt by the inventory officer. The latter signed the inventory at accused's request, and in his signing of the inventory, accused acted

as a volunteer. This transaction was not within the purview of the 24th Article of War.

Accused was also found guilty of three offenses of making and uttering checks with intent to deceive, then not having and not intending to have funds on deposit for payment thereof in violation of Article of War 96 (Spec 1, Chg I; Specs 1,2, Add'l Chg III). The checks in question were made payable to liquor dealers, one being payable to Peel Richards, Ltd., the creditor alleged in Specification 11 of Additional Charge III, and the other two to Schenley who emerged relatively unscathed financially from their transactions with accused.

The earliest check involved was dated 5 December 1949, was drawn upon the National City Bank of New York payable to "Schenley Ind. Inc." in the amount of \$577.00 and bears the purported signature of accused (Spec 2, Add'l Chg III). Accused admitted testimonially the fact of his authorship and utterance thereof and that the check was in payment of his account with Schenley. The record of accused's account at the drawee bank reflects that at the close of business on 5 December 1949 accused's balance was \$107.06. The record of transactions for the following day, 6 December, shows that among other transactions the account was debited for a check in the amount of \$577.00 and credited in the same amount for a returned check. The transactions for 6 December including the debit and credit entries of \$577.00 resulted in a balance of \$202.31. The account was closed on 12 December 1949 with a zero balance. At no time from 6 December on is a balance reflected amounting to \$577.00. Accused implicitly admitted that he was aware that his account was insufficient when he uttered the check in question, and stated that he was expecting a payment from Schneider with which he would cover the check. The check was returned unpaid. The foregoing summary of the evidence shows that accused being aware of the debilitated status of his account nonetheless issued the check in question knowing that he had not sufficient funds on deposit for payment thereof, and from the circumstance that he did not thereafter have sufficient funds on deposit it may be inferred that at the time of utterance he did not intend that he should have sufficient funds on deposit (CM 336515, Stewart, 3 BR-JC 115, 130-131).

The next check in point of time was dated 21 December 1949, and was drawn upon the Colonial Trust Company payable to "Peel Richards, Ltd" in the amount of \$500.00 and bears the purported signature of accused as drawer (Spec 1, Chg I). Accused admitted the making and uttering of the check and that it was given in part payment of his account with Peel Richards.

The last check was dated 29 December 1949, and was drawn upon the Colonial Trust Company payable to "Schenley Ind. Inc." in the

amount of \$594.18 and bore the purported signature of accused (Spec 1, Add'l Chg III). This check was evidenced by a photostatic copy thereof. Accused admitted that he drew the original check and gave it to Schenley in payment of his account. We here refer to pages 19 and 20 of this opinion where the record of accused's account is set forth. From a perusal of that record it is apparent that payment by the drawee of the checks payable to Schenley in the amount of \$594.18 and to Peel Richards in the amount of \$500.00 would have resulted in the account being overdrawn an additional amount of almost \$1100.00. The defense seeks to show that as to the Peel Richards check accused had a sufficient balance in the bank when the check was uttered and that accused attempted to cover each of the two checks in question. While accused may have had sufficient funds in the bank when he uttered the Peel Richards check, it is evident that such funds became hypothecated to other checks issued by accused. Had the two checks in question been paid by the bank relying on the accused to cover the two checks, it is obvious that other checks of accused broadcast by him at or about the same time would have been unpaid or the bank would have suffered a loss. While it may be true that accused with reference to any particular check might not have entertained an intent that it be not paid, his conduct as exemplified by the record of his account shows that as to some of his checks he, perforce, must have entertained such intent. As intent is best evidenced by events, the court was justified in concluding that as to the two checks in question, at the time of their utterance, accused knew he did not have and did not intend to have sufficient funds on deposit for payment thereof (CM 336515, Stewart, supra).

A finding of intent to deceive as alleged in the three specifications here considered may be based on findings that an accused made and uttered a worthless check in payment of an antecedent debt with knowledge of the insufficiency of his account and the intent that it be not sufficient (CM 329503, Frith, 78 BR 83,89,90). The findings of guilty of Specification 1 of Charge I, and Specifications 1 and 2 of Additional Charge III are warranted by the evidence.

Accused was also found guilty of misapplication of the services of a government employee in violation of Article of War 96. The evidence shows that at the times alleged one James DiPaola, a Civil Service employee of the Government, during working hours for which he was paid by the Government, ran errands, at accused's direction, in connection with accused's liquor business, and on occasion took accused's car to a garage for servicing. Such conduct constitutes a violation of Article of War 96 (CM 261505, Allen, 40 BR 267,272).

Finally, accused was found guilty of the sale of intoxicating liquor on a military post, the Brooklyn Army Base, in violation of Section 38, act of 2 February 1901 (31 Stat. 758); 10 U.S.C. 1350;

M.L. 1939, Sec. 310, in violation of Article of War 96 (Spec 2, Chg I). The cited provision of law provides as follows:

"The sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or Army transport, or upon any premises used for military purposes by the United States, is hereby prohibited. The Secretary of War is hereby directed to carry the provisions of this section into full force and effect."

Pursuant to the authority granted to implement the act there was in full force and effect at the time in issue a regulation promulgated by the Secretary of the Army prohibiting the sale of intoxicants upon any premises used for military purposes by the United States.

"The sale of or dealing in intoxicating liquors (including beer, wine, or other malt or vinous beverages containing an alcoholic content in excess of 3.2 percent by weight), regardless of what the transaction is called or how it is effectuated, is prohibited if title to such intoxicating beverage passes or changes upon any premises used for military purposes by the United States." (Memorandum No. 210-10-7, Department of the Army, 9 Oct 1947)

In effect, the specification alleges a violation of the Secretary's Regulation, for which violation, viz.: a violation of a standing order, a criminal penalty attaches (MCM, 1949, par 117c, sec. A, p 142).

The evidence shows that at the place, New York Port of Embarkation, and approximate date alleged, accused sold a case of intoxicating liquors to Michael Magliano, and that the place of sale was used for military purposes. The findings of guilty of Specification 2 of the Charge in violation of Article of War 96 are warranted by the evidence.

5. Accused is 30 years of age, married, and the father of two children. He is separated from his wife. He is a high school graduate and attended the University of Pittsburgh for three years. In civilian life he was employed as an insurance salesman. He had enlisted service from 15 October 1941 until 14 May 1943 when he was commissioned a second lieutenant. He was promoted to first lieutenant on 1 October 1944. He was separated from the service on 5 February 1946 and was recalled to active duty on 5 August 1948. He served in Panama from 8 April 1942 to 2 December 1942, and in the European Theater from 1 October 1943 to 25 November 1945. His efficiency ratings of record are "Superior" (5), and "Excellent" (4). His overall efficiency ratings are "119," "089," and "051" (2).

The Board of Review has considered a brief and oral argument in behalf of accused presented by Frederick Bernays Wiener, Esquire, and Thomas H. King, Esquire.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of violations of Article of War 96.

Lucius Barker, J.A.G.C.

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

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

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

JAGU CM 343752

UNITED STATES )

v. )

First Lieutenant SIDNEY )  
SCORATOW, O-1592037, Trans- )  
portation Corps, 9201 )  
Technical Service Unit- )  
Transportation Corps )

NEW YORK PORT OF EMBARKATION

Trial by G.C.M., convened at Head- )  
quarters, New York Port of Embarkation, )  
5 June, 10-14, 17, 19-21, 25, 28, 31 )  
July and 1-3 August 1950. Dismissal, )  
total forfeitures after promulgation, )  
and confinement for four years. )

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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 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 alleged violations of Article of War 96: selling intoxicating liquor to a civilian employee of the Department of the Army, between the dates of 1 September 1949 and 3 January 1950 on the military post of Brooklyn Army Base, Brooklyn, New York, in violation of a Federal statute prohibiting the sale of intoxicating liquor on an Army reservation (Laws, February 2, 1901, Chapter 192, 38; 31 Stat. 758; 10 USCA 1350) (Specification 2, Charge I); knowingly and willfully applying to his own personal use and benefit, at the New York Port of Embarkation, Brooklyn, New York, from on or about 15 November 1949 to on or about 20 December 1949, the services of a civilian employee of the Department of the Army during hours that the United States paid for and was exclusively entitled to said services (Specification 1, Additional Charge I); wrongfully and unlawfully, with intent to deceive, making and uttering the three following described checks on or about their respective dates, in each case as part payment of his indebtedness to the payee, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank to meet payment of the check when presented for payment: (1) drawn on The National City Bank of New York, Bush Terminal Branch, Brooklyn, New York, dated 5 December 1949, payable to the order of "Schenley Ind. Inc" in the amount of \$577.00, drawn by "Sidney Scoratow" with a notation thereon

"Ft. Hamilton Rec Group Brooklyn N.Y." (Specification 2, Additional Charge III), (2) drawn on Colonial Trust Company, Kingsboro Office (Brooklyn, New York), dated 21 December 1949, payable to "Peel Richards Ltd." in the amount of \$500.00, drawn by "Sidney Scoratow" (Specification 1, Charge I), and (3) drawn on Colonial Trust Company, Kingsboro Office, dated 29 December 1949, payable to "Schenley Ind. Inc." in the amount of \$594.18, drawn by "Sidney Scoratow" (Specification 1, Additional Charge III); and dishonorably failing and neglecting to pay the eight following described debts for merchandise purchased, during the periods commencing as respectively indicated, and in each case terminating on or about 19 April 1950, at New York City, under Additional Charge III: (1) to National Distillers Products Corporation in the total amount of \$4601.10 from the due date of each of the several portions of said amount, commencing on or about 20 October 1949 (Specification 10); (2) to Distilled Brands, Inc. in the total amount of \$6661.05 from the due date of each of the several portions of said amount, commencing on or about 1 November 1949 (Specification 9); (3) to Peel Richards, Ltd. in the total amount of \$2039.74 from the due date of each of the several portions of said amount, commencing on or about 16 November 1949 (Specification 11); (4) to Heublein Sales Company, Inc., in the total amount of \$3054.80 from the due date of each of the several portions of said amount, commencing on or about 17 November 1949 (Specification 4); (5) to Standard Food Products Corporation in the total amount of \$2711.37, from the due date of each of the several portions of said amount, commencing on or about 22 November 1949 (Specification 7); (6) to Hiram Walker Distributors, Inc. in the sum of \$3262.85 from on or about 28 November 1949 (Specification 6); (7) to Fleischmann Distilling Corporation in the total amount of \$2937.78, from the due date of each of the several portions of said amount, commencing on or about 15 December 1949 (Specification 8); and (8) to Julius Wile Sons & Company, Inc., in the sum of \$587.00 from on or about 25 December 1949 (Specification 5).

No evidence of previous convictions was introduced. The accused 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 four years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence is substantially as set forth by the Board of Review in its opinion and will be stated only to the extent material to the discussion herein. The Judicial Council concurs with the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Additional Charge I and Specification 1 thereof (misapplication of civilian employee's services) (CM 261505, Allen, 40 BR 267, 272).

Under Specification 2, Charge I, the accused was charged with and convicted of selling intoxicating liquor to an Army civilian employee on a military post in violation of a Federal statute of 1901 prohibiting such sale, and in violation of Article of War 96. The statute (Sec 38, act of Feb 2, 1901 (31 Stat 758; 10 USC 1350; ML 1949, sec 210, p 203)), inter alia, prohibits the sale of intoxicating liquors upon any premises used for military purposes by the United States and directs the Secretary of War to

carry its provisions into full force and effect. Inasmuch as the statute prescribes no penalty for its violation and the specification does not characterize the sale as illegal or wrongful except as a violation of the statute, the question arises whether the specification states an offense in violation of Article of War 96. In United States v. Evans (1948), 333 U.S. 483, the Supreme Court held that a civil indictment under a Federal statute, which the court construed as failing to prescribe a penalty for the offense charged, was properly dismissed. The statute involved in the Evans case was penal in nature, whereas the statute with which we are here concerned is essentially an administrative prohibition of the sale of intoxicants upon military premises. Without deciding whether and under what circumstances the violation of a penal statute which prescribes no punishment for such violation constitutes a military offense, we are of the opinion that the violation of the statute in the instant case is a military offense in violation of Article of War 96, notwithstanding the fact that no penalty is prescribed in the statute. That its violation constitutes conduct to the prejudice of good order and military discipline is evident from its subject matter and from the direction in the statute to the Secretary of War to enforce its provisions (see Memo 210-10-7, DA 9 Oct 47, par 3). Boards of Review have held that a violation of Section 38 of the act of February 2, 1901, constitutes a violation of Article of War 96 (CM 307050, Pasquariello, 60 BR 179, 181, and cases therein cited). Such being the case, it follows that the specification states an offense in violation of that Article. In view of the foregoing, it is unnecessary to consider whether, as the Board of Review herein states, the specification in effect alleges a violation of the directive promulgated by the Secretary of the Army pursuant to the authority of the act (Memo 210-10-7, supra). We concur with the Board of Review in its opinion that the findings of guilty of Specification 2, Charge I, are warranted by the evidence.

Under Specification 1 of Charge I and Specifications 1 and 2 of Additional Charge III, respectively, the accused was convicted of wrongfully and unlawfully making and uttering, with intent to deceive, three checks, in each case as part payment of his indebtedness to the payee, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank to meet payment of the check when presented. The evidence relating specifically to these alleged offenses is substantially as follows.

On 5 December 1949 the accused drew a check in the amount of \$577.00 payable to the order of "Schenley Ind. Inc." upon The National City Bank of New York, Bush Terminal Branch, Brooklyn, New York, in part payment for liquors purchased. The check was presented for payment on 5 December but was returned on 6 December because of insufficient funds. On 12 December, at the bank's direction and without request by the accused, his account therein was closed. On or about 12 December the check was again presented for payment and on 13 December was again returned. The accused evidently never made the check good. The record of the accused's account with The National City Bank of New York (Pros Ex 82) shows the following. At the close of business on

2 December (Friday) the accused's final balance was \$977.82. On 5 December (Monday), when the check was presented for payment, it was dishonored because of insufficient funds. Deposits totaling \$1135.75 made on 5 December were offset by payment of additional checks, leaving a final balance on that day of \$107.06, without the payment of the check in question. On 6 December, allowing for a deposit of \$82.40, the balance was \$202.31, and on 7 December, allowing for a deposit of \$513.00, payment of other checks left the balance at \$263.77. On 13 December the bank drew a cashier's check for this last balance payable to the accused, thereby closing out his account. The accused testified that the check in question was dishonored because an expected payment from Schneider was not forthcoming.

On 21 December 1949 the accused drew a check in the amount of \$500.00 payable to the order of "Peel Richards Ltd" upon Colonial Trust Company, Kingsboro Office, Brooklyn, New York, in part payment for liquors purchased. The check was presented for payment on 28 December but was returned on 30 December because of insufficient funds. "Around February" the accused offered to make this check good. The ledger account of the accused in Colonial Trust Company (Def Ex 0) shows the following. His balance on 20 December 1949 (Tuesday), the date preceding that of the check, was \$2890.71, on 22 December it fluctuated from \$1926.81 to \$3168.41, closing at \$2283.39, and on 23 December (Friday) the balance was \$2504.39. On 27 December (Tuesday) it increased from \$2416.01 to \$2657.51, but the debiting of the amounts of the check in question and other checks resulted in the account's being overdrawn to the extent of \$453.99 on 28 December. The crediting of the instant check upon its dishonor restored the account to a plus balance of \$46.01, and a subsequent deposit of \$1650.25 on the same date brought the closing balance to \$1696.26. Apparently the check was again presented for payment on 30 December and again returned on 3 January 1950 because of insufficient funds. The condition of the accused's account subsequent to 28 December 1949 will be considered in connection with the third check, to which we now turn.

On 29 December 1949 the accused drew a check in the amount of \$594.18 payable to "Schenley Ind. Inc" upon Colonial Trust Company, Kingsboro Office, in part payment for liquors purchased. The check was presented for payment on 30 December 1949 but was returned, apparently on 3 January 1950, because of insufficient funds. The accused made the check good on 10 March 1950. The accused's ledger account (Def Ex 0) shows the following. His balance on 29 December 1949 (Thursday), the date of the check, was \$746.80, and on 30 December was \$959.16. But at the opening of business on 3 January 1950 (Tuesday) his account was overdrawn to the extent of \$1437.38. The reason for this deficiency was the presentation on 30 December of, among others, checks aggregating \$1594.18, which included the instant check and the \$500.00 check payable to Peel Richards, Limited, drawn on 21 December, discussed above. The cancellation of this \$1594.18 debit on 3 January 1950 left a balance of \$156.80. Subsequently on that date the balance was increased to \$1083.33.

The question presented is whether the foregoing evidence establishes beyond a reasonable doubt that the accused, at the time of issuing each of the three checks, knew that he did not have sufficient funds in the drawee bank to meet payment thereof, did not intend to have sufficient funds therein, and intended to deceive, as alleged. The evidence shows that the accused's final balance on the last business day prior to the date of the first check, Monday, 5 December 1949, was more than sufficient to meet payment of the check. On the day of its presentation, the same day on which it was issued, the accused effected a substantial deposit. Because of the presentation of numerous additional checks on that day, however, the account was insufficient to meet payment of all the checks and this check was dishonored. On the date of the second check, Wednesday, 21 December 1949, the accused's balance was more than adequate to meet its payment. The same was true for a week thereafter, including a part of the day, Wednesday, 28 December, when the check was presented for payment. Also subsequent to its dishonor on that day the accused effected a deposit which was ample to cover it. Within somewhat over a month, he offered to make the check good. On the date of the third check, Thursday, 29 December, and for a part of the next day, when it was presented for payment, the accused's balance was more than adequate to meet its payment. The presentation of numerous additional checks on 30 December resulted in a substantial overdraft in his account and in the dishonor of the check in question. However on 3 and 4 January 1950 substantial deposits were made which would have been sufficient to pay the check in question and nearly the total amount of other checks dishonored on 30 December. The accused made the check good in March 1950.

It thus appears that although the accused did not exercise adequate caution to insure the sufficiency of his balance for payment of all checks presented as a result of his extensive financial operations, he did make substantial deposits in his accounts which were received just too late to cover the checks. Although even the intent to defraud may be implied from the fact that the check was dishonored because of lack of funds in the accused's account (CM 338736, Lucas, 6 BR-JC 259, 263, and cases therein cited), such inference is rebuttable by proof of circumstances negating it (see MCM 1949, par 125a, p 152). Under all the evidence, we are not convinced beyond a reasonable doubt of the accused's guilt as charged. In view of the sufficiency of his account immediately preceding the date of the first check and on and after the dates of the other two checks, we are unable to conclude that the accused knew his account was insufficient when he issued the checks. His substantial deposits in each case are inconsistent with the inference that he did not intend his account to be sufficient to pay the checks. In our opinion, while the evidence shows inexcusable carelessness on the accused's part in connection with his bank accounts, we are not convinced that with respect to any of the three checks the accused entertained an intent to deceive (see CM 280882, Hofferber, 53 BR 391, 398; CM 285445, Canavan, 56 BR 73, 82; CM 298601, Schippers, 58 BR 301, 308-309; CM 318727, Hoffman, 68 BR 1, 14-15). The evidence, however, in our opinion, does establish his guilt of the lesser included offenses of wrongfully and unlawfully making and uttering the several checks without intending to assure that he should have sufficient funds in the drawee bank for payment thereof (Ibid; see CM 335159, Smith, 2 BR-JC 69, 78).

Under Specifications 4 through 11, inclusive, Additional Charge III, the accused was convicted of dishonorably failing and neglecting to pay eight debts totaling \$25,855.69, for merchandise purchased, during various periods, commencing on or about 20 October 1949 and all terminating on or about 19 April 1950. It is contended by counsel upon appellate review that since the liquors for which the several obligations were incurred were sold to the accused not as an individual but in a representative capacity as officer in charge of some sort of organization of officers, known as the Officers' Recreation Committee or Group or otherwise, and since the creditors relied upon the credit of the accused not as an individual but as a representative of that organization, the accused did not become personally obligated and the debts were not his. Assuming, arguendo, the validity of the premise that the creditors believed they were selling liquors to the accused not as an individual but as the representative of an organization of officers, the conclusion by no means follows, on the evidence, that the accused did not become personally liable for the purchase price and that the debts were not his personal debts. The inference is clear from the record, and is supported by the testimony of the accused, that the "organization" for which he purported to act as agent in purchasing the liquors, had no existence in fact or in law and was purely fictitious. The rule in New York State, where the several sales were completed, as well as in other jurisdictions, is that one who enters into a contract in the name of a fictitious or nonexistent principal becomes individually obligated under the contract (*Puro Filter Corporation of America v. Trembley* (2d Dept, 1943), 266 App Div 750, 41 NYS 2d 472, and cases therein cited; see *Eli Dee Clothing Co., Inc. v. Marsh* (1928), 247 NY 392, 160 NE 651, and cases therein cited; see generally annotation, 126 ALR 114). It therefore follows from counsel's premise, in the light of the evidence, that the several debts were in law the individual, personal debts of the accused. On the other hand, accepting as true the accused's testimony that in ordering the liquors he was acting as agent for Van Eck but concealed that fact from the sellers, the conclusion is equally inevitable that he became individually liable for the purchase price. Again, the rule in New York State as well as in other jurisdictions is that an agent who enters into a contract for an undisclosed principal is individually bound to perform the contract (*Eli Dee Clothing Co., Inc v. Marsh*, supra; *Rogalsky et al v. Ryan et al* (4th Dept, 1949), 275 App Div 794, 89 NYS 2d 722; see generally annotation, 150 ALR 1303). It therefore follows also under this view of the evidence that the several debts were in law the individual, personal debts of the accused. Moreover, in our view, the record as a whole shows that the accused actually was dealing with the sellers as a principal on his own behalf.

It is contended, however, that since the accused's failure to pay the several debts was the result of mere inability to pay and was not accompanied by fraud, evasion or indifference, such failure was not dishonorable and did not constitute an offense in violation of the Articles of War. Specifically, the argument is that the accused's failure to pay for the liquors purchased was caused by the failure of Van Eck and Schneider to fulfill their agreement to pay him for the liquors after delivery to them,

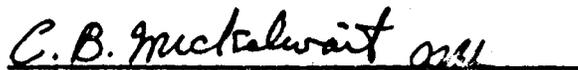
and that the accused reported the situation to the Post Chief of Staff in January 1950. There is substantial authority that neglect to pay debts does not violate the Articles of War unless the attendant circumstances are such as to make the neglect dishonorable. The debt must have been contracted under false representations or the failure to pay be characterized by fraud, deceit, evasion, or false promises, and the neglect continued for an unconscionable period (Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p 715, fn 42; CM 343316, Hartley, BR-JC Nov 1950, p 13; CM 341067, Waterman, 7 BR-JC 45, 58, 61, and cases therein cited). There is also authority, however, that wrongfully neglecting and failing to pay a debt, as where the failure is accompanied by indifference by the accused to his obligation, constitutes conduct discreditable to the military service and violative of Article of War 96 (CM 270641, Smith, 45 BR 329, 337-338, 343, and cases therein cited).

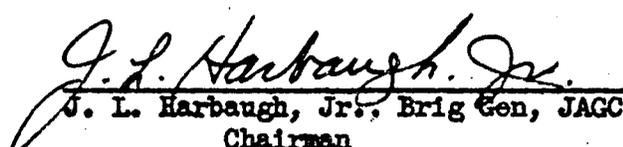
There is no dispute that the several debts which we have concluded were the personal obligations of the accused were due and payable and were not paid for substantial period as alleged. The analysis of the evidence by the Board of Review demonstrates that the accused received income and possessed funds and assets, including real estate, which would have enabled him to pay at least a substantial portion of the debts in question had he chosen so to apply them, but that instead of doing so he expended a substantial portion of some \$6,000.00 on extravagant living during the period of his indebtedness. These facts are established even excluding from consideration the 103 checks drawn by the accused and payable to others than creditors named in the specifications under consideration (Pros Exs 53, 57). It is therefore unnecessary, in our view, to determine whether or not such checks were properly admitted in evidence, and we express no opinion as to the correctness of the conclusion of the Board of Review on this point. We concur with the Board of Review that in view of the evidence there is no need to consider the propriety of the law member's rulings with respect to Van Eck's testimony. Under the foregoing analysis of the evidence in this case, we are not convinced beyond a reasonable doubt that the accused's failure to pay his debts was dishonorable so as to be violative of Article of War 95. On the other hand, we are of the opinion that his failure was characterized by such negligence and indifference as to bring discredit upon the military service and was thus wrongful and discreditable, in violation of Article of War 96. The offense proven is included within that charged (CM 270641, Smith, supra; see CM 340335, Coleman, 6 BR-JC 35, 44, 47).

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge I and Specifications 1 and 2 of Additional Charge III as involves findings in each case that the accused wrongfully and unlawfully made and uttered the described check as alleged, then not intending to assure that he should have sufficient funds in the drawee bank to meet payment of said check when presented for payment; legally sufficient to support only so much of the findings of guilty of Specifications 4 to 11, both inclusive, of Additional Charge III as involves findings in each case that the accused wrongfully and discreditably failed and neglected to pay the debt under the circumstances alleged; and legally sufficient to

support the remaining findings of guilty and the sentence and to warrant confirmation of the sentence. However, under all the circumstances of the case, including the modifications herein made respecting a number of the findings of guilty, the Judicial Council recommends that the un-executed portion of the sentence to confinement be resitted.

  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

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

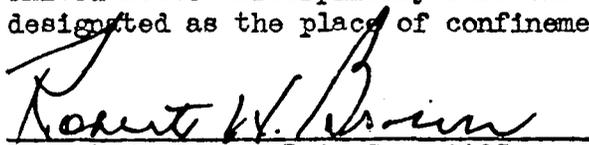
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DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

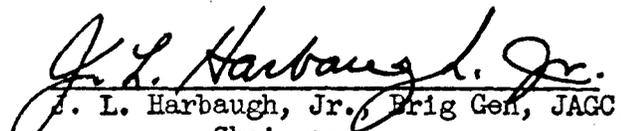
THE JUDICIAL COUNCIL

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

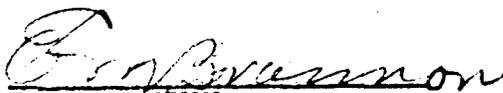
In the foregoing case of First Lieutenant Sidney Scroatow, O-1592037, Transportation Corps, 9201 Technical Service Unit-Transportation Corps, upon the concurrence of The Judge Advocate General only so much of the findings of guilty of Specification 1 of Charge I and Specifications 1 and 2 of Additional Charge III is approved as involves findings in each case that the accused did at the place and time alleged wrongfully and unlawfully make and utter to the payee named the check described as part payment as alleged, the accused then not intending to assure that he should have sufficient funds in the drawee bank to meet payment of said check when presented for payment; only so much of the findings of guilty of Specifications 4, 5, 6, 7, 8, 9, 10, and 11 of Additional Charge III is approved as involves findings in each case that the accused, being indebted to the creditor named at the place, in the amount and for merchandise purchased as alleged, which amount became due and payable and on which part payments were made as alleged, did at the place and for the periods alleged wrongfully and discredibly fail and neglect to pay said debt; 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, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

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

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  
Major General, USA  
The Judge Advocate General

10 April 1951

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

(81)

JAGK - CM 343792

14 DEC 1950

U N I T E D S T A T E S )

FRANKFURT MILITARY POST )

v. )

) Trial by G.C.M., convened at  
) Frankfurt-am-Main, Germany, 19  
) October 1950. Dismissal, total  
) forfeitures after promulgation,  
) and confinement for two (2)  
) years.

) First Lieutenant DUSIAN A.  
) KRIVOSKI (O-1281757), Finance )  
) Department, 7752d Finance )  
) Center. )

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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 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. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that, First Lieutenant Dusian A. Krivoski, FD, 7752 Finance Center, in conjunction with Captain Willard E. Finley, 7752 Finance Center, did, at Friedberg, Germany, on or about 3 August 1950, feloniously steal nine thousand, nine hundred and ninety dollars (\$9,990.00) in Military Payment Certificates, the property of the United States.

He pleaded guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances 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

By letter dated 11 October 1949, notification was given of the approval

by the Secretary of the Army of the appointment of accused as deputy disbursing officer to Colonel Samuel J. Taggart, Finance Corps, disbursing officer at 7752 Finance Center, Friedburg, Germany, and on 3 August 1950 accused was serving in that capacity (R 17, Pros Ex 2). By paragraph 15, Special Orders Number 166, Headquarters, Frankfurt Military Post, 2 August 1950, Major David W. Jones, Jr., Captain Willard E. Finley, and Second Lieutenant Ted R. Hayes were appointed as a committee for the purpose of destroying superseded and mutilated Military Payment Certificates at 7752 Finance Center on 3 August 1950 (R 13, Pros Ex 1). Three series of certificates, Series 461, 471, and 472, were represented in the currency to be destroyed. Series 461 and 471 had been superseded, but Series 472 was currently in use (R 14, 21). The committee met on the morning of 3 August 1950 in the office of Colonel Taggart, and then proceeded to the main vault (R 13,18,19). The main vault was divided into three inner vaults and the committee proceeded to inner vault No. 1. Meanwhile, Sergeant First Class John J. Sullivan, Jr. and the accused went into inner vault No. 2 to count the money which was to be destroyed. They bundle-counted the money to be destroyed and placed the bundles in 12 footlockers. Each footlocker contained the count attained by Sullivan and the accused. When each footlocker was loaded it was brought to the committee which in turn counted the certificates by bundle (R 9, 14). After the committee completed its count which was compared with the tally sheets contained in the footlockers and found to be identical, further comparison was made with "the total from the Accounting records" which also was found to be identical save for a "60-cent difference" which was satisfactorily explained (R 9, 14-15). Verification was completed by 11:00 a.m. (R 14).

Upon completion of the verification, the committee packed bundles of currency in three wooden boxes in order to determine the most expeditious manner of destroying currency in an emergency. After packing the three boxes, all the footlockers and boxes were placed in the vault which the accused locked, and the committee adjourned for lunch (R 10,15). The committee, accompanied by accused and Sullivan, returned to the vault at about 1330, took out the three boxes which had been prepared for the experiment and tried burning them in three different ways. At 1500 they returned to the vault and took the rest of the money to the furnace room where it was burned (R 10,15).

At about 1600 Colonel Taggart had occasion to go to the main vault, and in inner vault No. 2 found in a cashier's box a package of money which should have been destroyed. He took it to his office and found that the package contained \$9,990.00 worth of ten dollar denomination Military Payment Certificates of Series 472, the series currently in use (R 19-21). At 1630 hours, Colonel Taggart received a call from accused who stated that he was "scared" and wished to talk to him privately. Accused came to Colonel Taggart's office and after reiterating that he was "scared" told Colonel Taggart that not all the money which was to have been destroyed had been destroyed, that he had been talked into something and had withdrawn a package

of "ten dollar bills." Accused added that he had placed the package in a cashier's box in the vault, and at Colonel Taggart's insistence informed the latter as to the identity of the "second party" in the incident (R 21-22).

On 7 August 1950, accused was interviewed at the 52d Criminal Investigation Department by Sterling P. Griffin, Special Agent of the Criminal Investigation Branch, Provost Marshal Division, EUCOM, and Lieutenant Painter of the Criminal Investigation Department. Griffin explained to accused that he was investigating irregularities which were alleged to have occurred at the Finance Center on 3 August. After Lieutenant Painter advised accused of his rights under Article of War 24, the latter gave a verbal account and subsequently a written statement of his activities on 3 August. Griffin identified Prosecution Exhibit 4 as the written statement made by accused and it was admitted in evidence without objection (R 26-27).

In Prosecution Exhibit 4, accused, in great detail, related the procedure followed on 3 August to accomplish the destruction of mutilated money and corroborated the other prosecution evidence in this respect. He also related that after being assigned to the Finance Center he became acquainted with Captain Willard E. Finley who thereafter constantly urged that accused abstract money which was supposed to be turned over to a destruction committee. On the morning of 3 August 1950 while the committee was in session, Finley telephoned accused and asked him to stop by Finley's office prior to going to lunch. Accused went to Finley's office and Finley again urged him to remove a package of money. Accused left Finley's office for lunch without reaching a decision. After lunch the committee reassembled and a detail supervised by Finley and accused removed the experimental boxes from the vault. Finley and accused together with some German laborers were left alone in the vault. Finley suggested that this would be a good opportunity to remove a package from those remaining in the vault, and then left. Accused removed a package of "ten dollar (\$10.00) bills" and placed them in a cashier's box in vault No. 2. He rejoined the committee and remained with it until its task was completed. He returned to the office with the committee shortly before 1600 hours. As he approached his desk, he was told by Corporal Howard E. Perkins that the Colonel had brought some money up. Accused's conscience was bothering him and he was in a nervous state. Immediately after having the destruction schedules signed by the committee, he sought an audience with Colonel Taggart, and upon seeing Colonel Taggart "made a full confession" of what had occurred (Pros Ex 4).

b. For the Defense

Accused, after being apprised of his rights as a witness, elected to testify in his own behalf with reference to his personal and military background (R 35).

He testified that he is 34 years of age, married, and the father of two children, a boy three years of age and a girl approximately a year and a half. His wife and children were then awaiting transportation to the "States." He grew up in West Virginia and Pennsylvania and had approximately three years of college training. In civilian life he did general clerical work. He entered the military service in August 1940 and was commissioned a second lieutenant in October 1943 and was assigned to the Finance Department. He received awards for participation in three campaigns during the war. He was "a member of the reserve" from 1945 to 1948 when he was recalled to active duty. His current tour of duty in Europe extends from August 1949 (R 36-38).

Colonel Taggart, Sergeant Howard F. Perkins, Sergeant First Class John J. Sullivan, Jr. and First Lieutenant Ted R. Hayes, all fellow members with accused of the 7752 Finance Center, and Major Shelton Gaddis, a former superior of accused, testified as to the excellence of accused as an officer, and as to his general good reputation (R 24-25, 29-34).

#### 4. Discussion

Accused has been found guilty of larceny, which is defined 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, p 239). Aside from accused's pleas of guilty, which do not appear to have been improvidently made and to which accused adhered after full explanation of the effect thereof was made to him, the uncontradicted evidence shows that accused abstracted from a quantity of packages of Military Payment Certificates, property of the United States, which were to be destroyed, a package containing \$9,990.00 worth of Military Payment Certificates. The certificates although presumably mutilated by use, were of a series currently in circulation, and for the purposes served by Military Payment Certificates were as good as certificates then in circulation. Accused's act, in taking the package of certificates and thus preventing their destruction, constitutes the unlawful appropriation requisite to larceny. The evidence otherwise shows that the taking of the certificates was accompanied by an intent to deprive the United States permanently of its property therein. The findings of guilty of larceny of \$9,990.00 of Military Payment Certificates, property of the United States, in violation of the 93d Article of War are warranted by the record of trial.

It has been urged by appellate counsel for accused that accused was deprived of the effective assistance of counsel at the trial and, hence, the proceedings are "fatally defective."

We take judicial notice of CM 343938, Finley, as we are empowered so

to do (CM 326170, Davies, 75 BR 179,184). In that case, which was tried prior to the instant case, Finley was charged with stealing and conspiring to steal in conjunction with the accused in this case the same military payment certificates involved in this case. The regularly appointed defense counsel who was present throughout Finley's trial at Finley's request was Captain Roy H. Adams. Captain Adams' actual participation in Finley's trial was more or less limited, examination and cross-examination of witnesses being conducted exclusively by individual counsel. In the trial of Finley, in so far as the subject matter is common to that of the trial of accused, the principal witness against Finley was accused, who incriminated himself as effectually as he incriminated Finley. Shortly after the commission of the offenses for which he was tried and convicted, accused spontaneously confessed his participation therein to his superior, and later voluntarily gave a written detailed account of his offense to the Criminal Investigation Division. In this written account, which was admitted in evidence at his trial, accused showed graphically how he was induced by Finley to commit the offense.

Accused was represented at his trial by Captain Adams, the regularly appointed defense counsel, who, as is noted above, was the regularly appointed defense counsel for Finley. In this connection, accused as a witness for the prosecution in the Finley case was aware of the circumstance that Captain Adams was of counsel for Finley. Accused pleaded guilty, and adhered to his plea after being apprised of the effect thereof. Accused limited his testimony to biographical data. It is urged that the uncontradicted facts show only an attempted larceny and hence counsel was ineffective in allowing accused to plead guilty. We have elsewhere indicated our opinion that the facts sustain the offense of larceny. It is also urged that defense counsel should have stressed the circumstance that accused was induced to commit the offense by Finley. This had already been shown by prosecution evidence, accused's pretrial written statement.

There is nothing in the instant record of trial which evidences any disloyalty by Captain Adams to accused. Accused had openly proclaimed his guilt upon three occasions prior to his trial. Whether Captain Adams advised his plea is not shown by the record of trial, but, if he had, we do not perceive any evidence of disloyalty to accused from such advice under the circumstances. The evidence indicates that the plea may have been dictated by accused's conscience. Military counsel, in any event, from the nature of their office which precludes any financial gain for their defense of an accused person, are free from imputations of disloyalty which may attach to counsel for hire in similar circumstances.

5. The reviewing authority 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. Paragraph 87b, Manual for Courts-Martial, United States Army, 1949, provides on page 97:

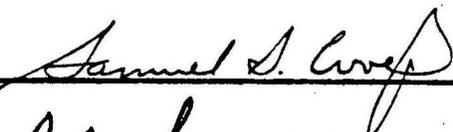
"If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving \*\*\* dismissal and confinement of officers, \*\*\* the confirming authority will designate the place of confinement."

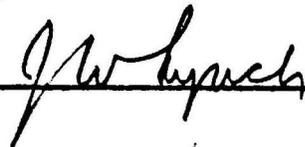
In the instant case, pursuant to the provisions of Article of War 48(c)(3), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

6. Accused's biographical data, and data as to service as related by him in his testimony are substantially corroborated by records of the Army. Otherwise records of the Department of the Army show as to accused the following efficiency ratings: "Excellent" (3), "Superior" (2), and the following overall efficiency ratings: "129," "101," and "077."

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

  
\_\_\_\_\_, J.A.G.C.

  
\_\_\_\_\_, J.A.G.C.

  
\_\_\_\_\_, J.A.G.C.

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

(87)

JAGU CM 343792

U N I T E D S T A T E S

v.

First Lieutenant DUSIAN A.  
KRIVOSKI, O-1281757, 7752  
Finance Center

FRANKFURT MILITARY POST

Trial by G.C.M., convened at  
Frankfurt-am-Main, Germany,  
19 October 1950. Dismissal,  
total forfeitures after  
promulgation, and confinement  
for two years.

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

1. Pursuant to Article of War 50d(2) the record of trial 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 guilty to, and was found guilty of, feloniously stealing in conjunction with Captain Willard E. Finley, of the accused's organization, \$9990.00 in Military Payment Certificates, the property of the United States, at Friedberg, Germany, on or about 3 August 1950, in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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.

3. The facts are fully stated in the opinion of the Board of Review.

At the time of the commission of the alleged offense the accused was, and had been for some time prior thereto, a duly appointed deputy disbursing officer to Colonel Samuel J. Taggart, Finance Corps, the disbursing officer at 7752 Finance Center, Friedburg, Germany (R 17; Pros Ex 2). As such, the accused had access to the main vault at the Finance Center, which was subdivided into three smaller vaults. Both the accused and

Colonel Taggart had the combination to the main vault and the accused had the key to vault No. 2 and Colonel Taggart the key to vault No. 1. For use in case of an emergency, each officer had a key "to the other room" (R 18). According to the accused he had "a complete set of keys" for the vaults in his safe in the cashier's office (R 27; Pros Ex 4).

On 2 August 1950 the Commanding Officer Frankfurt Military Post appointed a committee consisting of Major David W. Jones, Jr., Captain Willard E. Finley and Second Lieutenant Ted R. Hayes to destroy superseded and mutilated Military Payment Certificates at 7752 Finance Center on 3 August 1950 (R 13; Pros Ex 1). The committee assembled in vault No. 1 on that morning (R 14) and the accused, assisted by a non-commissioned officer, went to vault No. 2, removed the certificates to be destroyed from bins where they had been kept, bundle-counted them, packed them in footlockers, and delivered them to the committee in vault No. 1 (R 8, 14). The money to be destroyed consisted not only of superseded series but also of mutilated certificates of series 472, currently in use (R 14). The committee verified the count and then packed some of the certificates in three wooden boxes for the purpose of conducting an experiment to determine the most effective way of destroying currency in the event of an emergency (R 14). The footlockers and the three boxes were then locked in vault No. 1 and the committee adjourned for lunch (R 15, 27; Pros Ex 4).

When the certificates were turned over to the committee for destruction, the committee had custody of them (R 22). Thereafter, and pending their destruction, the certificates were ordinarily locked in footlockers, the key thereto being retained by the senior member of the committee, but that practice was not followed on this occasion because there was so much money in the lockers they could not be closed (R 27; Pros Ex 4).

According to the accused, for almost a year prior to this time, Captain Finley, who was also assigned to the Finance Center, had been suggesting to the accused that he steal for their joint benefit a package of the certificates scheduled for destruction. This, however, was the first occasion on which Captain Finley had been a member of the destruction committee. Shortly before lunch on the day in question the accused, in response to a telephone call from Captain Finley, visited the latter's office where the suggestion was renewed (R 27; Pros Ex 4).

In a sworn pretrial statement the accused said that after lunch while he and Captain Finley were supervising the removal from the vault of three wooden boxes containing certificates, Captain Finley observed that this was a good opportunity to take a package of the certificates and then left to join the rest of the committee. Almost immediately thereafter the accused removed a package of ten dollar bills from an open footlocker in vault No. 1, took it to vault No. 2 and placed it in a cash box which he locked. He then locked both vaults and joined the committee to assist in the destruction of the certificates (R 27; Pros Ex 4).

In the meantime, Colonel Taggart, in visiting vault No. 2 in search of some checks, discovered the cash box and upon opening it found a package of ten dollar bills, series 472, amounting to \$9,990.00 (R 19, 21; Pros Ex 3).

On returning to his office the accused, according to his statement, was informed by a non-commissioned officer that Colonel Taggart had "brought some money up." "Badly bothered by [his] \* \* \* conscience and in quite a nervous state," the accused after furnishing the committee with copies of the destruction schedules, which the members signed, went to Colonel Taggart and admitted his complicity in removing the certificates (R 21, 22, 27; Pros Ex 4). To the best of the accused's knowledge, Captain Finley was not aware that the accused had taken the money until after the latter's conversation with Colonel Taggart (R 27; Pros Ex 4).

Subsequently, on 7 August 1950, after being fully advised of his rights under Article of War 24, the accused made a complete and detailed confession to a Special Agent of the Criminal Investigation Branch, Provost Marshal Division, European Command (R 27; Pros Ex 4). This statement was read to the court and introduced in evidence as an exhibit (R 27).

For his part in the events of the day, Captain Finley was tried and convicted of, among other things, stealing and conspiring to steal the same certificates here involved, his trial being concluded on 3 October 1950. The accused testified against Captain Finley and during the course of his testimony fully implicated himself. The regularly appointed defense counsel at Captain Finley's trial was Captain Roy H. Adams, Infantry, a member of the Bar of the Supreme Court of Texas. Captain Adams was present throughout Captain Finley's trial and took an active part therein, as shown by an affidavit which was not before the Board of Review, although the main burden of the defense was borne by individual civilian counsel.

Thereafter, on or about 6 October 1950, pursuant to the provisions of Article of War 46b, the charges which are the subject of the present trial were investigated. At this pretrial investigation the accused, at his own request, was represented by Captain Adams. The court which tried the accused and on which Captain Adams served as defense counsel was not appointed until 11 October 1950. The charges were served on the accused on 12 October 1950.

At the trial, which took place on 19 October 1950, the defense counsel stated in open court and in the presence of the accused that the latter desired to be defended by the regularly appointed defense counsel (Captain Adams). Captain Adams stated at the trial without contradiction by the accused that he had advised him of the meaning and effect of a plea of guilty and of his rights to take the stand. Notwithstanding this, the law member fully instructed the accused on both points (R 7, 35). The accused took the stand for the limited purpose of testifying about his background, family status and prior military service. Defense counsel in examining witnesses developed the facts concerning the accused's prompt confession, his complete cooperation with the authorities and his prior good character (R 23, 28). He made a closing argument on behalf of the accused (R 38) and subsequently wrote to the reviewing authority recommending clemency.

4. On appellate review of the record of trial, it was contended that the accused's plea of guilty was improvidently entered since he was guilty

at most of attempted embezzlement, that his defense was perfunctory and ineffectual and that because of defense counsel's prior connection with the defense of Captain Willard E. Finley it was impossible for him to represent the accused with "undivided fidelity."

The distinction between larceny and embezzlement has been abolished (AW 93 and 94; MCM 1949, par 180g, p 239), but in view of the contention made it is necessary to advert to it.

An essential element of larceny is that there must be a trespass; that is, the property must be taken from the owner's possession without his consent. Accordingly, unlawful appropriation of property by one rightfully in possession of it is not larceny but embezzlement (MCM 1928, par 149g, p 172; par 149h, p 173). On the other hand, if one having custody or "bare charge" of property converts it to his own use it is larceny (id; 2 Wharton's Criminal Law (12th Ed.), secs 1197, 1198).

"Possession is the present right and power absolutely to control a thing, and not only includes those things of which one has actual manual grasp, but extends also to those things that are in his house or on his land, or in the actual manual care and keeping of his servants or agents"(MCM 1928, par 149g, p 172)

The accused was appointed a deputy disbursing officer pursuant to the provisions of the Act of 3 July 1926 (44 Stat. 888; 31 U.S.C. 103a) which constitutes a deputy so appointed an agent of the disbursing officer. His access to the certificates was for the limited purpose of preserving them intact pending the appointment of a committee to destroy them and to assist that committee in its mission when it was appointed. As an officer junior to the disbursing officer and as the latter's agent he was subject to his control in dealing with the money to which he had access and, accordingly had mere custody of it. As the Board of Review stated in CM 220398, Yeager, 12 BR 397, 400,

"Although accused was mess officer and as such had charge of the property issued to the mess, his removal of the cans of tuna fish was a trespass within the law of larceny. His powers as mess officer with respect to the property were limited to care thereof for the single purpose of operating the mess as an agency of the Government and for the benefit of the military personnel of the hospital. His control over the property was subject to the control of his superior officers. Such being the case, he had 'custody' only of the property as distinguished from 'possession'. Possession, the 'present right and power absolutely to control' (par 149g, M.C.M.) the property, remained in the United States."

See also CM 252103, Selevitz, 33 BR 383 (mess officer); CM 275547, Garrett, 48 BR 77 (mess officer); CM 277030, Williams, 51 BR 85 (communications officer in charge of communication equipment); CM 324235, Durant, 73 BR 49 (officer in charge of officers club); CM 325484, Dallman, 74 ER 253 (officer in charge of railhead).

Moreover, even the accused's custody of the certificates was attenuated, if not obliterated, when they were delivered to the committee for destruction. This committee had been appointed by superior headquarters for that sole purpose. It was their responsibility to see that they received the correct amount of money from the Finance Center and that that amount was destroyed. Colonel Taggart indicated clearly in his testimony that once the money was delivered to the committee, they had control of it. In addition, it had been the practice in the past, after the amount had been verified, to keep the money under lock and key with the key in the possession of the senior member of the committee, thus effectively guaranteeing that they and only they would have access to it. The mere fact that this practice was not followed on this particular occasion because the footlocker could not be locked did not vary the accused's legal relation to the certificates and make his taking of them any less a trespass.

Since, therefore, the accused did not have possession of the certificates, the slightest asportation of them by him with intent to steal constituted the crime of larceny. The fact that the certificates remained in one of the vaults because it was either too cumbersome or too dangerous for the accused to remove them therefrom is immaterial. Thus in People v. Lardner, 300 Ill 264, 133 N.E. 375, 19 A.L.R. 721, where the defendant removed some bags from a showcase, put them in his overcoat pocket and then left the coat on the counter of the store, the court, in holding that the defendant was not guilty of attempted larceny but of larceny, said,

"Taking goods and putting them into a place for convenient removal is the taking of property, and if one takes the goods of another out of the place where they are put, although he is detected before they are actually carried from the owner's premises, the crime is complete, as in the case of the removal of an article from one place to another in the same house."

Accord Eckels v. State, 20 Ohio St. 508; State v. Rozeboom, 145 Iowa 620, 124 N.W. 783, 29 L.R.A. (N-S.) 37. See Annotations in 19 A.L.R. 724.

We conclude, therefore, that when the accused removed the certificates from the footlocker with a present, existing intent to appropriate them to his own use, he was guilty of larceny, which is unlawful appropriation by trespass. It follows, therefore, that the

accused is guilty of stealing in violation of Article of War 93 (MCM 1949, par 180g, p 239).

5. Thus, in our opinion, the defense counsel at the trial did not demonstrate ineffectiveness when he failed to raise the point that the accused at most was guilty of attempted embezzlement. He can hardly be censured for taking what we think to be a correct view of the law. Although he might have argued the question, even if he thought it without merit, such a suggestion ignores the unenviable position in which the accused had placed himself. He had fully and volubly admitted his guilt. He came to court as a supplicant, not as a litigant. In a very real sense his counsel would have to bargain from weakness and not from strength. Any attempt by him to raise a technical distinction between the completed offense and an attempt, particularly in view of the fact that the frustration of the crime was due to mere chance and not to any merit of the accused, might very well have prejudiced him in his quest for leniency. It was a question of trial tactics, and we are not prepared to say that counsel was delinquent (See CM 337951, Lawrence and Smith, 5 BR-JC 395, 397, 421).

Much the same can be said about counsel's failure to stress more vigorously the fact that the accused committed the offense at the instigation of Captain Finley. This was adequately brought out in the statement the accused made to the special agent which was read to the court and was before it as an exhibit. Further efforts on the accused's part to shirk or minimize his responsibility and place blame on Captain Finley might well have redounded to his disadvantage. Counsel was entitled to believe that under the circumstances of this case, a manly assumption by one of responsibility for his own delinquencies is a good deal more likely to create a favorable impression than a cringing attempt to visit one's sins on someone else's head.

Nor are we of the opinion that the accused's defense was perfunctory or inadequate. Again it was a question of trial tactics, and Captain Adams did what a great many lawyers of undoubted competency have done when they represented clients whose guilt was obvious - admit guilt and seek leniency. Once that course was adopted, a course which the accused by his prior confessions made almost inevitable, little could be done that was not done. Evidence of prior good character and service and an indication of the hardship that would befall his family were the obvious points to develop, and these were developed. Furthermore Captain Adams did not stop there. After the hearing he made a strong plea for clemency in the form of a letter to the reviewing authority.

Finally, the results of the trial do not establish that the defense failed in its plea for clemency. The accused, a mature officer, committed a serious crime. He was placed in a position of trust and confidence which he disregarded for his own personal gain. That he was

not successful was due to the sheerest chance for which he is entitled to no credit. In view of these facts, it is not at all evident that with any other counsel, or with any other mode of defense, the court would have been any more lenient.

6. In our opinion, Captain Adams' prior participation in the defense of Captain Finley did not disable him from defending the accused effectively. The alleged conflict of interest is more apparent than real.

In the first place, there is an absence of any compelling motive on counsel's part to protect Captain Finley at the accused's expense. He assisted in Captain Finley's defense not for any reason of pecuniary profit nor, so far as we know, from any motive of personal affection. He was simply performing a duty assigned to him by superior authority. He had nothing to gain by sacrificing the accused for the benefit of Captain Finley, and there is no reason for us to suppose that, within the limits of his ability, he did not do for the accused as much as he had already done for Captain Finley. In addition, the trial of Captain Finley had been concluded. He could assume that there was little likelihood that any evidence elicited at the accused's trial would ever be used against Captain Finley at another trial.

Secondly, there was a good and substantial reason for maintaining some consistency in the accused's story. He had effectively branded himself as the author of the crime and Captain Finley as the person who counseled and advised it. Only by a radical change in his story could he possibly have established his innocence or introduced additional mitigating circumstances. Any such change would create a danger that the accused might have to stand trial for perjury or destroy the impression of candid penitence which he had sought so consistently to maintain. The plain fact of the matter is that the accused had on three occasions told a consistent version of his commission of the offense with which he was charged and the events leading up to it. It would have been hazardous in the extreme to change it at his trial. Captain Adams undoubtedly concluded that the accused had so clearly established his own guilt that there was nothing to do but formally admit it and plead for mercy.

It is also significant that the accused knew that Captain Adams had assisted in the defense of Captain Finley whose trial had been concluded on 3 October 1950. Thereafter, on or about 6 October 1950 the accused selected Captain Adams to represent him at the pretrial investigation which was held pursuant to the provisions of Article of War 46b. For aught that we know the very fact that Captain Adams was familiar with the case may have been regarded by the accused as an asset.

7. 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. In view of all the circumstances, however, including the facts that the accused promptly confessed, cooperated fully with the authorities by testifying at the trial of an alleged accomplice, and thereafter pleaded guilty in his own trial, it is recommended that the sentence to confinement be reduced to one year.

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

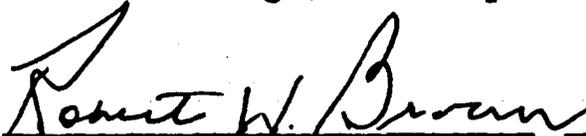
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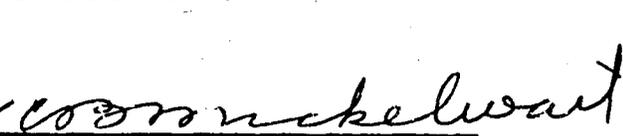
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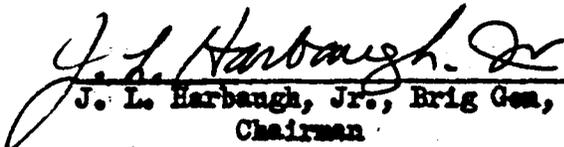
THE JUDICIAL COUNCIL

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

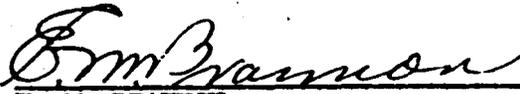
In the foregoing case of First Lieutenant Dusan A. Kriveski,  
O-1261757, 7752 Finance Center, upon the concurrence of The Judge  
Advocate General the sentence is confirmed and will be carried into  
execution. The United States Disciplinary Barracks or one of its  
branches is designated as the place of confinement.

  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

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

I concur in the foregoing action. Under the direction of the  
Secretary of the Army and upon the recommendation of the Judicial  
Council the term of confinement is reduced to one year.

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

19 March 1951

( GCMO 35, 27 March 1951 ).



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

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JAGH CM 343793

U N I T E D S T A T E S	)	FRANKFURT MILITARY POST
	)	
v.	)	Trial by G.C.M., convened at
	)	Frankfurt-am-Main, Germany, 21
Lieutenant Colonel FRANK X.	)	September and 5,6,9,10,11 and
CRUIKSHANK (0245094), S-4	)	12 October 1950. Dismissal,
Section, Headquarters Frankfurt.	)	total forfeitures after promulga-
Military Post.	)	tion, and confinement for three
	)	(3) years.

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OPINION of the BOARD OF REVIEW  
HAUCK, FITZHUGH, and IRELAND  
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 Judge Advocate General and The Judicial Council.

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

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

Specification 1: In that Lieutenant Colonel Frank X. Cruikshank, S-4 Section, Frankfurt Military Post (at that time Quartermaster, Company "D", 7811 Station Complement Unit, Darmstadt Sub-Post), did, in conjunction with Major Charles B. Simms, Friedrich Mangold, Karl Buensch, and Walter Roehl, at Darmstadt, Germany, on or about 5 September 1949, feloniously steal three thousand (3,000) gallons of gasoline of the value of more than Fifty Dollars (\$50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Lieutenant Colonel Frank X. Cruikshank, S-4 Section, Frankfurt Military Post (at that time Quartermaster, Company "D", 7811 Station Complement Unit, Darmstadt Sub-Post), did, in conjunction with Major Charles B. Simms, Friedrich Mangold, Karl Buensch, and Walter Roehl, at Darmstadt, Germany, on or about 5 September 1949, wrongfully and knowingly sell three thousand (3,000) gallons of gasoline of the value of more

than Fifty Dollars (\$50.00), property of the United States, furnished and intended for the military service thereof.

Specifications 3 and 4: (Nolle Prosequi).

Specification 5: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specifications 2 through 7: (Nolle Prosequi).

Specification 8: In that Lieutenant Colonel Frank X. Cruikshank, S-4 Section, Frankfurt Military Post (at that time Quartermaster, Company "D", 7811 Station Complement Unit, Darmstadt Sub-Post), did, at Darmstadt, Germany, during the month of April 1950, wrongfully and unlawfully obtain from the POL field of the Darmstadt Military Sub-Post approximately one hundred (100) gallons of gasoline through the use of European Exchange System POL coupons, in violation of letter, subject: "Transfer of Gasoline and Engine Oil Dispensing Responsibilities to EUCOM Exchange System," European Command, AG 463.7, GPA-AGO, dated 27 June 1949, paragraph 1.

Specification 9: In that Lieutenant Colonel Frank X. Cruikshank, S-4 Section, Frankfurt Military Post (at that time Quartermaster, Company "D", 7811 Station Complement Unit, Darmstadt Sub-Post), did, at Darmstadt, Germany, during the month of May 1950, wrongfully and unlawfully obtain from the POL field of the Darmstadt Military Sub-Post approximately one hundred (100) gallons of gasoline through the use of European Exchange System POL coupons, in violation of letter, subject: "Transfer of Gasoline and Engine Oil Dispensing Responsibilities to EUCOM Exchange System," European Command, AG 463.7, GPA-AGO, dated 27 June 1949, paragraph 1.

Specifications 10 through 15: (Nolle Prosequi).

Specification 16: In that Lieutenant Colonel Frank X. Cruikshank, S-4 Section, Frankfurt Military Post (at that time Quartermaster, Company "D", 7811 Station Complement Unit, Darmstadt Sub-Post), did, at Darmstadt, Germany, during the month of April 1950, wrongfully and unlawfully sell one hundred (100) gallons of gasoline to Friedrich Mangold, in violation of Circular No. 21, European Command, 12 September 1949, paragraph 2, Ordinance No. 38, Article 1, paragraph 1b.

Specification 17: In that Lieutenant Colonel Frank X. Cruikshank, S-4 Section, Frankfurt Military Post (at that time Quartermaster, Company "D", 7811 Station Complement Unit, Darmstadt Sub-Post), did, at Darmstadt, Germany, during the month of May 1950, wrongfully and unlawfully sell one hundred (100) gallons of gasoline to Friedrich Mangold, in violation of Circular No. 21, European Command, 12 September 1949, paragraph 2, Ordinance No. 38, Article 1, paragraph 1b.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1 and 2 of Charge I, both with exceptions and substitutions, of Charge I, of Specifications 8, 9 and 16 of Charge II, of Specification 17 of Charge II with exceptions and substitutions, and 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 approved the sentence, and forwarded the record of trial for action under Article of War 48.

### 3. Evidence.

The evidence contained in the record of trial pertinent to the findings of guilty is summarized as follows:

#### a. For the prosecution.

The court took judicial notice of Circular No. 21, Headquarters European Command, 12 September 1949; of Military Government Ordinance No. 38, 12 September 1949; of Letter AG 463.7 GPA-AGO, Headquarters European Command, Subject: Transfer of gasoline and Engine Oil Dispensing Responsibilities to EUCOM Exchange System, 27 June 1949; and of Circular No. 21, Headquarters European Command, 2 February 1949. Copies of these documents were offered and received in evidence as Prosecution Exhibits 1, 2, 3 and 4, respectively, without objection (R 18,30).

The accused was quartermaster at Darmstadt Military Sub-Post, Darmstadt, Germany, which position he occupied during the time of the alleged offenses (R 42-43). Among other officers and employees of the Quartermaster Section were: Major Charles B. Sims, the accountable officer for Class I, II, III and IV supplies (R 42,44), Mr. Walter Roehl, a German civilian in charge of the Darmstadt Military Sub-Post POL field (R 85), and Mr. Hans Willert, a German civilian employed as "a secretary" in the accused's office (R 135,138). Mr. Friedrich Mangold, 35 Hermannstrasse, Darmstadt, Germany,

a German national (R 29), operated an upholstering business and had a contract with the Darmstadt Military Sub-Post Quartermaster for furniture repair (R 19).

Gasoline for Darmstadt Sub-Post, prior to the summer of 1947, was stored at the Darmstadt airport. During that summer it was transferred to a POL (Petroleum and its products) field within the Darmstadt Sub-Post area (R 88). Between February and May 1948, a shipment of "emergency gasoline" was received at Darmstadt. This gasoline was "secret gasoline" (R 82), "it belonged to the emergency war goods and was on a secret file with the accountable officer" (R 89). It was stored in an underground bunker within the POL field (R 88).

Major Sims became accountable officer for quartermaster supplies at Darmstadt Sub-Post in April 1948 (R 48). Upon assuming accountability he made an inventory of the gasoline and other supplies with the former accountable officer (R 48-49). He was unaware, however, of the existence of the underground bunker on the POL field or of the fact that additional gasoline was stored therein (R 49,52). He first learned of the existence of the gasoline in the bunker in June or July 1949 (R 49,52). At that time there was approximately 4000 gallons of gasoline in cans in the bunker. The cans were rusty, leaking and in bad condition (R 52,95). Pursuant to the accused's orders, the gasoline was removed from the bunker, transferred from cans to drums and stored in a shack on the POL field (R 59,83,174). There were approximately 60 drums containing a total of 3000 gallons of gasoline so stored (R 83). (One witness stated that upon removal from the bunker, the gasoline was stored in cans with other emergency gasoline in a separate section of the POL field (R 89,95, 97)). Major Sims did not assume accountability for this gasoline at the time of its discovery as the accused ordered him not "to pick it up" on his stock record accounts pending a decision as to its disposition (R 51, 59).

In July 1949 a change in the type of coupons used by units to draw gasoline from quartermaster POL points was directed by higher headquarters. All units were directed to turn in old type coupons in their possession by 15 July. This exchange of coupons resulted in an overage in coupons of 3000 gallons of gasoline accruing to the credit of the Darmstadt quartermaster (R 80,81,86). These surplus coupons were surrendered to the Frankfurt depot and 3000 gallons of gasoline drawn therefrom against them (R 86,123). This gasoline was stored in 55-gallon drums in a separate enclosure within the Darmstadt POL field (R 123-124). It was not picked up on the accounts of the accountable officer but was held by the "chief of the POL field" to cover any shortages which might develop in the future (R 86). The accountable officer was advised of the surplus (R 88,96,97,125). He, however, denied on the stand any such knowledge or that any report of such a surplus had been made to him (R 50,159-160).

About the first of September 1949, the accused visited Mangold's shop in Darmstadt and requested him to accompany the accused in the latter's car. In the car, the accused stated to Mangold that "he wanted to do some business" concerning gasoline. As Mangold was unable fully to understand the accused, both proceeded to the accused's house where the accused's maid, Mrs. Gertrud Frey, acted as interpreter (R 19,20). There the accused advised Mangold that he had 3,000 gallons of gasoline which he desired Mangold to sell for him. Mangold undertook the commission and ascertained the current price to be from 60 to 65 pfennigs per liter (R 20,21). Mangold arranged for the sale of the gasoline to an acquaintance named Koerbel and further arranged for the transportation of the gasoline from the Darmstadt Quartermaster Depot to temporary storage in Darmstadt by a German trucking agency, Transport Hessen Kolonne. The accused gave Mangold a document signed by himself and Major Sims authorizing Mangold to pick up 3000 gallons of gasoline at the Darmstadt Quartermaster Depot (R 21,22,26). Koerbel paid Mangold 6,643 (or 6,634)(R 130) marks for the gasoline which money the latter delivered to the accused (R 22,129).

The accused's maid, Gertrud Frey, corroborated Mangold's testimony concerning the gasoline transaction described in the preceding paragraph to the extent that she remembered Mangold calling at the accused's house on several occasions on one of which there was "a conversation about gasoline which Mangold was supposed to pick up." The accused told her that this conversation "was confidential" (R 34). However, she could remember no details nor the amount of gasoline involved. Having been declared a hostile witness and being subjected to cross-examination by the prosecution, with the permission of the court (R 35), she admitted that among other things, she had told the CID, "During this conversation Colonel Cruikshank told Mangold that the gasoline had to be sold on the next day, an American holiday, and that Mangold had to furnish transportation, and Mangold agreed to it" (R 37). Later she repudiated her statement to the CID by testifying that it was prepared by the CID on the basis of statements made by Mangold and that she had signed it under duress (R 39).

On 5 September 1949, Labor Day, the accused called Major Sims at his quarters in Darmstadt and informed him that he "had received a call from the Theater Quartermaster to the effect that it was necessary for us to make an emergency issue of gasoline to the International Relief Organization and the gasoline would have to go to Lampertheim, which was on our sub-post, and it would be necessary for Major Sims to remain on duty that day until the issue was made" (R 43,153). Approximately 3000 gallons of gasoline were to be issued (R 44). As Major Sims was the accountable officer for Class III supplies, he proceeded to the POL dump where he contacted Mr. Roehl, whom he directed to make necessary preparations for the issue of the gasoline (R 44,90). He also had an issue slip

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to the International Relief Organization prepared which he signed authorizing the issue of three thousand gallons of gasoline to that organization (R 45,61,156). At approximately 1000 hours the same morning, the accused telephoned Major Sims and further informed him that, as it was a holiday, no Army trucks were available to transport the gas and that "he had made arrangements with Mr. Mangold, \* \* \* to transport the gasoline \* \* \*" (R 45). The accused further instructed Major Sims to issue the three thousand gallons of gasoline which was stored in drums in a separate inclosure within the POL field (R 45,153). This three thousand gallons of gasoline was not carried on Major Sims' books nor was he accountable for it. It was extra gasoline which had been found in an underground bunker on the POL field and was being held pending a decision by the accused as to its proper disposition (R 48,59). It was gasoline stored "in a separate barrack" which Mr. Roehl, who was in charge of the PCL field, planned to use "to make up for the shortage" on monthly inspections (R 95).

Major Sims returned to the POL field when notified that a truck had arrived for the gasoline. "\* \* it was a truck used to deliver furniture in and out of the field. The man who was in the truck had written authority signed by somebody from IRO stating that he would be the man to sign for the gas" (R 53). This man signed for the gasoline (R 158). The truck driver was Josef Boehm, an employee of "Transport Kolonn Hessen." He had been dispatched on 5 September 1949, with a 5-ton German truck and trailer to haul gasoline from "the Camp" in Darmstadt (R 98) "to Winkelkotter in Eberstadt." He made two trips hauling a total of "approximately 60 barrels" of gasoline (R 99,100).

Major Sims reported accomplishment of the gasoline issue to the accused (R 60); and, the following morning, delivered the issue slip to him at his office (R 54,157). Subsequently, the accused informed Major Sims that he had "taken care" of the issue of this gasoline "under salvage issue." As the accused was the salvage officer, Major Sims made no objection (R 55).

On 5 September 1949, Mr. Mangold approached Paul Winkelkoetter who owned "a pipeline business" at Eberstadt, Germany, with respect to the storage of some gasoline. Later that day sixty drums were delivered to Winkelkoetter's place of business. As this amount was far in excess of that which Winkelkoetter agreed to store, he insisted that it be removed promptly (R 103). Forty drums were removed that day by a Mr. Koerbel and the remaining twenty, the following day (R 103-104). The gasoline delivered to Winkelkoetter was sold by Mr. Mangold to other Germans at prices varying from 65 to 70 pfennigs per liter (R 107,110,111,112). The principal buyer, Rudolf Koerbel, paid Mangold approximately 6,600 marks for the 46 drums he received (R 111). Some of the drums were leaking, some were short and others were only half full (R 26).

An examination of the records of the Petroleum Section, Quartermaster Division, USAREUR, for the month of September 1949 did not reveal the issuance of any instructions or authority to the Darmstadt Sub-Post Commanding Officer for the issue of three thousand gallons of gasoline to the IRO on 5 September 1949 (R 131). Such a transaction normally would not be processed through that office as IRO was authorized to requisition gasoline directly from post commanders (R 133).

Examination of the records of the Darmstadt Sub-Post reflecting requisitions and issues of government gasoline during the period 1-15 July 1949, revealed receipts and issues of 18,921 gallons. No overages or shortages were indicated for this period (R 65,68). Balance between the receipts and issues of gasoline during this period was achieved by preparation of a false voucher for 12 July 1949, indicating the issue of 4,525 gallons to transients, of which amount 3000 gallons was not in fact issued (R 81, Pros Ex 8). The records of the Darmstadt Sub-Post POL section did not reveal any record of an issue of 3000 gallons of gasoline to the IRO in September 1949 (R 80).

The official price of government gasoline during the month of September 1949 was thirteen cents per gallon (R 64,69).

Independent of the transaction described in the foregoing paragraphs, the accused was indebted to Mangold in the sum of fifteen hundred marks. He arranged to pay this debt in gasoline. Between September 1949 and 1 April 1950, Mangold received 86 cans of gasoline from the accused. During the month of April 1950, he received 22 cans. During the month of May 1950, he received 15 cans (R 23). Each can contained 20 liters of gasoline (R 25). The gasoline was obtained at the Darmstadt POL point by Hans Willert and paid for with EES (European Exchange System) coupons furnished by the accused (R 92,93,136,140). Willert was authorized by the accused to deliver the gasoline to Mangold (R 47,135; Pros Ex 6), and he used the accused's car for this purpose (R 23). The amount of gasoline drawn and delivered to Mangold from time to time varied between three and ten cans per trip (R 93,139). Altogether, Willert estimated that he made between twenty and thirty trips involving a total of 75 to 90 cans of gasoline (R 140).

Mangold allowed the accused credit from between 12 to 15 marks per can for the gasoline (R 23). At this rate the total deliveries of gasoline credited equalled the debt (R 24).

The Darmstadt Sub-Post Commander had authorized the sale of quartermaster gasoline at the Darmstadt POL field to certain individuals for EES coupons subsequent to the transfer of individual gas sales to the EES (R 48,165).

b. For the defense.

Three German witnesses, all of whom were employed at the Bahnhof Hotel, Darmstadt, Germany, on 5 September 1949, were called in an effort to determine which one of them had called Major Sims for the accused on that date. None of them was able to remember whether he had been on duty that day or had called Major Sims (R 180-193).

One witness was called in an effort to attack the credibility of Major Sims with respect to his testimony concerning the delivery of a piano to an officer at EUCOM (European Command) Headquarters (R 193-199).

Having been duly warned of his rights as a witness, the accused elected to be sworn and to testify as a witness in his own behalf as to Charge I and Specifications 1 and 2 thereof only (R 204). He denied any knowledge, prior to the investigation made in June 1950 (R 211), of the transaction involving the 3000 gallons of gasoline on 5 September 1949 (R 205). He further denied authorizing Major Sims to issue 3000 gallons of gasoline to the IRO on 5 September 1949, or any other date. He denied ever discussing the sale of 3000 gallons of government gasoline with Mangold or ever receiving any money from Mangold for such gasoline (R 205). He further denied calling Major Sims on Labor Day, 1949, and discussing the issue of gasoline that day (R 206). He denied any knowledge, prior to the pretrial investigation, of an overage of gasoline resulting from the exchange of POL coupons in July 1949 (R 205).

The accused testified that he was born in Cedar Rapids, Iowa, 20 March 1898; that he had attended various schools finally attaining the degree of Bachelor of Philosophy from the University of Chicago (R 206-207). He first enlisted in the Army 5 June 1917, and served with the 33d Division overseas during World War I (R 207). He received a commission as a second lieutenant in the organized reserve in 1927 (R 208). He was called to active duty in 1933 and served with the CCC until 1939 (R 209). He was recalled to active duty as a captain in February 1941, and after ROTC duty in Chicago and a course at the "Command School" was assigned to the "Air Corps." He commanded an "Air Corps Service Group" in England from 1943 to 1945, during which time he participated in several bombing missions against the enemy. In connection with this duty he was awarded the Air Medal with an Oak Leaf Cluster and the Bronze Star (R 209). He married in 1947 and has two children, one aged two years and the other seven months (R 209-210). He has 24 years total commissioned service of which 18 years were on active duty (R 210).

Shortly after the pretrial investigation in the instant case, Major Sims approached him and told him "that the entire group of disgruntled enlisted men and some disgruntled Germans whom he had discharged had

got on a band wagon and were going to give him the works" (R 210). Major Sims recommended that he commit suicide (R 211).

On cross-examination the prosecution introduced in evidence a letter from the accused to Major Sims concerning the charges brought against him (Pros Ex 12). The accused admitted writing the letter and it was admitted without objection after certain non-pertinent parts had been deleted by mutual agreement between the prosecution and the defense (R 214,215).

The accused admitted that he knew of the discovery of certain gasoline in an underground pit which was unfit for issue because of its condition (R 215-216). He did not testify as to the ultimate disposition of this gasoline although he mentioned several plans which he had considered for its disposal (R 216).

c. Rebuttal for the prosecution.

Lieutenant Colonel Joe C. Lambert, Headquarters EUCOM, corroborated the testimony of Major Sims concerning a piano shipped by Major Sims from Darmstadt to Lieutenant Colonel Lambert in Heidelberg (R 231-232).

4. Discussion.

The accused was found guilty of stealing a quantity of gasoline, the property of the United States, valued at more than \$50.00, and of selling the same gasoline to a German national, in violation of Article of War 94. He also was found guilty of two violations of a EUCOM directive respecting the sale of gasoline to private individuals; and of two violations of a EUCOM circular prohibiting, among other things, the resale of articles obtained from EES or QM sources to Germans.

Larceny of property of the United States "furnished or intended for the military service thereof," and the wrongful sale of such property are denounced, among other things, as crimes by the 94th Article of War (AW 94, MCM, 1949, pp.297-298). Under the provisions of the Article, the crime of larceny has been incorporated into the offense of stealing (MCM, 1949, Par. 181h). The essential elements of proof of such crime are:

- "(a) The appropriation by the accused of the property as alleged;
- (b) that the property belonged to the United States and was furnished or intended for the military service thereof, as alleged;
- (c) that such property was of the value alleged, or of some value; and;

- (d) the facts and circumstances of the case indicating that the appropriation was with the intent to deprive the owner permanently of his interest in the property or of its value or a part of its value." (MCM, 1949, Pars. 180g, 181h).

Stealing and the sale of the same property are separate offenses and are properly chargeable in separate specifications (MCM, 1949, Par. 181h). The essential elements of proof of the crime of selling or wrongfully disposing of property being:

- "(a) That the accused sold or disposed of certain property in the manner alleged;
- (b) that the property belonged to the United States and was furnished or intended for the military service thereof;
- (c) facts and circumstances indicating that the act of the accused was wrongfully or knowingly done; and
- (d) the value of the property, as alleged." (MCM, 1949, Par. 181h).

Violations of regulations, such as are involved in the specifications of Charge II of which the accused was found guilty, are properly chargeable as offenses in violation of Article of War 96 (MCM, 1949, Pars. 152b, 183a).

It is not contradicted that the accused was quartermaster of Darmstadt Military Sub-Post during the time of the commission of the offenses alleged in the Charges and specifications. As a part of his duties he exercised general supervision over the operation of a quartermaster POL field located within the Darmstadt Military Sub-Post area. Gasoline and other quartermaster Class III supplies for this installation were drawn from a depot at Frankfurt and were issued both on requisition and in exchange for official gasoline coupons. Major Charles B. Sims was accountable officer, under the supervision of the accused, for these supplies. All gasoline and other Class III supplies within the POL field were property of the United States.

During the summer of 1949, between 3000 and 4000 gallons of gasoline was discovered stored in an underground bunker on the POL field. The existence of this gasoline had been unknown to the accountable officer and it was not carried on his stock record accounts. The fact of its discovery having been brought to the accused's attention, he directed that it be removed from the bunker and stored separately pending a decision as to its disposition. Pursuant to these orders, the gasoline was removed from the bunker and, according to the weight of the evidence, stored in 55-gallon steel drums in a shed on the POL field apart from

other gasoline stored on the field. The accused directed Major Sims not to assume accountability for this gasoline pending further instructions.

Between the first and fifteenth of July 1949, a change directed by higher headquarters in the type of official gasoline coupons used by units and authorized individuals to obtain issues of quartermaster gasoline resulted in an overage of coupons accruing to the credit of the Darmstadt Sub-Post POL field equivalent to 3000 gallons of gasoline. The extra coupons were surrendered to the Frankfurt depot and gasoline drawn against them. This gasoline also was stored separately in drums on the Darmstadt POL field and was not entered on the accountable officer's stock record accounts. A false entry was made on a voucher dated 12 July 1949, indicating the issue of 3000 gallons of gasoline to transients on that date to balance the requisition of this gasoline from the Frankfurt depot. There is no proof that the accused had any knowledge of this particular gasoline or of the transactions involved in its acquisition.

Early in September 1949, the accused approached Mangold and offered to sell him 3000 gallons of gasoline. Mangold negotiated the sale with other Germans and arranged for transportation with a German trucking firm. The accused gave him a written order authorizing him to draw the gasoline at the Darmstadt POL field. On Labor Day, 5 September 1949, the accused called Major Sims at his quarters and directed him to take necessary action to issue 3000 gallons of gasoline that day, explaining that he had been directed by the EUCOM Quartermaster to make an emergency issue in that amount to the IRO in Lampertheim. He further directed Major Sims to issue the 3000 gallons stored in drums which had been found in the underground bunker on the POL field and for which Major Sims was not accountable. As it was a holiday, he told Major Sims that Army trucks were not available and that he had arranged with Mangold to furnish German transportation. Later in the day, a truck from a German trucking firm loaded the gasoline at the POL field and delivered it to a German factory in Eberstadt. Major Sims reported to the accused the fact that the issue had been made as directed, and the following morning delivered the issue slip to him at his office. Subsequently, the accused advised Major Sims that he had "taken care" of the matter as a "salvage issue." Mangold paid the accused either 6,643 or 6,634 marks for the gasoline.

Accused's defense to the specifications of and Charge I of which he was found guilty consisted of a direct and explicit denial of any knowledge of or participation in the stealing and sale of the gasoline involved, together with the suggestion that the entire evidence against him had been fabricated by a "group of disgruntled enlisted men \* \* \* and Germans." Defense efforts to impeach the credibility of Major Sims failed.

The prosecution evidence establishes beyond reasonable doubt all the essential elements of proof necessary to support the court's findings

of guilty of Specifications 1 and 2 of Charge I and of Charge I. Thus, it is seen that the instant case presents, with respect to Charge I and Specifications 1 and 2 thereof, the sharply defined single controverted issue of fact raised by the accused of his knowledge of and participation in the theft and sale of the gasoline in question. The determination of this issue, in the first instance, was the duty of the trial court (CM 325457, McKinster, 74 BR 233,241); and its findings are entitled to considerable weight (CM 323161, Lacewell, et al, 72 BR 105,109). This does not preclude the Board of Review from reaching an opposite conclusion (AW 50(g), MCM, 1949, p.290), nevertheless under the circumstances presented by the present record of trial, the Board of Review cannot conclude that the court erred in its findings of guilty of Specifications 1 and 2 of Charge I and of Charge I, nor would the Board of Review be justified in disturbing these findings (CM 335526, Tooze, 3 BR-JC 313, 341). The court correctly excepted from its findings as to both specifications gasoline alleged to have been stolen and sold in excess of that established by the proof (MCM, 1949, Par. 78c).

Both Specifications 1 and 2 of Charge I allege that the accused committed the respective offenses "in conjunction with" other persons. With the exception of Mangold, the proof does not indicate that such persons acted "in conjunction with" the accused in the theft and sale of the gasoline. To the contrary, it appears that such persons were duped by the accused and that their acts were done in good faith pursuant to his orders. This failure of proof does not help the accused. It is well established that a specification which alleges that A did in conjunction with B commit an offense alleges the commission of the offense by A only and does not charge B with the commission of a crime (CM 260797, Hundley and Imes, 40 BR 19,20). The words "in conjunction with B" constitute a prepositional phrase describing the associate of A in the commission of his offense (CM 250668, Kistler and Hibner, 33 BR 31,33). Such descriptive words may be rejected as surplusage (MCM, 1949, Appendix 4f, p.311). The court should have excepted the words "Major Charles B. Simms, Karl Buensch, and Walter Roehl" from its findings of guilty as to Specifications 1 and 2 of Charge I.

A careful examination of Letter AG 463.7 GPA-AGO, Hq EUCOM, Subject: Transfer of Gasoline and Engine Oil Dispensing Responsibilities to EUCOM Exchange System, dated 27 June 1949, reveals it to be, as indicated by its subject, a directive transferring responsibility, as of 1 July 1949, from quartermaster facilities to EES facilities for the sale of gasoline and engine oil "to operators of motor vehicles registered with and licensed by the Chief, Provost Marshal Division, USAREUR \* \*." It also contains detailed instructions governing the transfer of facilities, supplies and personnel between quartermaster and EES installations, and establishes an accounting procedure. It does not prohibit the sale of

gasoline or engine oil by quartermaster installations to individuals after 1 July 1949. To the contrary, paragraph 7 specifically provides for the sale of gasoline and engine oil "to owners of vehicles licensed by the Chief, Provost Marshal Division, USAREUR" in isolated areas "where only US military gasoline dispensing facilities are available" under agreements to be negotiated locally between local Post Commanders and Exchange Officers. The use of EES POL coupons in obtaining gasoline and engine oil from "Ordnance emergency service" filling stations is specifically authorized, and the use of such coupons at quartermaster facilities is not prohibited.

In Specifications 8 and 9 of Charge II, the accused is charged with wrongfully and unlawfully obtaining gasoline from the Darmstadt POL field through the use of EES POL coupons in violation of the directive discussed in the preceding paragraph. In addition to the fact that such directive does not make the obtaining of gasoline in this manner either wrongful or unlawful, the record of trial contains uncontradicted evidence that the Darmstadt Post Commander had authorized the sale of gasoline at the Darmstadt POL field to certain individuals for EES POL coupons. Under these circumstances, the court erred in finding the accused guilty of Specifications 8 and 9 of Charge II and its findings as to these two specifications cannot be sustained (cf. CM 332338, Rabb, 81 BR 77,95).

In Specification 16 of Charge II, the accused is charged with wrongfully and unlawfully selling 100 gallons of gasoline to Friedrich Mangold during the month of April 1950. Specification 17 of Charge II alleges a similar offense during the month of May 1950. Both offenses are alleged to be in violation of paragraph 1b, Article 1, Ordinance 38, as stated in paragraph 2, Circular 21, Hq. EUCOM, 12 September 1949. The court found the accused guilty of Specification 16, Charge II, and guilty of Specification 17, Charge II, except for the words and figures 100 substituting therefor the words and figures 75.

That portion of the Military Government Ordinance and EUCOM circular alleged to have been violated prohibits, among other things, the sale by American Military personnel of any property, except automobiles, obtained from US Army or EES sources to Germans.

The evidence adduced by the prosecution in support of Specifications 16 and 17, Charge II, shows that the accused was indebted to Mangold in the sum of 1500 marks which debt he arranged to pay through the delivery of gasoline to Mangold. Beginning in September or October 1949, the accused's employee, Willert, acting on the accused's instructions and using the accused's car, obtained gasoline from time to time at the Darmstadt POL field which gasoline he delivered to Mangold. Willert paid for the gasoline with EES coupons furnished by the accused. During April 1950, Mangold acknowledged receipt of 22 twenty-liter cans of gasoline, and during May 1950, 15 twenty-liter cans. Mangold credited the accused's account at the rate of 12 to 15 marks per can according to

the prevailing price at the time of delivery of the gasoline. The defense offered no evidence to contradict these facts. Under these circumstances, the court was fully justified in finding the accused guilty of Specifications 16 and 17 of Charge II and of Charge II. It correctly excepted from its findings as to Specification 17 gasoline alleged to have been sold in excess of that established by the proof (MCM, 1949, Par. 78c).

The reviewing authority designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, 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 52 years of age, married, and has two children. He graduated from Valparaiso University High School in 1922 and from the University of Chicago in 1930, with the degree of Bachelor of Philosophy. He enlisted 5 June 1917 and served, including overseas service with the 33d Division, until discharged 31 January 1919. He was appointed a second lieutenant, infantry reserve, 23 August 1927. Thereafter, he performed numerous short periods of active duty as a reserve officer, including duty with the CCC from 21 April 1933 to 20 April 1939. He was called to active duty 10 February 1941 and served continuously until 14 January 1946 including duty as an instructor in Chicago ROTC Schools (10 February 1941 to 16 April 1943), and as S-4 and later Commanding Officer of an Air Force Service Unit within the continental United States and overseas. He was recalled to active duty 27 September 1946 and after duty as Information and Education Officer at Camp Lee, Virginia, was assigned to the European Command, 8 October 1947. He was promoted to First Lieutenant, Infantry Reserve, 25 October 1930, to Captain, Infantry Reserve, 7 February 1935, to Major, AUS, 27 June 1942, to Lieutenant Colonel, Air Reserve, 16 January 1946, to Lieutenant Colonel, AUS, 10 September 1946, and to Colonel, Infantry Reserve, 29 October 1946. His efficiency records indicate two ratings of excellent, four of superior and numerical ratings of 5.5, 5.7, 5.5 and 5.6 for duty performed from 10 February 1941 to 20 February 1947. Subsequent ratings have been: 114, 103, 073, 066, 076, 079, 099 and 083.

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 of Specifications 1 and 2 of Charge I, with the exception of the words "Major Charles B. Simms, Karl Buensch, and Walter Roehl" in each of these specifications, legally insufficient as to these words, legally sufficient to support the findings of guilty of Charge I; and of Specifications 16 and 17 of Charge II and Charge II, and legally insufficient to support the findings of guilty of Specifications 8 and 9 of Charge II. The Board of Review also is of the opinion that the record of trial is legally sufficient to support the sentence, and to warrant confirmation of the sentence. A sentence 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 confinement at hard labor for three years is authorized upon conviction of violations of Articles of War 94 and 96.

C. J. Hauch, J.A.G.C.  
William C. Fitzhugh, J.A.G.C.  
Arthur P. Ireland, J.A.G.C.

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

JAGU CM 343793

UNITED STATES

v.

Lieutenant Colonel FRANK K.  
CRUIKSHANK, O245004, S-4  
Section, Headquarters Frank-  
furt Military Post

FRANKFURT MILITARY POST

Trial by G.C.M., convened  
at Frankfurt-am-Main, Germany,  
21 September and 5, 6, 9, 10,  
11 and 12 October 1950. Dis-  
missal, total forfeitures after  
promulgation, and confinement  
for three years.

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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 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 and was found guilty of the following offenses, all alleged to have occurred at Darmstadt, Germany: feloniously stealing and wrongfully and knowingly selling an amount in excess of 2,000 gallons of gasoline of the value of more than fifty dollars, property of the United States, furnished and intended for the military service thereof, in conjunction with Major Charles B. Simms, Friedrich Mangold, Karl Buensch, and Walter Roehl, on or about 5 September 1949, in violation of Article of War 94 (Charge I, Specifications 1 and 2); wrongfully and unlawfully obtaining on each of two occasions, once during April 1950 and once during May 1950, from the POL field of the Darmstadt Military Sub-Post approximately 100 gallons of gasoline through the use of European Exchange System POL coupons, in violation of European Command letter dated 27 June 1949, and in violation of Article of War 96 (Charge II, Specifications 8 and 9); wrongfully and unlawfully selling, during the month of April 1950, 100 gallons of gasoline to Friedrich Mangold, in violation of Circular Number 21, European Command, dated 12 September 1949, and in violation of Article of War 96 (Charge II, Specification 16); and wrongfully and unlawfully selling, during the month of May 1950, 75 gallons of gasoline to Friedrich Mangold, in violation of said circular, in violation of Article of War 96 (Charge II, Specification 17).

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 approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I (stealing and wrongful sale of gasoline) with the exception of the words "Major Charles B. Simms, Karl Buensch, and Walter Roehl" in each specification, and to support the finding of guilty of Charge I, legally insufficient to support the findings of guilty of Specifications 8 and 9 of Charge II (wrongful obtaining of gasoline), and legally sufficient to support the findings of guilty of Specifications 16 and 17 of Charge II (wrongful sale of gasoline) and Charge II. The Board of Review is also of the opinion that the record of trial is legally sufficient to support the sentence and to warrant confirmation thereof.

3. The record of trial discloses that immediately after the arraignment of the accused, his individual defense counsel moved the court that the prosecution be required to furnish him "before the trial" copies of the written statements made to the "CID" by witnesses to be called by the prosecution (R 11, 12). The defense counsel advised the court that he was unable to give the names of the witnesses whose statements he desired because he did not know "who did and who did not make statements" (R 12, 13). A motion for continuance was also made by defense counsel (R 13). The court closed and upon reopening the law member announced that the motion to "direct the TJA to turn over certain papers to the defense [was] denied" and added that the defense counsel was "well aware of the procedures which they can go through in order to obtain any statements or at least a refusal of any statements that they desire" (R 14). A continuance for two weeks was granted (R 14).

Upon reconvening two weeks later the defense counsel offered two exhibits which were admitted in evidence, one a letter addressed to "Commanding Officer Frankfurt Military Post" in which he stated in part as follows:

"(1) Request is hereby made that the written statements made by witnesses, that are to be called by the prosecution, to the CID in the above mentioned case, or copies thereof be made available to defense counsel prior to trial. These statements are essential for preparation of the accused's case inasmuch as the statements contained therein may prove to be inconsistent with the testimony given by witnesses at the trial." (R 16, Def Ex A),

and the reply to this letter which, after indicating that a list of the names of the witnesses whose statements were desired had been subsequently furnished

by Major Carl E. Winkler, accused's military counsel, stated as follows:

"An examination of this list indicates that with the exception of Gertrude FREY and Master Sergeant Frank LEE, all witnesses named on the list gave testimony before the officer appointed pursuant to the provisions of Article of War 46b in the presence of Lt Col CRUIKSHANK and counsel of his own choice. The expected testimony of Master Sergeant Frank LEE was incorporated in a deposition upon agreement with counsel for Lt Col CRUIKSHANK. Gertrude FREY is, and has been, Lt Col CRUIKSHANK's housemaid and is easily available to him and his counsel for questioning.

"It is considered no reasons exist to make available to counsel the statements made to the C.I.D. by the witnesses listed by Major WINKLER. These statements are classified 'Confidential', and were furnished to the Post Commander for his information and guidance." (R 16, Def Ex B)

The defense counsel renewed his request for the "CID" statements and added

"I renew the request that I be permitted to see the statements -- these CID statements -- of the witnesses either during their testimony or right after they have completed their testimony. \* \* \* I want the record to show that they have not been available at all." (R 17)

The motion was overruled (R 17).

The accused subsequently pleaded not guilty to all charges and specifications thereunder and trial proceeded (R 17). After two witnesses had testified for the prosecution, Major Charles B. Sims was called as a witness (R 19-30, 31-42). He was questioned on direct examination and cross-examination was begun without any request by defense counsel for his or other "CID" statements. After a period of cross-examination the defense counsel stated to the court:

"I would like to leave off cross-examination of this witness at this point and request him at a subsequent point after further witnesses have testified \* \* \*"(R 58)

The law member stated, "You may continue cross-examination of this witness later" (R 58). After a short redirect and examination by the court, the court adjourned until the next day (R 58-62).

Upon reconvening at 1330 hours and while the prosecution's next witness was being called, the defense counsel stated to the court as follows:

"If it please the court, while that witness is coming in, I would like to make this motion. You have heard my motions, and of course, I have heard your ruling on my request for C.I.D. statements of witnesses. I particularly refer, without waiving the motion itself, to Major Sims, the last witness yesterday. I move that the trial judge advocate be instructed by the court to make his statements to the C.I.D. available to me so that upon his recall I may show inconsistencies between statements therein and his testimony before this court."

The motion of the defense was overruled (R 63).

The record shows no further requests by defense counsel for "CID" statements. After the prosecution rested, the defense called Major Sims as the first witness, stating prior to his call as follows:

"If the court please, as you will recall, Major Sims, the prosecution witness was excused during the course of his cross-examination, to be recalled for further cross-examination at a later time. I therefore request that Major Sims be recalled at this time so his cross-examination may be continued." (R 151)

On this cross-examination Major Sims testified that he had given one written statement to the "CID" (R 152). He was not questioned as to its contents, truth or falsity nor was a request made by defense counsel for an inspection of it (R 152).

The request of individual defense counsel that he be given the opportunity of inspecting the statements of witnesses given to the Criminal Investigation Division and its refusal require some comment. The Manual for Courts-Martial 1949, paragraph 137b, page 181, 182, provides:

"The privilege that extends to communications made by informants to public officers engaged in the discovery of crime should be given a common-sense interpretation, keeping in mind both the public interest and the interest of the accused."

This privilege may be waived by appropriate governmental authorities, and does not warrant the exclusion from evidence of statements of informants which are inconsistent with, or might otherwise be used to impeach, their testimony as witnesses (see *United States v. Krulewitch*, 145 F 2d 76, 156 ALR 337). As a general rule, however, an accused's request for the production of written statements made by a prosecution witness should not be granted if

the purpose of the request is a mere "fishing expedition." Such request will ordinarily be refused where the defense fails to lay a proper foundation, by showing, either through a sworn statement or by the testimony of the witness himself at the trial, that the witness' testimony at the trial varies materially from his prior statement, and in what particulars (*Arnstein v. United States*, 54 App DC 199, 296 F 946 (cert den, 264 U.S. 595); *United States v. Rosenfeld*, 57 F 2d 74, 76, 77; *Asgill v. United States*, 60 F 2d 776; *United States v. Krulewitch*, supra, and cases cited therein; *State v. Simon*, 131 La 520, 59 So 975; *State v. Zimmaruk*, 128 Conn 124, 20 A 2d 613).

In *Arnstein v. United States*, supra, the court said:

"The statements were not admissible for the purpose of impeaching Gluck, because the proper foundation therefor had not been laid. While Gluck admitted that he made a statement to Dooling which the latter afterwards read to him, and that he said to Dooling that part of it was untrue, the defendants did not ask him what the statement contained, nor did they offer to show in what particular it conflicted with anything which he had testified to in chief. It is true they said they desired the statements for the purpose of using them to contradict what he had said; but they did not say that they would contradict him or that they expected to contradict him by them. They were simply bent upon a tour of investigation, in the hope that they would find something which would aid them."  
(p 950)

When the principles enunciated in the above cited cases are applied to the facts before us it becomes clear that it was not error under the circumstances to refuse the "CID" statements to the defense. In each instance except one the defense counsel stated that he wanted the statements because they "may" prove inconsistent with the testimony given at the trial. Obviously on these occasions the defense counsel was "bent upon a tour of investigation," a mere "fishing expedition." On the other occasion when he requested Major Sims' statement "so that upon his recall I may show inconsistencies between statements therein and his testimony before this court" he did not offer to show in what particular it conflicted with anything which he had testified to in chief. It appears that he was still bent on a tour of investigation. This becomes even more apparent when it is considered that on cross-examination he failed even to question Major Sims as to the contents of his statement or its truth or falsity but attempted merely to show that he was cooperating with the "CID" for his own benefit. We are of the opinion that it was not error to refuse the "CID" statements under the circumstances.

A further question presented by the record of trial arises out of the cross-examination by the prosecution of Gertrud Frey, a witness called by the prosecution, on grounds that she was hostile, resulting in the admission of extracts of a statement she had given to the "CID."

It is apparent from the record of trial, without going into details, that Gertrud Frey was a reluctant and recalcitrant witness and did not intend to aid the prosecution more than absolutely necessary. She had been employed by the accused for approximately two years and his "family has been always very good and nice to me, and I like the children very much, especially the two-year old" (R 31, 38). Upon being questioned by the prosecution concerning an alleged pertinent conversation between the accused and another witness in which she acted as interpreter, she said she was unable to "remember exactly because she wasn't really interested, and I am not so very good in interpreting. Lots of times the Colonel was not able to understand myself clearly" (R 33). After receiving this reply, the prosecution attempted to refresh her recollection by questioning her as to whether or not she had made a statement to the "CID" (R 33). She replied in the affirmative but qualified her answer with "I always repeated that I am not able to remember" (R 34). When urged by the prosecution, she remembered she put in the statement "there was a conversation about gasoline which Mangold was supposed to pick up" (R 34). When interrogated as to whether she remembered anything else she put in her statement she replied "I don't remember very well" (R 34). After several collateral questions by the court the prosecution expressed a desire that the witness be declared hostile and requested permission to cross-examine her, which permission was granted (R 35, 36). The prosecution thereupon elicited the following testimony from her.

"Questions by prosecution (Major Atkins):

"Q Miss Frey, did you make a statement to the CID, Agent Perry, on the 13th of June 1950?

A Yes; I don't know the date but I gave it.

"Q Now, I will ask you if in that statement you said the following, and I quote: 'In the beginning of September 1949, I was present during a conversation between Lieutenant Colonel Cruikshank and the German contractor Mangold at the house of Lieutenant Colonel Cruikshank.'

A Yes.

"Q Now, also in that statement I will ask you if you made the following statement, and I quote: 'I supported the conversation of the two with translations since Mangold doesn't speak any English.' Did you say that?

A Yes.

"Q Now, I will ask you if you also said in that statement the following, and I quote: 'The conversation was about 3,000 gallons of gasoline that Mr. Mangold was to sell for Colonel Cruikshank.' Did you say that?

A I always stated I can't remember the amount. There was talk about gasoline but I always said I don't know the amount.

"Q Did you say in your statement that the conversation was about 3,000 gallons of gasoline that Mr. Mangold was to sell for Colonel Cruikshank?

A Well, if it is there, but I always said to Mr. Perry, 'I don't know it,' but he wanted to write it down at any rate." (R 35,36)

At this point the defense objected to the procedure on the ground that the prosecution was attempting to use the extrajudicial statement as substantive evidence rather than as a means of refreshing the witness' recollection in connection with her sworn testimony. The objection was overruled, the law member stating that "the court, having observed the demeanor of this witness, reaffirms its original ruling that she is a hostile witness, and the prosecution may proceed."

"Q I will ask you if in this statement that you made to the CID, you said the following, and I quote: 'Mangold told the Lieutenant Colonel through me that he would inquire with friends if they wanted to buy gasoline.' Did you say that?

A Yes, Mangold said it, but it is definitely not correct.

"Q What isn't correct? Did Mangold say that?

A He said that." (R 36)

At this point the defense interjected that "what Mangold said to the CID" was irrelevant.

"Q I will ask you if in your statement you said the following, and I quote: 'During this conversation Colonel Cruikshank told Mangold that the gasoline had to be sold on the next day, an American holiday, and that Mangold had to furnish transportation, and Mangold agreed to it.' Did you say that, yes or no?

A Yes.

\*

\*

\*

"Q I will ask you if in your statement you said the following, and I quote: 'They also agreed about the price that Mangold was to pay the Colonel but I cannot recall the exact amount.' Did you say that, yes or no?

A Yes.

"Q I will ask you if in this statement you said the following, and I quote: 'A few days later, as far as I can recall, the Colonel had another conversation with Mangold about the aforementioned gasoline at the Colonel's quarters during which I was present for a part of.' Did you say that?

A I don't remember it any more; if I had written it.

"Q I will ask you if in that statement you said the following, and I quote: 'Mangold complained to the Colonel that a shortage was found in the gasoline.' Did you say that, yes or no?

A Yes, he said that.

"PROSECUTION (Major Atkins): I have no further questions." (R 37)

Prior statements made out of court by a witness may be used by the prosecution to refresh the witness' memory (CM 323083, Davis, 72 BR 23, 33; Morris v. State, 35 Okla. Crim. Rep. 5, 247 P 418, 420; Wharton's Criminal Evidence 11th ed, sec 1273). When the witness Frey stated she did not "remember exactly" the conversation between the accused and Mangold concerning gasoline although admitting her presence during the conversation and her action as interpreter, it was permissible for the prosecution to attempt to refresh her recollection. He proceeded to do this by questioning her whether or not she had made a statement to the "CID." She admitted having made such a statement but continued to insist she was unable to remember. It was under these circumstances, her failure to remember although admitting a statement to the "CID," coupled with her obvious reluctance to testify, her evasiveness and her demeanor, that the court declared her to be a hostile witness and permitted the prosecution to cross-examine her.

The Manual for Courts-Martial 1949, paragraph 139b, page 188 provides in part as follows:

"A witness who refuses to testify as to a certain fact (as when he relies on his right not to incriminate himself) or who testifies that he has no recollection as to such fact, cannot be impeached by proof that at some other time he made a statement as to the fact in question. The reason for this rule is that proof of his former statement would not serve to contradict his testimony or lack thereof." (Underscoring supplied)

In CM 323083, Davis, 72 BR 23, an accused was charged with the wrongful and unlawful sale of cognac to one Anderson. Anderson, when called as a witness by the prosecution, refused to testify on the ground that his answer might incriminate him. He was then asked whether he

had made a written statement concerning any dealings with the accused. The witness admitted making such a statement whereupon it was admitted in evidence. This statement incriminated the accused. No other testimony was offered in support of this specification. The Board of Review in setting aside the finding of guilty stated,

"The witness Anderson having refused to testify to any material fact in the case, he was therefore not subject to impeachment. The court erred in permitting the prosecution to 'impeach' the witness. Under the guise of impeachment the prosecution succeeded in placing before the court a statement made by the witness prior to trial. This was improper and the statement should not have been admitted in evidence for any purpose."  
(p 33)

When the trial judge advocate persisted in his interrogation of Gertrud Frey after it appeared she either had no recollection or was unwilling to testify against the accused and thereby succeeded in getting portions of her statement to the "CID" before the court, clearly his action resulted in error. Her extrajudicial statement could not properly be considered as evidence (CM 323083, Davis, supra; CM 297312, Westfield, 18 BR (ETO) 269, 281) and if it was the sole indication of guilt, the conviction would necessarily be set aside as in CM 323083, Davis, supra. Had her testimony been stricken out, a finding of guilt clearly would not have resulted in prejudicial error (Kuhn v. United States, 24 F 2d 910). Inasmuch, however, as this did not occur and there was other competent evidence of guilt, it becomes necessary to examine such evidence to determine whether or not the improper presentation of portions of her extrajudicial statement to the court injuriously affected the accused's substantial rights within the contemplation of Article of War 37.

Friedrich Mangold testified in pertinent substance as follows:

He was a German national operating an upholstering business and had a contract with the Darmstadt Military Sub-Post Quartermaster for furniture repair (R 19, 29). About the first of September 1949, the accused visited his shop in Darmstadt and requested him to "come along into" the latter's car. In the car the accused "suggested and told" him that he wanted to do "some business" with him "about some gasoline." As Mangold was unable fully to understand the accused, both proceeded to the accused's house where they conversed and the accused's maid, Mrs. Gertrud Frey, acted as interpreter. There the accused advised Mangold that there was "available" 3,000 gallons of gasoline which he desired Mangold to "mediate" for sale. Mangold was unable to "say yes right away" because he "didn't know whether it was possible to get rid of such amount and [he] had to find out about it first" (R 20). No price was agreed upon at the time, but two days later, after obtaining some information about price, he "notified the maid, Mrs. Frey, about the price, and this was from 60 to 65

pfennigs and was accepted." Mangold agreed to negotiate the sale of the gasoline (R 21). He arranged for the sale of the gasoline to an acquaintance named Koerbel and further arranged for its transportation from the Darmstadt Quartermaster Depot by a German trucking agency, Transport Hessen Kolonne (R 22). The accused gave Mangold a document signed by himself and Major Sims authorizing Mangold to pick up 3,000 gallons of gasoline at the Darmstadt Quartermaster Depot (R 22, 26). Koerbel paid Mangold 6,643 or 6,634 marks for the gasoline, which money the latter "turned over" to the accused in the presence of "the maid, Mrs. Frey" (R 22, 129, 130).

Major Charles B. Sims testified in pertinent substance as follows:

He first became acquainted with the accused when assigned to the Darmstadt Military Post in March 1948, when the accused was Quartermaster for this post (R 42, 43). On Labor Day, 5 September 1949, at about 7:00 a.m., a desk clerk at his hotel in Darmstadt came to his room and advised him that the accused wanted to see him immediately. Sims proceeded downstairs where he saw and had a conversation with accused. The accused informed him that he had received a call from the "Theater Quartermaster" to the effect that it was necessary to make an emergency issue of approximately 3,000 gallons of gasoline to the International Relief Organization in Iampfertheim and it would be necessary for Sims to remain on duty that day until the issue was made (R 43). He further informed Sims that the particular gasoline to be issued was in drums in a separate inclosure (R 45). The 3,000 gallons of gasoline was not carried on Sims' books nor was he accountable for it. It was extra gasoline which had been found in an underground bunker on the "POL" field and was being held pending a decision by the accused as to its proper disposition (R 48, 59). At approximately 10:00 a.m. on 5 September 1949 the accused telephoned him and advised him that

"\* \* \*no Army trucks were available that day since it was Labor Day, and that he had made arrangements with Mr. Mangold, who was a contractor and regularly worked for us, to transport the gasoline and that there would be a representative to sign for the gasoline" (R 45).

Later that day the gasoline was issued and he, Sims, signed the issue slip which was delivered to the accused the next morning (R 44, 54, 157). Subsequently, the accused informed Major Sims that he had "taken care" of the issue of this gasoline "under salvage issue" (R 55).

Josef Boehm testified that on 5 September 1949 he was employed as a Driver by the Transport Kolonne Hessen, Darmstadt (R 98). On that day he proceeded to a camp at Darmstadt and obtained approximately sixty steel "barrels" of gasoline which he delivered to "Winkelkoetter in

Eberstadt" (R 99).

Paul Winkelkoetter testified that on 5 September 1949 he gave Mangold permission to "store" some drums of gasoline in his "depot" (R 102). He was not at his place of business when the gasoline arrived but when he learned of the quantity, owing to the fire hazard, he told Mangold to "get rid of the drums" (R 103). Forty drums were removed the same day and the remaining twenty drums were removed the following day (R 104).

Rudolph Koerbel testified that he had a "wholesale-agency business" (R 109). Subsequent to his conversation with Mangold he "offered" the gasoline to his "associates." He obtained the gasoline from the "establishments" of Mr. Winkelkoetter (R 110). He received seventy pfennigs per liter for the gasoline and turned over approximately 6000 marks to Mr. Mangold (R 110, 111).

Gertrud Frey testified on direct and cross-examination, exclusive of her inadmissible statement, that she was in the employ of accused; that Mangold came several times to the home of the accused; that she acted as interpreter for these two men; that there was conversation about gasoline, and that "Everything we talked over, he always said, 'That's confidential'" (R 33, 34, 39).

The accused's defense consisted of an explicit denial of any knowledge of or participation in the alleged transaction involving 3,000 gallons of gasoline.

This competent evidence establishes each essential element of the theft and wrongful sale of gasoline found by the court. It is apparent that the inadmissible portions of the extrajudicial statement of Gertrud Frey were purely of a corroborative nature and not necessary to support a conviction. On cross-examination she repudiated her statement to the "CID", testifying that it was prepared on the basis of statements made by Mangold and that it was signed under duress.

Article of War 37 in pertinent part provides:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence \* \* \* unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused; \* \* \*"

In Kotteakos v. United States ((1946) 328 U.S. 750, 757), the Supreme Court, in considering the Federal harmless error statute then in effect, the provisions of which are substantially similar to those of Article of War 37, summarized its conclusions as follows:

"If, when all is said and done the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment shall stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 U.S. at 294, 84 L ed 260, 60 S Ct 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Although the presentation in court of portions of the extra-judicial statement of Gertrud Frey was erroneous, considered in the light of the record of trial as a whole, we see no reason to suspect that this testimony materially affected the findings or prejudicially affected any substantial right of the accused. Neither do we believe that the subsequent consideration of Mrs. Frey's testimony by the court (R 239) resulted in any prejudicial error. The transcript itself shows that Mrs. Frey repudiated in court her statement to the "CID" and testified that it was given and signed by her under duress. Moreover, before the court examined the transcript the defense counsel invited the court's attention to his cross-examination of Mrs. Frey during which he developed the manner in which the statement was obtained (R 239). We therefore conclude that in the light of all the evidence in this case the substantial rights of the accused were not prejudiced by the erroneous presentation to the court of Mrs. Frey's testimony as to what she said to the "CID."

The Board of Review is of the opinion that the evidence does not support so much of the findings of guilty of Specifications 1 and 2 of Charge I as finds that the offenses were committed in conjunction with "Major Charles B. Simms," and "Karl Buensch and Walter Roehl." We concur in that conclusion.

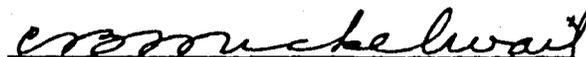
The Board of Review is of the further opinion that the evidence fails to support the findings of guilty of Specifications 8 and 9 of Charge II, wherein it is alleged that the accused wrongfully and unlawfully

obtained gasoline from the Darmstadt POL field through the use of European Exchange System POL coupons in violation of a letter directive. We concur with the Board's reasoning and conclusions on this point.

The evidence as to Specifications 16 and 17 of Charge II is substantially as set forth by the Board of Review in its opinion and clearly establishes the accused's guilt of wrongfully and unlawfully selling during the months of April and May 1950, respectively, 100 gallons and 75 gallons of gasoline to Friedrich Mangold, in violation of Circular Number 21, European Command, dated 12 September 1949 and in violation of Article of War 96.

4. For the foregoing reasons the Judicial Council is of the opinion the record of trial is legally sufficient to support the findings of guilty as to Specifications 1 and 2 of Charge I, except for the words "Major Charles B. Sims," and "Karl Buensch, and Walter Roehl," and the finding of guilty of Charge I, legally insufficient to support the findings of guilty of Specifications 8 and 9 of Charge II, legally sufficient to support the findings of guilty as to Specifications 16 and 17 of Charge II, and Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof.

  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

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

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

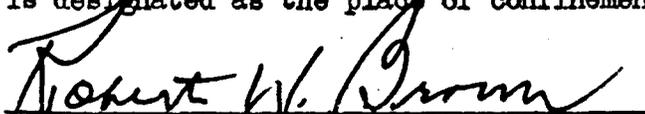
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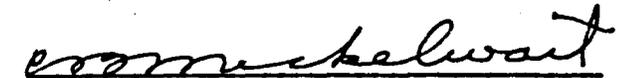
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THE JUDICIAL COUNCIL

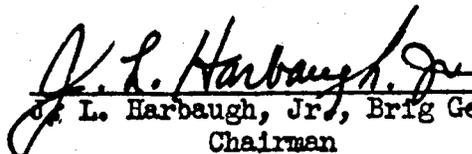
Harbaugh, Brown and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of Lieutenant Colonel Frank X. Cruikshank, 0245094, S-4 Section, Headquarters Frankfurt Military Post, upon the concurrence of The Judge Advocate General only so much of the finding of guilty of Specification 1 of Charge I is approved as involves a finding that the accused did at the place and time alleged, in conjunction with Friedrich Mangold, feloniously steal an amount in excess of 2,000 gallons of gasoline of the value of more than fifty dollars, property of the United States, furnished and intended for the military service thereof; only so much of the finding of guilty of Specification 2 of Charge I is approved as involves a finding that the accused did at the place and time alleged, in conjunction with Friedrich Mangold, wrongfully and knowingly sell an amount in excess of 2,000 gallons of gasoline of the value of more than fifty dollars, property of the United States, furnished and intended for the military service thereof; the findings of guilty of Specifications 8 and 9 of Charge II are 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, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

MAR 27 1951

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

I concur in the foregoing action.

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

8 March 1951



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

(127)

JAGK - CM 343938

JAN 4 1951

U N I T E D S T A T E S )

FRANKFURT MILITARY POST

v. )

) Trial by G.C.M., convened at Frankfurt-  
) am-Main, Germany, 28, 29 September and 2,  
) 3 October 1950. Dismissal, total for-  
) feitures after promulgation, and con-  
) finement for three (3) years.

)  
)  
) Captain WILLARD E. FINLEY )  
) (O-1291971), 7752 Finance )  
) Center. )

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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 Judge Advocate General and The Judicial Council.

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

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

Specification 1: In that Captain Willard E FINLEY, Inf, 7752 Finance Center, did, at Friedberg, Germany, on or about 2 July 1950, feloniously steal one (1) 16 mm Motion Picture Projector complete with Sound Reproducing Equipment, Bell & Howell design, bearing Serial No. 387917, of the value of about two hundred, sixty-two dollars and twenty cents (\$262.20), property of the United States.

Specification 2: In that Captain Willard E FINLEY, Inf, 7752 Finance Center, did at Bad Nauheim, Germany, on or about 2 July 1950, knowingly and without proper authority dispose of by placing for sale with Erich FROEBEL, the proprietor of a photographic store, one (1) 16 mm Motion Picture Projector complete with Sound Reproducing Equipment, Bell & Howell design, bearing Serial Number 387917, of the value of about two hundred, sixty-two dollars and twenty cents (\$262.20), property of the United States.

CHARGE II and Specification: (Nolle prosequi by direction of the appointing authority).

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

Specification: In that Captain Willard E FINLEY, Inf, 7752 Finance Center, did, at Friedberg, Germany, on or about 1 October 1949, conspire with First Lieutenant Dusian A. KRIVOSKI, 7752 Finance Center, to commit an offense against the United States, to wit: larceny, by stealing Military Payment Certificates intended for destruction as mutilated currency, and that the said First Lieutenant Dusian A KRIVOSKI did, for the purpose of effecting the object of said conspiracy, feloniously steal one package of mutilated Military Payment Certificates in the total amount of nine thousand, nine hundred and ninety dollars (\$9,990.00).

CHARGE IV: Violation of the 93d Article of War.

Specification: In that Captain Willard E FINLEY, Inf, 7752 Finance Center, in conjunction with First Lieutenant Dusian A KRIVOSKI, 7752 Finance Center, did, at Friedberg, Germany, on or about 3 August 1950, feloniously steal nine thousand, nine hundred and ninety dollars (\$9,990.00), in Military Payment Certificates, the property of the United States.

He pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for five (5) years. The reviewing authority approved the sentence but reduced the period of confinement to three (3) years, 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 forwarded the record of trial for action under Article of War 48.

### 3. Evidence

#### a. For the Prosecution

#### Specifications 1 and 2, Charge I, and Charge I

On 15 March 1950, the Central Film and Equipment Exchange, Friedberg, Germany, issued a serviceable motion picture projector with sound equipment, manufactured by Bell & Howell, Serial No. 387917, to the "7752nd Finance Center 'ATTN: Capt Finley'". The Issue Slip evidencing the transaction listed the item as Signal Corps property "requested for the

previewing of training films prior to their use in training and I & E programs," and was signed by accused as having received it as the authorized representative of the organization to which it was issued (R 75, Pros Ex 5).

Erich Froebel, a German national, testified that he is the owner of the Photo Centrale, a camera shop located at Bad Nauheim, Germany, which he has operated since 1945. He has known accused since January or February 1950, during which time he sold him several items of photographic equipment. About the "first part of June" 1950 accused called Froebel on the telephone and asked if he could repair a motion picture projector but did not thereafter discuss the same subject. On "the last Wednesday or Thursday in the month of June" 1950, accused telephoned him and asked him whether he would sell a motion picture projector for him. Froebel agreed and promised to pick it up at accused's home on the following Sunday. At about 1200 hours on "the first Sunday in July," Froebel arrived at accused's home, located at Friedberg, Germany (R 35,38,40). Froebel's testimony as to what there transpired is as follows:

"\*\*\* Captain Finley went together with me to the basement and on that occasion I asked him how much he wanted for the projector and sound equipment. He said the sum of 1000 Marks. After about two minutes we left together the house and put the projector and the sound equipment into my car. From Friedberg I drove right away to my shop, to Bad Nauheim \*\*\*.

"It was a 16 mm movie projector with sound equipment \*\*\*" (R 38).

\* \* \*

"I agreed with Captain Finley after I sold it to hand him 1000 Marks. I refused to make a down payment to Captain Finley for the projector. I just wanted to have it on commission in my shop" (R 40).

Froebel further stated, "I had the positive opinion, because of the phone call and the visit to his accused's house, that the projector and sound equipment were turned over to me for sale only" (R 38).

"A misunderstanding could only have been possible on the part of Captain Finley that he had given the wrong projector to me" (R 59).

Froebel placed the projector and sound equipment he had received from accused on the floor of the sales room in his shop, where they remained undisturbed until 4 July 1950 (R 37-38).

On the afternoon of that day, Major Warren E. Crane and Captain

John G. Isgrigg, both of the 7751st Military Police Customs Unit of Frankfurt, Isgrigg also being Chief Agent of the 35th Criminal Investigation Detachment, entered Froebel's shop to price a part for Major Crane's camera. On the floor of the shop, they noticed the projector and sound equipment which Froebel had placed there the previous Sunday. On closer inspection they observed, attached to the projector, a metal tab on which was printed, "U.S. Army Air Corps," and, attached to the extension cord on the sound equipment, a tag on which was inscribed "Philadelphia Signal Depot." Noticing the interest of the two officers in the items, Froebel stated that the projector and sound equipment were for sale and quoted a price. Captain Isgrigg thereupon showed Froebel his "CID" credentials, informed him that the projector and sound equipment might be United States property and placed a guard over the property (R 15-19,22-28,33,36,38,42). About an hour later, Sergeant First Class Charles Bolgiani, Jr., 52nd Criminal Investigation Detachment, arrived at the shop, seized the projector and sound equipment and gave Froebel a receipt therefor (R 39,69). On 10 July 1950, Master Sergeant Jim H. Winslett, 52nd Criminal Investigation Detachment, returned the same projector and sound equipment to accused, who, on 17 July 1950, turned them into the Central Film and Equipment Exchange for repair (R 71-73,78).

First Lieutenant Wallace C. Marley, commanding officer of the Central Film and Equipment Exchange, testified that the latest Signal Corps catalogue listing the projector and sound equipment of the same model and type as that in issue shows their price to be \$262.50 (R 86, 89).

Charge III and its Specification and Charge IV and its Specification

First Lieutenant Dusian A. Krivoski, "Deputy Finance Officer" to Colonel Samuel J. Taggart, Commanding Officer, 7752d Finance Center, Friedberg, Germany, had unrestricted access to the vaults of the Finance Center, and was the only person other than Colonel Taggart who had keys thereto. When Lieutenant Krivoski was assigned to the 7752d Finance Center about the middle of August 1949, he became acquainted with accused who was Headquarters Detachment Commander. About the latter part of November 1949, accused broached the subject to Lieutenant Krivoski "about the possibilities of getting some mutilated money from the Finance Center." Thereafter accused brought up the same subject to Lieutenant Krivoski about once a week until August 1950. Krivoski testified that during these conversations, he "listened and hedged most of the time," was "very definitely" undecided, and "just never considered it" (R 120-121,136-138,147-148).

By paragraph 15, Special Orders Number 166, Headquarters Frankfurt Military Post, dated 2 August 1950, a committee of three officers, Major

David W. Jones, Jr., Captain Willard E. Finley (accused), and Second Lieutenant Ted R. Hayes, were appointed for the purpose of destroying superseded and mutilated Military Payment Certificates at the 7752d Finance Center on 3 August 1950. The currency to be destroyed was of three series, two of which had been superseded prior to that date and the third of which, Series No. 472, was currently in circulation (R 94-95,102,107-108).

At about 0830 hours, 3 August 1950, accused, Major Jones, and Lieutenant Hayes, as the committee hereinabove appointed, reported to the office of Colonel Taggart pursuant to said order. This was accused's first assignment as a member of a committee for the destruction of Military Payment Certificates (R 159). On this occasion as on previous occasions of a like nature, Lieutenant Krivoski represented Colonel Taggart during the proceedings (R 160). At about the same time, Lieutenant Krivoski and Sergeant First Class John Sullivan, also assigned to the Finance Center, were in Room No. 2 of the main vault of the Finance Center preparing the currency to be destroyed by wrapping each denomination in packages of 100 bills and tying each ten packages into a bundle. The bundles thus prepared were packed into footlockers, in each of which was a tally sheet listing its contents. The main vault, which is located in the basement of Headquarters Building of the Finance Center, is partitioned into three rooms. Accused, Major Jones, and Lieutenant Hayes proceeded from Colonel Taggart's office to Room No. 1 of the main vault, and Lieutenant Krivoski and Sergeant Sullivan brought the footlockers to that room. The committee opened the footlockers, removed the currency and counted it, accused doing a "great share" of the counting. The total amount counted agreed substantially with the figure furnished by Colonel Taggart's office as the amount of currency to be destroyed. Three small boxes of the money were then prepared for the purpose of experimental burning. As it was about 1130 hours, and the lunch hour for the Finance Center was between 1130 and 1230 hours, the money was repacked into the footlockers and placed in an inner room within Room No. 1. Lieutenant Krivoski locked up and everyone left (R 95-100, 104,111, 113-117,122-123).

Lieutenant Krivoski went to his office where he received a telephone call from accused. In response to this telephone call, Lieutenant Krivoski met accused in the basement, at which time accused "reminded him again that this looked like a good opportunity to take some of the money - to lay aside a package of money." Lieutenant Krivoski, "shrugging his shoulders," left accused and went to lunch. Everyone returned at about 1230 hours and accused, Lieutenant Krivoski, Sergeant Sullivan and one or two other enlisted men went into the vault. Sergeant Sullivan and the other enlisted men carried upstairs the boxes of currency previously prepared for experimental burning. Accused and Lieutenant Krivoski remained in the vault at the entrance to Room No. 1. According to Lieutenant Krivoski, accused told him that "this is an excellent opportunity to put some away, or words to that effect." Concerning this conversation, Krivoski testified, on cross-examination, as follows:

"Q On or about the 3rd day of August 1950, did you and Captain Finley come to any definite agreement about stealing \$9,990.00?

"A Did we come to a definite agreement?

"Q Yes, a definite clear-cut agreement to steal \$9,990.00 before you actually took the money?

"A I don't know how to anser that.

"Q Let me ask you some more questions. You say you had a conversation during the lunch period on the 3rd day of August, 1950, in the basement of the building with Captain Finley. Right?

"A Yes.

"Q And you didn't answer Captain Finley when he made this alleged proposal to take some money, did you?

"A Yes, I said, 'How do I know the committee wont miss the money.'

"Q Did you say anything further to that?

"A I told him I was scared.

"Q Did you tell him you were going to go ahead and take the money?

"A No.

"Q As a matter of fact, you in your own mind on the 3rd day of August, during the lunch period had not determined in your own mind that you were going to take any money?

"A No.

"Q So you and Captain Finley never came to any agreement prior to the time you went down to the vault to take the money, had you?

"A Must I answer that? I'd rather let the court answer that.

"Q Well, suppose we find out. You refuse to answer that question?

"A No.

"Q You don't know how to?

"A No." (R 140-141)

After this conversation, accused left and Lieutenant Krivoski, a "half a minute or approximately one fourth of a minute" later, entered the

inner room within Room No. 1, took one bundle of ten dollar bills "presumably \$10,000" from one of the footlockers, carried it into Room No. 2, and locked it in a "cashier's box." He then locked the rooms of the vault and joined the committee who were supervising the experiment in connection with the destruction of boxes of currency. After this was completed, the footlockers full of currency were burned. The committee and Lieutenant Krivoski returned to the Finance Center headquarters and accused, Major Jones, and Lieutenant Hayes signed certificates that all the currency which they had received and counted had been destroyed in their presence by burning (R 100-103,123-124,134-136, 141,146; Pros Ex 10).

At about 1400 hours of the same day, Colonel Taggart entered Room No. 2 of the main vault "to get some checks for the check-writer," and, observing that one of the locked cashier's boxes was not empty as it should have been, carried it to Lieutenant Krivoski's office, opened it, and found therein a pasteboard carton in which was "a bundle of money." When Colonel Taggart counted it, he observed that they were Military Payment Certificates of the series then in circulation and "good money," and that it amounted to \$9,990 (R 148-149,156).

At about 1700 hours, Colonel Taggart called accused and Lieutenant Hayes to his office (Major Jones having returned to his home station) and informed them that he had discovered some money which should have been burned and "something would have to be done about it." Accused asked how much money was involved but Colonel Taggart did not reply (R 152-153).

At about 1730 hours, Lieutenant Krivoski told accused that "the jig was up. \*\*\* I told accused I had bad news for him. He said, 'Why,' and I told him that the colonel stared me in the face with the money and I couldn't go through with it and I confessed" (R 134-135).

That evening at about 1930 hours, accused came to Colonel Taggart's quarters and asked Colonel Taggart to "step outside and talk" (R 150). According to Colonel Taggart, the following transpired:

"We went out to his car. He accused told me that he had been over to Lieutenant Krivoski's house and he understood that Krivoski had implicated him in the mishandling of funds, that he didn't know why Krivoski had implicated him, that he wouldn't do anything of that kind, that he was very surprised when he heard that Lieutenant Krivoski had taken as much as \$10,000, he said he only wanted \$600 or \$700 to get out of debt, --to use the phrase he used, he said, 'Colonel, I didn't want any cheese, I only wanted to get out of debt,' that he was afraid Lieutenant Krivoski was going to do that, that he almost asked to be removed from the Board because he was afraid the Lieutenant was

going to do that, and he was sure that if I had not taken the action I did and found the money, that Lieutenant Krivoski would not have divided with him" (R 156).

On cross-examination, Colonel Taggart stated that accused had been under his close supervision for about five months prior to this incident, that during that time he had worked hard and faithfully, and that his performance of duty was "at least normal." On redirect examination, he stated that if accused were acquitted he would not want him back "because of certain admissions he has made to me in connection with this thing" (R 158,159).

b. For the Defense

After being advised of his rights as a witness, accused elected to testify under oath as to Specifications 1 and 2 of Charge I and Charge I (R 178).

As to his personal history, accused stated that he attended Sanderson and Maclemney High Schools and completed two years at the University of Florida by means of summer and correspondence courses. After leaving the University of Florida, he taught school for almost six years in his "home town" of Maclemney, Florida, and thereafter entered the Army as a private in 1940. In 1942, he attended Officers Candidate School at Fort Benning, Georgia, was commissioned second lieutenant and has been promoted to captain. In December 1948, he was assigned to the Finance Center where he has been ever since. During that time he has been Detachment Commander, Mess Officer, Maintenance and Supply Officer, Motor Officer and "TI and E" Officer. He is married and the father of a five year old girl (R 178-179).

As to Specifications 1 and 2 of Charge I and Charge I, accused stated that he obtained a "Bell & Howell" motion picture projector on memorandum receipt from the "Film Center" to show Army motion picture films in connection with his duties as Training Officer of the Finance Center (R 180-181). On 14 June 1950 he purchased from Captain Edgar L. Barham a "Bell & Howell" motion picture projector in exchange for two cameras and about \$15 in cash. This projector remained in Captain Barham's possession until accused obtained it a few days prior to trial after accused told Barham he "was being implicated in something about a Government projector" (R 181-183,185).

About 20 or 25 June 1950, accused spoke to Mr. Erich Froebel relative to the sale of the motion picture projector which he owned (R 185,193). On a "Wednesday or Thursday" prior to "a Sunday in July," accused spoke to Froebel about two "Bell & Howell" projectors (R 185). The conversation, as related by accused, was as follows:

"\*\*\*.I told him I had a Bell and Howell I'd like to sell. That's the gist of it, and at the same time I mentioned that I had one to be fixed. Then he said 'Do you have the one to sell?'. I said, 'Yes I have the one to sell'. I didn't say 'also' or 'too', I said, 'I have one to be fixed and when can you come?'. He said 'I will call you Sunday morning'. I said, 'Maybe I'll see you on Saturday and talk to you about it at the shop', but I didn't get to go, so he called Sunday morning" (R 185-186).

At about 1130 hours on Sunday, Froebel came to accused's home and stayed for two or three minutes during which time accused told Froebel that he wanted the projector repaired and said nothing relative to its sale (R 183-184). Froebel then left with the projector. Accused stated that the reason he wanted Froebel to repair the projector was because he had damaged it on 17 June while driving over rough roads on a fishing trip and knew that the Signal Corps would not repair it under those circumstances. After the projector was returned to him by the "CID," accused "turned it into the Signal Corps right away" on orders of "my Colonel" (R 183,186,190).

Captain Franc W. Bell, Captain Lunsford Thying, First Lieutenant Stanley R. McClellan, and Sergeant First Class Leonard A. DeCola testified to accused's excellent character and performance of duty (R 196-198, 199-200, 201-202, 203-204).

#### c. Rebuttal

Mr. Eugene E. Rau, in charge of repairs of motion picture projectors at the Central Film and Equipment Exchange, stated that the cost of repairing the projector which accused turned in on 17 July 1950 was \$6.15 for parts and 10 marks 5 pfennigs for labor, that the nature of the repairs was minor, and that the damage was incurred through "fair wear and tear" (R 209).

Captain Edgar L. Barham testified that he traded accused a Bell & Howell motion picture projector for two cameras and possibly a small cash payment depending upon "what the second camera would bring." Captain Barham retained possession of the projector until "sometime this last month" when accused came for it, stating at that time that "he needed it to show in the trial" (R 213).

#### 4. Discussion

##### a. Specifications 1 and 2 of Charge I and Charge I

Accused was found guilty of two specifications of feloniously stealing, and knowingly and, without proper authority, disposing of by placing for sale with Erich Froebel, a certain motion picture projector complete with sound equipment, of the value of \$262.50, property of the United

States, in violation of Article of War 94.

"Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment. In military law former distinctions between larceny and embezzlement do not exist" (MCM, 1949, par 180g).

The elements of proof of larceny in violation of Article of War 93 are:

"(a) The appropriation by the accused of the property as alleged; (b) that such property belonged to a certain other person named or described; (c) that such property was of the value alleged, or of some value; and (d) the facts and circumstances of the case indicating that the appropriation was with the intent to deprive the owner permanently of his interest in the property or of its value or a part of its value" (MCM, 1949, par 180g).

Where larceny is alleged in violation of Article of War 94, the following additional element of proof is required:

"(b) That the property belonged to the United States and was furnished or intended for the military service thereof, as alleged."

It was proved and accused admitted that he obtained the motion picture projector and sound equipment in issue on memorandum receipt from a United States Army agency for official purposes, and that at the time and place alleged he turned it over to Erich Froebel, a German national. The prosecution proved that the transfer was made in order that Froebel could sell the equipment in his camera shop for 1000 marks, which Froebel attempted to do and probably would have accomplished this purpose except for the perspicacity of two United States Army officers, who, seeing the equipment in Froebel's shop, were instrumental in having it returned to Government authorities. Accused contended that he gave Froebel the equipment to repair. The main issue, therefore, was whether accused had given the equipment to Froebel to sell or to repair. Froebel's testimony that accused gave him the equipment to sell was positive and unequivocal, his only concession to accused's contention being that accused might have given him the wrong equipment. That accused could not have done so was shown by the fact that the equipment taken by Froebel was the only equipment

that accused had in his possession at the time. Under the circumstances, the court was amply justified in concluding that accused gave Froebel the equipment to sell. Unless clearly erroneous, great weight should be given the findings of the trial court which is confronted with and has the best opportunity to judge the credibility of the witnesses for both sides (Neal v. United States, 114 F.(2d) 1000, 1002, 312 U.S. 679). There is nothing in the record of trial which would lead the Board of Review to a conclusion other than that attained by the court, viz., that accused unlawfully appropriated the motion picture projector and sound equipment, the property of the United States, with intent to permanently deprive the owner of its property therein, and that he (accused) wrongfully disposed of it by placing it for sale with Froebel.

As to the value of the equipment, it was shown that the list price in the latest Signal Corps catalogue in which it was listed is \$262.50, the value alleged. Proof of value was properly established. The applicable rule is that "serviceable items of Government issue, the property of the Government, are deemed to have values equivalent to the prices listed in official publications of the Department of the Army, \*\*\*" (MCM, 1949, par 180h).

The remaining question is whether the larceny and the attempted wrongful disposition of the property described in the two specifications herein discussed, alleged to be "property of the United States" but not alleged to be "furnished or intended for the military service thereof" is in violation of Article of War 94.

Article of War 94 states in pertinent part:

"Any person subject to military law \*\*\* who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully sells or disposes of any \*\*\* equipment \*\*\* or other property of the United States furnished or intended for the military service thereof \*\*\*." (Underscoring supplied.)

"To be the subject of an offense within this article AW 94, the property must be that 'of the United States furnished or intended for the military service thereof'" (MCM, 1949, par 181h, p 252) (underscoring supplied).

It was held in CM 316193, Holstein, 69 ER 271, that where an accused was charged with larceny of an item, "the property of the United States," in violation of Article of War 93, and the court's findings of guilty added the words "furnished and intended for the military service thereof," and substituted Article of War 94 for Article of War 93, such findings were erroneous and the record was held to be legally

sufficient to support the findings of guilty of the offense charged. In that case, at page 276, the court said:

"Larceny in violation of Article of War 94 is not a lesser included offense of larceny under Article of War 93, because the larceny denounced under Article of War 94 includes an added element, namely, that the stolen property must be 'property of the United States furnished or intended for the military service thereof.' It is, however, still larceny and necessarily includes each element of larceny under Article of War 93." (See also CM 340100, Little, 3 March 1950, to the same effect.)

Likewise, where wrongful disposition of property of the United States is not alleged as furnished or intended for the military service thereof, such offense is a violation of Article of War 96 (CM 319857, Dingley, 69 ER 153,163).

In order that Specifications 1 and 2 of Charge I in the instant case may be properly alleged under Article of War 94, they must include not only the words "the property of the United States" but also the words "furnished and intended for the military service thereof." If the latter words which are a necessary element of the offenses are not included, they are not in violation of Article of War 94. However as each element of the offenses charged are necessarily included in Articles of War 93 and 96 as hereinabove stated, it is the opinion of the Board that the record of trial sustains only so much of the findings of guilty of Charge I, with reference to Specification 1, as involves a finding of guilty of a violation of Article of War 93, and only so much of the finding of guilty of Charge I, with reference to Specification 2, as involves a finding of guilty of a violation of Article of War 96.

b. Charge III and its Specification and Charge IV and its Specification

Accused was also found guilty of two specifications of feloniously stealing, and conspiring with another officer to feloniously steal, \$9,990 in Military Payment Certificates, the property of the United States, in violation of Articles of War 93 and 96 respectively.

The evidence shows that over a lengthy period of time accused counseled Lieutenant Krivoski, Deputy Finance Officer of the Finance Center, who had unrestricted access to the vaults thereof, to steal Military Payment Certificates intended for destruction as mutilated or worn out currency. Lieutenant Krivoski stated that he was undecided about the matter until 3 August 1950, when accused was, for the first time, appointed to a committee of three officers charged with

verifying the count and supervising the destruction of superseded and mutilated Military Payment Certificates in which Lieutenant Krivoski, as was customary, assisted. This presented a very favorable situation for the illegal transaction inasmuch as accused's presence as a committee member reduced the risk of detection by at least one-third. Accused, as an assigned officer to the Finance Center, did a "great share" of the counting of the currency in the vault. At possibly the most opportune moment to avoid detection, after the currency had been verified and prior to its removal from the vault for destruction, during the noon meal period, no one else being present in the vault, accused again urged Lieutenant Krivoski twice that "This was an excellent opportunity to put some away," "to lay aside a package of money." Almost immediately thereafter accused left and Lieutenant Krivoski took \$9,990 of the currency earmarked for destruction from the inner room within Room No. 1 of the vault where it had been placed by the committee and secreted it in a cashier's box in Room No. 2 of the vault.

The law applicable to the factual situation under consideration has been stated as follows:

Section 333, Federal Criminal Code (18 U.S.C. 550, 35 Stat. 1152) provides:

"Principals defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

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

"A conspiracy is a 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).

Conspiracy is an independent substantive offense both at common law and under the Federal Statutes. The conspiracy charged herein

comes within the provisions of section 37, Federal Criminal Code (18 U.S.C. 88, 35 Stat. 1096) inasmuch as an overt act is alleged.

At common law and under the statute the gist of the offense charged is the conspiracy or the agreeing together to effect the unlawful purpose. Two elements of proof are requisite to the offense of conspiracy: (1) The proof of a conspiracy or agreement to commit the offense named against the United States; (2) the proof of an overt act or acts done in furtherance of the conspiracy. The overt act and the manner and circumstances under which it is done may be considered in connection with other evidence in the case in determining whether there was formed the conspiracy or act charged, but it must be established that the agreement which is charged to have existed and which is the gist of the offense had been formed before and was existing at the time of the commission of the overt act. Conspiracy may be established by circumstantial evidence or by deduction from statements, acts and conduct of the parties, or where a tacit understanding is shown to have existed (Reavis v. United States, 106 F. 2d 982, 984, C.C.A. 10th 1939; CM 320455, Gaillard, 69 BR 345,377; CM 318296, Mayer, 67 BR 211, 217). The common design is the evidence of the crime and this may be inferred if the parties steadily pursue the same object, whether acting separately or together by common or different means, but ever leading to the same unlawful result (United States v. Di Orto, 150 F. 2d 938, C.C.A. 3rd 1945). If parties acted together to accomplish something unlawful, a conspiracy is shown even though individual conspirators may have done acts in furtherance of a common unlawful design apart from and unknown to the others (CM 319747, Watson, 69 BR 47,66-67).

"It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which taken together apparently indicate that they are merely parts of some complete whole" (Underhill's Criminal Evidence, sec. 773, pp 1404-1405).

As to the commission of the larceny, the fact that accused was not present does not render him less liable as a principal. Where, as in the instant case, an accused participates in a criminal venture by counseling or advising its commission but is not present either actively or constructively when the offense is committed, the accused is nevertheless liable as a principal (CM 324235, Durant, 73 BR 49,110).

Counsel for accused has presented the proposition that the currency taken by Lieutenant Krivoski was never removed from the vault

by him and that it remained in the custody and control of the United States. Although it is true that Lieutenant Krivoski did not remove the currency from the vault, it is undenied that he abstracted a portion of the currency destined for destruction and removed it from one room of the vault to another and concealed it there by locking it in a cashier's box, where, but for its discovery by Colonel Taggart, it probably would have been taken by Lieutenant Krivoski at a later and more opportune time in furtherance of the conspiracy. In any event, the offense of larceny does not require asportation of the stolen property. Any movement of the property or any exercise of dominion over it with the requisite intent is sufficient (MCM, 1949, par 180g). This was accomplished when Lieutenant Krivoski's act prevented the destruction of the currency in issue.

Counsel for accused contends that there was no conspiracy because although accused counseled Lieutenant Krivoski to steal the currency, Lieutenant Krivoski did not agree to accept accused's proposal. It is seldom possible to show, by direct evidence, the meeting of minds of persons engaged in illegal activities (CM 320455, Gaillard, supra). Krivoski appears to have been a willing witness, anxious to unburden his conscience. His testimony that accused over a period of about nine months repeatedly urged him to steal the currency, accused's urging on 3 August 1950 to steal the money when he was a member of the committee whose duty it was to protect the Government's interest, and finally accused's spontaneous admissions to Colonel Taggart that his only interest in the money taken by Lieutenant Krivoski was to obtain enough money to get out of debt, is compelling evidence from which the court could properly conclude that the agreement was completed prior to the time the larceny was committed (CM 319747, Watson, supra).

The conspiracy was alleged to have been committed on or about 1 October 1949. The proof showed that the agreement to conspire was consummated between the latter part of November 1949 and 3 August 1950. The Board of Review is of the opinion that there is no material variance between the allegation and the proof. So long as the commission of the offense is laid within the statute of limitations, the time is not of the essence where as here accused was fully acquainted with the gist of the offense charged, and was able to, and did in fact, address his defense to the offense intended to be charged (Moore v. United States, 160 U.S. 258; CM 219135, Stryker, 12 ER 225, 241).

#### c. Motion for Continuance

At 1900 hours, 2 October 1950, the defense moved for a continuance until the following morning.

The trial took place on 28 and 29 September and 2 October 1950. On the first two days of trial the court met at 1000 and 1010 hours and adjourned at 1645 and 1515 hours, respectively (R 2,49,50,92). On the third and last day of trial the court met at 1010 hours, at which time the president of the court said:

"For the information of the defense and the prosecution and the members of the court we are informed that this court will hold night sessions starting at 7:00 o'clock this evening and continuing until the completion of the case" (R 93).

At this time, the defense raised an objection to night sessions (R 93).

The court recessed at 1700 hours and reconvened at 1900 hours, at which time Mr. Milton J. Teiger, special defense counsel, requested a continuance until the next morning (R 166-167). The trial judge advocate, who was called as a sworn witness by Mr. Teiger, stated that he had requested the night sessions in this case because of his "commitments before another court," and that night sessions had been held in two previous cases in which he had participated (R 170-172). Mr. Teiger also took the stand as a sworn witness and stated that he knew of only one other case in which night sessions were required in which he had also served as defense counsel and asserted that the night session in this case would prevent his doing his best for his client and was "a studied attempt to embarrass" him (R 169-170). The motion was thereafter denied (R 173),

At 2000 hours, accused, after being duly warned of his rights as a witness, testified as to Specifications 1 and 2 of Charge I and his civilian and military record (R 177-195). His answers to questions propounded to him indicated that he was keenly aware of the meaning and effect of his testimony. He was on the stand for about an hour and concluded his testimony at approximately 2100 hours. The defense neither called other witnesses to testify on the merits of the case nor stated that it desired to do so. The sentence was announced and the court adjourned at 0010, 3 October (R 220). The actual time consumed on the last day of trial, including the time spent by the court in its deliberations on the findings and sentence, was less than nine hours.

Article of War 20 states: "A court martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just."

Among the grounds that may be considered as reasonable are "the absence of a material witness; sickness of the trial judge advocate,

accused, counsel, or a witness; insufficient time to prepare for trial; and a pending prosecution in a civil court based on the same act or omission" (MCM, 1949, par 52b).

The granting of a continuance is discretionary with a court-martial, and its refusal to do so will not be questioned upon review in the absence of a showing of an arbitrary abuse of discretion by the court (CM 260637, Arthur, 39 BR 381,393). The refusal, in the instant case, to grant a continuance upon the grounds advanced by defense counsel, cannot be considered arbitrary or capricious. In any event, the denial of the continuance is not deemed to be prejudicial error (CM 330299, Fickas, 78 BR 363,366).

5. The reviewing authority 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. Paragraph 87b, Manual for Courts-Martial, United States Army, 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.

6. Records of the Department of the Army show that accused is 35 years of age, married, and has one child. He graduated from Sanderson High School, Sanderson, Florida, and successfully passed a competitive examination for a first grade teacher's certificate for the State of Florida. He taught school in Baker County, Florida, for 5-1/2 years, terminating that employment to enter the Army in 1940. After attending The Infantry School, Fort Benning, Georgia, he was commissioned a second lieutenant on 29 August 1942. He was promoted to first lieutenant on 11 May 1943 and to captain on 22 January 1944. He was relieved from active duty 9 May 1947 and was promoted from captain to major on 24 July 1947. He was recalled to active duty in the grade of captain on 10 August 1948. He is entitled to wear the Asiatic-Pacific Theater and American Theater ribbons, World War II Victory and American Defense Service Medals and Meritorious Unit Award. His efficiency reports from 1 July 1944 to 15 February 1947 average about 4.9. His overall efficiency ratings show 128 for the period 10 October 1948 to 11 December 1948; 106 for the period 12 December 1948 to 31 March 1949;



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

(145)

JAGU CM 343938

UNITED STATES )

v. )

Captain WILLARD E. FINLEY,  
O-1291971, 7752 Finance  
Center )

FRANKFURT MILITARY POST

Trial by G.C.M., convened at  
Frankfurt-am-Main, Germany,  
28, 29 September and 2, 3  
October 1950. Dismissal, total  
forfeitures after promulgation  
and confinement for three years.

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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 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 stealing a motion picture projector with sound reproducing equipment, of the value of about \$262.20, property of the United States, at Friedberg, Germany, on or about 2 July 1950 (Specification 1, Charge I), and knowingly and without proper authority disposing of the above described property by placing the same for sale with Erich Froebel, proprietor of a photographic store, at Bad Nauheim, Germany, on or about 2 July 1950 (Specification 2, Charge I), both in violation of Article of War 94; conspiring with First Lieutenant Dusan A. Krivoski, of the accused's organization, at Friedberg on or about 1 October 1949, to commit an offense against the United States, larceny, by stealing Military Payment Certificates intended for destruction as mutilated currency, and for the purpose of effecting the object of such conspiracy, stealing one package of mutilated Military Payment Certificates in the amount of \$9,990.00, in violation of Article of War 96 (Specification, Charge III); and stealing, in conjunction with said Lieutenant Krivoski, \$9,990.00 in Military Payment Certificates, the property of the United States, at Friedberg on or about 3 August 1950, in violation of Article of War 93 (Specification, Charge IV). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for five years. The reviewing authority approved the sentence, but reduced the period of confinement to three years, 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 only so much of the

findings of guilty of Specifications 1 and 2, Charge I, as find the accused guilty of such specifications in violation of Articles of War 93 and 96, respectively, and legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation of the sentence.

### 3. Evidence.

#### a. Charge I and Specifications.

The facts and circumstances surrounding the issuance by the United States Army to the accused of a Bell and Howell motion picture projector with sound equipment, its value, its character as property of the United States and its discovery in the camera shop of a German national are sufficiently set forth in the opinion of the Board of Review. We shall limit our summary of the evidence to what appears to be the crucial issue, i.e., whether the accused delivered this equipment to the proprietor of the camera shop for the purpose of having it repaired or of having it sold.

The accused and Erich Froebel, the owner of the Photo Centrale, a camera shop located at Bad Nauheim, Germany, had known each other since January or February 1950, the accused having been a customer of the latter (R 35, 180). According to Froebel, the accused telephoned him toward the latter part of May or early in June and asked him if he could repair a movie projector (R 40, 45, 51). Froebel was an expert in repairing projectors and cameras and owned a repair shop which was located at Wetzlar, Germany (R 44, 63). It was possible that he had told the accused of his ability to repair projectors and of his repair shop (R 38). He did not, however, repair sound equipment (R 63). On the last Wednesday or Thursday of June the accused again telephoned Froebel, according to the latter, and inquired as to the possibility of Froebel's selling a movie projector for him. Froebel undertook to sell it and told the accused he would come to his apartment before noon on the following Sunday to get it (R 38).

The accused testified that on 14 June he had purchased a movie projector from Captain Edgar L. Barham (R 181). This projector was introduced in evidence and was of the same make as the projector issued to the accused by the Army (R 181, 182; Def Ex A). The purchase was corroborated by the vendor (R 213) and a "sales invoice" dated 14 June and signed by Captain Barham was introduced in evidence (R 182; Def Ex B) together with a bill of sale for the projector running to Captain Barham from STEG (R 183; Def Ex C), an organization formed for the purpose of disposing of surplus military equipment through the German economy (R 21). The bill of sale recited that the price for the projector was 60 marks. The accused testified that it was not in running condition when Captain Barham bought it and that the latter had it repaired (R 194). Captain Barham stated that it still broke down but that it was in working condition (R 215). Delivery of this projector was not effected until a few days before trial, it remaining in Captain Barham's possession, although the accused testified that "it was where I could get it" (R 185, 186). The "sales invoice" recited that the

equipment covered by it would remain in Captain Barham's quarters because it was of "little value in way of entertainment at the present time" (R 182; Def Ex B). Captain Barham testified, however, that he had not been fully paid (R 213).

In addition to the movie projector, both the bill of sale from STEG and the "sales invoice" covered by their terms "sound equipment" or a "sound box" (R 182, 183; Def Exs B and C) but it was not in operating condition (R 215). The accused testified that the reference to the sound equipment in the "sales invoice" was a mistake (R 195).

The equipment which had been issued to the accused by the Army was repaired by the Signal Corps on 14 June 1950 (R 76, 186; Pros Ex 4). It was at least six years old and projecting machines as old as that are likely to get out of order frequently. According to the accused, he took it on a fishing trip shortly thereafter and damaged it badly. He stated that he did not want to take it to the Signal Corps for repairs because he was afraid that they would charge him for the repairs and also because he was afraid that they would take the equipment away from him (R 186, 191, 192). It was not an uncommon occurrence for military personnel to whom projectors had been issued to have them repaired in civilian shops (R 80). If repairs were made necessary by the negligence of the person responsible for the machine, the Army would charge the cost of repairs to him (R 84).

The accused admitted having telephoned Froebel twice, but placed the time of the first call around 20 or 25 June. On that occasion he discussed with Froebel the possibility of the latter's selling projection equipment but the accused was referring to the equipment he had bought from Captain Barham (R 184, 185). Shortly thereafter he again telephoned Froebel, and this conversation, as related by accused, was as follows:

"\* \* \* I told him that I had a Bell and Howell that I would like for him to get. I told him I had a Bell and Howell I'd like to sell. That's the gist of it, and at the same time I mentioned that I had one to be fixed. Then he said 'Do you have the one to sell?' I said, 'I have one to be fixed and when can you come?' He said 'I will call you Sunday morning.' I said, 'Maybe I'll see you on Saturday and talk to you about it at the shop', but I didn't get to go, so he called Sunday morning."  
(R 185-186).

He never discussed with Froebel the sale of the Government equipment (R 183, 184).

Both the accused and Froebel agree that the latter visited the accused at his home on Sunday morning next following the last telephone conversation (R 38, 183); that Froebel was in a hurry and remained only two or three minutes (R 46, 184); and that he took away a movie projector and sound equipment, conceded by the accused to be the set issued to him by the Government (R 38, 183). According to Froebel, the accused wanted to realize 1000 marks from the sale, Froebel apparently to be compensated by whatever he was able to get in excess of that amount (R 38, 41). On

the other hand, the accused testified that because of Froebel's haste he had no opportunity to talk with him other than to say that he wanted the equipment "fixed" and that he would see Froebel the following Wednesday. He specifically denied that he had any conversation that morning with Froebel about a possible sale of the equipment (R 184).

Froebel in a pretrial statement said "it was probably a misunderstanding between both of us and that the projector had just been given to me for repair" (R 58). At the trial he insisted that if there was a misunderstanding, it was on the part of the accused in giving him the wrong projector in the dark basement of his home (R 52-59). The accused, however, expressly disclaimed any misunderstanding on this score (R 187). Froebel could not state positively under oath that nothing was said about repairs on that Sunday morning (R 63).

On 4 July two officers, Major Warren E. Crane and Captain John G. Isgrigg, both of the Military Police Corps, visited Froebel's shop for the purpose of buying an attachment for Major Crane's camera (R 15, 16). According to Froebel, the equipment which the accused had delivered to him was at this time on the floor of the sales room of his shop. It did not have a price tag on it but that was true of all the goods inside the shop (R 37, 38). On examining the equipment Captain Isgrigg saw a plate on the side of the carrying case bearing the legend "U.S. Army Air Corps" (R 16) or possibly "U S Army" (R 32), and attached to an electrical cord was a tag with the words "The Philadelphia Signal Depot" (R 16) or "Philadelphia Signal Procurement Center" (R 27). According to Captain Isgrigg, who was corroborated by Major Crane, Froebel asked him if he wanted to buy the projector, stating that he would sell it for 1000 marks (R 16, 23, 25, 27). Froebel testified, however, that Captain Isgrigg asked him the price of the projector and sound equipment and that Froebel told him (R 43). In fact, according to him, he was not ready to sell the equipment then and there because he had not checked it to make sure it was in good operating condition (R 42).

Froebel testified that on the Wednesday following 4 July the accused without any prior communication from him came to his shop and told him that he (Froebel) must be in error and that the projector was delivered to him to be repaired. Froebel's reply, according to him, was that he was "definitely of the opinion" that he was to sell the equipment and that it was "impossible to make another statement to the CID" (R 40). In his pretrial statement Froebel said that "as a good businessman I would stick to my statement made on 4 July 1950 and to the best of my knowledge it would be impossible to change my statement or give another explanation" (R 58).

The equipment was seized by an agent of the 52d Criminal Investigation Detachment, Military Police (R 69). Master Sergeant Jim H. Winslett, of the same detachment, investigated the incident and on 10 July 1950 returned the equipment to the accused because he was unable to find any irregularity in the transaction, although he denied that he told the accused he had been exonerated (R 71-73; Pros Ex 2). On 17 July 1950 the accused returned the projector and equipment to the Signal Corps because "his Colonel told him to" (R 79, 190). Repairs were made to the equipment at

this time (R 79; Pros Ex 6) at a cost of \$6.15 for materials and 10 marks and five pfennigs (approximately \$2.38) for labor (R 209). According to the person in charge of repairing such machines who, however, was not technically qualified to make repairs himself, the repairs were not made necessary by negligence but were due to "fair wear and tear" (R 209-211).

Froebel testified through an interpreter although he was able to speak "good English" in his business dealings (R 34). He understood the meaning of "repair", "fix" and words of similar import (R 65). The accused, on the other hand, did not speak German (R 66).

b. Charges III and IV and Specifications.

First Lieutenant Dusian A. Krivoski was the Deputy Disbursing Officer to Colonel Samuel J. Taggart, Disbursing Officer at 7752d Finance Center, Friedberg, Germany (R 147, 148). He testified that on his assignment to the Center in 1949 he became acquainted with the accused, who was Commanding Officer of its Headquarters Detachment (R 120). According to Lieutenant Krivoski, the accused, in August 1949 (later changed to November 1949 on cross-examination (R 136)) discussed with him the possibility of taking some mutilated Military Payment Certificates from the vaults at the Finance Center (R 120, 136-137). These conversations, he said, were initiated by the accused (R 137) and were held on an average of once a week for a year (R 121). He testified that he listened to the accused "and hedged most of the time;" that he "never considered it;" and that he never acceded to the accused's suggestions (R 138, 139).

On 2 August 1950 a committee of three officers was appointed by the Commanding Officer, Frankfurt Military Post, to destroy superseded and mutilated Military Payment Certificates at the Center on 3 August. The accused was a member of this committee (R 94, 95; Pros Ex 9). This was the first time he had served on such a committee (R 159).

The certificates to be destroyed were kept in the main vault of the Center and were made up of two superseded series and one series then in use, Series 472. This main vault was subdivided into three vaults. The door to the main vault had a combination lock, but it was also necessary to use a key. Colonel Taggart and Lieutenant Krivoski were the only persons who knew the combination and had keys to the vault (R 96, 102, 105, 116, 157).

On 3 August the committee assembled in one of the three smaller vaults, known as vault number 1 (R 96). Lieutenant Krivoski acted as Colonel Taggart's deputy in assisting the committee in the destruction of the certificates (R 148). The accused was aware that Lieutenant Krivoski always performed this function (R 160).

Lieutenant Krivoski worked in his vault, vault number 2, with enlisted personnel, "bundle-counting" the money and packing it in footlockers for delivery to the committee (R 110). After the committee verified the amount, they packed some of the money in three wooden boxes preparatory to conducting an experiment to ascertain the most effective way of destroying currency in the event of an emergency (R 99). Both the

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footlockers and the wooden boxes were then locked in an inner room in vault number 1 and the committee adjourned for lunch (R 100).

During the lunch period, according to Lieutenant Krivoski, in response to a telephone call from the accused, he had a conversation with the accused in which the latter again reminded him that a good opportunity existed to take some of the money. Lieutenant Krivoski testified that he merely shrugged his shoulders and walked away, a gesture intended to convey to the accused that he had not decided what to do (R 123, 124, 141, 142).

After lunch, according to the senior member of the committee, Lieutenant Krivoski and a non-commissioned officer went to the vault to get the wooden boxes with which the experiment was to be conducted (R 100). The enlisted man testified that he thought there were four enlisted men in addition to himself and Lieutenant Krivoski (R 117). According to the latter, the accused, the non-commissioned officer, and one or two other enlisted men were present at the time (R 124). Lieutenant Krivoski testified that when the wooden boxes were removed and he and the accused were left alone in the vestibule to vault number 1, the accused said "this is an excellent opportunity to put some away" or "words to that effect" (R 124). According to Lieutenant Krivoski, he made no reply and the accused left (R 130, 131). Within a quarter to a half minute after the accused made this remark, Lieutenant Krivoski went into the small room off vault number 1 where the money was, took a bundle of \$10.00 certificates presumably amounting to \$10,000, carried them to vault number 2 and locked them in a cash box (R 130, 131, 132). He was "sure" that the accused did not see him take the money (R 145). The taking of the money was an "impulsive act." Until he committed this "impulsive act" he had no idea of stealing the money (R 142). He did not make up his mind to take the money at the time the accused talked to him in the vestibule of the vault (R 143).

According to Lieutenant Krivoski, after secreting the money he joined the committee at the scene of the experiment (R 132). When the experiment was almost concluded the accused and two or three enlisted personnel went to the vault, redistributed the money among the footlockers, locked them, and transported them in a converted ambulance to the place where the certificates were destroyed (R 101, 132).

In the meantime, Colonel Taggart visited the vaults in search of some checks. While there he discovered the cash box and upon opening it found a package of \$10.00 certificates, Series 472, amounting to \$9,990.00 (R 148, 150; Pros. Ex 11).

When the destruction was complete, the committee went to Lieutenant Krivoski's office with him and signed a certificate as to the destruction of the currency (R 115, 133). At about 1600 hours, as a result of a conversation he had with a non-commissioned officer, Lieutenant Krivoski went to Colonel Taggart and told him what he had done (R 134). About 1700 hours Colonel Taggart informed the accused and one other member of the committee, the third member having returned to his station, that not all

the money had been burned (R 152). Lieutenant Krivoski testified that he visited the accused in his quarters about 1730 or 1745 hours and that he thought he, Lieutenant Krivoski, said, "The jig was up," although he did not know that those were the exact words he used. At any rate, according to Lieutenant Krivoski, he told the accused that he had confessed and he declined to see Colonel Taggart with the accused (R 134, 135).

About 1930 hours the accused, according to Colonel Taggart, called upon him at his quarters and asked to talk with him (R 156). Colonel Taggart testified that:

"We went out to his car. He told me that he had been over to Lieutenant Krivoski's house and he understood that Krivoski had implicated him in the mishandling of funds, that he didn't know why Krivoski had implicated him, that he wouldn't do anything of that kind, that he was very surprised when he heard that Lieutenant Krivoski had taken as much as \$10,000, he said he only wanted \$600 or \$700 to get out of debt, -- to use the phrase he used, he said, 'Colonel, I didn't want any cheese, I only wanted to get out of debt,' that he was afraid Lieutenant Krivoski was going to do that, that he almost asked to be removed from the Board because he was afraid the Lieutenant was going to do that, and he was sure that if I had not taken the action I did and found the money, that Lieutenant Krivoski would not have divided with him." (R 156)

The accused did not testify with respect to the specifications dealing with conspiracy to steal and stealing the Military Payment Certificates.

#### 4. Discussion.

##### a. Charge I and Specifications.

The sufficiency of the record to support the accused's conviction of stealing and wrongfully disposing of the projection equipment depends upon the credibility of the witness Froebel. While we have the power to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, due deference must be accorded the findings of the trial court which saw the witnesses and observed their demeanor in testifying (*Neal v. United States* (CCA 8th, 1940), 114 F 2d 1000, 312 U.S. 679; *CM 338993, Pelkey*, 6 BR-JC 303),

Froebel testified positively that as a result of the accused's second telephone call and his conversation with the accused in the basement of his home he understood he was to sell the projector and sound equipment for a specific price on a commission basis. Thereafter, it is unquestioned that he did attempt to sell it. The accused and Froebel are in agreement that the accused did have a talk about the sale of projection equipment on

the occasion of his second telephone conversation with Froebel, although the accused's version of this conversation was that the main talk was about repairs.

The weakness of the accused's version lies in his explanation for having the equipment repaired in a civilian shop rather than by the regular facilities provided by the Army. His statement that he had damaged the equipment severely on a fishing trip is not only somewhat bizarre but is not borne out by the amount and character of repairs eventually made on the equipment. The rather trivial adjustments made to the equipment by the Signal Corps when it was eventually returned could hardly have been an adequate reason for the accused's believing that he would have to pay for them, particularly in view of the age of the equipment and the evidence that the repairs were not necessitated by more than ordinary wear and tear. In any event, the accused would have had to pay Froebel if the latter did the repairing.

In addition, the accused's explanation of his conversations with Froebel about the sale of certain projection equipment is not convincing, as it is not at all clear that the equipment which he had bought from Captain Barham was as readily available as he claimed, since he had not fully paid for it. His expectations of selling the equipment for 1000 marks seem slightly fantastic in view of the fact that STEG sold it to Captain Barham for 60 marks, even making all due allowances for the repairs made by the latter.

Accordingly, we find nothing in the record to militate against believing Froebel's testimony to the same extent as the court.

Having concluded, therefore, that the accused delivered the property in question to Froebel with instructions to sell it, the court was warranted in also concluding that he had the intention permanently to deprive the United States of its property therein and was guilty of stealing (MCM 1949, par 180g, p 240). There is no merit in the accused's contention that there was an unreasonable multiplication of charges in joining the specification alleging stealing the projection equipment with that alleging its wrongful disposition (MCM 1949, par 181h, p 251). Since, however, it was not alleged that the projector and sound equipment were "property of the United States furnished or intended for the military service thereof" but that they were merely "property of the United States," for the reasons stated by the Board of Review we concur in their opinion that the record of trial is legally sufficient to sustain only so much of the finding of guilty of Charge I, with respect to Specification 1, as involves a finding of guilty of a violation of Article of War 93, and only so much of the finding of guilty of Charge I, with reference to Specification 2, as involves a finding of guilty of a violation of Article of War 96.

b. Charges III and IV and Specifications.

The accused's guilt, so far as it is a question of fact, of the specifications dealing with conspiracy to steal and stealing \$9,990.00 in Military Payment Certificates must rest almost entirely on the testimony of his self-described accomplice, Lieutenant Krivoski. Lieutenant Krivoski testified to a long course of solicitation, counsel and advice by the accused to commit the offense alleged. The accused by his unsolicited statement to his commanding officer clearly implicated himself, even though that statement as related by the commanding officer is not as clear as it might be. While the record reveals the accused as a man of considerable naivete in expecting Lieutenant Krivoski, who had to assume all the risk, to share the proceeds of the theft with him, that is not a sufficient reason for us to disapprove the conviction where the trial court, which saw and heard the witnesses, believed Lieutenant Krivoski and the accused's commanding officer and where such disapproval — would involve the unrealistic hypothesis that Lieutenant Krivoski's testimony, in so far as it implicated the accused, was sheer invention.

The question arises, however, whether the conviction of the accused of these specifications can stand as a matter of law. We turn first to the specification involving conspiracy.

An essential element of the offense of conspiracy is an agreement (Dahly v. United States (CCA 8th, 1931), 50 F 2d 37; United States v. Falcone (CCA 2d, 1940), 109 F 2d 579; 311 U.S. 205). Indeed, the words "conspiracy" and "agreement" are used interchangeably (MCM 1949, par 181j, p 253). "If there was no agreement, then there was no conspiracy" (United States v. Direct Sales Co (DC WD, SC, 1941), 40 F, Supp. 917, 923). It is not necessary, however, that there be a formal agreement; it is sufficient if there is a meeting of the minds (Marx v. United States (CCA 8th, 1936), 86 F 2d 245; Reavis v. United States (CCA 10th, 1939), 106 F 2d 982), and this can be inferred from the acts done by the alleged conspirators (United States v. Gordon (CCA 7th, 1943), 138 F 2d 174, cert. den. 320 U.S. 798; re. den. 320 U.S. 816).

The vital question here is whether or not we may properly infer that Lieutenant Krivoski by his action in taking the Military Payment Certificates entered into an agreement with the accused as to their theft. We say that is the vital question because it is clear that up to the moment of the theft Lieutenant Krivoski had not reached any agreement with the accused. We conclude in the circumstances revealed by this record that the theft of the money by Lieutenant Krivoski is an insufficient basis on which to predicate the conclusion that he had become a co-conspirator with the accused.

Taking the prosecution's case at its strongest, the record discloses a long continued course of solicitation of Lieutenant Krivoski by the accused to steal the certificates without any agreement on the former's part right up to seconds before the actual commission of the offense. Although we may assume, as hereinafter indicated, that the accused's protracted solicitation was the underlying cause of Lieutenant Krivoski's action in stealing the certificates, the latter's testimony clearly negates any inference that his action resulted from an agreement with the accused or that the theft itself actually completed such an agreement. Lieutenant Krivoski claimed it was an "impulsive act" on his part, or in other words, that he was acting on his own and not on behalf of or in agreement with the accused. The record as a whole corroborates rather than refutes Lieutenant Krivoski's testimony in this regard. No reason is apparent from the record why Lieutenant Krivoski should have entered into any agreement with the accused, with its necessary implication of sharing the loot. Despite the fact that they were together for almost three hours after the theft, Lieutenant Krivoski took no steps to inform the accused thereof. In our opinion, the record as a whole fails to establish any conspiracy between the accused and Lieutenant Krivoski and is therefore legally insufficient to support the findings of guilty of Charge III and its specification.

The accused was also convicted of the theft of the certificates. Since he was not present at the commission of the crime and since his only part in it was to urge it upon Lieutenant Krivoski, the evidence at most would make him a common-law accessory (1 Wharton's Criminal Law, 12th ed., sec 263), but due to the abolition of the former distinction between principal and accessory the question is whether he is guilty as a principal. Section 2 of 18 United States Code provides in part,

"a. Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." (See MCM 1949, par 27, p 21)

We lay to one side all forms of conduct embraced by the statute except "counsels" although it is worthwhile to note its sweeping definition. The only point we need to decide is whether this record establishes the accused's guilt of the theft of the certificates by virtue of "counseling" its commission by Lieutenant Krivoski.

"To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it." (Masses Publishing Co. v. Patten (DCSD, NY, 1917), 244 F 535)

Incontestably, the accused's urgings fell within the above definition and the only questions are whether the accused's conduct must have been a causative factor in the commission of the crime or whether there must have been some sort of agreement between the accused and Lieutenant Krivoski.

The first question was answered almost 150 years ago by Chief Justice Parker in Commonwealth v. Bowen (1816), 13 Mass 359, involving an indictment for counseling another to commit suicide.

"The government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of crime is of itself unlawful. The presumption of law is that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given."

Accord: Fed. Cas. #18250 (1854); State v. Bailey (1909), 63 W. Va. 668, 60 S.E. 785; State v. McFadden (1908), 48 Wash. 259, 93 Pac 414, 14 L. R.A. (N.S) 1140.

As to the second question, the accessory and the principal need not effect an agreement to commit the crime. In Bragg v. State (1914), 73 Tex Cr. R. 340, 166 S.W. 162, the court stated:

"It is not the law and was not necessary for the court to charge as contended by the appellant, that in order to make him guilty as an accomplice the jury must believe beyond a reasonable doubt that he and the principal entered into an agreement to commit the offense of swindling."

In Commonwealth v. Bloomberg (1939), 302 Mass 349, 19 N.E. 2d 62, the court held that there was no inconsistency between acquittal on conspiracy charge and conviction as accessory to same crime.

The accused's conviction of the completed theft of the certificates was, accordingly, proper (See CM 343792, Krivoski, decided this date).

5. At the opening of the third day of the trial at 1008 hours on Monday, 2 October 1950, the President announced that the court would hold night sessions beginning that evening and continuing until the completion of the trial. The defense counsel objected on the grounds that this would be prejudicial to the rights of the accused (R 93). The court recessed that day at 1700 hours and reconvened at 1900 hours. At that time the defense counsel moved for a continuance until the next morning and testified in support of his motion. The main point made in his argument and testimony was that a night session prejudiced him in preparing the defense of his client. The motion was denied (R 167-173).

Subsequent to the disposition of this case by the Board of Review the accused and civilian counsel who defended him at the trial submitted affidavits relative to the accused's physical condition on 2 October 1950. The accused stated in his affidavit that "he was in terrible pain" from a skin allergy and that the President of the court, Colonel John L. Crawford, Medical Corps, gave him a sedative. By implication he charges that this sedative adversely affected him in testifying on his own behalf and thereby prejudiced him in his defense. The civilian defense counsel went further and alleged that the accused collapsed during a recess.

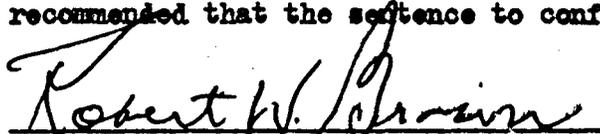
Affidavits were also submitted by five members of the court including the President, by the Trial Judge Advocate, by the regularly appointed defense counsel who assisted in the defense of the accused, and by a non-commissioned officer who acted as interpreter. These affidavits categorically deny that the accused's physical condition affected the conduct of his defense. None of them states that the sedative was given to the accused before he had testified or that it had any visible effect on him. Some specifically aver that the accused disclaimed any desire for a continuance and that he expressed the wish to conclude the trial as speedily as possible.

The record of trial does not reveal any impairment of the accused's ability to testify intelligently. Moreover, counsel made no mention of the accused's alleged physical condition in arguing or testifying on behalf of his motion for a continuance. It is difficult for us to believe that if the accused's condition was as bad as he now states, counsel would not have asserted it in argument or brought it to the court's attention in connection with his motion for a continuance, a motion which was pressed with vigor. We conclude that the accused has not substantiated the additional reasons he has urged upon us for the court to have granted the continuance asked for by his counsel at the trial. With respect to the grounds actually urged upon the court, we agree with the Board of Review, for the reasons stated in their opinion, that the court did not abuse its discretion in denying the motion.

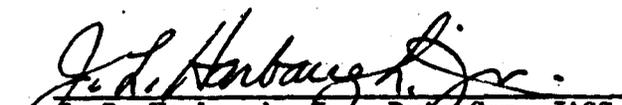
The accused in his affidavit also states that the regularly appointed Defense Counsel and the Trial Judge Advocate discussed this case on a social occasion during the course of the trial, a statement which is denied by both. Even if they had discussed it, however, that in itself would not be a sufficient reason for disapproving the conviction. There is no rule that forbids opposing counsel discussing a case, even on social occasions. An attorney's only duty in this respect is not to disclose any information to the opposition that would assist it or hamper him in the conduct of the case (Cf. CM 320618, Gardner, 70 BR 71). It is not even alleged that such disclosure occurred here.

6. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of

guilty of Charge III and its specification; legally sufficient to support only so much of the finding of guilty of Charge I with respect to Specification 1 thereof as involves a finding of guilty of a violation of Article of War 93 and only so much of the finding of guilty of Charge I with respect to Specification 2 thereof as involves a finding of guilty of a violation of Article of War 96; and legally sufficient to support the findings of guilty of Charge IV and its specification and the sentence. In view of all the circumstances, however, including the legal insufficiency of the record of trial to support the conviction of conspiracy, it is recommended that the sentence to confinement be reduced to two years.

  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mielkewitz, Brig Gen, JAGC

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

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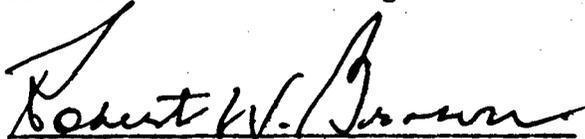
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Office of The Judge Advocate General

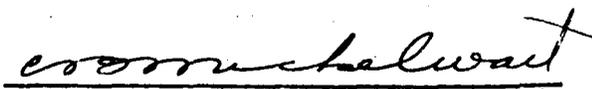
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CM 343938

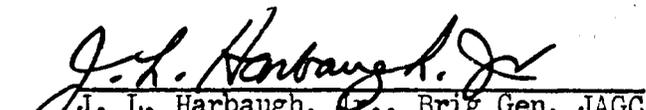
Harbaugh, Brown and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Willard E. Finley, O-1291971, 7752 Finance Center, upon the concurrence of The Judge Advocate General only so much of the finding of guilty of Charge I with respect to Specification 1 thereof is approved as involves a finding of guilty of a violation of Article of War 93, only so much of the finding of guilty of Charge I with respect to Specification 2 thereof is approved as involves a finding of guilty of a violation of Article of War 96, the findings of guilty of Charge III and its specification are disapproved, and 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

MAR 12 1951

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

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

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

16 March 1951

( GCMO 34, 27 March 1951 ).

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

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JAGH CM 343951

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U N I T E D S T A T E S

v.

Private ROOSEVELT BLEDSOE  
(RA 19293580), Company E,  
24th Infantry Regiment, APO  
25.

25TH INFANTRY DIVISION

Trial by G.C.M., convened at  
APO 25, 23 October 1950. Dis-  
honorably discharged, total for-  
feitures after promulgation, and  
confinement for life.

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OPINION of the BOARD OF REVIEW  
HAUCK, FITZHUGH, and IRELAND  
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 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 75th Article of War.

Specification: In that Private Roosevelt Bledsoe, Company 'E', 24th Infantry Regiment, being present with his organization while it was engaged with the enemy, did, at Company 'E' 24th Infantry Regiment, on or about 29 July 1950, shamefully abandon the said Company 'E' and seek safety in the rear, and did fail to rejoin it until the 20 August 1950.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of two previous convictions by summary court-martial for breach of restriction, failure to obey a lawful order and having in his possession an unauthorized pass 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 was a member of Company E, 24th Infantry Regiment (R 10).

On 28 and 29 July 1950, Company E, 24th Infantry Regiment, was engaged with the enemy in the vicinity of Haman, Korea. The accused was present with his company on 28 July 1950, on which date he was serving as a member of the .57 mm Mortar Section of the fourth platoon (R 10,14). The company sustained an attack by the enemy that day which necessitated a withdrawal of elements of the company with resulting disorganization and confusion (R 11). The following day, 29 July 1950, a perimeter defense was organized and a check made of "each individual man" within the defensive area. The accused could not be found (R 11,14). His absence was reported to the first sergeant (R 14). Between 29 July and 20 August 1950, "three or four" additional checks were made of the fourth platoon of Company E, 24th Infantry Regiment, but at no time was the accused found. During this period the accused neither had permission to be absent from his unit (R 12,14), nor was he relieved, reassigned or transferred from the fourth platoon (R 13,14). On 20 August 1950, the accused was seen at "the CP" talking to the first sergeant (R 11).

b. For the defense.

The defense called no witnesses, and introduced no evidence. The rights of the accused as a witness in his own behalf having been explained to him, he elected to remain silent (R 16).

4. Discussion.

The accused was charged with and found guilty of violation of the 75th Article of War in that he

"\* \* being present with his organization while it was engaged with the enemy, did, \* \* shamefully abandon the said Company 'E' and seek safety in the rear, and did fail to rejoin it until the 20 August 1950."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"\* \* any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

\* \* \*

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"\* \* acts by any officer or soldier, as -- \* \* going to the rear or leaving the command when engaged with the enemy; \* \*" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The evidence adduced by the prosecution in support of the charge and specification was not refuted by the defense in any respect. It established conclusively that the accused was a member of a unit which, at the time and place alleged, was engaged in combat with the enemy. The accused's post of duty was with a front line element of his unit. Upon reorganization of his platoon following an enemy attack the accused could not be found, nor was he again seen until twenty-two days later. He had no permission to be absent.

The factual situation thus presented is substantially the same as that existing in the case of CM 298931, Sexton, 15 BR (ETO) 125, in which case the following language is found at page 127:

"The prosecution showed, through the testimony of Lieutenant Schwarzkopf, that on 8 October and on 4 November, 1944, accused's company was either actively attacking the enemy or was in reserve positions subject to call and within the range of enemy artillery fire. It thus appears that, on those dates, the company was 'before the enemy' within the meaning of that phrase as used in Article of War 75 (CM ETO 1404, Stack; Winthrop's Military Laws and Precedents, Reprint, 1920, pp.623,624; Dig. Opns, JAG, 1912-40, sec.433(2), p.303). It was further shown through the introduction of an extract copy of the company morning reports, that accused absented himself without leave from his company on the dates alleged. The evidence thus supports the inference that accused was before the enemy on the dates alleged and shows that he absented himself from his company without permission on those dates. This conduct constitutes misbehavior before the enemy in violation of Article of War 75 (CM ETO 1663, Ison; CM ETO 1659, Lee; CM ETO 2582, Keyes; CM ETO 3828, Carpenter). The evidence adduced although it is meager and fails to give the picture as to the company's operations and the circumstances under which the accused absented himself, supplies the minimum requirements and thus supports the court's finding that accused was guilty of the offenses alleged."

The Sexton case differs from the instant case in that in the Sexton case the accused was charged with and found guilty of running away from his company in violation of Article of War 75, while in the instant case the specification alleges that the accused did "shamefully abandon" and "seek safety in the rear." This difference does not help the accused as the gravamen of the offense alleged in either manner is the abandonment of his company by the accused (CM 297170, Woods, 13 BR (ETO) 37,42), with the result that a specification alleging that the accused did "shamefully abandon" his company while it was before the enemy "and seek safety in the rear" is equivalent to an allegation that he did "run away from his company" (CM 257053, Marchetti, supra; CM 277044, Puleio, 9 BR (ETO) 37, 39), and may be supported by the same proof (CM 277044, Puleio, supra, and cases there cited).

For these reasons the Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings and sentence (CM ETO 1408, Saraceno, 4 BR (ETO) 293,295; CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM 263351, Keyes, 7 BR (ETO) 187,188; CM 276183, Kuykendoll, 9 BR (ETO) 315,316; CM 289896, O'Berry, 11 BR (ETO) 203,204-205; CM 298931, Sexton, supra).

5. The papers accompanying the record of trial indicate the accused is 21 years old, unmarried, and has no dependents. He completed two years of high school in 1946, and thereafter worked as a laborer until he enlisted in the Army on 22 November 1947. He joined his present organization 5 May 1950. His commanding officer rates him "poor" as to character and "unsatisfactory" as to efficiency. Two previous convictions by summary court-martial for minor offenses are indicated.

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 misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, J.A.G.C.  
William C. Fitzhugh, J.A.G.C.  
Arthur P. Ireland, J.A.G.C.

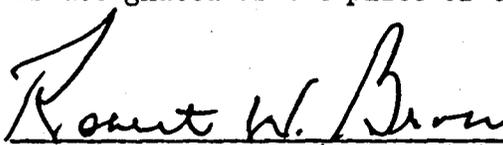
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Office of The Judge Advocate General

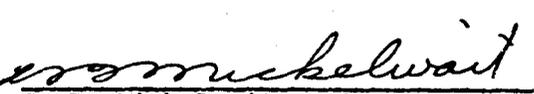
CM 343951

THE JUDICIAL COUNCIL

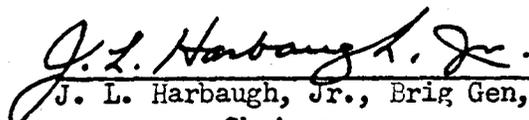
Harbaugh, Brown and Mickelwait  
Officers of The Judge Advocate General's Corps /

In the foregoing case of Private Roosevelt Bledsoe,  
RA 19293580, Company E, 24th Infantry Regiment, APO 25,  
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.

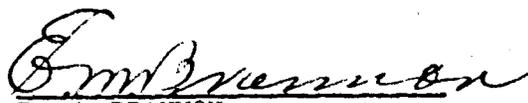
  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

MAR 13 1951

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

I concur in the foregoing action. Under the direction of the  
Secretary of the Army the term of confinement is reduced to twenty  
years.

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

13 March 1951

( GCMO 30, March 22, 1951).



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

(165)

NOV 23 1950

JAGH CM 343952

UNITED STATES )

25TH INFANTRY DIVISION

v. )

Trial by G.C.M., convened at  
Taejon, Korea, APO 25, 25

Private TOMMIE L. WALKER (RA  
18334870), Company G, 24th  
Infantry Regiment, APO 25. )

October 1950. Dishonorable  
discharge, total forfeitures  
after promulgation, and confine-  
ment for life. )

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OPINION of the BOARD OF REVIEW  
HAUCK, FITZHUGH, and IRELAND  
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 75th Article of War.

Specification: In that Private Tommie L. Walker, Company G, 24th Infantry Regiment, APO 25, did, at or near Haman, Korea, on or about 20 September 1950, misbehave himself before the enemy, by leaving his company without authority, while his command was engaged with the enemy,

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be 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 Tommie L. Walker, was a member of Company G,

24th Infantry Regiment (R 9). On 19 and 20 September 1950, Company G, 24th Infantry Regiment, was engaged with the enemy in the vicinity of Haman, Korea (R 9). On the 19th the Company was "hard hit" by the enemy (R 10), the company commander being killed (R 11). On the 20th the company was in battalion reserve (R 12) and was located on a hill near the front line (R 11). The company command post was located about a mile to the rear (R 9). On the afternoon of 20 September 1950, the accused was observed in the company command post area by Second Lieutenant (then First Sergeant) Thomas L. Bowling. Bowling ordered the accused to report to the company commander "in position" and further instructed him "to ride up on the chow truck." The accused "got on the chow truck." About an hour later, Bowling again noticed the accused in the company command post area accompanied by a sick Korean soldier. Bowling again "told Walker to report to the company commander," to which the accused replied: "I am not going back on the hill" (R 10,11). At the time, the accused appeared to be normal and to understand Sergeant Bowling's order. Bowling then made arrangements to have him confined (R 10). The accused had not been given permission by his platoon leader to leave his platoon (R 12).

b. For the defense.

Sergeant Harvey C. Boone, Company G, 24th Infantry Regiment, saw the accused at a road block which the witness was manning sometime "during the month of September." He ordered the accused to "report back to the Company CP" (R 13).

The rights of the accused as a witness in his own behalf having been explained to him (R 14), he elected to be sworn as a witness. He admitted being ordered by "1st Sgt Bowling" "to report on the hill" on 20 September 1950. He maintained, however, that he had complied with the order, had reported to the "captain" "on the hill," had been assigned to a foxhole in the second platoon area, and had remained there all night. The next morning, as his foot pained him and as the Korean in the next foxhole was sick, he "came down the hill" with the Korean to obtain medical treatment. Sergeant Bowling saw him as he was going back "up on the hill," called him over and said "Sit down in the chair," after which he was confined. He did not have permission to leave his platoon "to go on sick call." Although he told Sergeant Bowling that he had been "on the hill" all night and had come back for sick call, Sergeant Bowling did not believe him (R 15-19). He insisted that Sergeant Bowling had given him only one order which he had obeyed (R 17).

4. Discussion.

The accused was charged with and found guilty of violation of Article of War 75 in that he did

"\* \* misbehave himself before the enemy, by leaving his company without authority, while his command was engaged with the enemy."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"\* \* any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

\* \* \*

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"\* \* acts by any officer or soldier, as -- \* \* going to the rear or leaving the command when engaged with the enemy; \* \*" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The specification in the instant case does not follow exactly any of the approved forms given in the Manual for Courts-Martial (MCM, 1949, spec. Nos. 39 through 49, pp.318-319). It becomes necessary, therefore, to determine whether it states an offense in violation of Article of War 75. Those offenses properly chargeable as violations of the 75th Article of War most nearly analogous to that alleged in the instant case are: (1) that the accused did "run away from his company" which was then engaged with the enemy, and (2) that the accused did "shamefully abandon" his company and "seek safety in the rear" (MCM, 1949, spec. Nos. 41 and 42, p.318). These allegations have been held to be equivalent to each other (CM.257053, Marchetti, supra). In either case, the essential elements of proof necessary to sustain such a specification being: (1) that the accused was present with his detachment while it was before the enemy at the time and place alleged, and (2) that he either abandoned the detachment and sought safety in the rear, or that he ran away (CM 277044, Puleio, 9 BR (ETO) 37,39 and cases there cited). Numerous cases alleging that the accused ran away from his company which was engaged with or before the enemy have been held legally sufficient on proof that the accused absented himself without leave from his unit which was before the enemy

at the time and place alleged (CM ETO 1408, Saraceno, 4 BR (ETO) 293, 295; CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM 263351, Keyes, 7 BR (ETO) 187,188; CM 276183, Kuykendoll, 9 BR (ETO) 315,316; CM 289896, O'Berry, 11 BR (ETO) 203,204-205; CM 298931, Sexton, 15 BR (ETO) 125,127). For these reasons, the Board of Review is of the opinion that the specification in the instant case is equivalent to an allegation that the accused being present with his company before the enemy did run away therefrom, and, consequently, that it alleges an offense in violation of Article of War 75.

The proof in support of the charge and specification is uncontradicted in that on the afternoon of 20 September 1950, while his company was engaged with the enemy, the accused was observed in the company command post area approximately a mile to the rear of the company position. He was directed to report to the company commander "in position" and left the area on "the chow truck." Testifying as a witness in his own behalf, the accused maintained that he had reported to the company commander as directed and had remained with the company overnight, returning to the command post area the next morning in search of medical treatment. According to the testimony of Second Lieutenant Bowling, the accused was again in the command post area approximately an hour after he had left on "the chow truck," at which time, having again been ordered to report to the company commander, the accused replied, "I am not going back on the hill." It is immaterial which version of the incident is true as the accused admitted that he did not have permission to leave his platoon. Both elements of the offense alleged, i.e. (1) that the accused was present with his unit before the enemy, and (2) that he left it without permission, are thus established by the evidence (CM ETO 1408, Saraceno, supra; CM ETO 1659, Lee, supra; CM 263351, Keyes, supra; CM 276183, Kuykendoll, supra; CM 289896, O'Berry, supra; CM 298931, Sexton, supra).

5. The papers accompanying the record of trial show the accused to be nineteen years old and unmarried. He claims his mother and a sister as dependents. He completed eight years of schooling in 1945. He enlisted 1 April 1948 and was assigned to his present organization 5 March 1949. His character and efficiency ratings are unknown.

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 misbehavior before the enemy in violation of Article of War 75.

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

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

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

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

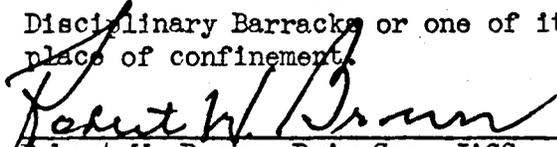
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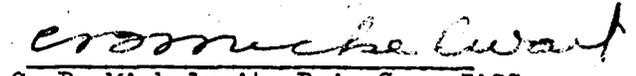
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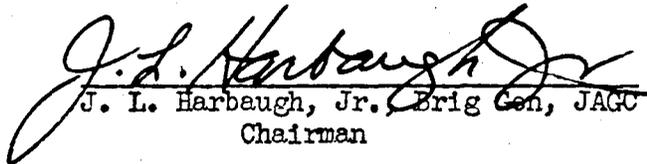
THE JUDICIAL COUNCIL

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

In the foregoing case of Private Tommie L. Walker, RA  
18334870, Company G, 24th Infantry Regiment, APO 25, 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.

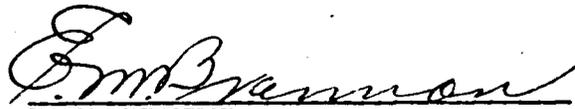
  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

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

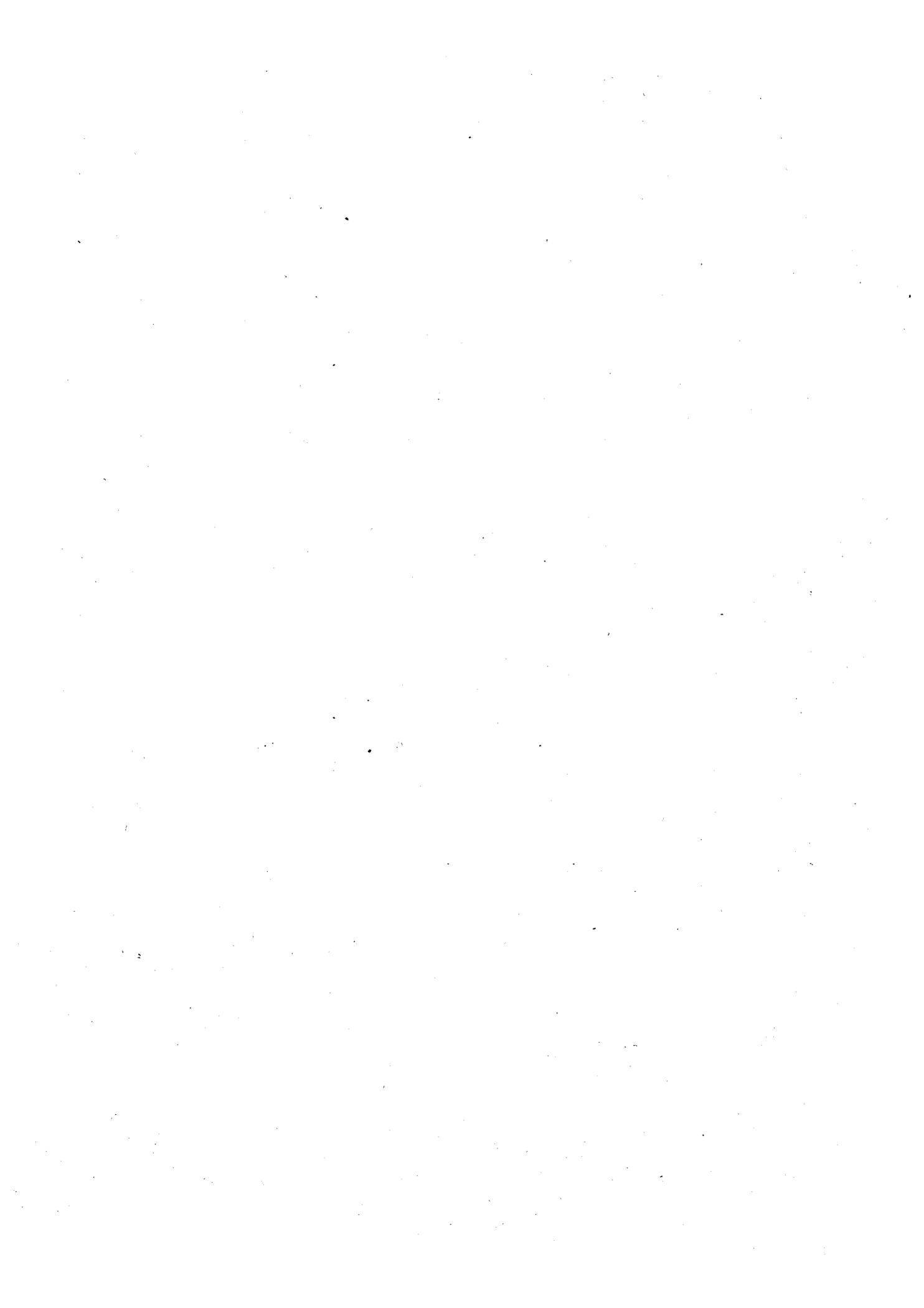
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I concur in the foregoing action. Under the direction of the  
Secretary of the Army the term of confinement is reduced to twenty  
years.

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

27 March 1951

( GCMO 37, 3 April 1951 )



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

(171)

DEC 5 1950

JAGH CM 343982

U N I T E D S T A T E S	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Taejon, Korea, APO 25, 25
Private HERBERT BENNETT (RA	)	October 1950. Dishonorable
16261275), Battery B, 159th	)	discharge, total forfeitures
Field Artillery Battalion, APO	)	after promulgation, and con-
25.	)	finement for life.

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OPINION of the BOARD OF REVIEW  
HAUCK, FITZHUGH, and IRELAND  
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 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 64th Article of War.

Specification 1: In that Private Herbert Bennett, Battery "B" 159th Field Artillery Battalion, APO 25, having received a lawful command from Captain Curtis R. Walton Jr, his superior officer, to report for duty on outpost, did, at or near Haman, Korea, on or about 2 September 1950, willfully disobey the same.

Specification 2: In that Private Herbert Bennett, Battery "B" 159th Field Artillery Battalion, APO 25, having received a lawful command from 1st Lt Marshall R. Hurley, his superior officer, to report for duty on outpost, did, at or near Haman, Korea, on or about 15 September 1950, willfully disobey the same.

He pleaded not guilty to, and was found guilty of, the Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 Herbert Bennett, was a member of Battery B, 159th Field Artillery Battalion (R 10,13). On 2 September 1950, Battery B, 159th Field Artillery Battalion, was located "down a little south of Haman in the valley" (R 9). On that day the accused's duty was "to go to the outpost and observe the enemy activity in front \* \*" (R 9). He was a member of the outpost group (R 10). During the day, the first sergeant brought the accused before the battery commander, Captain Curtis R. Walton, Jr., "for coming back from outpost duty without authority" (R 9). Captain Walton "ordered the [accused] to go back on outpost." The accused refused to obey the order (R 9,10,12-13), and stated "I refuse to go" (R 10). Captain Walton was sure the accused understood his order; and was "quite sure" the accused knew him to be his battery commander (R 9,10). He was wearing his insignia of rank (R 9). Master Sergeant Walter Malichi, Jr., first sergeant of Battery B, 159th Field Artillery Battalion, corroborated Captain Walton's testimony (R 15).

On 15 September 1950, Battery B, 159th Field Artillery Battalion, was in the vicinity of Haman, Korea (R 12) north of Masan (R 14). On that date, the accused "was a member of the security platoon which had been established for the purpose of perimetive defense of the battery" (R 12). About noon, on that day, the accused was brought before First Lieutenant Marshall R. Hurley, the battery executive officer, "by Sgt Davis, the ammunition sergeant, for refusal to go on an outpost" (R 11). Lieutenant Hurley

"\* \* told the accused to proceed to the outpost, and the accused remained silent, as he did throughout the entire conversation. I mean, he was mute throughout the entire conversation, except when I would ask him definitely did he understand what I was saying to him. At such time he would say 'Yes.' I told him to report to the outpost and he stood there. I told him again, 'Report to the outpost, Bennett,' and he stood there with his hands in his pocket, so I said, 'Take your hands out of your pocket and stand at attention.' He did, and I said, 'Bennett, can you understand what I am saying to you?' He said, 'Yeah,' and I said, 'Then, are you going to the outpost?' He didn't answer. I said, 'Do you understand me, Bennett?' He said, 'Yeah.' I said, 'Then are you going to the outpost' again; that was the third time I asked him. There was still no reply, so I said, 'What's wrong with you? Do you realize the seriousness of what you are doing?' He said nothing, so I said, 'You stand at attention until you learn to talk,' and I walked away from him and as I walked away, he turned around and walked towards the water - not water trailer - kitchen trailer where he laid his

mess kit and picked it up. I said, 'Come back, Bennett.' I said, 'Now, are you going to the outpost?' And he still hadn't answered and I called him over in the presence of two other officers who were at the table and I said, 'Bennett, I am going to give you a direct order to go to the outpost,' and I said, 'Do you understand me?' And he said, 'Yeah.' I said, 'Are you going to the outpost?' And he said, 'No.' I said, 'Well, that is all I have.' \* \*." (R 11-12)

The accused knew Lieutenant Hurley to be an officer (R 13). Warrant Officer Jesse P. Newhouse, Battery B, 159th Field Artillery Battalion, corroborated Lieutenant Hurley's testimony (R 14).

b. For the defense.

On or about 2 September 1950, the accused complained to Private First Class Fred J. Moore, Battery B, 159th Field Artillery Battalion, that he (the accused) had hurt his leg in moving from a hill then under enemy fire during withdrawal of the battery. Moore looked at the accused's leg which appeared to be blistered, and noticed that he had difficulty walking (R 17).

After being warned of his rights as a witness on his own behalf, the accused elected to remain silent (R 18).

4. Discussion.

The accused stands convicted of two violations of Article of War 64 in that on 2 September 1950, and again on 15 September 1950, he willfully disobeyed an order of his superior officer to report for outpost duty.

The wilful disobedience contemplated by Article of War 64 is an intentional disobedience manifesting an intentional defiance of authority, of an order, relating to a military duty, given by an authorized superior officer (MCM, 1949, Par. 152b; CM 325635, Richardson, 74 BR 381,383; CM 255602, Pritchard, 36 BR 151,157). There must be a specific intent to defy authority deliberately and consciously (CM 343259, Hale, 31 Oct 50; CM 234993, Orbon, 1 BR (ETO) 95,105). An order requiring the performance of a military duty is presumed to be lawful and is disobeyed at the peril of the subordinate (MCM, 1949, *ibid*).

In the instant case, the facts are undisputed that the accused was a member of Battery B, 159th Field Artillery Battalion, and on the dates alleged was assigned to duty as a member of a security group or detachment which was charged with manning a defensive perimeter for the battalion. It also is undisputed that on 2 September the accused was taken to the battery commander by the first sergeant "for coming back from outpost duty without authority." The battery commander ordered the accused "to go back

on outpost." The accused refused to go. On 15 September 1950, the accused, having again been detailed for outpost duty, was brought before the battery executive officer by the sergeant in charge of the detail. He was given a direct order "to report to the outpost." He acknowledged that he understood the order and when asked if he intended to obey, answered: "No."

The accused's intention deliberately and intentionally to disobey the lawful orders of his superior officers on both occasions is proven both by his acts and words. In addition to his failure to comply with the order given in each instance, he verbally, openly and expressly refused to obey. No question arises on the record here as to legality of the orders (cf. CM 236447, Bartlett, 1 BR (ETO) 115,130). The Board of Review is of the opinion that the evidence is sufficient to sustain the offenses alleged beyond a reasonable doubt (CM 291200, Reed, 17 BR (ETO) 213,216; CM 294784, Dominick, 15 BR (ETO) 375,377).

5. The papers accompanying the record of trial show the accused to be 20 years old. Data as to his education and occupation prior to entry on military service is not given. He enlisted in the Army 29 December 1947, for five years. His commanding officer rated him unsatisfactory as to character. There is no evidence of previous convictions by court-martial or of civilian offenses.

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, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of willful disobedience of the lawful orders of a superior officer in violation of Article of War 64. (Executive Order 10149, 8 August 1950, 15 Fed. Reg. 5149)

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

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

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

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

CM 343982

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Herbert Bennett,  
RA 16261275, Battery B, 159th Field Artillery Battalion,  
APO 25, 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

1951

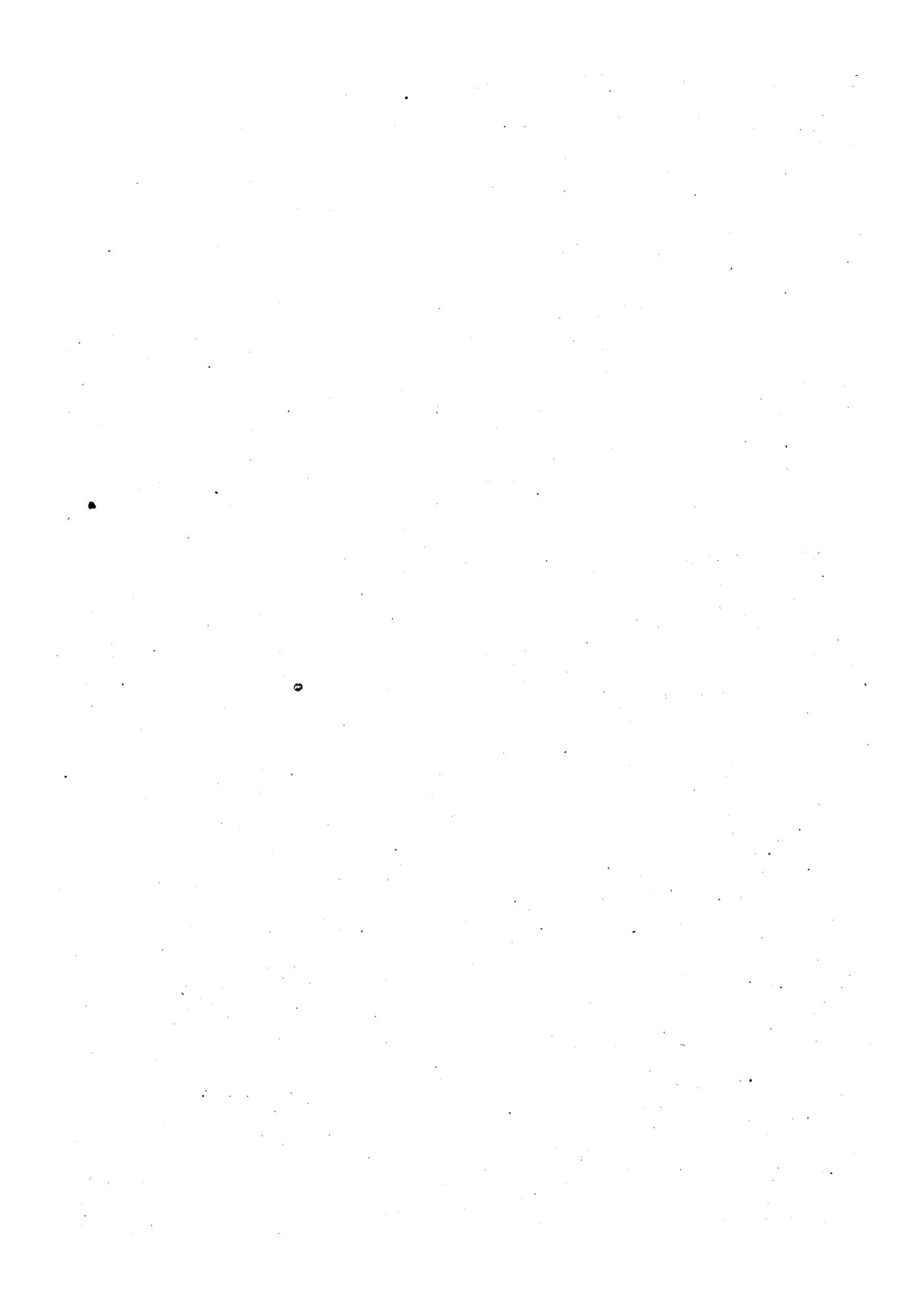
*J. L. Harbaugh, Jr.*  
J. L. Harbaugh, Jr., Brig Gen, JAGC  
Chairman

I concur in the foregoing action. Under the direction of the  
Secretary of the Army the term of confinement is reduced to twenty  
years.

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

*13 March 1951*

( GCMO 32, March 22, 1950).



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

(177)

DEC 7 1950

JAGH CM 343983

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Taejon, Korea, APO 25, 23
Corporal Eddie Brewer (RA	)	October 1950. Dishonorable
16261175), Battery A, 159th	)	discharge, total forfeitures
Field Artillery Battalion.	)	after promulgation, and con-
	)	finement for life.

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OPINION of the BOARD OF REVIEW  
HAUCK, FITZHUGH, and IRELAND  
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 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 75th Article of War.

Specification: In that Corporal Eddie Brewer, Battery A, 159th Field Artillery Battalion, being present with his outpost while it was before the enemy, did, near Masan, Korea, on or about 6 September 1950, shamefully abandon the said outpost and seek safety in the battery area and did fail to rejoin his outpost.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be 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, Corporal Eddie Brewer, was a member of Battery A, 159th

Field Artillery Battalion (R 8). On 6 September 1950, Battery A, 159th Field Artillery Battalion was located "northwest of Masan and a little southwest of Haman," Korea (R 16); and was engaged in firing, in support of the 24th Infantry (R 15-16), against the North Koreans (R 16). To prevent infiltration of enemy troops into the battery position, an outpost guard was established on the night of 6 September (R 15-16). The outpost consisted of three posts numbered 1, 2 and 3, all of which were located on a hill overlooking the enemy (R 10). Post Number 1 was manned by the accused, Private First Class Nathaniel Austin and two South Koreans (R 8, 10). The accused was posted by Sergeant First Class Ed Simmons who "was in charge of the guard that day" (R 8) shortly after 1730 hours (R 10). Although Sergeant Simmons did not personally accompany the accused to Post Number 1, he directed the accused to report to the post (R 8) and sometime thereafter received a hand signal indicating that the accused was at the post (R 9). The accused should have remained on the post from 1800 hours, 6 September 1950, to 0600 hours, 7 September 1950 (R 10). He knew this as he had been on outpost before, and Sergeant Simmons told him when he sent him to his post "that he should stay up until he was relieved by the patrol that was going up the next morning" (R 11).

The accused reported to Private First Class Nathaniel Austin on Post Number 1, about thirty minutes after the latter had gone "up on the hill" on 6 September 1950. Private First Class Austin asked the accused "was he supposed to stay with me that night on outpost #1," to which the accused replied: "Yes" (R 12). About midnight (R 12) or "one o'clock" (R 13) Post Number 2 called the fire direction center and reported that "there was snipers on the hill coming their way." Private First Class Austin, who was listening in on the telephone conversation, told the accused of the report from Post Number 2 and also told him "not to get excited because there would be shells on #2." Shortly thereafter Austin heard a shot. The accused "broke and run down the hill." Austin further testified: "I looked the first time and he was there hiding in the weeds. The second time I looked he was gone." Austin reported the accused's departure to the fire direction center (R 12). Austin did not see the accused again that night (R 13). He remained at Post Number 1 with the two South Koreans until "around seven" in the morning. He did not receive any instructions over the telephone "to pull out" of his position during the night (R 14).

Sergeant Simmons observed the accused "inside the CP" talking to the first sergeant "around one or two o'clock in the morning" of 7 September (R 9). The first sergeant took the accused to the battery commander "early in the morning." At no time during the night of 6-7 September was the outpost given instructions by any of the battery officers or noncommissioned officers "to pull off the hill" (R 15).

b. For the defense.

Corporal Richard F. Minor, Battery A, 159th Field Artillery Battalion,

was corporal of the "security guard" of which the accused was a member on the night of 6-7 September 1950 (R 17). Corporal Minor knew "of previous occasions in Battery A when men had been posted on outposts and after a firing had broken out, had called the BC - the battalion commander and immediately withdrew" (R 17). Corporal Minor did not give the accused permission "to leave his post" on the night of 6-7 September, nor did he know of anyone else having given him permission (R 17). Ordinarily, the security guard was relieved each morning "by anyone in authority from the Fire Direction Center such as battery commander or sergeant of the guard" at times which varied depending upon the weather and light conditions (R 18).

Sergeant First Class A. L. White had known the accused for about a year and a half. During this time, the accused served under Sergeant White for about a year and four months. Sergeant White had found him to be a good soldier who never caused trouble. He did not know of the accused ever having "deserted his post before" (R 18).

After explanation of his rights as a witness in his own behalf, the accused elected to remain silent (R 20).

#### 4. Discussion.

The accused was charged with and found guilty of violation of Article of War 75 in that he

"\* \* being present with his outpost while it was before the enemy, did, \* \* shamefully abandon the said outpost and seek safety in the battery area and did fail to rejoin his outpost."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"\* \* any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

\* \* \*

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"\* \* acts by any officer or soldier, as -- \* \* going to the rear or leaving the command when engaged with the enemy; \* \*" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50)

The specification in the instant case follows closely the form given in the Manual for Courts-Martial (MCM, 1949, p.318, spec. No. 42). It varies therefrom in that (1) the words "before the enemy" are substituted for the words "engaged with the enemy," and (2) the words "did fail to rejoin his outpost" are substituted for the words "did fail to rejoin it until (the engagement was concluded) (----)" given in the form specification. Neither of these differences is deemed material by the Board of Review. The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143, 150); and the allegation with respect to the time of the accused's return has been held to be "wholly immaterial" and not to require proof (CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM ETO 1404, Stack, 4 BR (ETO) 279,281). The Board of Review, therefore, is of the opinion that the specification in the instant case states an offense in violation of Article of War 75, the essential elements of proof of which are (1) that the accused was present with his detachment while it was before the enemy at the time and place alleged and (2) that he either abandoned the detachment and sought safety in the rear, or that he ran away (CM 277044, Puleio, 9 BR (ETO) 37,39).

The proof adduced by the prosecution in the instant case in support of the Charge and Specification is uncontradicted in that at about 1800 hours, 6 September 1950, the accused was detailed as a member of an outpost guard of Battery A, 159th Field Artillery Battalion, which was then before the enemy in the vicinity of Masan, Korea. The accused proceeded to his post on a hill overlooking enemy territory pursuant to the orders of the Sergeant of the Guard where he should have remained until relieved by competent authority the next morning. Between midnight and one o'clock in the morning, word was received at the accused's post that snipers were approaching Post Number 2, and shortly thereafter Post Number 2 opened fire. At the first carbine shot the accused "broke and run down the hill." Later he was seen in the battery command post area talking to the first sergeant. No one competent to do so had given him permission to leave his post. This proof establishes misbehavior before the enemy as alleged beyond a reasonable doubt (CM 257053, Marchetti, supra, at 151; CM ETO 1404, Stack, supra; CM ETO 1408, Saraceno, 4 BR (ETO) 293,295; CM 289896, O'Berry, 11 BR (ETO) 203,206; CM 278016, Folse, 11 BR (ETO) 351,352).

5. The papers accompanying the record of trial indicate the accused to be 21 years old. Information as to his education, occupation prior to entering the military service and marital status is unknown. He enlisted in the Army 21 April 1948, for six years. He had no prior service. His battery commander rated him poor as to character and unsatisfactory as to efficiency. There is no record of prior military or civilian convictions.

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 misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.  
William C. Fitzhugh, J.A.G.C.  
Arthur P. Ireland, J.A.G.C.

(182)

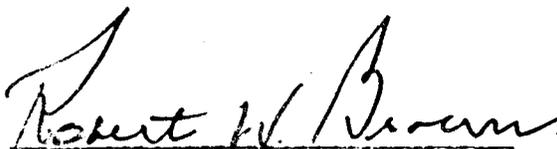
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Office of The Judge Advocate General

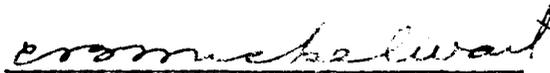
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THE JUDICIAL COUNCIL

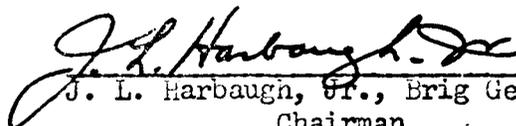
Harbaugh, Brown and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal Eddie Brewer,  
RA 16261175, Battery A, 159th Field Artillery Battalion, 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.

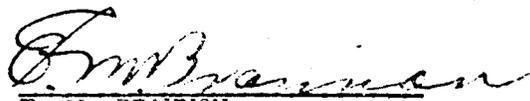
  
Robert W. Brown, Brig Gen, JAGC

  
C. B. Mickelwait, Brig Gen, JAGC

100 1001

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

I concur in the foregoing action. Under the direction of  
the Secretary of the Army the term of confinement is reduced  
to twenty years.

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

1370-451

(CCMO 28, March 20, 1951).

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

JAGH CM 344950

APR 17 1951

UNITED STATES )

SOUTHWESTERN COMMAND )

v. )

) Trial by G.C.M., convened at Sasebo,  
) Kyushu, Japan, 30 November 1950 and  
) at Kokura, Kyushu, Japan, 7-12  
) December 1950. Life imprisonment

) EMILIANO M. FERNANDEZ, Civilian,  
) Mess Boy, and PHILIP L. PANTORILLA,  
) Civilian, Electrician, both of  
) LSM 463, a Ship Operated by the  
) United States Army )

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OPINION of the BOARD OF REVIEW  
MILLER, FITZHUGH and IRELAND  
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 civilians named above and submits this, its opinion, to The Judge Advocate General and the Judicial Council.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Philippe L. Pantorilla and Emiliano M. Fernandez, both persons serving with the armies of the United States without the territorial jurisdiction of the United States, acting jointly and in pursuance of a common intent, did, at Sasebo, Kyushu, Japan, on or about 7 September 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Yasutori Ryohei, a human being, by shooting him with a pistol.

Both accused pleaded not guilty to, and were found guilty of, the Charge and its Specification. No evidence of previous convictions was

introduced. They were sentenced to be imprisoned at such place as proper authority may direct for life. The reviewing authority approved the sentence as to each accused. The record of trial was forwarded for action under Article of War 48.

### 3. Evidence.

#### a. For the prosecution.

A written stipulation, entered into between the Trial Judge Advocate, both accused and their defense counsel, was received in evidence as Prosecution Exhibit 1 (R 21, 22), which stated, in effect, that both accused were persons serving with the Armies of the United States without the territorial jurisdiction of the United States and that they were the same persons named in the specification and the charge.

On the evening of 6 September 1950, Ryohei Yasutomi (the deceased), a Japanese policeman, off duty and not in uniform (R 47, 86), together with three other Japanese Nationals, visited a Japanese dance hall and several drinking establishments in Sasebo, Kyushu, Japan, where they drank intoxicating beverages (R 23, 48, 60). Shortly after midnight, 7 September 1950, these four, Fuchi, Yasutomi, Hayashi and Oba, were seated from left to right in that order on a bench in front of a fruit shop on the north side of Mifune-cho, a street in Sasebo. Because of the cramped conditions on the bench, Yasutomi sat facing the fruit shop while the other three faced the street (R 23-24, 60-62, 83). While sitting there engaged in conversation, Yasutomi was brought a bottle of beer by an old woman of his acquaintance (R 25, 48).

At approximately 0045 hours the group was approached by two persons, (R 44-45, 62-63) later identified as the accused Philippe L. Pantorilla and Emiliano M. Fernandez (R 79, 86, 98-99, 106 - 108), both Filipinos and civilian crew members of the LSM 463, a ship then berthed in the harbor of Sasebo (Pros Ex 2, 4). As the two accused came in front of the bench, Fernandez engaged Yasutomi in conversation for about two minutes (R 26, 29, 44) and then walked around the east end of the bench. Standing between the bench and the fruit shop, he continued to talk to Yasutomi, while Pantorilla remained in front of the bench (R 70). Yasutomi, who by this time had arisen to his feet, exchanged words with Fernandez, but neither this nor the previous conversation was understood by the other Japanese as they were talking half in English and half in Japanese (R 26, 70, 71). Fernandez then returned to the front of the bench where he proceeded to search Fuchi's pockets (R 29, 45-46, 70-71, 85-86). At this point the witness Saito Masue, referred to in the record as "Jeannie", who had observed the above proceedings from her house across the street, hastened to the scene and pulled Fernandez by the arm in an attempt to separate him and Fuchi. Fernandez desisted in his search and Fuchi "just disappeared" (R 86). Yasutomi said something to accused Fernandez and he returned to the rear of the bench near the

policeman. Holding a beer bottle in his right hand, Yasutomi walked up to Fernandez and started to feel his pockets whereupon Fernandez struck him in the face with his closed fist. The policeman staggered backwards two or three feet and accused Pantorilla, who had moved around the west end of the bench to a position behind Yasutomi, struck him on the head with a pistol. Immediately thereafter Fernandez produced a pistol "went up to Yasutomi, took hold of his arm and fired" ... "towards the sky". At almost the same time, Pantorilla discharged his weapon and Yasutomi fell to the ground, bleeding profusely about the head (R 29-30, 46, 72-74, 86-89, 98-100).

When accused Pantorilla fired his pistol, he was standing directly behind the deceased, holding the pistol about 6 inches from deceased's head. He held the weapon in his right hand with his right arm parallel to the body and his forearm at a forty-five degree angle to the biceps. The shooting occurred at approximately 0050, 7 September 1950 (R 100-101), at which time there was light coming from the fruit stand and from the house across the street (R 30, 75). According to Saito, who was standing just in front of the bench, the light "was shining on the street", but "Where the bench was, it was rather dark" (R 104).

After the deceased fell to the ground, the two accused unhurriedly withdrew from the scene (R 101) and returned to their ship where accused Pantorilla was identified about 0300 hours by Hayashi. They were subsequently apprehended aboard ship by the CID at approximately 0730, 7 September 1950 (R 171).

At about 0200 hours, 7 September 1950, the Sasebo police viewed the deceased's body at the scene of the shooting. He was lying on the ground face downward, his head bloody and surrounded by a pool of water. A beer bottle was lying nearby (R 143-144). The corpse was taken to police headquarters about 0700 that morning and from there to a hospital (R 144). That afternoon a qualified medical doctor performed an autopsy which established that a bullet entered the skull at a point behind the right ear, penetrated the skull and part of the brain and emerged on the left side of the forehead. The doctor stated that the cause of death was "a bullet wound through the head" (R 151-153, 156, 158).

The statement of accused Pantorilla, made to Walter T. Oliver, CID agent, was received in evidence as Prosecution Exhibit 2. Pantorilla stated in substance that he was employed as an electrician aboard the ship, LSM 463; that he was in Sasebo between the hours of 2300, 6 September 1950, and 0300, 7 September 1950; that he had acquired a .45 caliber automatic pistol, Number 311456, three clips and three rounds of ball ammunition in Pusan; that at 0100, 7 September 1950, using this weapon, he had shot and killed a man whose name he did not know; that his reason for killing the man was that deceased, along with two other men were after him and had stated they were going to kill him; and that these men wanted to start a fight with him on 5 September for reasons unknown (R 171-176, 178, 179, 185).

The statement of accused Fernandez, made to Walter T. Oliver, CID agent, 7 September 1950, was received in evidence as Prosecution Exhibit 4. Fernandez stated in substance that he was employed as a mess boy on the ship, ISM 463; that he and Pantorilla were together between the hours of 2300, 6 September 1950, and 0300, 7 September 1950; that Pantorilla had a quarrel with someone in Sasebo about 1230 0030 hours, 7 September 1950, but he, Fernandez, did not know the reason; that he saw a gun in Pantorilla's possession the night of 6 September 1950; that he thought Pantorilla fired the gun because he heard a shot; that he had purchased a weapon from a Korean civilian in Pusan for \$20.00; that on the night of 6 September 1950 he had discharged his weapon into the air because he thought there was going to be trouble and he wanted to frighten the people; and that he later threw the weapon off the ship into the ocean (R 173-176, 178, 213, 226).

b. For the defense.

Imakakura Mitsue, a Japanese National, who lived in a house across the street from the fruit shop on Mifune-cho, testified that she had become acquainted with the deceased when he was stationed at a police box near her home and that three months earlier he had been transferred to another post. The deceased had not been a close friend of the family and had not visited her house prior to 6 September 1950 (R 256). He had come to her house shortly after midnight, 7 September 1950, and she had conversed with him briefly in the kitchen (R 256-257, 261). In her opinion, the deceased did not know what he was doing; "I think he was drunk and happy" (R 262).

First Lieutenant Lloyd J. Faul, 710th Military Police Company, Camp Mower, testified that at the time of the shooting he was Provost Marshal of the Sasebo Area which position he had occupied since 1 March 1950 (R 263). Beginning in July 1950 there had been an increase in the number of personnel passing through the port of Sasebo which caused an increase in the number of crimes of violence committed in that area. Subsequent to July 1950 the Commanding Officer of Camp Mower directed that officer personnel carry individual weapons at all times and that enlisted personnel carry individual weapons to and from work during duty hours (R 264-265). Upon cross-examination, Lieutenant Faul stated that his testimony as to the degree of violence in Sasebo was based on information contained in monthly statistical reports of offenses, prepared in the Provost Marshal's Office for submission to higher headquarters. He estimated that in the period 1 March 1950 to 7 September 1950 between 5 and 10 major crimes had been reported to him (R 265-266).

After having been advised of his rights as a witness by the law member (R 272-274), accused Fernandez elected to make an unsworn statement (R 274). He stated that on 7 September 1950 he was employed on the ship ISM 463. After leaving a cabaret about 11:20 on the evening of 6 September 1950, he, with Pantorilla and Juan Manila, had gone to Mama-san's (Imakakura Mitsue) house to see his girl friend, Judy. They

left her shortly thereafter to take Manila, who was drunk, back to the ship and then returned to the neighborhood of the incident in order to see the women. Both he and Pantorilla were carrying guns that night because Pantorilla and some companions had been held up about 2:00 o'clock on the morning of 6 September about 300 yards from the place where the present incident occurred (R 275-276).

The accused Pantorilla, after having been advised of his rights as a witness by the law member (R 272-274), elected to remain silent (R 277).

Five stipulations, entered into between the trial judge advocate, each accused and his defense counsel, were received in evidence and read to the court by defense counsel (R 285-286). The stipulated testimony of these absent witnesses, all members of the ship's complement aboard the LSM 463, is substantially as follows:

Shoemaker, Chief Engineer, would testify that he was aboard the LSM 463 before 2400 hours on 6 September 1950; that he saw each of the accused come aboard the ship and enter the mess hall as he was preparing to go on watch as a midnight engineer; and that the accused had brought one of their shipmates, Leon Manila, back to ship and put him to bed (Def Ex B).

Antonio Ariola, seaman, would testify that he returned to the LSM 463 before 2400 hours on 6 September 1950 after he and the two accused had been visiting the home of Jeanne and Judy, cabaret girls and that upon arrival at the ship before 2400 hours, he observed each of the accused eating in the mess hall (Def Ex C).

Catalino, radio operator, would testify that about 2:00 a.m. on 6 September 1950 he, in company with the accused Pantorilla, while returning to the ship, were held up by three Japanese persons, two of whom had knives and the other a stick and that the crew after that were carrying firearms when they went ashore in Sasebo (Def Ex D).

Antonio Lma, known as Zabro, seaman, would testify that he left the LSM 463 on 6 September 1950; that each of the accused were carrying their pistols; that he, in company with the two accused, attended the Shangri-La Cabaret; that after the dance, he picked up the two accused in a taxi and drove to Jeanne's house where each of the accused and Leon Manila left the taxi cab and went into the house; that within a few minutes, the two accused left mama-san's house with Leon Manila; and that he (Antonio Lma), known as Zabro, remained at the house and later returned to the ship (Def Ex E).

Leon Manila, oiler, would testify that on 6 September 1950, while the ship was anchored at Sasebo, Kyusho, Japan, he and the two accused left the LSM 463 and went to Sasebo and, during the evening, were at the Shangri-La Cabaret, where they met Antonio Lma and Antonio Ariola; that

they all carried their guns ashore with them because of having heard rumors as to hold-ups in Sasebo; that each of the accused at the time they left the ship at about 1930 hours on 6 September 1950 had their guns upon their person; that before 2400 hours on 6 September 1950 he, Leon Manila, and the two accused returned to their ship; that prior thereto they had been visiting in the house of mama-san whose real name is Masayoshi, Maeda, which house was occupied by two girls known as Jeanne and Judy; and that when they left this house, they left there one Antonio Luna, known as Zabro (Def Ex F).

c. For the court.

Fuchi Masatochi, #199 Komipra-cho, Sasebo City, was called as a witness for the court and testified that after midnight on the 6th of September 1950 he was sitting on a bench in Mifune-cho. He stated that he heard a shot and ran to a house nearby, later returning to the scene of the shooting until the policemen and the MPs came. He saw a corpse. Before the shooting, Yasutomi (the deceased) was talking to a Filipino but he could not understand their conversation. The smaller of the two Filipinos touched the pockets of the witness and he stood up. He could not recall whether the Filipino touched the deceased or whether the deceased touched the Filipino. He could not identify the smaller Filipino but stated that he remembered the accused Pantorilla who was behind the bench where witness had been sitting (R 278-281).

4. Discussion.

a. Jurisdiction.

The first problem presented by the record of trial is whether the record established that the accused were properly within the jurisdiction of the court.

The specification described the accused as "persons serving with the armies of the United States without the territorial limits of the United States", terminology identical with that contained in Article of War 2(d) (MCM, 1949, p. 274). Such pleading is a sufficient allegation that the accused were persons subject to military law, but, since jurisdiction is a fact and not a matter of pleading (Givens v. Zerbat, 255 U.S. 11; CM 195867, Jones, 2 ER 307, 308; CM 318380, Yabusaki, 67 ER 265, 269; CM 324445, Spencer, 73 ER 209, 216), we must determine from the record of trial whether the necessary jurisdictional facts have been sufficiently proved.

The evidence is undisputed that on 7 September 1950 the two accused were civilian crew members of the ship ISM 463, which was then berthed in the harbor at Sasebo, Kyushu, Japan. A stipulation, introduced by the trial judge advocate after the accuseds' plea to the general issue, stated that each accused was a person serving with the Armies of the United States without the territorial limits of the United States and that the persons

present as the accused were one and the same persons named in the specification of the charge (Pros Ex 1). Before accepting the stipulation, the court inquired of each accused and his counsel and heard their express acknowledgement that they understood and consented thereto. In fact, the accused Pantorilla stated, "I understand that it is the jurisdiction of the United States and that I know the meaning of the stipulation; it means that I am a citizen of the United States, working on a ship operated by the Army."

ISM 463, on which both accused were admittedly serving as crew members, was described on the charge sheet as "A Ship operated by the United States Army". That it was operating without the territorial limits of the United States is unquestioned. It has long been held that civilian seamen of vessels operated by, or under control of the Army, are persons subject to military law under Article of War 2(d) (CM 226362, Alamo, 15 BR 95, 98; Dig. Op. JAG 1912-1940, sec. 369 (6); 4 Bull. JAG 227 and cases there cited) and the mere fact that an accused may be a person of another nationality has never been considered to affect the rights of the United States to claim jurisdiction over him where in fact he was a person serving with the armies of the United States without the territorial jurisdiction of the United States (JAGJ CM 329933, 17 June 1948, 7 Bull. JAG 126).

We deem the stipulation above mentioned to be an agreed statement of the ultimate facts as to the status of each accused at the time the offense was committed and we conclude from the facts and circumstances appearing in the record that the court was warranted in accepting this statement as sufficient proof of the jurisdiction of a court-martial to try the accused. Certainly its acceptance did not prejudice the accused because at no time throughout the trial did the defense introduce any evidence contradicting the ultimate facts recited therein. It is apparent that the defense was well aware of the facts upon which jurisdiction was based and were content to join in the stipulation. Moreover, it is further indicated that the defense was laboring under no misapprehension because defense counsel, during final argument, stated, "\*\*\* these men are occupied in the services of our government. This Court has jurisdiction of these two men the same as any one else within the bounds of the Manual for Courts-Martial". We are of the opinion that the record of trial sufficiently shows that the accused were persons serving with the armies of the United States without the territorial limits of the United States and accordingly establishes jurisdiction of the court over the accused as persons subject to military law.

b. Offense.

The two accused were charged with and found guilty of the premeditated murder of Yasutomi Ryohei, while acting jointly and in pursuance of a common intent, in violation of Article of War 92. The specification in the instant case alleges the joint offense of premeditated murder in language identical with that set forth in the Manual for Courts-Martial (MCM, 1949, App. 4, pp. 311 and 322, spec. No. 81).

Murder is the unlawful killing of a human being with malice aforethought (MCM, 1949, par. 179a, p. 230). Malice may consist of an intention to cause death or grievous bodily harm (Ibid, par. 179a, p. 231), and may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death (Ibid, par. 125a, p. 151). A deadly weapon is anything with which death may be easily and readily produced (Acers v. United States (1896), 164 U.S. 388, 391). Murder does not require premeditation, but if premeditated, it is a more serious offense and may be punished by death. 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, p. 231; CM 337089, Aikins and Seevers, 5 BR-JC 331, 375, 390, and authorities therein cited; CM 339254, Barnes et al., 8 BR-JC 219, 249, 263; CM 344372, Davis, BR-JC, April 1951).

The evidence establishes that at the time and place alleged, the accused Pantorilla shot Yasutomi Ryohei with a pistol and that, as the result of the shooting, Yasutomi died shortly thereafter. An analysis of the events immediately preceding the shooting discloses the unquestionable existence of malice aforethought and premeditation.

Shortly after midnight, 7 September 1950, on a street in Sasebo, Kyushu, Japan, the two accused accosted Yasutomi who at that time was sitting on a bench, drinking and talking with three Japanese companions. The only indication that either of the accused was in any way acquainted with Yasutomi is Pantorilla's unsupported statement that Yasutomi had been with a couple of men who were after him and had said they were going to kill him. Nevertheless, it was the accused Fernandez who began and carried on the conversation with Yasutomi. Although the colloquy between the two was not understood by the Japanese companions, this fact is unimportant in view of subsequent events. After conversing briefly with Yasutomi, Fernandez began to search Fuchi, one of the group sitting on the bench. At Saito's intervention he stopped and Yasutomi, holding a beer bottle in his right hand, walked up to Fernandez and started to feel his pockets. This is the only evidence of any positive action against either of the accused upon the part of the deceased. At that moment, Fernandez struck Yasutomi in the face with his fist. As he reeled backwards from the force of the blow, Yasutomi was struck on the head with a pistol by Pantorilla who was behind him. Fernandez, who was now directly in front of Yasutomi, drew his pistol and fired into the air. Almost simultaneously, Pantorilla, who was holding the pistol in his right hand approximately six inches from the back of Yasutomi's head, discharged the weapon and the deceased fell to the ground, bleeding from the wound in his head. It was subsequently established that Yasutomi died shortly thereafter as a result of the bullet wound through the head. Clearly such evidence establishes that Pantorilla consciously conceived the intention to kill the deceased and accomplished his intended act by shooting the deceased from the rear through the back of the head.

The defense offered no evidence in explanation or justification of Pantorilla's conduct. The testimony of Lieutenant Faul afforded no more

than a reason why the accused were carrying weapons on the night of the killing. It certainly constituted no explanation of the conduct of the accused in assuming the role of aggressors in an unjustified, unprovoked assault upon the unarmed policeman. There is absolutely no evidence of provocation and any posture of self-defense is untenable. Pantorilla shot the deceased from behind as he stood dazed and defenseless from an attack initiated by the other accused, Fernandez. Clearly there was no legal justification or excuse for the act and the evidence amply supports the court's findings that the accused Pantorilla is legally and morally guilty of premeditated murder, perpetrated with malice aforethought (CM 336706, Pomada, 3 ER-JC 209, 215; CM 339254, Barnes et al, supra at pp. 250, 264; CM 344018, Kitchens, January 1951; CM 344372, Davis, supra).

It was alleged that the accused Pantorilla and Fernandez killed Yasutomi "acting jointly and in pursuance of a common intent." That Fernandez is equally guilty of premeditated murder is established even though the evidence reveals that Pantorilla fired the fatal shot. It is a fundamental principle of law that when two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual who contributes to the wrongdoing is in law responsible for the whole, the same as though performed by himself alone (Clark, Criminal Law (2d. Ed., 1902), sec. 47, p. 106; Bishop, Criminal Law (8th Ed., 1892), sec. 629, p. 385).

It is also firmly established in our law that where one assailant strikes a blow which is not fatal and a confederate follows it up with a fatal blow, both are principals in the homicide (Wharton, Criminal Law (12th Ed., 1932), sec. 255, p. 340). American Jurisprudence states the rule as follows:

"All persons present concurring and participating, by some overt act, in the commission of the homicide are equally guilty with the one who struck the fatal blow, fired the fatal shot, etc., and it need not be shown that there was an actual verbal agreement to stand by and aid one another. Those who advise, encourage, aid, or abet the killing of another are as guilty as though they take the person's life with their own hands." (26 Am. Jur. 198-199; underscoring supplied)

The accused Fernandez was present, participated in, and in fact, was the instigator of the assault on the deceased, which resulted in his death. It follows that he is as guilty of the consequences of his co-accused's act committed in the accomplishment of their common design as though he had committed such acts with his own hands (CM 266724, McDonald, 43 ER 291, 296; CM 314404, O'Neal, 64 ER 137, 143; CM 324519, Davis et al, 73 ER 251, 263-264; CM 339254, Barnes et al, supra at 243).

c. Pretrial Statements.

The pretrial statements of the two accused were received in evidence over objection of the defense that the accused had not been properly advised of, and did not understand, their rights under Article of War 24. In support of this contention the defense placed the two accused on the stand for the limited purpose of testifying regarding the circumstances surrounding the taking of the statements. Each accused admitted that the 24th Article of War had been read to him by Walter T. Oliver, CID Agent, prior to making the statement, but both denied understanding its meaning. First Lieutenant Rayford Brooks, who had acted as Defense Counsel for the two accused during the pretrial investigation testified " \* \* \* both of them [accused] possibly, were not fully aware of their rights under the 24th Article of War, considering the small amount of English they knew."

Agent Oliver testified that after reading the 24th Article of War to the accused and advising them of their rights, he proceeded to take question and answer statements from each of the accused. Prior to giving their statements, Pantorilla said, "he understood it fully" and Fernandez stated, "he understood the 24th Article of War and didn't need me to explain it again". This testimony of Agent Oliver was corroborated in substance by Corporal Carl E. Craig who was present throughout the interview. Moreover, Pantorilla demonstrated his ability to read English on the witness stand and Private First Class Donald W. Hunt testified as to the ability of Fernandez to converse in English.

A question of fact was thus created by the conflicting evidence as to whether the statements were voluntarily given because of the limited understanding of the accused. In the exercise of its function and duty, the court resolved this controverted issue of fact adversely to the defense. The court, having the opportunity to observe and hear the witnesses on the stand, apparently was satisfied that both accused had been properly advised of and understood their rights prior to making the statements. In the absence of a showing of any abuse of discretion, the ruling of the law member admitting the statements into evidence should not be disturbed by the Board of Review (CM 320489, Valesquez, 69 BR 395, 403; CM 331601, Brill, 80 BR 75, 85-86; and see CM 335526, Tooze, 3 BR-JC 313, 341; CM 338993, Pelkey, 6 BR-JC 289, 308-309; CM 343793, Cruikshank, BR-JC, 8 March 1951). Moreover, in view of the overwhelming evidence of the accuseds' guilt independent of these statements, had error been present it would not have been of such character as to require that the conviction be disturbed (CM 331849, Estrada, 80 BR 183, 196, CM 342409, Woodall, 8 BR-JC 69, 79 and cases there cited).

d. Findings and Sentence.

The record of trial discloses that the vote on the findings and the sentence was announced as follows: " \* \* \* all members present at the time the vote was taken, concurring \* \* \*." Inasmuch as the accused were not being tried for an offense for which the death penalty is made mandatory

by law, this recitation constitutes an unwarranted disclosure of the vote of the members of the court and a clear violation of the members' oath. However, it does not affect the validity of the proceedings or sentence (Dig. Op. JAG 1912, p. 161; Winthrop, Military Law and Precedents (2d Ed., 1920 Reprint), sec. 351, p. 234; id., sec. 615, p. 404). In the instant case, the concurrence of two-thirds of the members present was all that was required for a finding of guilty and the concurrence of three-fourths of the members present was all that was required for a sentence to life imprisonment (AW 43).

Finally, it appears that the court failed to include in its sentence the words "hard labor". The Manual for Courts-Martial provides that "confinement 'without hard labor' will not be adjudged" (MCM, 1949, par. 1161), and Article of War 37 specifically provides that:

"The omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments."

It follows that the authority executing the sentence has the power to require hard labor as a portion of the sentence to confinement notwithstanding the court's failure to include it therein (CM 243456, Bernstien, 27 HR 359, 361-362).

6. The accused Pantorilla is 25 years of age and began his present employment 24 June 1950. The accused Fernandez is 22 years of age and began his present employment 28 July 1950. There is no evidence of any civilian criminal record as to either accused.

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

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, A.G.C.

Att. R. ...

(194)

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

JAGU CM 344950

UNITED STATES

v.

EMILIANO M. FERNANDEZ, Civilian,  
Mess Boy, and PHILIP L. PANTORILLA,  
Civilian, Electrician, both of LSM  
463, a Ship Operated by the United  
States Army

SOUTHWESTERN COMMAND

Trial by G.C.M., convened at  
Sasebo, Kyushu, Japan, 30  
November 1950 and at Kokura,  
Kyushu, Japan, 7-12 December  
1950. EACH: Life imprisonment.

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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 in the case of the persons 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 a general court-martial both accused pleaded not guilty to and were found guilty of jointly and with premeditation murdering Yasutomi Ryohei at Sasebo, Japan, on or about 7 September 1950, in violation of Article of War 92. No evidence of previous convictions was introduced. They were sentenced to be imprisoned for life. The reviewing authority approved the sentence as to each accused. The Board of Review is of the opinion that, as to each accused, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The facts are fully stated in the opinion of the Board of Review and we will confine ourselves to summarizing them briefly.

a. Evidence for the prosecution.

Shortly after midnight, 7 September 1950, the two accused approached four Japanese who were seated on a bench in front of a fruit store in Sasebo, Japan (R 23, 24, 36, 42). The accused Fernandez engaged one Yasutomi, a Japanese policeman who was not on duty and who was not in uniform, in a conversation which was not intelligible to the other

Japanese (R 26, 29). Fernandez then proceeded to search the pockets of one of the other Japanese until a Japanese woman who had been watching the group from across the street pulled him away. The Japanese who was being searched then left (R 70-71, 86). The record at this point is confused as to whether Fernandez then searched Yasutomi's pockets or Yasutomi felt those of Fernandez (R 71, 86, 89). In any event, Fernandez struck Yasutomi once or twice in the face with his fist (R 29, 86). Pantorilla, who had been standing behind Yasutomi, then struck him on the head with a pistol (R 89). Fernandez immediately drew his gun, grabbed the deceased by the arm and fired his pistol into the air (R 88, 98), whereupon Pantorilla shot Yasutomi in the back of the head and killed him (R 30, 56, 74, 151-153, 158). The accused then returned to their ship.

In a pre-trial statement Fernandez said that he discharged his pistol into the air because he thought there was going to be trouble and wanted to frighten the people (R 173-176, 178).

b. For the defense

Fernandez made an unsworn statement in which he stated that he and Pantorilla were carrying guns that night because the latter and some companions had been held up the morning of 6 September (R 275-276).

There was other evidence showing that there was an epidemic of violent crimes in Sasebo and that military personnel had been ordered to go about armed (R 265, 266; 285; Def Ex F).

4. The accused were convicted of joint, premeditated murder. "Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended" (MCM 1949, par 179a, p 231). Even though Fernandez did not fire the fatal shot he could still be convicted as a principal if he aided and abetted the killing of Yasutomi (id, par 29, p 21).

We have no doubt that Pantorilla was guilty of premeditated murder. Laying to one side any question of conspiracy, since there is no evidence in the record warranting a finding that there was a conspiracy, to convict Fernandez of premeditated murder there must be evidence showing that he aided and abetted Pantorilla with the intent to kill Yasutomi or that he knew or believed Pantorilla intended to kill him (State v. Leavine, 109 Fla. 447, 147 So. 897 (1933); Mowery v. State, 132 Tex. Cr. R. 408; 105 S.W. 2d 239 (1937)).

In our opinion, the evidence does not justify the conclusion that Fernandez intended to kill Yasutomi. The maximum amount of violence he offered to Yasutomi was to punch him and shoot his pistol in the air while holding Yasutomi's arm. Fernandez was close enough to the deceased

to have shot him if that was his intention, yet he did nothing more than shoot in the air.

Moreover the evidence does not warrant the conclusion that Fernandez knew or had any reason to believe that Pantorilla had a design to kill Yasutomi. As we have said, there is nothing to show any prior conspiracy between the two. Up to the time that Pantorilla struck Yasutomi with the pistol Pantorilla's actions were not such as to give Fernandez any reason to believe he was harboring a design to kill anybody. Even after this intervention of Pantorilla in the fray, Fernandez not unreasonably might believe that Pantorilla intended no more than the infliction of bodily harm, albeit grievous bodily harm, on Yasutomi without a specific intent to kill him. Indeed, he might well have concluded that Pantorilla did not intend to kill because he used his pistol as a club rather than to shoot. Since, therefore, Fernandez did not intend to kill and since he had no reason to believe that Pantorilla had any such intention, his conviction of premeditated murder cannot stand (*State v. Leavine, supra; Red v. State, 39 Tex. Cr. R. 667; 47 S.W. 1003 (1898); Leslie v. State, 42 Tex. Cr. R. 65, 57 S.W. 659 (1900)*).

On the other hand, Fernandez was aware that Pantorilla had assaulted the deceased with a dangerous weapon with intent to do bodily harm. He was aware that his companion had joined in the fray and evidenced an intention to inflict grievous bodily harm on Yasutomi. He knew Pantorilla had drawn his gun and bludgeoned the deceased. Despite this knowledge, however, he not only did not withdraw from the conflict and did not attempt to dissuade his companion from assaulting the deceased in such a serious manner, but by drawing his gun and shooting in the air took an action which tended to lend encouragement to Pantorilla and to keep the fray going. In thus continuing to participate in the disturbance knowing or having reason to believe Pantorilla's intention Fernandez associated himself with Pantorilla's activities and when they resulted in Yasutomi's death, he was guilty of unpremeditated murder (*Red v. State, supra, Leslie v. State, supra, CM 339189, Brown, 5 BR-JC 27; MCM 1949, par 179a, p 231*).

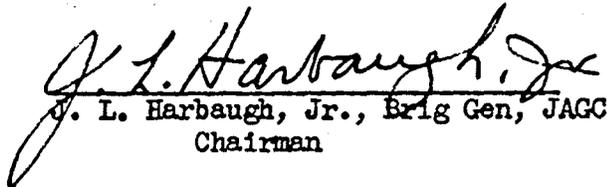
5. For the foregoing reasons, we are of the opinion that the record of trial is legally sufficient to support the findings of guilty as to the accused Pantorilla, legally sufficient to support only so much of the findings of guilty as to the accused Fernandez as involves a finding of guilty of unpremeditated murder and, as to each accused, legally sufficient to support the sentence and to warrant confirmation thereof. In view of all the circumstances, however, including the reduction in the degree of Fernandez' crime, it is recommended that as to him the period of confinement be reduced to twenty-five years.

6. General Brown is of the opinion that Fernandez and Pantorilla are each guilty of premeditated murder and consequently does not concur in this opinion.

(Dissent)

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

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

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DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Emiliano M. Fernandez, Civilian, Mess Boy, and Philippe L. Pantorilla, Civilian, Electrician, both of LSM 463, a Ship Operated by the United States Army, upon the concurrence of The Judge Advocate General so much of the finding of guilty as to the accused Fernandez as involves a finding that the killing of the victim was with premeditation is disapproved, and the sentence as to each accused is confirmed and will be carried into execution. The PHILCOM (AF) and 13th Air Force General and Garrison Prisoners Stocizade, APO 74, is designated as the place of confinement of each accused.

(Dissent as to modification  
of finding of guilty)

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. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the term of confinement of the accused Fernandez is reduced to twenty-five years.

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

15 May 1951

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

(199)

JAGK - CM 344982

MAR 14 1951

U N I T E D S T A T E S )

101ST AIRBORNE DIVISION

v. )

Trial by G.C.M., convened at Camp  
Breckinridge, Kentucky, 2 February  
1951. Dismissal.

Lieutenant Colonel EARL D.  
VAN ALSTYNE (O-336496),  
101st Airborne Division,  
Camp Breckinridge,  
Kentucky )

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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 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. Accused was tried upon the following charges and specifications:

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

Specification: In that Lieutenant Colonel Earl DeForest VanAlstyne, Headquarters, 101st Airborne Infantry Division, Camp Breckinridge, Kentucky, did, at Shawneetown, Illinois, on or about 2 December 1950, wrongfully, unlawfully, and bigamously marry Marion Graham of Henderson, Kentucky, having at the time of his said marriage to the said Marion Graham, a lawful wife then living, to wit: Catherine Bridget O'Toole VanAlstyne of Worchester, Massachusetts.

CHARGE II: Violation of the 96th Article of War

Specification 1: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Shawneetown, Illinois, on or about 2 December 1950, wrongfully, unlawfully, and bigamously marry Marion Graham of Henderson, Kentucky, having at the time of his said marriage to the said Marion Graham, a lawful wife then living, to wit: Catherine Bridget O'Toole VanAlstyne of Worchester, Massachusetts.

Specification 2: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Henderson, Kentucky, from on or about 2 December 1950, to on or about 5 December 1950, wrongfully, dishonorably and unlawfully live and cohabit as man and wife with a woman not his wife, to wit: Marion Graham of Henderson, Kentucky.

Specification 3: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Henderson, Kentucky, from on or about 13 October 1950 to about 30 November 1950, wrongfully, dishonorably and unlawfully live and cohabit as man and wife with a woman not his wife, to wit: Ida Brenda Boyd of Columbus, Georgia.

Specification 4: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Henderson, Kentucky, on or about 3 December 1950, wrongfully and unlawfully make and utter to Dick's Grill and Bar, Route #1, Henderson, Kentucky, a certain check, in words and figures as follows, to wit:

COLUMBUS BANK & TRUST CO. 73-53  
Columbus, Ga. ~~Henderson, Ky.~~ Dec 3 1950 832  
~~COLUMBUS BANK & TRUST CO.~~  
Columbus Bank & Trust Co.

Pay to Cash \_\_\_\_\_ or Bearer \$60.00

Sixty and 00/100 ----- DOLLARS

For \_\_\_\_\_  
Safety Deposit Boxes for Rent

(Reverse)  
Dicks Grill  
& Bar  
Earl J. Richards

/s/ Earl D. VanAlstyne  
Lt Col, Inf.

and by means thereof, did fraudulently obtain from the said Dick's Grill and Bar the sum of sixty dollars (\$60.00), lawful money of the United States, without having, and without intending to assure that he should have sufficient funds in the drawee bank for payment thereof.

Specification 5: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Henderson, Kentucky, on or about 4 December 1950, wrongfully and unlawfully make and utter to Dick's Grill and Bar, Route #1, Henderson, Kentucky, a certain check, in words and figures as follows, to wit:

~~THE FIRST NATIONAL BANK OF HENDERSON, KY.~~

COLUMBUS BANK & TRUST CO.

73-50  
832

Columbus, Ga.

December 4

1950

Pay to the order of Cash \$20.00  
Twenty and 00/100 ----- DOLLARS

For \_\_\_\_\_

/s/ Earl D. VanAlstyne  
Lt Col, Inf.

Visit the Audubon Memorial Museum

(Reverse)

Dicks Grill & Bar  
Earl J. Richards

and by means thereof, did fraudulently obtain from the said Dick's Grill and Bar the sum of twenty dollars (\$20.00), lawful money of the United States, without having, and without intending to assure that he should have sufficient funds in the drawee bank for payment thereof.

Specification 6: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Henderson, Kentucky, on or about 6 December 1950, wrongfully and unlawfully make and utter to Right Quick Cafe of Henderson, Kentucky, a certain check in words and figures as follows, to wit:

COLUMBUS BANK & TRUST CO.

Columbus, Ga.

Dec 6, 1950

Pay to the order of Cash \$50.00  
Fifty and 00/100 ----- DOLLARS

For value received, I represent 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.

FOR \_\_\_\_\_

/s/ Earl D. VanAlstyne  
Lt Col, Inf.

(Reverse)

Pay to the Order of  
First National Bank  
of Henderson, Henderson, Ky.

All prior endorsements guaranteed  
RIGHT QUICK CAFE

COUNTER CHECK

and by means thereof, did fraudulently obtain from the said Right Quick Cafe the sum of fifty dollars (\$50.00), lawful money of the United States, without having, and without intending to assure that he should have sufficient funds in the drawee bank for payment thereof.

Specification 7: In that Lieutenant Colonel Earl DeForest VanAlstyne, \*\*\*, did, at Henderson, Kentucky, on or about 6 December 1950, wrongfully and unlawfully make and utter to Right Quick Cafe, Henderson, Kentucky, a certain check in words and figures as follows, to wit:

6 Dec 1950 No. \_\_\_\_\_  
Columbus Bank & Trust Co.  
Columbus, Ga.

Pay to the Cash \_\_\_\_\_  
order of \_\_\_\_\_ \$20.00  
Twenty and 00/100 \_\_\_\_\_ Dollars

(Reverse) /s/ Earl D. VanAlstyne  
Lt Col, Inf.  
Pay to the order of  
FIRST NATIONAL BANK  
of Henderson, Henderson, Ky.  
All prior endorsements guaranteed  
RIGHT QUICK CAFE

and by means thereof, did fraudulently obtain from the said Right Quick Cafe the sum of twenty dollars (\$20.00), lawful money of the United States, without having, and without intending to assure that he should have sufficient funds in the drawee bank for payment thereof.

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification of Charge I and of Charge I, not guilty, but guilty of a violation of the 96th Article of War; guilty of Specifications 1, 2, 4, 5, 6 and 7 and of Specification 3, except the words "to wit: Ida Brenda Boyd of Columbus, Georgia," of the excepted words, not guilty, of Charge II, and of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved "only so much of the findings of Specification 1 of Charge I and Specification 1 of Charge II as involves one offense of bigamous marriage on 2 December 1950, at Shawneetown, Illinois, to Marion Graham, as otherwise alleged," approved

the sentence and forwarded the record of trial for action under Article of War 48.

### 3. Evidence

#### a. For the Prosecution

The accused married Catherine Bridget O'Toole VanAlstyne at Clinton, Massachusetts, on 28 January 1933, and the marriage contracted at that time is undissolved. Catherine VanAlstyne is presently living in Massachusetts and has not been outside of that state in the last five years (R 13, Pros Ex 2; R 14-15, Pros Ex 3).

Marion Graham, Henderson, Kentucky, testified that on 1 December 1950 she met the accused at "Dick's Grill" in Henderson, Kentucky. She and the accused had several drinks and stayed at this place "till closing time," which was about 0130 hours, 2 December. They then proceeded to "another place up the highway" where they had more to drink and left about 0330 hours or 0400 hours for Henderson. At this juncture the accused proposed "matrimony" to her. She agreed, and after having breakfast, which they finished about 0600 hours, they drove by taxi to Morganfield where they submitted to blood tests and waited two hours for the results of these tests. At about 1100 hours, 2 December 1950, the witness entered into a "marriage ceremony" with the accused at Shawneetown, Illinois. The "marriage ceremony" was performed by Reverend Williams. Miss Graham had known the accused "three weeks or a month" before the purported marriage. "After the marriage," she and the accused lived together as man and wife from 2 December 1950 to 5 December 1950 at the Gateway Motor Court and at her home in Henderson, Kentucky (R 16-23, Pros Ex 4).

Kyle Thomas Waggener, office clerk, Gateway Motor Court, Henderson, Kentucky, identified Prosecution Exhibits 5 and 6 as records kept by the Gateway Motor Court in the regular course of business. These exhibits, which were admitted in evidence over objection by the defense, show that E. D. VanAlstyne rented Cottage No. 1 for a "party" of two on 2 and 3 December 1950 (R 24-28).

Mrs. Sophie Graham, the mother of Marion Graham, testified that on 2 December 1950 the accused together with Marion came to her home in Henderson, Kentucky. The accused informed her that he and Marion had been married. When she expressed surprise at the hurried marriage, the accused replied, "this was not hurriedly. I begged Marion about fourteen hours to marry me and I was afraid she was going to back out at the last minute." The accused denied to Mrs. Graham that he had been married before. On 4 December 1950, he and Marion "stayed all night" in her home and together occupied the same bedroom (R 29,30).

Noah Ernest McDonald, manager of the Soaper Hotel, Henderson,

Kentucky, identified accused as having stayed at the hotel. The witness also identified Prosecution Exhibit 7, a registration form, as a record kept in the "normal" course of the hotel business and which was signed in his presence. This exhibit, admitted in evidence over the objection of the defense, shows that on 22 October 1950, Lieutenant Colonel and Mrs. E. D. VanAlstyne and son, Camp Breckinridge, Kentucky, were registered for one room at the Soaper Hotel, departing therefrom on 28 October 1950 (R 31-34).

Mrs. Ernest E. Eades, operator of a tourist home at 325 North Green, Henderson, Kentucky, identified the accused as the person who came to her home with a woman and a little boy and occupied one room as guests from on or about 1 November to 5 November 1950. She also identified Prosecution Exhibit 8 as a register kept in the "normal course" of business of her tourist home. This exhibit, admitted in evidence over the objection of the defense, shows the registration of Earl D. and Mrs. VanAlstyne, Washington, Pennsylvania (R 34-37).

Captain Robert A. Whitmire, 2108th Area Service Unit, Camp Breckinridge, Kentucky, testified that for twenty days during the month of November 1950 he and the accused rode in the same "car pool" and that the accused resided at 601 Third Street, Henderson, Kentucky (R 41).

Marion Graham, recalled as a witness for the prosecution, testified that she did not at any time live as husband and wife with the accused at the Soaper Hotel, or at 325 North Green, Henderson, Kentucky, or at 601 Third Street, Henderson, Kentucky (R 47).

Early in December 1950, the accused wrote and signed two checks for \$60 and \$20 payable to "cash," dated 3 and 4 December, respectively, drawn on the Columbus Bank and Trust Company, Columbus, Georgia. By means of these checks the accused obtained their face value in cash from Earl J. Richards, a proprietor of "Dick's Grill and Bar." Each of the mentioned checks was duly presented to the drawee bank for payment and was returned unpaid with the notation "not sufficient funds" (R 48,49; Pros Exs 9,10). On 3 January 1951 "the defense counsel or investigating officer" paid Richards, on behalf of the accused, \$80, the face value of the two checks, and received from the latter a "release \*\*\* from any and all claims" (R 49,50; Def Ex A).

The latter part of November 1950 the accused wrote and signed two postdated checks bearing the dates 6 December 1950 for \$50 and \$20, payable to cash, drawn on the Columbus Bank and Trust Company, Columbus, Georgia, and gave them to John L. Parker, a proprietor of the "Right Quick Cafe." The accused stated to Parker that he was not sure he had a sufficient balance in the bank at that time to cover the amounts of the checks; that he was paid on the first of

of the month, and that there would be money in the bank sometime after the first part of December, and requested that Parker hold the checks until after the first part of the month. Parker agreed and gave the accused the face value in cash for the two checks. On 6 December, Parker deposited the checks in the First National Bank, Henderson, Kentucky. These checks were subsequently returned unpaid with the notation "not sufficient funds." On 3 January 1951 one Lieutenant Duffield on behalf of the accused gave Parker the full amount in cash for the two checks and Parker in turn signed a "release" relieving the accused of any further claim in connection with these checks (R 51,52; Pros Exs 12,13).

By deposition George M. Brown, cashier, Tenth Street Branch, Columbus Bank and Trust Company, Columbus, Georgia, testified that he is the custodian of the records pertaining to checking accounts of the bank and has access to all the records of accounts thereof. Checks substantially identical to the checks designated as Prosecution Exhibits 9,10,12 and 13 were presented to the drawee bank for payment and were returned unpaid because of insufficient funds. "Normally statements are mailed to depositors on the last day of each month, which include current balance and cancelled checks." The accused and Mrs. Earl D. VanAlstyne maintained a joint checking account and statements were mailed monthly to Lieutenant Colonel or Mrs. Earl D. VanAlstyne, General Delivery, Henderson, Kentucky, for the period from 13 October 1950 through 13 December 1950. The records of the bank show that the bank balance of the accused from 25 November to 9 December was \$.99. On 9 December 1950, a \$200 deposit was credited to his account, which was reduced the same day to a balance of \$3.99 as a result of checks presented for payment on that date (R 53-57, Pros Ex 14).

Bank stamps on all the checks in issue show that they were in banking channels by 6 December 1950.

b. For the Defense

Earl J. Richards, recalled as a witness for the defense, stated that on 2 December 1950 he saw the accused and Miss Graham at his (Richards') place of business. Miss Graham had a wedding band on her finger and said "[she] was married to Colonel Van Alstyne." This statement made within hearing of the accused was not commented upon by him. That evening the accused may have had a drink or two, but he was not drunk. On the night of 5 December 1950 Marion Graham visited Richards at his quarters and told him that "she and [accused] had been at the Right Quick Cafe and she endorsed a number of checks, which were given for obtaining funds for gambling and that she and two fellows \*\*\* took [accused] for the money he lost and she was responsible for it." She also told him that she had been informed

that the accused was married to another woman and requested information as to his whereabouts. Miss Graham said "she didn't know why [accused] married her when he already had a wife and that it was not necessary for [accused] to have married her, in order to have dated her." Richards recalled a conversation he had with the accused the previous day, at which time he asked the accused if he had married Miss Graham and the accused replied, "You don't think I'm foolish? I did not" (R 59-63).

First Lieutenant Robert O. Linaker, 101st Airborne Division, Camp Breckinridge, Kentucky, stated that at 0400 on the morning of 2 December 1950 he saw the accused in a night club in Evansville, Indiana, with a tall girl and that the accused was "quite inebriated at that time" (R 81,82).

The accused, having been apprised of his rights as a witness, elected to testify under oath. He attended Holy Cross College for one year, after which he was employed as an engineer with the Worcester Aluminum Company. He enlisted as a private in the National Guard of Massachusetts in 1924 and served as an enlisted man in that organization until 1935, at which time he was commissioned a second lieutenant. He was called into active Federal Service in 1941 in the grade of first lieutenant and was subsequently promoted to captain. In 1942 he was assigned to the Third Infantry Regiment in Newfoundland, and served as battalion S-3, battalion commander, and was promoted to major. He returned to the United States with the Third Infantry Regiment and subsequently attended the Command and General Staff School at Fort Leavenworth, Kansas, in 1944. Upon graduating he volunteered for foreign service and was sent to Italy where he was assigned as a battalion commander. In 1945 he returned to the United States, again volunteered for overseas service, and was sent to Japan. Arriving back in the United States in June 1948 he was assigned to the Pennsylvania National Guard as senior instructor of the 110th Infantry Regiment.

The accused was "first married" to Catherine B. O'Toole in Clinton, Massachusetts, in 1933. His married life had been an unhappy one and he has not lived with his wife since 1941. He always has, however, provided adequately for her support. His wife, with whom he has had four children, would not consent to a divorce. The accused met Miss Graham on 25 November 1950 at the "Right Quick Cafe" in Henderson. He denied that he discussed matrimony with her that night. The following week "on Friday night" he met Miss Graham at "Dick's Bar and Grill" at about 2200 hours. He "had quite a few drinks" and she drank too. They left this place about 0200 hours and went to "another drinking and gambling place" where he had more to drink. He does not recall how long he stayed here nor does he remember leaving by taxi with Miss Graham for Morganfield and submitting to a blood test there, or going to Shawneetown and "making an application for a marriage license." Neither does he recall meeting Reverend Williams. All he remembers in connection with the "marriage ceremony"

is "just what [he] heard afterward." He remembers, too, Richards asking him if he was married and his reply, "What do you think I am, crazy? Of course not." At the time he cashed the checks in the "Right Quick Cafe," he told the payee, "I wasn't exactly certain how much I had left in the bank, that I had an allotment that came into the bank every month from Finance and I asked him if I could postdate them and he could submit them after my allotment got in after the first of the month." The accused also has an allotment to Mrs. Van Alstyne in Worcester, Massachusetts, in the amount of two hundred dollars a month. Concerning the checks he had given to Richards the "first notice that [accused] had that these checks were no good," was January second or third when he was in the hospital. He gave his defense counsel part of his December salary "to go down and pay them." "At the time I signed those checks I fully believed that there was enough money in the bank, or shortly after the first there would be that amount of money there to cover them." He maintained a joint account with Catherine B. O'Toole VanAlstyne of Massachusetts in the Columbus Bank and Trust Company. The accused did not withdraw one hundred and sixty dollars from his account on 9 December 1950 and he does not know who did, although Mrs. VanAlstyne has the right to draw on this account. The accused stated that he and his wife do not "correspond very much." He requested the bank to send his bank statement and acknowledgment of receipt of his allotment in care of General Delivery, Henderson, Kentucky, but he has not checked with the General Delivery as to whether he received the bank statements. He has been in the Post hospital since 5 or 6 December and has not been off the Post. The accused did not write to the bank to "find out what the status of his account was," because he did not think there was anything wrong with it "until January when they brought the checks around." He admitted he "never bothered to look at the exact date" when his allotment arrived at the bank (R 64-80).

It was stipulated that the accused had a Class E allotment in the amount of \$200 monthly in favor of the Columbus Bank and Trust Company, Columbus, Georgia, effective 1 December 1944 and the account is currently being paid; that the regular monthly payments of Class E allotments are mailed from the Finance Office between the first and tenth of the month following that in which the allotment is due (R 80).

The following defense exhibits were admitted in evidence:

Exhibit C: A citation accompanying the award of a bronze star medal.

Exhibit D: A letter of commendation to the accused for his "superior performance" of duty as the Senior Army Instructor, 110th Infantry, Pennsylvania National Guard.

Exhibit E: Letter of appreciation.

Exhibit F: Letter of commendation.

Exhibits G and H: Copies of General Orders awarding the accused a Purple Heart and Combat Infantryman's Badge, respectively.

Exhibit J: Letter Orders awarding the accused a First Oak Leaf Cluster to the Bronze Star Medal, and

Exhibit L: An award to the accused of the Cross of War Merit by the Italian Government.

4. Discussion

a. Specification of Charge I and Specifications 1 and 2 of Charge II

The accused, while lawfully married to Catherine B. O'Toole Van Alstyne did on or about 2 December 1950 at Shawneetown, Illinois, go through a marriage ceremony with Marion Graham. This conduct was the subject of two specifications alleging bigamy in violation of Articles of War 95 and 96 (Spec, Chg I; Spec 1, Chg II). The court found the accused guilty of only so much of the specification of Charge I and Charge I alleging bigamy as a violation of Article of War 95 as involved a violation of Article of War 96, and guilty of Specification 1, Charge II, and Charge II, wherein the accused's bigamous conduct was alleged as a violation of Article of War 96. Thus accused for one act was found guilty of two identical offenses. We are of the opinion that this error of the court was cured by the action of the reviewing authority in approving "only so much of the findings of Specification 1 of Charge I and Specification 1 of Charge II, as involves one offense of bigamous marriage on 2 December 1950, at Shawneetown, Illinois, to Marion Graham, as otherwise alleged."

In addition the accused was found guilty of unlawfully cohabiting with Marion Graham in violation of Article of War 96 (Spec 2, Chg II).

Bigamy is willfully and knowingly contracting a second marriage when the contracting party knows that the first marriage is still subsisting (CM 258630, Reynolds, 5 BR (ETO) 259,263). This offense has long been recognized as a violation of Article of War 95 as well as a violation of Article of War 96. The essential elements of the offense are:

- (1) A valid marriage entered into by the accused prior to and undissolved at the time of the second marriage,

(2) survival of the first spouse to the knowledge of the accused,

(3) a subsequent marriage to a different spouse (CM 326147, Nagle, 75 BR 159, 174).

Cohabitation has been defined as - "The act or state of a man and woman not married, who dwell together in the same house, behaving themselves as man and wife" (CM 344452, Dunlop, 25 Jan 1951).

The evidence for the prosecution clearly established that the accused did at the time and place alleged contract a marriage with Marion Graham when he, the accused, admittedly had a legal wife living. This was conclusively shown by the testimony of his first wife, duly authenticated copies of marriage certificates of the first marriage, and the bigamous marriage, the pretrial admissions of the accused, both tacit and expressed, and the testimony of Marion Graham with whom he entered into a bigamous marriage. The accused's defense was that he was so intoxicated at the time that he did not know what he was doing, and, therefore, was not capable of any criminal or matrimonial intent. It was shown that after his proposal of marriage to Miss Graham they had breakfast, then drove to Morganfield by taxi, where they submitted to blood tests and waited two hours for the result of this test. His conduct after the marriage of living with Marion and continuing to cohabit with her as husband and wife during the period alleged in Specification 1 of Charge II was not consistent with his defense. Under all the circumstances, the court was justified in rejecting the accused's defense. We can find no good reason for disturbing its findings as approved by the reviewing authority.

The Board of Review therefore sustains the findings of guilty of the Specification of Charge I and Charge I and Specification 1 of Charge II as approved by the reviewing authority and Specification 2 of Charge II.

b. Specification 3, Charge II

Under this specification, the accused was charged as follows:

"In that Lieutenant Colonel Earl DeForest VanAlstyne, Headquarters, 101st Airborne Infantry Division, Camp Breckinridge, Kentucky, did, at Henderson, Kentucky from on or about 13 October 1950 to about 30 November 1950, wrongfully, dishonorably and unlawfully live and cohabit as man and wife with a woman not

his wife, to wit: Ida Brenda Boyd of Columbus, Georgia."

The court found the accused guilty of this specification except the words "'to wit: Ida Brenda Boyd of Columbus, Georgia', of the excepted words, Not Guilty."

The only question requiring consideration is whether or not there is a fatal variance between the allegations of the specification and the finding thereunder. It is therefore deemed unnecessary to discuss the evidence in detail. Suffice it to say that it is established beyond a reasonable doubt that the accused committed the offense of unlawful cohabitation at the time and place alleged with a woman not his wife, but there is no evidence to show who this woman was.

The accused was charged with having committed the offense of unlawful cohabitation with a particular individual, namely, Ida Brenda Boyd. The court has found that the accused did not commit unlawful cohabitation with the person named in the specification but did commit the offense with some other person whose name to the record is unknown. This finding constitutes an acquittal of the offense charged and a conviction of an offense not charged. The Board of Review is, therefore, of the opinion that there is a fatal variance between the allegations of the specification and the finding thereunder (CM 204461, Fisher, 8 ER 11, 12; CM 324736, Moore, 73 ER 341,347; CM 322052, Shamel, 71 ER 19,25; see also CM 313788, Wolfe, 63 ER 283,287).

c. Specifications 4-7, Inclusive, Charge II

The accused was found guilty of four offenses of wrongfully and unlawfully making and uttering checks and by means thereof fraudulently obtaining money without intending to assure that he should have sufficient funds in the drawee bank for payment of the checks in violation of Article of War 96 (Chg II, Specs 4-7 incl).

The evidence shows that accused and his wife had a joint account in the drawee bank, that on 25 November 1950 their balance in the drawee bank was \$0.99, that no deposits were thereafter made to the account until 9 December 1950, but that accused did have a monthly allotment of his pay to the drawee bank in the amount of \$200.00. In the latter part of November 1950 accused received the amounts of \$50.00 and \$20.00 for checks in those respective amounts from a proprietor of the "Right Quick" cafe, the checks being postdated to 6 December 1950 with the proprietor's consent. Accused assured the proprietor there would be money in the drawee bank some time after the first of December. Early in December, accused cashed two checks for \$60.00 and \$20.00 with Earl Richards, a proprietor of "Dick's Bar and Grill," the checks being dated respectively 3 and 4 December 1950. The record substantially shows that

by the close of business on 8 December 1950 the four checks in issue were presented to the drawee bank and dishonored because of insufficient funds. On 9 December 1950, a deposit of \$200.00 (evidently accused's allotment check) was made to the account.

The issue in question as to the four checks, the making, uttering, and obtaining their face amount in cash being admitted, is whether accused uttered the checks without intending to assure their payment. Had accused's allotment check reached the bank prior to 9 December 1950, in our view of the evidence, the checks in issue would have been paid. The issue narrows down to the question: Does an Army officer who cashes checks in anticipation of the deposit by allotment in the drawee bank of a portion of earned pay and allowances, the allotment check being sufficient to take care of his outstanding checks, have a duty to take additional steps to assure the payment of the checks? We believe not, since on the dates inscribed on the checks accused could not be presumed to have knowledge of the actual depleted state of his account (CM 283726, Bowles, 55 HR 125, 130-131). In the cited case accused made and uttered five checks and obtained money therefor when his account was insufficient to pay any of the checks in question. The defense was that the checks in issue had been uttered in reliance upon the deposit of accused's allotment of earned pay and allowances which was greater than the total amount of the checks. The specification upon which the accused in the Bowles case, supra, was tried alleged that he did "with intent to defraud, wrongfully and unlawfully make and utter" the checks in issue "and by means thereof, did fraudulently obtain" money, he "then well knowing that he did not have and not intending that he should have sufficient funds" for payment thereof. The Board of Review concluded that the evidence not only failed to support the offenses alleged, but likewise failed to support any lesser included offense. The offenses here alleged are lesser included in the offenses alleged in the Bowles case, supra (CM 335159, Smith, 2 HR-JC 69,78).

We note in passing that had the checks in issue been re-presented they would not have been paid because charges entered against the account on 9 December 1950 reduced the balance to \$3.99. The authorship of one of the charges in the amount of \$160.00 was denied by accused. Since the account was jointly owned by accused and his lawful wife, it is as probable that the \$160.00 charge was incurred by his wife as by the accused (CM 335159, Smith, 2 HR-JC 69, 75). As the charge was entered subsequent to the negotiation and presentation of the checks in issue, and since the record fails to show that at the time of negotiation of the checks in issue \$160.00 of the account had become otherwise hypothecated, the \$160.00 charge did not in any way contribute to the nonpayment of the checks in issue. It is thus apparent that the nonpayment of the checks in issue was caused by the late arrival of the accused's allotment check and not by reason of the accused's carelessness or neglect.

For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to sustain the findings of guilty of Specifications 4 to 7, inclusive, of Charge II.

5. Department of the Army records substantially corroborate the accused's personal history as narrated by him in his testimony. In addition, records of the Department of the Army show his overall efficiency reports of record as follows: 081, 089, 082, 094 and 122.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 3 to 7, inclusive, of Charge II, legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I and Specification 1 of Charge II as approved by the reviewing authority, legally sufficient to support the findings of guilty of Specification 2 of Charge II and of Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Acorn Baran, J.A.G.C.  
Samuel S. Coep, J.A.G.C.  
Judynch, J.A.G.C.

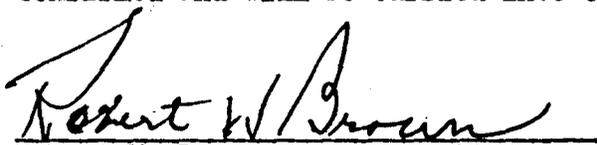
DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

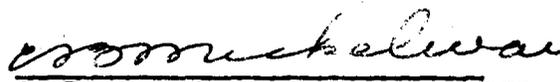
THE JUDICIAL COUNCIL

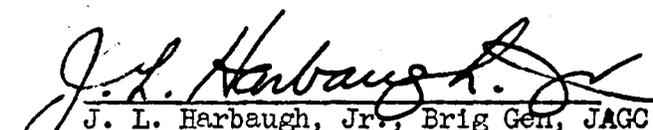
Harbaugh, Brown and Mickelwait  
Officers of The Judge Advocate General's Corps

CM 344982

In the foregoing case of Lieutenant Colonel Earl D. Van Alstyne, O-336496, 101st Airborne Division, Camp Breckinridge, Kentucky, upon the concurrence of The Judge Advocate General the findings of guilty of Specifications 3,4,5, 6 and 7 of Charge II are disapproved, and 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

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( GCMO 39, 5 April 1951 )



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

16 MAR 1951

JAGV CM 345000

U N I T E D S T A T E S )	FORT LEONARD WOOD, MISSOURI
)	)
v. )	Trial by G.C.M., convened at
Private LLOYD LEON )	Fort Leonard Wood, Missouri,
LANGLEY (RA 15417963), )	8 February 1951. Dishonorable
355th Engineer Depot )	discharge, total forfeitures
Company )	after promulgation and confine-
)	ment for three (3) years and
)	one (1) month. Disciplinary
)	Barracks.

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HOLDING by the BOARD OF REVIEW  
BISANT, CROOK and OEDING  
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 upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Lloyd L Langley 355th Engineer Depot Company, did, without proper leave, absent himself from his organization at Fort Leonard Wood Missouri from about 27 November 1950, to about 14 December 1950.

Charge II: Violation of the 58th Article of War

Specification: In that Private Lloyd L Langley, 355th Engineer Depot Company, did, at Camp Atterbury Indiana, on or about 1 January 1951, desert the service of the United States, and did remain absent in desertion until he was apprehended at Kokomo, Indiana, on or about 13 January 1951.

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

Specification: In that Private Lloyd L. Langley, 355th Engineer Depot Company, having been ordered by Special Order Number 138, Headquarters, Camp Atterbury, Indiana, dated 28 December 1950, to proceed without delay to Fort Leonard Wood, Missouri, reporting upon arrival to the Commanding Officer 355th Engineer Depot Company, did at Camp Atterbury, Indiana, on or about 1 January 1951, fail to obey the same.

The accused pleaded guilty to Charge I and the Specification thereunder; not guilty of Charge II and the Specification thereunder, but guilty of absence without leave for the period alleged and guilty of a violation of the 61st Article of War; and not guilty to the Specification of Charge III and of Charge III. He was found guilty of all Specifications and Charges. Evidence of five 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 the execution of the sentence, and to be confined at hard labor for three years and one month. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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 of the Specification of Charge I and Charge I, and the Specification of Charge III and Charge III. The only questions requiring consideration are whether the evidence adduced at the trial is legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II, and whether the desertion (Charge II) and the disobedience of Special Orders Number 138 "to proceed without delay to Fort Leonard Wood, Missouri, reporting upon arrival to the Commanding Officer, 355th Engineer Depot Company" (Charge III) were separate offenses permitting the imposition of separate punishments.

4. The evidence pertinent to the questions set forth in the preceding paragraph is summarized as follows:

a. For the prosecution

After accused had pleaded guilty to absence without leave from 27 November 1950 to 14 December 1950 (R 8), it was shown that accused, following his return to military control on 14 December 1950, was confined by or under the control of the military authorities (R 9, 10, Prosecution's Exhibits 1, 2, 3 and 4). The defense stating that they had no objections, paragraph 12, Special Orders Number 138, Headquarters Camp Atterbury, Indiana dated 28 December 1950, which in pertinent part directed the accused to

JAGV CM 345000

proceed without delay to Fort Leonard Wood, Missouri, was received in evidence as Prosecution's Exhibit 5 (R 10); and a duly authenticated extract copy of the morning report of the 355th Engineer Depot Company, Fort Leonard Wood, Missouri, for 31 January 1951, showing the accused from confinement to absent without leave effective 1 January 1951, was received in evidence as Prosecution's Exhibit 7 (R 11).

Thereafter, the following stipulation was received in evidence by the court (R 13):

"It is hereby stipulated and agreed by and between the trial judge advocate, the defense counsel, and the accused, Private Lloyd L. Langley, that if Sergeant George E. Kessner were present in open court he would testify on oath that his name is Sergeant George E. Kessner; that he is assigned to the 5015th ASU Military Police Detachment No. 3, at Camp Atterbury, Indiana, as booking sergeant; that at Camp Atterbury, Indiana, on 1 January 1951, he delivered a copy of Special Orders No. 138, Headquarters Camp Atterbury, Indiana, dated 28 December 1950, to the accused, Private Lloyd L. Langley, and informed the accused of the contents thereof; that also at said time and place he delivered to the accused transportation tickets to Fort Leonard Wood, Missouri, and meal tickets; that thereafter on said date the accused, Private Lloyd L. Langley, was released from confinement at Military Police Detachment No. 3, 5015th ASU Station Complement, Camp Atterbury, Indiana; and that he, Sergeant Kessner, took the accused, Private Langley, to the railroad station and put him on the train.

"It is further stipulated and agreed by and between the trial judge advocate, the defense counsel, and said accused, that if Don Akers of Kokomo, Indiana, were present in court he would testify on oath that his name is Don Akers; that he is a sergeant of the Kokomo, Indiana, Police Department; that on the 13th day of January, 1951, he arrested the accused, Private Lloyd L. Langley, in Kokomo, Indiana; that at the time of said arrest the accused, Private Lloyd L. Langley, was dressed in civilian clothing; and that the accused was turned over to military control at Fort Benjamin Harrison, Indiana, on said 13th day of January, 1951.

"In reading this stipulation, the stipulation did not contain paragraph No. 12 of Special Orders No. 138; and the accused, the defense counsel, and the trial judge advocate have agreed in open court to insert the paragraph number in the stipulation.\*\*\*"

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b. For the defense

It was stipulated that if Mrs. Lloyd Langley, Mrs. Claude McKinney, Mrs. Cecil Langley, and Floyd Langley were present in court as witnesses they would testify that the accused stated on or about 12 January 1951 that he was going back to Fort Leonard Wood, Missouri, on 14 January 1951 (R 15, Defense Exhibits A, B, C and D).

5. Desertion is absence without leave accompanied by the intention not to return (par. 146a, p 197, MCM, 1949). The absence without leave for the period alleged in Specification of Charge II was established by the accused's plea of guilty to the lesser included offense of absence without leave and competent prosecution evidence (Prosecution's Exhibit 7 and Stipulation, supra). It has been held repeatedly that mere absence without leave for a relatively short period does not establish desertion (CM 213817, Fairchild, 10 BR 287). However, in such cases, all circumstances surrounding an unauthorized absence should be considered in determining the intent of the absentee (CM 318467, Johnson, 67 BR 325). In CM 226871, Green, 15 BR 171, the Board of Review in sustaining three findings of guilty of desertion for periods of 12, 15 and 26 days respectively, terminated in each case by apprehension, stated in pertinent part at page 174:

"His repeated absences terminated in each case by apprehension and his failure twice to comply with his orders to return to his organization for which he was furnished transportation, his statement of dissatisfaction with the station at which he was serving, the circumstances of each apprehension, and the increasing length of his absences, are circumstances from which the court could legally draw, as it did, the inference of intent to desert."

A similar conclusion was reached in CM 261405, Bailey, 40 BR 229, wherein the board stated pertinently at page 232:

"\*\*\*His prolonged absence of 90 days is unexplained. At the time of his departure he faced the probability of disciplinary action for the AWOL, of which he had just been advised by the Adjutant. He was apprehended by the military police at a point 450 miles from his proper station. When apprehended he denied his true identity. He had incurred a large number of debts, aggregating \$700 or \$800, at his own post. While absent he financed himself by issuing worthless checks, a course of action which he must have known would embroil him in a court-martial proceeding in case he ever returned. He visited many Army fields and installations and thus had many opportunities of turning himself over to military authorities, but failed to do so. Each of these circumstances is strongly persuasive that the accused

JAGV CM 345000

intended permanently to absent himself from his station (M.C.M., 1928, par. 130). Taken together they compel the conclusion that he intended permanently to absent himself from his station.\*\*\*" (Underscoring supplied)

In this case the following circumstances were persuasive that the accused intended permanently to absent himself from his station and when taken altogether justified the court in inferring the requisite intent:

- (1) Accused's absence without leave from 27 November 1950 to 14 December 1950.
- (2) The confinement of accused from 14 December 1950 to 1 January 1951.
- (3) Accused's subsequent absence without leave from 1 January 1951 to 13 January 1951 was terminated by apprehension.
- (4) At the time of apprehension accused was dressed in civilian clothes.
- (5) At the time of apprehension the accused was in the vicinity of Fort Benjamin Harrison, Indiana.
- (6) At the time of the initiation of his second period of absence without leave on 1 January 1951 the accused was under orders to proceed directly from Camp Atterbury, Indiana to Fort Leonard Wood, Missouri, for which he had received transportation.
- (7) At the time of initiating this absence without leave accused was being returned to his station where he faced possible punishment for a previous unauthorized absence.

The act of the accused in absenting himself without leave on 1 January 1951 supplies one of the elements of the offense alleged in Specification of Charge II and is the basis of the offense alleged in Specification of Charge III, the two offenses being but different aspects of the same act or omission (Sp CM 1711, Davis, 6 BRJC 335).

Paragraph 80a, of the Manual for Courts-Martial, 1949, provides at page 80:

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

JAGV CM 345000

This provision has been held to be a positive and mandatory rule of limitation (See Sp CM 1711, Davis, supra).

The maximum authorized punishment for absence without leave for 17 days (Charge I) is confinement at hard labor for 51 days and forfeiture of 34 days pay; for desertion terminated by apprehension (Charge II) 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 two and one-half years; and for failure to obey an order as alleged in the Specification of Charge III confinement at hard labor for six months and forfeiture of two-thirds pay per month for not to exceed six months (par. 117c, pp 134, 142, MCM, 1949). It is noted that the evidence, supra, indicates that the offense alleged under Charge III could have been charged more appropriately as a willful disobedience of the lawful order of a commissioned officer in the execution of his office, in violation of Article of War 64 (See CM 241209, Price, 26 BR 227; CM 283352, Tork, 55 BR 73). However, as the maximum punishment which could be adjudged in this case for violations of the Specification of Charge II and Specification of Charge III was limited to the most important aspect of the two offenses charged, the maximum punishment imposable was 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 two and one-half years.

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 dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing the execution of the sentence and confinement at hard labor for two years, seven months and twenty-one days.

Oscar M. Bryant, J.A.G.C.  
Seward B. Brook, J.A.G.C.  
Ernest E. Dedering, J.A.G.C.

- JAGV CM 345000

1st Ind.

MAR 21 1951

JAGC, Department of the Army, Washington 25, D. C.  
 TO: Commanding General, Fort Leonard Wood, Missouri

1. In the case of Private Lloyd Leon Langley (RA 15417963), 355th Engineer Depot Company, 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 is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing the execution of the sentence and confinement at hard labor for two years, seven months and twenty-one days. Under Article of War 50e(3), this holding and my concurrence vacate so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing the execution of the sentence and confinement at hard labor for two years, seven months and twenty-one days. 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:

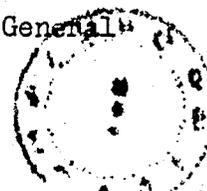
(CM 345000).

*E. M. Brannon*

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

Incl:

Record of trial



RECEIVED  
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MAY 9 1951

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

JAGI CM 345743

MAY 9 1951

UNITED STATES	)	1ST INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Darmstadt,
	)	Germany, 20 and 21 February 1951.
Corporal JOHN J. McSORLEY	)	McSORLEY — Dishonorable discharge,
(RA 42 268 226), and Private	)	total forfeitures after promulgation
HAROLD D. PYLE (RA 37 217 248),	)	and confinement for two (2) years.
both of Headquarters Company,	)	PYLE — Dishonorable discharge, total
1st Infantry Division.	)	forfeitures after promulgation and
	)	confinement for three (3) years.
	)	BOTH — Disciplinary Barracks.

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HOLDING By the BOARD OF REVIEW  
JOSEPH, HYNES 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 soldiers named above and submits this, its opinion, to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification 1: In that Corporal John J. McSorley, Headquarters Company, 1st Infantry Division, did, at Paris, France, on or about 7 December 1950, wrongfully, unlawfully, and falsely have in his possession, with intent to defraud, a certain instrument purporting to be leave orders, knowing the same to be false.

Specification 2: (Finding of not guilty).

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

Specification 4: (Finding of guilty disapproved by the reviewing authority).

Specification 5: In that Corporal John J. McSorley, Headquarters Company, 1st Infantry Division, having been restricted to the limits of Headquarters Company Area; did at Bad Tolz, Germany, on or about 2 December 1950 break said restriction by going to Paris, France.

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

Specification: In that Corporal John J. McSorley, Headquarters Company, 1st Infantry Division, did, without proper leave absent himself from his organization at Bad Tolz, Germany, from about 3 December 1950 to about 7 December 1950.

(With the exception of the name, the above charges, specifications, and findings are the same as to Private Harold D. Pyle.)

Each accused pleaded not guilty to all specifications and charges, and was found guilty of all specifications and charges with the exception of specification 2 of Charge I, to which the finding was not guilty as to each accused. The court considered evidence of two (2) previous convictions as to accused Pyle, and no evidence of previous convictions as to accused McSorley. Accused McSorley was sentenced to be discharged from the service with a dishonorable discharge, to be confined at hard labor at such place as the reviewing authority might direct for a period of two (2) years and to forfeit all pay and allowances to become due after the date of the order directing execution of the approved sentence. Accused Pyle received a similar sentence except that the period of confinement at hard labor adjudged by the court was three (3) years. The reviewing authority disapproved the court's findings of guilty as to Specifications 3 and 4 of Charge I as to each accused, approved the other findings of the court as to each accused, and approved the sentence as to each imposed by the court 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. Pursuant to Article of War 50e, the order directing the execution of the sentence as to each was withheld.

3. There is no question as to the legal sufficiency of Specification 5 of Charge I and Charge I, and the Specification of Charge II and Charge II. Specification 1 of Charge I alleges wrongful possession of false leave orders with intent to defraud. The question is whether this specification as to each accused is legally sufficient to sustain the court's finding of guilty because of the means by which the evidence was secured. Only the evidence relating to this offense will be summarized.

EVIDENCE. a. For the Prosecution:

The record of trial establishes that both accused broke restriction and went AWOL from their organization at Bad Tolz, Germany,

on 3 December 1950. They were apprehended in the lobby of the Lucy Hotel, Paris, France, on 8 December 1950, by Sergeant First Class Fernand C. Quinn, a provost marshal investigator following a "TWX" from the accused's organization. At the time of arrest he was accompanied by a French police inspector (R 47). Accused McSorley was arrested by Sergeant Quinn, and the French police inspector arrested Pyle (R 47). Following the arrest, both accused were confined in a nearby French jail (R 56). After placing the accused in confinement, Sergeant Quinn and the French police inspector returned to the Lucy Hotel and searched the separate rooms indicated on the hotel register as belonging to each accused (R 47). The Lucy Hotel was a private French hotel and was not located on military property or within any military area or compound (R 53, 54). Sergeant Quinn had no authority to conduct the search (R 54). No commissioned officer of the United States Army was present during the search (R 55). The accused had not consented to the search of their rooms (R 55). In accused McSorley's room (#8) they found what purported to be orders issued by Headquarters 1st Infantry Division, granting leave to both accused for the purpose of visiting Paris, among other places, commencing 1 December 1950 for 20 days in the case of McSorley, and commencing 30 November 1950 for 18 days in the case of Pyle (R 48). They then proceeded to Pyle's room (#5) where similar leave orders were seized (R 48). Over the objection of defense counsel, the leave orders were received in evidence as Prosecution Exhibit 1 (R 49). Chief Warrant Officer Arthur J. Conrad, Assistant Adjutant General, 1st Infantry Division, whose duties included the publication of orders, testified that he had not published the purported leave orders (R 68-70).

b. For the Defense:

Having been informed of their rights by the law member, both accused elected to remain silent. No evidence was adduced by the defense (R 132, 133).

4. Discussion:

The accused were charged with unlawful possession of false leave orders with intent to defraud. The evidence shows that Sergeant Quinn, accompanied by a French police inspector, arrested the accused, confined them, returned to their rooms and searched them, finding the false leave orders. He admitted his lack of authority to make the search, stating that he relied upon the authority of the French police inspector to make the search. No evidence as to the French law on the subject was introduced in the record. The question then presented is as to admissibility, in the trial of accused, of this evidence which was discovered by the search and seizure. Paragraph 138 of the Manual for Courts-Martial U.S. Army, 1949, states in pertinent part:

"Evidence obtained as a result of an unlawful search (see 18 USC 2236) of the property of an accused conducted or instigated by persons acting under authority

of the United States, \* \* \* is inadmissible in a trial by court-martial".

Sergeant Quinn was clearly acting under authority of the United States government. That he either conducted or instigated the search is equally as clear from his following testimony:

"I received a TWX concerning the accused. As a result of that TWX I picked up a French police inspector and went to the Lucy Hotel for the purpose of arresting the accused".

After testifying as to the arrest, he continued:

"The two men were then taken to a French police station and locked up there, pending the search of the room by the French inspector and myself". (R 47) (Underscoring supplied)

As the search was conducted or instigated by a person acting under authority of the United States, the remaining question to be determined is whether the search was lawful. MCM, 1949, par. 138, further states that when the property to be searched is situated in a foreign country, a search is lawful when authorized by the commanding officer having jurisdiction over the personnel subject to military law or to the law of war in such locality. The record reveals that no such authorization was received by Sergeant Quinn for he testified as follows:

"Q Did you have a search warrant to search this hotel or any portion thereof?

"A No sir.

"Q Did you have any search warrant or any official authority in your hand to search any of the rooms in which you went?

"A No sir." (R 54)

MCM, 1949, par 138, in discussing unlawful searches, makes reference to 18 USC 2236, which section authorizes the following types of searches:

- "(a) serving a warrant of arrest; or
- "(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or
- "(c) making a search at the request or invitation or with the consent of the occupant of the premises."

None of the above-mentioned provisions are supported by the facts in the instant case. In CM 264149, Engelhardt, 42 BR 25, it was said:

"It is of course axiomatic that searches and seizures affecting military personnel outside of the limits of a military reservation are subject to the requirements and restrictions imposed by the Fourth and Fifth Amendments to the Federal Constitution. The general rule is that a search and seizure made without a search warrant will be sustained only when (1) it is incident to a lawful arrest or (2) when the property itself by reason of its physical characteristics furnishes credible evidence of the commission of a crime, or (3) when reliable information of a violation of the law is received and immediate action is imperative because of the exigencies of the situation."

See ACM 1144, Darby, Vol. 2 Court Martial Reports of the Judge Advocate General of the Air Force p 200, which cites the Engelhardt case with approval in holding a search unlawful. The question presented there was similar to that in the instant case with the exception that the accompanying official was a state officer.

Sergeant Quinn did not receive authority of any commanding officer to make the search. He did not make the search incident to the arrest, for he confined the accused and returned later. The report of arrest which is not a part of this record of trial but which is included in the accompanying papers forwarded with the record of trial to this office, shows the time of arrest as 1255 hours, 8 December 1950, with an unexplained delay of 5 hours before the confinement.

We next consider the legal effect of the action of the French official. Assuming that the search was conducted in accordance with French law, the principle of law laid down in In re Schuetze, 299 F. 827, would be controlling. In deciding the search was unlawful because it was unreasonable under the Federal Constitution, it was said:

"State police, who act under an arrangement with, and in aid of, prohibition agents, become agents of the United States government, and subject to the Federal Constitution and laws governing the right of search and seizure, and evidence secured through a search by them without a warrant may not be used in a federal prosecution, though the search was authorized for different purposes by a local statute or ordinance."

However, there is no evidence in the record to support any assumption that the search was a lawful one under French law. As there is no evidence in the record of the French law under which the French inspector could have proceeded, the foreign law cannot be judicially noticed (MGM, 1949, p 173, par 133). Sergeant Quinn, the only witness who testified as to the authority for the search, gave the following testimony which is pertinent:

"Q Do you know whether this search in which you participated was conducted in accordance with French law?

\* \* \* \* \*

"A No sir." (R 120)

The accused were apprehended by a military agent for offenses of a military nature. As they were not being sought for offenses against the Republic of France, this seems to be the logical explanation for the record failing to show that the French inspector took any affirmative action to proceed in accordance with the laws of France. The record fails to disclose a lawful search under French law, therefore, Sergeant Quinn's action of relying upon the authority of the French police inspector cannot be legally supported.

The search was not authorized by the "commanding officer having jurisdiction over personnel subject to military law or to the law of war in such locality". It was not given legal sanction by 18 USC 2236, nor does it fall within the ruling of the Engelhardt case.

There are numerous Federal decisions which hold that if the search is an unreasonable one, the evidence thus obtained is not admissible when gathered by a Federal official for prosecution in a Federal court. (Citing Byars v. United States, 273 US 28,32, 71 L ed 520,523, 47 S Ct 248; Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, IRA 1915B 834, Ann Cas 1915C 1177; United States v. Di Re, 332 US 581, 92 L ed 210, 68 S Ct 222; Johnson v. United States, 333 US 10, 92 L ed 468, 68 S Ct 367).

However, such evidence is admissible when Federal officials are not involved in procuring it. It is clear that the courts are condemning, not the evidence, but the means by which it is procured by Federal officers. In view of par. 138, MCM 1949, the same legal reasoning should be applied to a search and seizure of evidence by military authorities for use in military courts.

It is the opinion of the Board of Review that in the instant case the search of the accused's hotel rooms without authority and without their consent, without a showing of necessity for immediate action, constituted an unlawful search under MCM 1949, par. 138, and the evidence secured was therefore inadmissible as to each accused.

5. We consider it appropriate to note defense counsel's objection to the pre-trial investigation. This was a procedural matter and when defense counsel stated he had no desire to secure additional witnesses and was ready to proceed with the trial, there was obviously no injury to the substantial rights of the accused.

6. For the foregoing reasons, the Board of Review is of the opinion that the record of trial as to each accused is not legally sufficient to support the findings of guilty of Specification 1 of Charge I, and is legally sufficient to support only so much of the sentence as provides for confinement at hard labor for one month for each accused and forfeitures of \$58.33 per month for one month as to accused McSorley, and \$63.33 per month for one month as to accused Pyle.

Robert E. Joseph, J. A. G. C.

John E. Hynes, A. G. C.

John F. Taylor, A. G. C.

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

JUN 14 1951

JAGU CM 345743

UNITED STATES )

1st INFANTRY DIVISION

v. )

Corporal JOHN J. McSorley,  
RA 42268226, and Private  
HAROLD D. PYLE, RA 37217248,  
both of Headquarters Company,  
1st Infantry Division )

Trial by G.C.M., convened at  
Darmstadt, Germany, 20 and 21  
February 1951. Each: Dishonor-  
able discharge, total forfeitures  
after promulgation and confinement  
McSORLEY for two years, PYLE for  
three years.  
Each: Disciplinary Barracks.

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

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 soldiers named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by a general court-martial each accused pleaded not guilty to, and, as approved by the reviewing authority, was found guilty of, wrongfully, unlawfully and falsely with intent to defraud having in his possession at Paris, France, on or about 7 December 1950 a certain instrument purporting to be leave orders knowing the same to be false, in violation of Article of War 96; breach of restriction at Bad Tolz, Germany, on or about 2 December 1950, in violation of Article of War 96, and absence without leave from his organization at Bad Tolz, Germany, from about 3 December 1950 to about 7 December 1950, in violation of Article of War 61. No evidence of previous convictions was introduced as to the accused McSorley and evidence of two previous convictions by summary court-martial was introduced as to the accused Pyle. The accused McSorley was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for two years. The accused Pyle received a similar sentence except that the period of confinement adjudged was three years. The reviewing authority as to each accused 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 as to each

accused legally insufficient to support the findings of guilty of wrongful possession of the leave orders, legally sufficient to support the findings of guilty of breach of restriction and absence without leave and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for one month and forfeitures of \$58.33 per month for one month as to the accused McSorley and \$63.33 per month for one month as to the accused Pyle. The Judge Advocate General has not concurred in the Board's holding.

3. This is a companion case to CM 345745, Sherwood, BR-JC, decided this day. The only question presented by the record is whether the convictions of wrongful possession of the leave orders can stand, since they rest on the introduction into evidence of a copy of these leave orders which the defense contended was inadmissible because it was the product of an unlawful search and seizure. The facts in this case are not significantly different from those in the Sherwood case and will not be recited again. On the authority of that case we are of the opinion that the reception in evidence of the leave orders was proper and the record is legally sufficient as to each accused to sustain the findings of guilty of wrongful possession of the orders.

4. For the foregoing reasons the Judicial Council is of the opinion that as to each accused the record of trial is legally sufficient to support the findings of guilty, as modified by the reviewing authority, and the sentences and to warrant their confirmation.

C. B. Mickelwait  
C. B. Mickelwait, Brig Gen, JAGC

(Dissent)

Edward H. Young, Colonel, JAGC

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

(232)

DISSENTING OPINION

by

Young  
Member of the Judicial Council

I dissent for the reasons stated in my opinion in CM 345745,  
Sherwood decided this date.

  
Edward H. Young, Colonel, JAGC

[Ed. Note. For CM 345745, supra, see 11 BR-JC 253.]

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

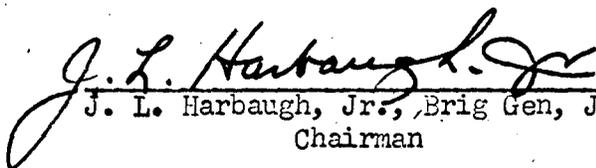
THE JUDICIAL COUNCIL

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

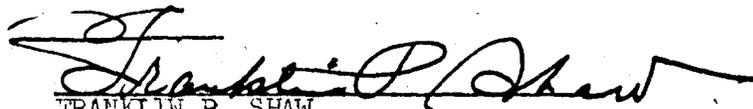
In the foregoing case of Corporal John J. McSorley,  
RA 42268226, and Private Harold D. Pyle, RA 37217248, both of  
Headquarters Company, 1st Infantry Division, upon the concur-  
rence of The Judge Advocate General, the sentence as to each  
accused is confirmed and will be carried into execution.  
The United States Disciplinary Barracks or one of its branches  
is designated as the place of confinement of each accused.

  
C. B. Mickelwait, Brig Gen, JAGC

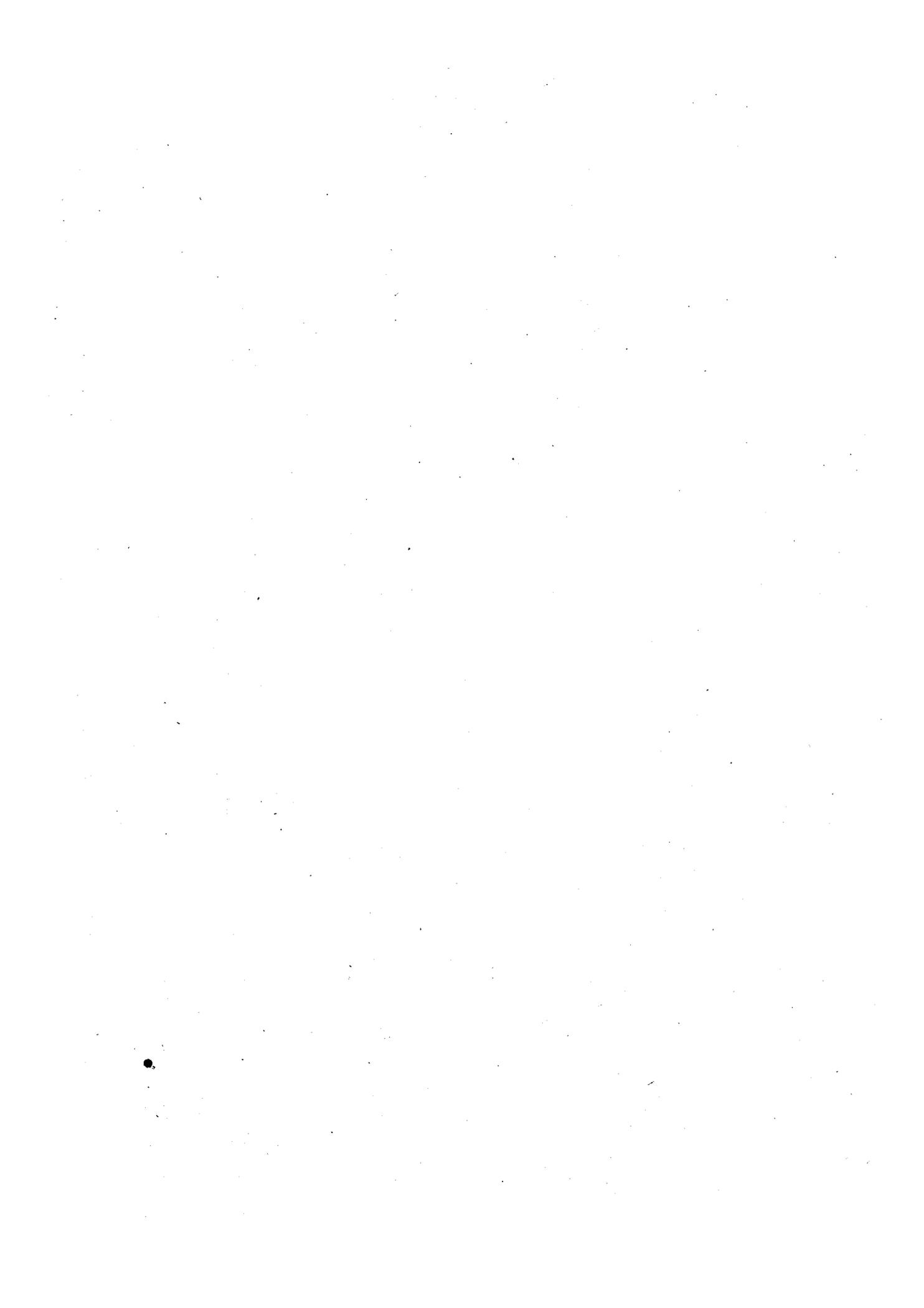
(Dissent)  
Edward H. Young, Colonel, JAGC

  
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

13 June 1951



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

JAGK - CM 346362

MAY 25 1951

UNITED STATES )

25TH INFANTRY DIVISION

v. )

Trial by G.C.M., convened at APO 25,  
22 April 1951. Dishonorable discharge,  
total forfeitures after promulgation,  
and confinement for thirty (30) years.  
Disciplinary Barracks.

Private JAMES H. KEARNS )  
(RA 23930030), Company "A", )  
35th Infantry Regiment, )  
APO 25. )

-----  
REVIEW by the BOARD OF REVIEW  
BARKIN, WOLF and BROWN  
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.
2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James H. Kearns, Company A, 35th Infantry Regiment, APO 25 did, at APO 25, on or about 7 November 1950, desert the service of the United States, and did remain absent in desertion until he was apprehended at Pusan, Korea on or about 11 January 1951.

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 dishonorably discharged from the service and 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 thirty years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 50e.

3. Evidence

a. For the Prosecution

Two duly authenticated extract copies of morning reports of Company

(236)

A, 35th Infantry Regiment, were admitted in evidence without objection as Prosecution Exhibits 2 and 3 (R 18-20). Entered thereon are the following entries pertaining to accused:

"10 Nov 50

Kearns James RA 23930030 Pfc  
Dy to AWOL 0800 7 Nov 50

/s/ Merrill J McCabe  
/t/ MERRILL J McCABE  
2nd Lt, Infantry  
Personnel Officer" (Pros Ex 2)

"M/R 13 Mar 51

Kearns James H RA 23930030 Pfc  
AWOL to Hands of Mil Auth 11 Jan 51

/s/ Merrill J McCabe  
/t/ MERRILL J McCABE  
2nd Lt Inf  
Ass't Adj

M/R 24 Mar 51

CORRECTION (10 Nov 50)

Kearns James RA23930030 Pfc  
Dy to AWOL SHOULD BE  
Kearns James RA 23930030 Pvt-2

CORRECTION (13 Mar 51)

Kearns James RA23930030 Pfc  
AWOL to Hands of Mil Auth  
SHOULD BE  
Kearns James RA23930030 Pvt-2

/s/ Merrill J McCabe  
/t/ MERRILL J McCABE  
2nd Lt Inf  
Ass't Adj" (Pros Ex 3).

Sergeant First Class William C. Atkins, Company A, 35th Infantry Regiment, accused's squad leader, testified that on 7 November 1950 accused was not present at a morning formation of the squad. Sergeant Atkins reported accused absent and searched the platoon and company area, but he

was unable to locate him. Accused was not present in his squad between 7 November 1950 and 11 January 1951, and Sergeant Atkins did not give accused permission to be absent from his organization during that period (R 9,10).

Sergeant First Class Donald Brown, 94th Military Police Battalion, testified that on 11 January 1951 he took accused into custody at the Seaman's Club in Pusan, Korea. Sergeant Brown stated that there were several military installations in Pusan, Korea, during the period of accused's absence. Accused was dressed in civilian clothing at the time and was taken to the Provost Marshal's office and booked as an "AWOL" suspect. Here accused was asked if he understood his rights under the 24th Article of War and replied that he did not because he was a civilian. Sergeant Atkins then read and explained the 24th Article of War to him and accused reiterated that he was a civilian and said that he was employed as a "trader for a fish net company," located in Japan, that he had come to Seoul in October to establish a business between Korean fishermen and a Japanese concern and that he lived in the Chosun Hotel in Seoul. The accused was asked for his passport and he stated that his baggage, containing his passport and other personal papers, had been stolen on 29 October 1950 when he arrived in Seoul and that he had unsuccessfully attempted to get another passport (R 11-14).

#### b. For the Defense

Accused, after being advised of his rights as a witness, elected to remain silent.

Two letters from accused's mother, dated 15 March 1951 and 28 March 1951, advising him of his father's poor health and financial difficulties were admitted in evidence as Defense Exhibits "A" and "B" (R 24,25).

#### 4. Discussion

Proof of desertion requires proof of absence without leave from the service of the United States accompanied by an intent not to return thereto (MCM 1949, par 146a; CM 315964, Cohen, 65 BR 187,192). The authenticated extract copies of the morning reports of accused's organization and the testimony of accused's squad leader that accused was absent from formation without permission on 7 November 1950 and was not present between that date and 11 January 1951 conclusively shows that accused was absent without leave for the period of 7 November 1950 to 11 January 1951 as alleged. That accused was apprehended at the time and place alleged was shown by the testimony of the military police who took him into custody in Pusan, Korea. The facts that accused was dressed in civilian clothing when apprehended, denied being in the military service, and failed to return to military control despite the fact that he was in the vicinity of military establishments constituted facts sufficient

to warrant the court in finding that accused did not intend to return to the military service. The court was therefore justified in finding the accused guilty of desertion as alleged.

5. Accused is 21 years of age and unmarried. He attended school from 1936 to 1945. He worked as an automobile mechanic's helper from October 1945 to October 1948. He enlisted 10 November 1948 for a period of three years with no prior service. His company commander rates him poor as to character and unsatisfactory as to efficiency.

6. The court was legally constituted and had jurisdiction over 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. A sentence to confinement at hard labor for thirty years is authorized upon conviction of a violation of the 58th Article of War (Executive Order No. 10149, 15 Fed. Reg. 5149, 8 Aug 1950).

        , J.A.G.C.

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

Sumner A. Brown, J.A.G.C.

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

(239)

Board of Review

CM 346362

MAY 25 1951

UNITED STATES )

v. )

Private JAMES H. KEARNS  
(RA 23930030), Company "A",  
35th Infantry Regiment,  
APO 25.

25TH INFANTRY DIVISION

Trial by GCM, convened at APO 25,  
22 April 1951. Dishonorable discharge,  
total forfeitures after promulgation,  
and confinement for thirty (30) years.  
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW  
BARKIN, WOLF and BROWN

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 .

Robert Barkin, J.A.G.C.  
Samuel S. Wolf, J.A.G.C.  
Sumner A. Brown, J.A.G.C.

1st Indorsement

Dept. of Army, J.A.G.O.

<sup>5-27</sup>  
MAY 28 1951 To the Commanding General, 25th  
Infantry Division, APO 25, c/o Postmaster, San Francisco, California.

1. In the case of Private James H. Kearns (RA 23930030), Company "A",  
35th Infantry Regiment, APO 25,

(240)\*

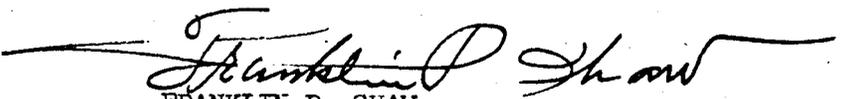
attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

2. Pursuant to the provisions of Article of War 51(a), and under the direction of the Secretary of the Army, so much of the sentence as exceeds 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 20 years is remitted. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as thus modified.

3. A radiogram is being sent advising you of the foregoing holding and action. It is recommended that the attached draft of that portion of the general court-martial order pertaining to the action be included in the published order. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 346362).

1 Incl  
Draft of  
part 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

JAGH CM 346512

MAY 29 1951

UNITED STATES

v.

Private First Class WALLACE L.  
HOLMAN (RA 12223705), 212th  
Military Police Company, APO 301.

) EIGHTH UNITED STATES ARMY KOREA (EUSAK)  
)  
) Trial by G.C.M., convened at Taegu,  
) Korea, 16 April 1951. Dishonorable  
) discharge, total forfeitures after  
) promulgation, and confinement at  
) hard labor for thirty (30) years.  
) Federal Institution.

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REVIEW by the BOARD OF REVIEW  
BROWNE, FLYNN and IRELAND  
Officers of The Judge Advocate General's Corps

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

The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

- Specification: In that Private First Class Wallace L. Holman, 212th Military Police Company, APO 301, did, at Taejon South, Korea, on or about 15 February 1951, with malice aforethought, willfully, feloniously, and unlawfully kill Ra Suck Pil, a human being, by shooting him with a pistol.

He pleaded not guilty to, but was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. Accused was sentenced 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 thirty (30) years. The reviewing authority approved the sentence, designated a United States 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 confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50(e).

There is substantial evidence in the record of trial to the following effect:

On 15 February 1951, accused, Private First Class Wallace L. Holman, was a member of the 212th Military Police Company, stationed at Taejon, Korea (R 9, 12). He and Private First Class Earley were members of the guard and were posted by the Sergeant of the Guard approximately at 0400 hours on Post No. 7, which was north of the railroad tracks where the "main MSR" goes south. This post is in the "free market" place (R 9, 24). The tour of duty was from 0400 to 1200 hours and the orders of the guard were to keep all Korean refugees from crossing the "main MSR", stop traffic on the approach of trains and to protect all government property in sight. The accused was armed with a .45 caliber pistol and Earley with a carbine. Neither the sergeant of the guard nor Earley knew of any orders that the military police were to apprehend persons engaging in black market activities (R 10-11, 13). Sometime between 1000 and 1200 hours accused told Earley that he was going to obtain some fire wood and left the post for about five to eight minutes (R 12).

Ra Hyong Young was the son of Ra Suck Pil (the victim) (R 15). On 15 February 1951, the son was in the "Free Market" at Taejon, selling goods including American cigarettes. When he saw the accused coming, he was afraid that he would lose his cigarettes and started to run. He heard some yelling which he did not understand, but, when a shot was fired, he stopped running about 20 meters from his stand, and offered the cigarettes to the accused; the offer was refused (R 17). At this point, the father, Ra Suck Pil, came up, bowed to accused and said, "this is my son, please excuse me", but, according to Ra Hyong Young, did not push the soldier or try to pull the boy away. The accused pulled his pistol and shot the father (R 18). In open court, the son identified the accused as the American soldier who fired this shot (R 16), and stated that at the time of the shooting, he was standing about three feet to the rear and slightly to one side of his father while accused was standing about four and a half feet in front of the deceased (R 16, 18). The victim fell to the ground and accused, although he knew the bullet struck "the man in the head (Pros Ex 1)", left the scene without offering any aid. About five minutes later Ra took his father to the hospital (R 17).

A Korean doctor, who was the deceased's family physician, examined him at about 1100 hours, the same day as the shooting. He determined that a bullet had entered the body through the left cheek and that the cause of death was a brain hemorrhage as a result of this gunshot wound (R 19-20).

First Lieutenant Harry A. Putnam, assigned to the 212th Military Police Company, was duty officer at the Taejon RTO on 15 February 1951 and was responsible for the military police in the Taejon Railway yard area. About 1000 hours he went to the market area south of Taejon, found a "large puddle of blood" on the ground and then went to Post No. 7 which was nearby. Accused and Earley were at the latter location. Lieutenant Putnam examined accused's pistol and found that it had been fired within the past two hours. He relieved accused from his post (R 14).

A statement of the accused made to the CID agents on the day of the homicide was received in evidence without objection by the defense as Prosecution Exhibit 1 (R 22); in it he admitted firing the fatal shot but contended that he did not realize the weapon was loaded and that he intended merely to fire it into the air. He added that thereafter he went directly back to his post, carrying a load of wood.

Private Earley was recalled as a witness for the defense and stated that it had been the practice of the guards on Post No. 7 for one of them to go in search of wood to use in the stove (R 23).

Accused, having been advised of his rights as a witness by the law member, elected to be sworn and testified, in substance, as follows:

He is twenty-three years old and has been in the Army continuously since 4 December 1945. He has been in the Military Police since October 1946 and in the course of his duties as a military policeman has made approximately 50 arrests, but this is the first time that he has ever shot anyone in attempting to make an arrest (R 24).

He added that on 15 February 1951, he was on duty on Post No. 7 with Private First Class Earley. Between 1000 and 1015 hours, he told Earley that he was going to get wood. He had noticed all during the morning that people were running across the railroad tracks but because of the heavy traffic on the "MSR", the military police had been unable to pursue them. He went down the tracks into the village and saw a Korean boy with American cigarettes. When the boy saw accused, he grabbed his cigarettes and ran. Accused yelled and fired his pistol into the air. He then saw the Korean standing behind another man. As

accused started to pass this man, he "shoved" accused, who in the excitement pulled his pistol. "I didn't think it was loaded and I fired, shooting him in the head and then I left and got the wood and went back on my post." Accused stated that when he fired the first time, he returned his pistol to his holster but did not "hit the safety". He did not intend to fire the weapon but just to scare the old man (R 25). According to accused no instructions were posted upon the bulletin board as to the action the military police were to take with respect to people suspected of blackmarketing, but the "OD" had issued instructions that Koreans with American goods were to be detained until the National Police arrived (R 25).

Accused explained that he did not tell Earley about the incident because the latter was busy directing traffic. He gave as his reason for not rendering aid himself that he intended to call the National Police and did not have a chance to do so before he was relieved by Lieutenant Putnam (R 26). He did not make a report to Lieutenant Putnam about the shooting although he knew the lieutenant was his superior officer, because he did not know him (R 27). Accused stated that the "OD" who gave the instructions about arresting Koreans suspected of blackmarket activities was the one who preceded Lieutenant Putnam but he could not recall his name (R 28).

Murder is the unlawful killing of a human being with malice aforethought.<sup>1/</sup> Malice may consist of an intention to cause death or grievous bodily harm,<sup>2/</sup> and may be presumed when a homicide is directly caused by the use of a deadly weapon, without legal excuse, in a manner likely to result in death.<sup>3/</sup> A deadly weapon is anything with which death may be easily and readily produced.<sup>4/</sup>

The uncontroverted evidence establishes that the victim was killed by the accused without legal justification or excuse. Although the accused was on duty as a military policeman, he was not performing his

<sup>1/</sup> Page 230, subparagraph 179a, of the Manual for Courts-Martial, U.S. Army, 1949.

<sup>2/</sup> Ibid, p. 231, subparagraph 179a.

<sup>3/</sup> Ibid, p. 151, subparagraph 125a; Vaccaro v. Collier, 38 F. 2d 862, 869, 19 (DC D Md. 1930); Cockrell, MO-JAGA, 361, 364.

<sup>4/</sup> Acers v. United States, 164 U.S. 388, 391 (1896).

authorized duties when he entered the "free market" and undertook the pursuit of a person whom he assumed was engaging in blackmarket activities. His contention that the guards had been instructed to apprehend persons suspected of blackmarketing is in sharp conflict with the testimony of the other witnesses who testified that their duties as military policemen were the prevention of refugees crossing the "main MSR", protection of government property and traffic regulation. But even accepting accused's version as true, the manner of his accomplishment of the asserted mission was not legally justifiable, because he was not engaged in the apprehension of a felon. <sup>5/</sup> Moreover, the intended victim of his unauthorized use of the pistol was not the person whom he was chasing but the aged father who happened on the scene.

The posture of the accused that he did not intend to kill the deceased finds little support in the evidence. <sup>6/</sup> Admittedly, accused had been a military policeman since October 1946 and, in the course of his duties, had made over 50 arrests. He knew what he was doing when he drew his pistol from his holster and shot the deceased from a distance of approximately  $4\frac{1}{2}$  feet. His subsequent actions further negative any consideration of accidental shooting. He offered no aid to his stricken victim and made no effort to secure assistance or report the incident. Instead, he calmly walked away, obtained a load of wood and returned to his post, informing neither Earley, his companion on guard, nor the duty officer upon his arrival. The Board of Review is of the opinion that the evidence establishes beyond a reasonable doubt the unlawful killing of a human being with malice aforethought as charged, in violation of Article of War 92.

In view of the fact that accused does not contend, nor does the evidence indicate, that he acted in self-defense, <sup>7/</sup> his statement that he was "shoved" by the deceased required no further comment than to point out that such an act even if it occurred, would constitute insufficient provocation to require a lesser finding. <sup>8/</sup>

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<sup>5/</sup> Page 230, subparagraph 179a, of the Manual for Courts-Martial, U.S. Army, 1949.

<sup>6/</sup> Cf. CM 294685, Magby, 57 BR 391, 396.

<sup>7/</sup> Page 230, subparagraph 179a, of the Manual for Courts-Martial, U.S. Army, 1949; Cockrell, MO-JAGA, 361, 364.

<sup>8/</sup> CM 261439, Smith, 40 BR 255, 263; CM 274678, Ellis, 47 BR 271, 290; page 234 subparagraph 180a, of the Manual for Courts-Martial, U. S. Army, 1949.

Accused is 23 years of age. He reenlisted in the Army 1 February 1949 for four years, after prior service of two years, nine months and twenty-five days. No information is available as to his civilian background. There is no evidence of previous convictions. His service prior to commission of the present offense is characterized as "poor".

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. A sentence to dishonorable discharge, total forfeitures and imprisonment at hard labor for 30 years is authorized upon conviction of unpremeditated murder in violation of Article of War 92, Confinement in a penitentiary is permitted 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 for more than one year. <sup>9/</sup>

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

Arthur P. Ireland J.A.G.C

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<sup>9/</sup>  
18 U.S.C. (Supp III) Sections 1111 and 4083.

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

(247)

Board of Review

CM 346512

MAY 29 1951

UNITED STATES ) EIGHTH UNITED STATES ARMY KOREA (EUSAK)

v. )

Private First Class  
WALLACE L. HOLMAN (RA  
12223705), 212th Military  
Police Company, APO 301. )

) Trial by G.C.M, convened at Taegu,  
Korea, 16 April 1951. Dishonorable  
) discharge, total forfeitures after  
) promulgation and confinement at  
) hard labor for thirty (30) years.  
) Federal Institution.

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HOLDING by the BOARD OF REVIEW  
BROWNE, FLYNN and IRELAND  
Officers of the Judge Advocate General's Corps

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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 .

Allen R. Browne, J.A.G.C.  
William J. Flynn, J.A.G.C.  
Arthur B. Ireland, J.A.G.C.

1st Indorsement  
MAY 30 1951

Dept. of Army, J.A.G.O.

Eighth United States Army Korea (EUSAK), APO 301, c/o Postmaster, San Francisco California.

To the Commanding General,

1. In the case of Private First Class Wallace L. Holman (RA 12223705), 212th Military Police Company, APO 301,

(248)

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 346512 ).

FOR THE JUDGE ADVOCATE GENERAL:

  
ROBERT J. O'CONNOR  
Colonel, JAGC  
Special Assistant

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

(249)

JAGK - CM 346405

May 26, 1951

U N I T E D S T A T E S )

v. )

Private AUBREY L. MORRISON )  
(RA 18263234), Company "D", )  
187th Airborne Infantry )  
Regiment, APO 660. )

EIGHTH UNITED STATES ARMY KOREA (EUSAK)

Trial by G.C.M., convened at Head-  
quarters EUSAK, APO 301, 12 April  
1951. Dishonorable discharge,  
total forfeitures after promulga-  
tion, and confinement for life.

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HOLDING by the BOARD OF REVIEW  
BARKIN, WOLF and BROWN

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 50(d).

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private Aubrey L. Morrison, Company "D", 187th Airborne Infantry Regiment, APO 660, San Francisco, California did, at or near P'yongyang, Korea, on or about 3 November 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill LEE TAI INN, a human being, by shooting with a carbine and stabbing him with a bayonet.

Specification 3: In that Private Aubrey L. Morrison, \*\*\* did, at or near P'yongyang, Korea, on or about 3 November 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill KIM EU SURN, a human being, by shooting him with a carbine and stabbing with a bayonet.

Specification 4: In that Private Aubrey L. Morrison, \*\*\* did, at or near P'yongyang, Korea, on or about 3 November 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill KIM LI SURN,

a human being, by shooting him with a carbine and stabbing him with a bayonet.

Specifications 5, 6, 7 and 8: (Findings of not guilty).

He pleaded not guilty to the charge and all specifications. He was found not guilty of Specifications 1,5,6,7 and 8, and guilty of Specification 2 "except the words 'LEE TAI INN, a human being, by shooting him with a carbine and stabbing him with a bayonet', substituting therefor the words 'a North Korean male human being by stabbing him with a bayonet and by shooting him with a carbine', of the excepted words, NOT GUILTY, of the substituted words, GUILTY"; guilty of Specification 3 "except the words 'KIM EU SURN, a' and 'carbine', substituting therefor respectively, the words, NOT GUILTY, of the substituted words, GUILTY"; guilty of Specification 4 "except the words 'KIM LI SURN, a', substituting therefor the words 'four North Korean males', and except the words 'and stabbing him with a bayonet', of the excepted words, NOT GUILTY, of the substituted words, GUILTY"; and guilty of the charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50e.

3. The only question in this case which is deemed necessary for consideration by the Board of Review is whether or not there is a fatal variance between the allegations of the specifications of which accused has been found guilty and the findings thereof by exceptions and substitutions.

The court, in its determination of the identity of the victims, has found, in effect, that accused did not kill the persons named in Specifications 2,3, and 4 of the Charge, but is guilty of the murder of "a North Korean male human being" as to each of Specifications 2 and 3, and of "four North Korean males" as to Specification 4. It is deemed unnecessary to discuss the evidence except to state that nowhere do the names or other identification of the victims listed in Specifications 2,3 and 4 appear in the record of trial.

The proof necessary to justify a conviction of murder is as follows:

"(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 179a, p 232) (Underscoring supplied)

The rule relative to exceptions and substitutions in the findings of a court-martial are:

"Exceptions and Substitutions. - One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense." (MCM 1949, par 78c, p 77)

The great weight of legal authority supports the proposition that a material variance as to the name of a person upon whom a felony is committed is fatal error (40 C.J.S. 1078-1080).

In a case involving the voluntary manslaughter by accused of a named victim by shooting him with a pistol, the proof established that accused had unlawfully shot and killed an unnamed civilian and that at about the same time and in the same general area the victim named in the specification was found dead of gunshot wounds. It was held that, although the person killed by accused and the victim named in the specification had been killed by similar gunshot wounds at about the same time and in the same general area, the evidence failed to establish that the unnamed person killed by accused and the individual named in the specification were one and the same and was, therefore, legally insufficient to sustain the finding of guilty because of failure of proof as to the identity of the victim (CM 302849, Hertz, 59 BR 59, 65-66).

In a case involving the unpremeditated murder of a named victim by striking him on the head with a rock, the proof established that at the time and place alleged, accused struck "some civilian," otherwise unidentified, on the head with a rock. At about the same time and in the same general area, the victim named in the specification was admitted to a hospital in the vicinity suffering from a severely fractured skull from which he subsequently succumbed. It was held that, although the person injured by accused and the victim named in the specification presumably sustained similar injuries at about the same time and in

the same general area, the evidence failed to establish beyond a reasonable doubt that the victim of accused's assault was the individual named in the specification, and the record of trial was held to be legally insufficient to support the findings thereof (CM 338030, Rainey et al, 4 BR-JC 215, 222-223). A similar rule of law was held to apply in a case where accused was charged with and found guilty of committing sodomy with a named person in Manila, Philippine Islands. The proof identified the person only as a "native" man. It was held that such a variance between allegation and proof was fatal (CM 191369, Seluskey, 1 BR 245,246). In another case where accused was charged with committing sodomy with one Edward Osorio in Panama City, Republic of Panama, and was found guilty, except the words "Edward Osorio," substituting therefor the words "a human being, to wit, a Panamanian boy, name unknown," and the proof established "beyond a reasonable doubt by uncontradicted evidence" the facts as found, it was nevertheless held that such a variance between allegation and finding was fatal (CM 204461, Fisher, 8 BR 11,12-13).

In Homicide case, the identity of the deceased with the person alleged to have been killed in the specification and with the person shown to have been killed by accused is a necessary element of the offense charged and must be fully established (CM 316930, Mitchell, 66 BR 117, 118; CM 202359, Turner, 6 BR 87,122). In the instant case, the variances between Specifications 2, 3 and 4 and findings thereon, wherein the court found accused not guilty of murder of named victims but guilty of murder of other persons whose names or other identity to the record of trial are unknown, are material and substantial. These findings constitute an acquittal of the offenses charged and a conviction of offenses not charged. The Board of Review is, therefore, of the opinion that fatal variances exist between the allegations of each of Specifications 2, 3 and 4 and the findings thereunder.

4. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 2, 3 and 4 of the Charge, and the Charge, and the sentence.

ALBERT W. BARKIN , J.A.G.C.

SAMUEL S. WOLF , J.A.G.C.

SUMNER A. BROWN , J.A.G.C.

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

JAGU CM 346405

18 June 1951

U N I T E D S T A T E S

EIGHTH UNITED STATES ARMY KOREA (EUSAK)

v.

Private AUBREY L. MORRISON,  
RA 18263234, Company D, 187th  
Airborne Infantry Regiment,  
APO 660

Trial by G.C.M., convened at APO 301,  
12 April 1951. Dishonorable dis-  
charge, total forfeitures after  
promulgation and confinement for  
life.

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Opinion of the Judicial Council  
Harbaugh, Mickelwait and Young  
Officers of The Judge Advocate General's Corps  
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1. Pursuant to Article of War 50d(4), the record of trial and the opinion of 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 general court-martial, the accused pleaded not guilty to eight specifications each alleging the premeditated murder of a named victim, "a human being," by shooting him with a carbine and stabbing him with a bayonet, at or near P'yongyang, Korea, on or about 3 November 1950, in violation of Article of War 92. The court found the accused not guilty of Specifications 1, 5, 6, 7 and 8, and guilty of Specifications 2, 3 and 4, with exceptions and substitutions as follows:

"Of Specification 2: GUILTY, except the words 'LEE TAI INN, a human being, by shooting with a carbine and stabbing him with a bayonet', substituting therefor the words 'a North Korean male human being by stabbing him with a bayonet and by shooting him with a carbine', of the excepted words, NOT GUILTY, of the substituted words, GUILTY.

"Of Specification 3: GUILTY, except the words 'KIM EU SURN, a' and 'carbine', substituting therefor respectively, the words 'a North Korean male' and' .45 caliber pistol', of the excepted words, NOT GUILTY, of the substituted words, GUILTY.

"Of Specification 4: GUILTY, except the words 'KIM LI SURN, a', substituting therefor the words 'four North Korean males', and except the words 'and stabbing him with a bayonet', of the excepted words, NOT GUILTY, of the substituted words, GUILTY."

No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, stating in his action that "pursuant to Article of War 50e the order directing execution of the sentence is withheld." The Judicial Council here treats the record of trial as having been forwarded for action under Article of War 48. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Acting Judge Advocate General has not concurred in the Board's holding.

3. The evidence establishes that on 3 November 1950, the accused was one of a group of about seven enlisted men and two South Korean interpreters who left their organization located some six or seven miles from Pyongyang, Korea, to take some laundry to a nearby village. While there, Private First Class Arnold A. Saunders, a member of the party, shot a North Korean, whom the group had taken into custody, and the accused bayoneted him "about two times." (Saunders was charged with the premeditated murder of "a Korean National, name unknown, a human being" and found guilty of the lesser included offense of assault with intent to commit murder (CM 346212). The accused was apparently not tried for his participation in this incident.)

Later the accused and Private Donald L. Lasswell, another member of the group, took two other North Koreans into custody. The accused bayoneted one of them in the back and, when he did not fall, shot him. Lasswell shot the other Korean. Both Koreans appeared to be dead. At the trial the prosecution stated that Lasswell had been granted immunity from trial in this case (R 55). There is no record in the Office of The Judge Advocate General that Lasswell was tried for his participation in this incident.

The group then boarded a truck and rode to another town. There they took six more North Koreans into custody. The accused beat one of them and, when he fell, shot him with a .45 caliber pistol and bayoneted him. When the group left the scene, the Korean appeared to be dead. The five remaining North Koreans were loaded onto the truck and after proceeding a short distance out of town, the accused ordered the truck to stop. He ordered the Koreans off the truck and, after they had complied, shot four of them with a burst of his carbine. The fifth Korean was shot by an

unidentified enlisted man in the group. All five victims appeared to be dead.

The accused made a voluntary pretrial statement to Lieutenant Colonel Ryerson W. Mausert, who investigated the charges in this case, in which the accused admitted substantially the facts hereinabove stated. Colonel Mausert drew a sketch of the area and the accused identified thereon the approximate location of the incidents hereinabove recited. Colonel Mausert contacted the chief of police and certain Koreans at the places where the killings apparently occurred and was shown the locations where persons, killed at about the time and place alleged, were buried. On 11 November 1950, the bodies were disinterred in the presence of a medical officer who examined them. He testified that the deaths had occurred between three to four days and one to two weeks previously, and that the deaths were caused by gunshot wounds.

4. The Board of Review has held the record of trial legally insufficient to support the findings and the sentence upon the ground that a fatal variance existed between the allegations of Specifications 2, 3 and 4 and the findings of the court thereunder, in that the court in effect found that the accused did not kill the persons named but killed other persons.

The requisite of a specification is that it shall set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended (MCM, 1949, par 29a, p 22). While the same particularity is not called for in military charges as is required in civil indictments, there are certain essential purposes which must be effectuated in their drafting. These are (1) to inform the accused of the precise offense attributed to him so that he may intelligently admit, deny, or move with respect to the same, (2) to enable him to plead his conviction or acquittal upon any subsequent prosecution for the same offense, and (3) to advise the court and reviewing authorities of the nature of the accusation so that they may properly act upon the case (CM 324736, Moore, 73 BR 341, 345; CM 319514, Robbins, 68 BR 337, 349; Winthrop's Military Law and Precedents, 1920 Reprint, p 188).

While the rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, may be disregarded, it is well settled that a material variance between allegations and findings as to an essential element of the offense is fatal error. An accused is entitled to be advised by direct averment or by reasonable implication from facts alleged of all elements of the offense sought to be charged. The proof must pertain to the offense charged, and where the findings embody an offense materially different therefrom the accused has not been accorded a fair trial. The true test of the sufficiency of an allegation is not whether it could have been made more definite and certain, but whether it contains the elements of the

offense intended to be charged, "sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction" (Cochran et al v. United States, 157 U.S. 286, 290, 15 S. Ct. 628, 630 (1895); Rosen v. United States, 161 U.S. 29, 34, 16 S. Ct. 434, 480 (1896)).

One of the elements of proof necessary to a conviction of murder is "that the accused unlawfully killed a certain person named or described by certain means, as alleged" (MCM, 1949, par 179a, p 232). In the instant case each specification lists a named victim, otherwise described as "a human being," as the "certain person named or described."

By the court's findings under each specification of which the accused was found guilty, the name of the victim was excepted and the words "a North Korean male human being" or similar words were substituted therefor. The record fails to disclose the identity of the victims either by name or by other description. It is well settled in both military and civil law that the failure to establish the identity by name or other description of a person upon whom a felony is alleged to have been committed is fatal error (homicide - CM 338030, Rainey et al, 4 BR-JC 215, 222, 223; CM 316930, Mitchell, 66 BR 117, 118; CM 313788, Wolfe, 63 BR 283, 288-389; CM 302849, Hertz, 59 BR 59, 65, 66, Smith v. State, 86 S. 640 (Fla. 1920); State v. German, 54 Mo. 526, 530 (1874); Smith v. Commonwealth (21 Gratt (Va.) 809 (1871); Wheaton v. State, 194 S. 712 (Ala. 1940); People v. Allen, 14 NE 2d 397 (Ill. 1937); Stewart v. State, 30 S. 2d 489 (Fla. 1947); sodomy - CM 191369, Soluskey, 1 BR 245, 246; CM 204461, Fisher, 8 BR 11, 12-13). A similar rule is applicable to other crimes in which the identity of the victim is an essential element of proof of the offense (assault - CM 218667, Johns, 12 BR 133, 134; larceny - CM 191809, Price, 1 BR 301, 302; wrongful conversion - CM 198657, Green, 3 BR 239, 241; CM 201485, Darr, 5 BR 119; wrongful cohabitation - CM 344982, VanAlstyne, BR-JC, 1951).

In the instant case there was a fatal variance between the allegations and findings as to the identity of the victims (CM 338030, Rainey et al, supra; CM 344982, VanAlstyne, BR-JC, 1951) and therefore as to the identity of the offenses (see MCM, 1949, par 78c).

It would be prejudicial to the substantial rights of the accused to require him to defend himself against a charge not only of the murder of

a victim named or otherwise described in the specification but also of the murder of any other civilian native occurring at about the time and place alleged. This is particularly true where the accused, as in the instant case, is charged with the murders of eight named victims, found not guilty of five specifications, and found guilty by exceptions and substitutions of the murder of two unnamed North Koreans under two of the remaining specifications and of the murder of four unnamed North Koreans under the third remaining specification. If under the latter specification the court intended to find the accused guilty not only of the one victim shown therein but also of three others included in the five specifications of which the accused was found not guilty, the question arises: as to which three of the five victims did the court intend to convict the accused? The answer must be that, as their findings indicate, the court did not know, and such findings fail for lack of certainty as to the identity of the victims described. In view of this conclusion, it is unnecessary to consider the question of the effect, apart from the uncertainty adverted to, of the court's apparent consolidation under one specification of four murders alleged under separate specifications. We conclude that by the court's findings, the accused has been found guilty of offenses of which he has not been fairly apprised and against charges of which he has had no opportunity to defend. For this reason the findings and sentence must be disapproved.

In view of the foregoing considerations, we deem it unnecessary to determine whether the findings of guilty, under all the circumstances, would if approved afford the accused an adequate basis for asserting the defense of former trial upon a subsequent prosecution for one or more offenses similar to those involved herein. Such considerations, including particularly the uncertainty as to the identity of the various victims, however, emphasize the seriousness of the problem in this regard upon a subsequent prosecution and the danger inherent in upholding the instant findings. We have not overlooked the cases of CM 271043, Guy, 2 BR (NATO) 169 and CM 318443, Jeffcoat, 67 BR 313, and are unwilling to apply the principles therein announced to the instant case.

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.

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C. B. Mickelwait, Brig Gen, JAGC

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Edward H. Young, Colonel, JAGC

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

(258)

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

THE JUDICIAL COUNCIL

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

JAGU CM 346405

In the foregoing case of Private Aubrey L. Morrison,  
RA 18263234, Company D, 187th Airborne Infantry Regiment,  
APO 660, upon the concurrence of The Judge Advocate General,  
the findings of guilty and the sentence are disapproved.

C. B. Mickelwait, Brig Gen, JAGC      Edward H. Young, Colonel, JAGC

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

I concur in the foregoing action.

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

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

(259)

JAGN-CM 341782

July 21, 1950

U N I T E D S T A T E S )

9TH INFANTRY DIVISION )

v. )

Trial by G. C. M., convened at  
Fort Dix, New Jersey, 14, 15,  
16, 17, 20 and 21 March 1950.

Private CARMON SILES SMITH (RA  
37383433) and Recruit JOHN D. WILSON  
(RA 13276471), both of 1262 Area  
Service Unit, Det. 17 (Repl); )

ALL: Dishonorable discharge and  
total forfeitures after promulga-  
tion. Confinement: SMITH: Ten  
(10) years; WILSON: Eight (8)  
years; NEUFELD: Six (6) years;  
and MEEK: Fifteen (15) years.

Private HERBERT NEUFELD (RA 12255417), )  
Headquarters 4th Medical Laboratory  
APO 403, atchd to Det. 14 (Reassgmt), )  
1262d Area Service Unit; and Recruit  
LAWRENCE R. MEEK (RA 33434561), Det. )  
11 (Personnel Sec, Repl), 1262 Area  
Service Unit. )

ALL: Federal Institution.

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HOLDING by the BOARD OF REVIEW  
YOUNG, LUDINGTON 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 soldiers above named and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. By direction of the appointing authority (R 3) the accused were tried by common trial upon the following Charges and Specifications:

NEUFELD:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Herbert Neufeld, Headquarters 4th Medical Laboratory, APO 403, and attached Detachment 14, (Reassignment), 1262d Area Service Unit, Fort Dix, N.J., then of 9213 Technical Service Unit, Transportation Corps, Detachment 12, Camp Kilmer, N.J. for the purpose of obtaining the approval allowance and payment of a claim against the United States by presenting to A. S. Kinsman, Lt Col, F. D. (Symbol No 210-961) finance officer at

Camp Kilmer, N.J. an officer for the United States duly authorized to approve pay and allow such claims did at Camp Kilmer, N.J. on or about 17 June 1949 forge and counterfeit the signature of Clarence T. Wiggins on a certain paper Viz; WDAGO form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 17 June 1949 at line 17 thereof in words and figures as follows: "17. Wiggins, Clarence T. RA 14311056 Sgt Clarence T. Wiggins 201.00"

Specification 2: In that Private Herbert Neufeld, Headquarters 4th Medical Laboratory, APO 403, and attached Detachment 14 (Reassignment), 1262d Area Service Unit, Fort Dix, N.J., then of 9213 Technical Service Unit, Transportation Corps, Detachment 12, Camp Kilmer, N.J. for the purpose of obtaining the approval allowance and payment of a claim against the United States by presenting to A. S. Kinsman, Lt Col. F. D. (Symbol No 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims did at Camp Kilmer, N.J. on or about 10 May 1949 forge and counterfeit the signature of Charles Hilliard on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 10 May 1949 at line 15 thereof in words and figures as follows: "15. Hilliard, Charles RA 70834180 Sgt Charles Hilliard 200.00"

WILSON:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Recruit John D. Wilson, 1262d Area Service Unit, Detachment 17, Fort Dix, N.J. then of 1277 Area Service Unit, Replacement Division, Detachment 3-C, Camp Kilmer, N.J. for the purpose of obtaining the approval allowance and payment of a claim against the United States by presenting to A. S. Kinsman, Lt Col, F.D. (Symbol No 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims, did at Camp Kilmer, N.J. on or about 17 June 1949 forge and counterfeit the signature of Rufus L. Wilson on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 17 June 1949 at line 4 thereof in words and figures as follows: "4. Wilson, Rufus L. RA 13251407 Cpl Rufus L. Wilson 201.00"

Specification 2: In that Recruit John D. Wilson, 1262d Area Service Unit, Detachment 17 Fort Dix, N. J. then of 1277 Area Service Unit, Replacement Division, Detachment 3-C, Camp Kilmer, N.J. for the purpose of obtaining the approval allowance and payment of a claim against the United States by Presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims, did at Camp Kilmer, N.J. on or about 24 June 1949 forge and counterfeit the signature of John Wilson on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 24 June 1949 at line 2 thereof in words and figures as follows: "2. Wilson, John RA 13251403 Cpl John Wilson 201.00"

SMITH:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Carmon S. Smith, 1262d Area Service Unit, Detachment 17 (Replacement) Fort Dix, N.J. then of 1277 Area Service Unit, Replacement Division Detachment 3C, Camp Kilmer, New Jersey, for the purpose of obtaining the approval allowance and payment of a claim against the United States by presenting A.S. Kinsman, Lt Col, F.D. (Symbol 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims did at Camp Kilmer, N.J. on or about 11 May 1949 forge and counterfeit the signature of Charles Smith on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 11 May 1949 at line 9 thereof in words and figures as follows: "9. Smith Charles RA 31384598 Cpl Charles Smith 200.00"

Specification 2: In that Private Carmon S. Smith, 1262d Area Service Unit, Detachment 17 (Replacement) Fort Dix, N.J. then of 1277 Area Service Unit, Replacement Division, Detachment 3-C, Camp Kilmer, N.J. for the purpose of obtaining the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims did at Camp Kilmer, N.J. on or about 24 May 1949 forge and counterfeit the signature of Charles S. Mason on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 24 May 1949 at line 37 thereof in words and figures as follows: "37. Mason, Charles S. RA 37383432 Sgt Charles S Mason 200.00"

Specification 3: In that Private Carmon S. Smith 1262d Area Service Unit, Detachment 17 (Replacement) Fort Dix, N.J. then of 1277 Area Service Unit, Replacement Division, Detachment 3-C, Camp Kilmer, N.J. for the purpose of obtaining the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims did at Camp Kilmer, N.J. on or about 25 May 1949 forge and counterfeit the signature of Charles S. King on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 25 May 1949 at line 19 thereof in words and figures as follows: "19. King, Charles S. RA 37383431 Sgt Charles S. King 200.00"

Specification 4: In that Private Carmon S. Smith, 1262d Area Service Unit, Detachment 17 (Replacement) Fort Dix, N.J. then of 1277 Area Service Unit, Replacement Division, Detachment 3-C, Camp Kilmer, N.J. for the purpose of obtaining approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) finance officer at Camp Kilmer, N.J. an officer of the United States duly authorized to approve pay and allow such claims did at Camp Kilmer, N.J. on or about 31 May 1949 forge and counterfeit the signature of Charles King on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 31 May 1949 at line 50 thereof in words and figures as follows: "50. King, Charles RA 37383440 Cpl Charles King 200.00"

MEEK:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Recruit Lawrence R. Meek 1262d Area Service Unit, Detachment 11, then Corporal Lawrence R Meek of 1277 Area Service Unit, Station Complement Detachment 1-L, for the purpose of obtaining and of aiding others Viz; Private First Class Salvatore A. DeVito to obtain the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No. 210-961) an officer of the United States duly authorized to approve; allow and pay such claims did at Camp Kilmer, N.J. on or about 30 June 1949 advise, procure and use the signature of Private First Class Salvatore A. DeVito as William Blake on a certain paper Viz; WDAGO

Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 30 June 1949 at line 48 thereof in words and figures as follows: "48. Blake, William RA 13294226 Cpl William Blake 201.00" such writing and signature being forged and counterfeited and then known by said Corporal Lawrence R Meek to be forged and counterfeited.

Specification 2: In that Recruit Lawrence R. Meek 1262d Area Service Unit, Detachment 11, Fort Dix, N.J. then Corporal Lawrence R. Meek of 1277 Area Service Unit, Station Complement Detachment 1-L, Camp Kilmer, N.J. for the purpose of obtaining and of aiding other Viz; Recruit Herbert Neufeld to obtain the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) an officer of the United States duly authorized to approve, allow and pay such claims did at Camp Kilmer, N.J. on or about 17 June 1949 advise, procure and use the signature of Recruit Herbert Neufeld as Clarence J. Wiggins on a certain paper Viz, WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 17 June 1949 at line 17 thereof in words and figures as follows: "17. Wiggins, Clarence J. RA 14311506 Sgt Clarence J. Wiggins 201.00" such writing and signature being forged and counterfeited and then known by said Corporal Lawrence R. Meek to be forged and counterfeited.

Specification 3: In that Recruit Lawrence R. Meek 1262d Area Service Unit, Detachment 11, Fort Dix, N.J. then Corporal Lawrence R. Meek of 1277 Area Service Unit, Station Complement Detachment 1-L, Camp Kilmer, N.J. for the purpose of obtaining and aiding of others Viz; Recruit Brownard Thompson to obtain the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col F.D. (Symbol No 210-961) an officer of the United States duly authorized to approve, allow, and pay such claims did at Camp Kilmer, N.J. on or about 27 June 1949 advise, procure and use the signature of Recruit Brownard Thompson as George S. Peters on a certain paper Viz; WDAGO Form 14-57 otherwise known as "voucher for Partial Payment-Enlisted Men" dated 27 June 1949 at line 10 thereof in words and figures as follows: "10. Peters, George S. RA 15282731 Cpl George S. Peters 201.00" such writing and signature being forged and counterfeited and then known by said Corporal Lawrence R Meek to be forged and counterfeited.

Specification 4: In that Recruit Lawrence R. Meek 1262d Area Service Unit, Detachment 11, Fort Dix, N.J. then Corporal Lawrence R. Meek of 1277 Area Service Unit, Station Complement Detachment 1-L, Camp Kilmer, N.J. for the purpose of obtaining and of aiding others Viz; Recruit John D. Wilson to obtain the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) an officer of the United States duly authorized to approve, allow and pay such claims did at Camp Kilmer, N.J. on or about 17 June 1949 advise, procure and use the signature of Recruit John D. Wilson as Rufus L. Wilson on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 17 June 1949 at line 4 thereof in words and figures as follows: "4. Wilson, Rufus L. RA 13251407 Cpl Rufus L. Wilson 201.00" such writing and signature being forged and counterfeited and then known by said Corporal Lawrence R. Meek to be forged and counterfeited.

Specification 5: In that Recruit Lawrence R. Meek 1262d Area Service Unit, Detachment 11, Fort Dix, N.J. then Corporal Lawrence R. Meek of 1277 Area Service Unit, Station Complement Detachment 1-L, Camp Kilmer, N.J. for the purpose of obtaining and of aiding others Viz; Private Carmon S. Smith to obtain the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) an officer of the United States duly authorized to approve, allow and pay such claims did at Camp Kilmer, N.J. on or about 31 May 1949 advise, procure and use the signature of Private Carmon S. Smith as Charles King on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 31 May 1949 at line 50 thereof in words and figures as follows: "50. King, Charles RA 37383440 Cpl Charles King 200.00" such writing being forged and counterfeited and then known by said Corporal Lawrence R. Meek to be forged and counterfeited.

Specification 6: (Finding of not guilty)

Specification 7: In that Recruit Lawrence R. Meek 1262d Area Service Unit, Detachment 11, Fort Dix, N.J. then Corporal Lawrence R. Meek of 1277 Area Service Unit, Station Complement Detachment 1-L, Camp Kilmer, N.J. for the purpose

of obtaining and aiding others Viz; Recruit Edgar O. Ellis to obtain the approval allowance and payment of a claim against the United States by presenting to A.S. Kinsman, Lt Col, F.D. (Symbol No 210-961) an officer of the United States duly authorized to approve, allow and pay such claims did at Camp Kilmer, N.J. on or about 24 June 1949 advise, procure and use the signature of Recruit Edgar O. Ellis as William R. Morrison on a certain paper Viz; WDAGO Form 14-57 otherwise known as "Voucher for Partial Payment-Enlisted Men" dated 24 June 1949 at line 15 thereof in words and figures as follows: "15. Morrison, William R. RA 15274262 Sgt William R. Morrison 201.00" such writing being forged and counterfeited and then known by said Corporal Lawrence R. Meek to be forged and counterfeited.

The accused pleaded not guilty to all Specifications and Charges and were found guilty of all Specifications and Charges except that accused Meek was found not guilty of Specification 6 of the Charge. Evidence of one previous conviction by summary court-martial was introduced as to Wilson and one previous conviction by summary court-martial was introduced as to Neufeld. The accused were sentenced as follows: As to all accused: 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, as to Neufeld, to be confined at hard labor for six years; as to Wilson, to be confined at hard labor for eight years; as to Smith, to be confined at hard labor for ten years; and as to Meek, to be confined at hard labor for fifteen years. The reviewing authority approved the sentences as to each accused, designated a United States penitentiary, reformatory or other such institution as the place of confinement for each accused and forwarded the record of trial for action under Article of War 50e.

### 3. Evidence for the prosecution

From January 1949 and on the dates of the offenses allegedly committed by the accused, Lt. Pewinski was Chief of the Enlisted Records Section, Building 1000, Camp Kilmer, New Jersey. In March 1949, Lt. Pewinski was assigned the additional duty of certifying payrolls to Lieutenant Colonel A. S. Kinsman, F. D., disbursing officer at Camp Kilmer (R 37-38). Among other duties, Lt. Pewinski's section had the responsibility of preparing daily "partial pay payrolls" (WDAGO Form 14-57 "Voucher for Partial Payments-Enlisted Men") for transient enlisted personnel who had received shipment orders or discharges and who applied for partial payments. These partial pay payrolls were completed by about 1500 hours each day, except Saturdays and Sundays, usually certified by Lt. Pewinski, delivered to the finance officer for administrative action,

and the individuals named on these payrolls were paid at 1600 hours by some transient officer, appointed for the purpose, on the same day the payrolls were completed. These payrolls were known as the "four o'clock payrolls" and payments thereof took place in Building 1013, 1016 or 1026, Camp Kilmer, New Jersey (R 39-41). At the time these partial pay payrolls were prepared in the Enlisted Record Section each one was assigned an office number. This number was posted daily in a ledger book, followed by the name of the individual who prepared (typed) the payroll and the date thereof (R 42, 43, 114, 115, Pros Ex 1). This section did not prepare any payrolls for the permanently stationed personnel of Camp Kilmer.

Subsequent to identification by Lt. Pewinski, there was admitted into evidence over the objection of the accused, "Voucher for Partial Payment-Enlisted Men" (WDAGO Form 14-57) dated 24 June 1949 as to accused Wilson, and Meek (R 132, Pros Ex 2); 10 May 1949 as to accused Neufeld (R 129, Pros Ex 3); 17 June 1949 as to accused Wilson, Neufeld and Meek (R 132, Pros Ex 4); 11 May 1949 as to accused Smith (R 130, Pros Ex 5); 24 May 1949 as to accused Smith (R 132, Pros Ex 6); 25 May 1949 as to accused Smith (R 133, Pros Ex 7a, 7b); 31 May 1949 as to accused Smith and Meek (R 133, Pros Ex 8a, 8b); 27 June 1949 as to accused Meek (R 134, Pros Ex 9a, 9b) and 30 June 1949 as to accused Meek (R 134, Pros Ex 11a, 11b). Each of the vouchers reveal that each one was "Paid by A S Kinsman, Lt Col. F.D. Symbol No. 210-961," and all of these vouchers are not on file in the General Accounting Office, Army Audit Branch, Reconciliation and Clearance Subdivision, St. Louis, Missouri (Pros Ex 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21). Prosecution's Exhibit No. 1, received in evidence over the objection of the accused, reveals that accused Meek typed each of the partial pay payrolls above enumerated.

Extracts of Prosecution's Exhibits Nos. 2 through 11a, 11b reveal the following amounts were paid as follows to:

(Pros Ex 2)

(Line) "2. Wilson John RA 13251403 Cpl. /s/ John Wilson 201.00"  
(Line) "15. Morrison William R. RA 15274262, Sgt /s/ William R. Morrison 201.00"

(Pros Ex 3)

(Line) "15. Hilliard Charles RA 70834180 Sgt /s/ Charles Hilliard 200.00" (Note: It was stipulated the specification erroneously states the signature as "Hilliard")

(Pros Ex 4)

(Line) "4. Wilson Rufus L. RA 13251407 Cpl /s/ Rufus L. Wilson  
201.00"

(Line) "17. Wiggins Clarence J RA 14311056 Sgt /s/ Clarence J  
Wiggins 201.00" (Note: It was stipulated the  
specification erroneously stated the name and  
signature as "Clarence T. Wiggins.")

(Pros Ex 5)

(Line) "9. Smith Charles RA 31384598 Cpl /s/ Charles Smith 200.00"

(Pros Ex 6)

(Line) "37. Mason Charles S RA 37383432 Sgt /s/ Charles S Mason  
200.00"

(Pros Ex 7a, 7b)

(Line) "19. King Charles S RA 37385858 Sgt /s/ Charles S King 200.00"

(Pros Ex 8a, 8b)

(Line) "50. King Charles RA 37383440 Cpl /s/ Charles King 200.00"

(Pros Ex 9a, 9b)

(Line) "10. Peters George S RA 15282731 Cpl /s/ George S. Peters  
201.00"

(Pros Ex 11a, 11b)

(Line) "48. Blake William RA 13294226 Cpl /s/ William Blake 201.00"

The accused Meek was assigned to duty in the payroll unit, Enlisted Records Section at the time Lt. Pewinski assumed responsibility. Meek was made Chief Clerk of the payroll unit in early May 1949. In addition to his duties to supervise the personnel in the preparation of the "Four o'clock payroll," Meek interviewed each applicant to verify eligibility of each individual as being entitled to partial pay. If the soldier was so entitled, his name was then typewritten on the daily payroll voucher (WDAGO Form 14-57 "Voucher for Partial Payment-Enlisted Men"). The ledger book (Pros Ex 1) reveals that accused Meek typed each of the six payroll vouchers in question. Meek also had the responsibility of identifying each applicant who appeared at the pay table before the agent officer to receive his partial pay at the "Four o'clock payroll." Accused was observed performing all of these duties (R 42-45, 67, 68, 78).

D. L. Comstock, Agent, C.I.D., Camp Kilmer, saw accused Smith on 8 July 1949, and, after advising Smith of his rights under Article of War 24, Smith refused to make a statement (R 211, 212). On 16 September 1949, 26 September 1949 and 21 October 1949 Comstock at various times on these dates interviewed accused Smith, Wilson and Neufeld, and also Private First Class Salvatore A. DeVito, Recruit Broward Thompson and Recruit Edgar O. Ellis for the purpose of securing specimens of their handwriting (exemplars). He first warned all of these individuals to the effect they "did not have to write anything; anything [they] did write could be used against [them]." Each individual above named furnished Comstock with specimens of their handwriting. These specimens, or exemplars, consisted of two parts, (a) the writing of the "London Letter" and, (b) the writing of a list of names (R 146-239). Smith, DeVito and Thompson testified under oath as to the voluntary nature of the exemplars given by them to Comstock. Each denied that Comstock warned them in any manner whatsoever of their rights under Article of War 24 (R 238-259). Over the objection of the Defense Counsel the court received in evidence the exemplars of Smith (Pros Ex 22), Wilson (Pros Ex 23), Neufeld (Pros Ex 24), Recruit Broward Thompson (Pros Ex 25), Private First Class Salvatore A. DeVito (Pros Ex 26), and Recruit Edgar O. Ellis (Pros Ex 27) (R 271-274). Private First Class DeVito was assigned to the station complement of Camp Kilmer and was not a transient (R 275, 276).

On 17 November 1949 and six times thereafter, Agent Comstock delivered to Detective Francis Murphy, New York City Police Laboratory, handwriting expert, the exemplars (Pros Ex 22, 23, 24, 25, 26 and 27), the partial pay vouchers (Pros Ex 2, 3, 4, 5, 6, 7a, 7b, 8a, 8b, 9a, 9b, and 11a, 11b) and some fifty other partial pay payroll vouchers. At the times of his conferences with Detective Murphy he told the former that he suspected certain individuals including Smith, Wilson and Neufeld (R 276, 279, 281, 293-299). Detective Murphy, whose qualifications as a handwriting expert were established (R 292, 293), after study and comparison of the disputed writings (Pros Ex 2 through 11a, 11b) with the exemplars (Pros Ex 22 through 27) was of the opinion that:

The questioned signatures of "John Wilson" (Line 2, Pros Ex 2) and "Rufus L Wilson" (Line 4, Pros Ex 4) were written by the same person who had written the known signature "John D. Wilson" (Pros Ex 23, accused Wilson) (R 303).

The questioned signatures of "Charles Hilliard" (Line 15, Pros Ex 3) and "Clarence J. Wiggins" (Line 17, Pros Ex 4) (R 318) were written by the same person who had written the known signature "Herbert Neufeld" (Pros Ex 24, accused Neufeld) (R 318).

The questioned signature of "Charles Smith" (Line 9, Pros Ex 5), "Charles S. Mason" (Line 37, Pros Ex 6), "Charles S. King" (Line 19, Pros Ex 7a, 7b), and "Charles King" (Line 50, Pros Ex 8a, 8b) were written by the same person who had written the known signature "Carmon S. Smith" (Pros Ex 22, accused Smith) (R 323).

The questioned signature "William Blake" (Line 48, Pros Ex 11a, 11b) was written by the same person who had written the known signature "Salvatore A DeVito" (Pros Ex 26) (R 326).

The questioned signature "George S. Peters" (Line 10, Pros Ex 9a, 9b) was written by the same person who had written the known signature "Broward Thompson" (Pros Ex 25) (R 327).

The questioned signature "William R. Morrison" (Line 15, Pros Ex 2) was written by the same person who wrote the known signature "Edgar O. Ellis" (Pros Ex 27) (R 328).

Sergeant Kenneth Boesch has known accused Neufeld for about two years. On or about 5 June 1949 Boesch met Neufeld after the noon mess in the orderly room and gave accused a ride in Boesch's automobile to the latter's office. During the general conversation that ensued during the ride Neufeld said he had "approximately \$5500.00 in a bank in New York City that he had received on payroll vouchers through Building 1000, Camp Kilmer, New Jersey, illegally" (R 470, 471, 472). Boesch, at first, thought Neufeld's statement was a joke and fantastic, but he reported the conversation to his First Sergeant, Master Sergeant Herbst a day or two after the conversation (R 473, 476).

On 8 July 1949, 11 July 1949, 21 July 1949 and 14 September 1949 Agent Comstock interviewed accused Meek. At the time of their first meeting Comstock, with Agent Wade as a witness, read and explained Article of War 24 to Meek, and also followed the same procedure on the three following occasions, as a result of which Meek gave four voluntary statements (R 381, 382, 385, 398, 406, 407, 427, 434, 447). Meek, appearing specially denied he was ever warned of his rights under Article of War 24 but on the contrary was threatened and placed in solitary confinement for not wishing to give a statement and was promised he could see his pregnant wife if he would give the statements (R 392, 395, 415, 417, 418, 437, 438). Meek's testimony was denied by Agent Comstock. After proper instructions to the court the four pre-trial statements were admitted in evidence over the numerous objections of the defense (R 405, 433, 445, 455, Pros Ex 32, 33, 34, 35).

A summary of the revelant facts contained in the four pre-trial statements is as follows:

Sometime in April 1949 Meek was approached with the scheme of adding to the "Four o'clock Payroll" the names of soldiers who had been discharged or had gone overseas. These names were supplied to him by those persons in the conspiracy and then certain soldiers from detachment 4 would appear at the pay table and receive partial payments, usually \$200, under the false names on the payroll. Meek inserted about forty (40) names on various payrolls and three of those who received illegal partial payments were Private First Class DeVito, Recruits Broward Thompson and Edgar Ellis. The accused Meek identified the soldiers as being eligible for partial pay, after which the agent officer would pay them. The illegal partial payments collected were pooled and divided four ways. Meek received his one-fourth share which amounted to about \$2000.00.

4. Evidence for the defense

Dr. Norman S. Anderson, a qualified psychiatrist and contract surgeon for the U. S. Army (486) examined accused Neufeld four times during the period 18 January 1950 to 21 February 1950. It was his opinion that Neufeld would be classified as Schizophrenia reaction, paranoid, latent (R 487). However, Neufeld was of superior intelligence, knew the difference between right and wrong, could cooperate in his defense, but his ability to adhere to the right was impaired (R 489, 491, 492).

Mr. J. Howard Haring, a qualified handwriting expert (R 493, 494) examined and compared the questioned signatures "Charles Hillard" (line 15, Pros Ex 3) and "Clarence J. Wiggins" (line 17, Pros Ex 4) with the known handwriting of accused Neufeld (Pros Ex 24). He also made a comparison with other known writings of Neufeld (R 496, 497). He was unable to arrive at any positive conclusion as to the authorship of the two questioned signatures (R 498) but he was inclined to believe that Neufeld did not write the questioned signatures (R 523).

It was established by extract copy of the morning report that accused Wilson was on ten (10) days emergency leave effective 20 June 1949 (R 530, Def Ex G). It was stipulated that if two attorneys and other witnesses were present they would testify that on 22 June 1949 Wilson was in Washington, North Carolina, retaining and conferring with counsel pertaining to a case to be tried in Superior Court, Beaufort County. That on 23 June 1949 Wilson was in Aurora, North Carolina, and that he was in court in North Carolina on 27, 28 and 29 June 1949 (R 529, 530, 531, 532, Def Ex F, H, I, J).

By extract copy of the morning report accused Smith was shown on an emergency seven (7) days leave effective 30 May 1949 (R 533, Def Ex L) and it was stipulated that if Smith's mother was present she would testify that Smith, because of her illness, was home in Delta, Missouri, from 9 May to 25 May 1949 (R 533, Def Ex K).

Accused Smith, after being advised of his rights as witness, elected to take the stand under oath and testify in substance as follows:

On 8 July 1949 he received a telephone call from his home in Missouri requesting his immediate presence because of the illness of his mother. He was unable to get immediate Red Cross verification and after a conference with company commander Captain Joseph Scanlan, he was given five Form 7, 3-day passes. These passes were signed by Captain Scanlan but the dates were left blank. He immediately left Camp Kilmer and arrived at his home on the evening of 9 May and remained there until 25 May at which time he returned to Camp Kilmer on 26 May. On 30 May he had just returned from Newark, New Jersey. He was notified by the Red Cross about the continued illness of his mother. The duty officer approved 7-day emergency leave and when he returned to his orderly room he told Captain Scanlan that seven days probably would not be enough time and requested three more signed but undated passes which were given to him by Captain Scanlan. He left Camp Kilmer immediately and arrived in Missouri on 31 May and remained there until 14 June when he returned to Camp Kilmer. He used one of the passes in order to enable him to stay the required length of time and tore up the other two passes (R 536-538).

Accused Wilson after being advised of his rights as a witness, elected to take the stand under oath and testified in substance as follows:

On 17 June (Friday) he went to Building 1000, Camp Kilmer, in order to secure his emergency leave papers which were effective 20 June 1949. He spent the entire afternoon in Building 1000 and then left that night and was in Norfolk, Virginia, on 20 June. He stayed in Norfolk, until 22 June and then accompanied by his mother and other people went to North Carolina in order to consult with Mr. Leroy Scott and Mr. H. C. Carter his attorneys. On 23 June he was in Aurora and on 24 June he was in Washington, North Carolina, where he again conferred with his attorney. Because of his mother's serious illness he returned to Norfolk, Virginia, on 24 June

and left there on 25 June for Washington, North Carolina where he remained through 29 June. Wilson denied that he was in Lt. Pewinski's office, Building 1000, at any time on the afternoon of 17 June while waiting for his leave papers on the afternoon of 17 June nor did he see or talk to accused Meek. He denied signing any payroll in the building (R 540-546). He also denied being at Camp Kilmer on 23 and 24 June 1944 (R 543, 544).

Accused Meek after being advised of his rights as witness, elected to take the stand under oath and testified in substance as follows:

On 8 July 1949 two C.I.D. agents apprehended him in Building 1000 and took him to Agent Comstock. Comstock wanted him to make a statement and he replied that he didn't know why he was over here. Upon being informed that it was about payroll deals he replied that he knew nothing about the matter and did not want to make a statement. Comstock then brought up the subject of Meek's pregnant wife and told him that he would get to see his wife if he made a statement. Meek again refused to do so and Agent Comstock ordered him to write the statement, and he did. Meek was then put in the "PMO" and later was transferred to the post stockade. He was again summoned to the C.I.D. office and appeared before Agent Comstock at which time Comstock said he wanted him to make a question and answer statement. Again Meek refused to make the statement whereupon Comstock told the guard "Take this goddamn man back where you got him from." Upon his arrival at the post stockade he was placed in solitary confinement where he remained from Monday until Tuesday afternoon where he again saw Comstock and after being ordered to do so, signed and initialed his second statement without having the opportunity to read it. He signed this statement rather than return to solitary confinement. He was later released from the stockade and was notified again to appear before Comstock. He was told by the latter to "Sign this goddamn statement if you want to be with your wife and baby" whereupon he signed the statement. He declared that all of the statements were false. Meek, upon being shown the ledger book (Pros Ex 1) admitted his signatures which appeared 13 times during the month of May and 13 signatures also appeared for the month of June. However, he explained that to the best of his recollection he only typed up five payrolls during the entire time he worked in Building 1000 and that other persons actually typed the payrolls even though he signed his name as the typist in the ledger book. He admitted that sometimes he appeared at the four o'clock payroll when it was paid and identified the people being paid. However, he was not there at all times and that other people made the identification for officer (R 548-558).

Mr. Rufus Wilson, father of accused Wilson, is a resident of Norfolk, Virginia. On 22 June 1949 his son was in Norfolk, Virginia. On that date accused took his mother and as far as he knew went down to see their folks in Washington and Aurora, North Carolina. Two or three days later he brought the witness' wife back to Norfolk, Virginia (R 559-560).

Accused Neufeld after being advised of his rights as a witness, elected to take the stand under oath and testified in substance as follows:

He denied that he wrote the name "Clarence J. Wiggins or "Charles Hillard" nor did he have anything to do with the writing of those names (R 567).

#### 5. Rebuttal evidence for prosecution

Captain Scanlan was the commanding officer of Detachment 4 Replacement Division, Camp Kilmer and accused Smith was a member of that Detachment as night charge of quarters. It was his policy to give about two 3-day passes per month to his men but he never issued Smith a series of signed but undated 3-day passes. The officer rated Smith's character as excellent and his efficiency as excellent. Captain Scanlan had knowledge of the Red Cross verification of the illness of Smith's mother and upon that basis Smith was granted emergency leave (R 569-571).

Captain William M. White, MC, Chief of the Neuropsychiatric Section, Fort Dix, New Jersey, examined Neufeld during the period 3-13 March 1950. His diagnosis was pathologic personality with paranoid and antisocial trend. Captain White found that as of the date of the alleged offenses, accused was sane, able to distinguish between right and wrong, adhere to the right and was able to intelligently cooperate in his defense (R 579).

#### 6. Discussion

##### Accused Wilson, Smith and Neufeld

The elements of proof for the offense of forgery as charged under Article of War 94 which the prosecution must establish are found in paragraph 180i, page 244, Manual for Courts-Martial, 1949, as follows:

"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 Manual, at page 244, further provides:

"The instrument itself should be produced, if available. 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. If the name of a fictitious person is used, as, for example, the purported signature of a fictitious person as drawer of a check, evidence of falsity may include evidence from the bank upon which the check is drawn that the drawer of the check has no account in that bank." (Emphasis supplied)

It is succinctly stated in Section 116A, 26 Corpus Juris 959:

"The burden is on the prosecution to show the false making \* \* \* of the instrument as that the signature is not that of the person it purports to be or that it is a signature of a fictitious person assumed for the purpose of fraud \* \* \*."

This same rule was stated in different language in CM 155772, Julian (1923) when the Board of Review stated:

"This office has long adhered to the rule that lack of authority to sign the instrument alleged to have been forged must be shown (C.M. No. 114211, Meyers). Lack of authority, however, may be reasonably inferred from circumstances (C.M. No. 133967, Holland). In the present case from Sergeant Thuman's testimony /the person whose name was forged/ that he did not sign the checks, accused's nervousness when cashing the check for \$45.00, the bank's refusal to pay them, accused's subsequent absence without leave, together with all of the circumstances, the inference may be reasonably drawn that accused had no authority to sign such checks." (Emphasis supplied)

In the Meyers' case, supra, (1919) the Board of Review specifically held:

"\* \* \* the prosecution \* \* \* should \* \* \* prove not only that the signature on the check was not that of J. R. Glazier, but also that J. R. Glazier had not authorized the accused or any other person to sign this check for him." (Emphasis supplied)

This same rule has been applied by the Board of Review in recent cases (CM 247111, Grannell, 30 BR 255, 258; CM 271591, Bailey, 46 BR 129, 138; CM 286100, Perkins, 56 BR 147, 150; CM 294487, Spillner, 57 BR 343, 352; CM 328246, Courage, 76 BR 349, 356; CM 331650, Downes, 80 BR 127, 135; see also: Bailey v. U.S., 13 Fed (2) 325; U.S. v. Sonnenberg et al, 158 Fed (2) 911.).

The only elements of proof that the prosecution established in its case against accused Wilson and Smith were: (1) that Wilson possibly wrote the questioned signatures "Rufus L. Wilson" and "John Wilson," and that Smith possibly wrote the questioned signatures "Charles Smith," "Charles S. Mason," "Charles S. King," and "Charles King"; (2) that the writings were of a nature to impose a legal liability on the Government. The record of trial is absolutely void of any evidence that the signatures were false (i.e. unauthorized).

If the questioned signatures were the names of real persons there is no evidence that such persons did not authorize these accused to sign their names; or if the questioned signatures were fictitious names, no one testified that such names were fictitious, nor was there evidence competent or otherwise that such military persons were fictitious. The slightest amount of evidence that names are fictitious is sufficient to make out a prima facie case (ETO 2273, Shuman, 6 BR (ETO) 271) but such evidence must be produced by the prosecution. No one testified that Smith and Wilson appeared at the pay table and received partial pay under the names of the questioned signatures. No one saw these accused sign the questioned signatures nor is there any other direct or circumstantial evidence in the record of trial from which it could be reasonably inferred that these accused had no authority to sign the questioned signatures or had the intent to defraud. This absence of proof that the questioned signatures were false is fatal error. The testimony of the handwriting expert (which should be considered with utmost caution (Sec 991, p 1733, Wharton's Criminal Evidence, Vol 2, Eleventh Edition)) merely established that these two accused possibly wrote the questioned signatures, i.e. established the making of the instrument (Sec 96, 37 C.J.S. 101) but such testimony does not establish the falsity of the instrument -- which is the very essence of the offense of forgery (Sec 95, 37 C.J.S. 100, 101).

7. The evidence of the prosecution in its case against accused Neufeld was substantially the same as that against Wilson and Smith except for an added bit of evidence as brought out in the testimony of Sergeant Boesch. The witness testified that on or about 5 June 1945 Neufeld told him that:

"\* \* \* he had approximately \$5500.00 in a bank in New York City that he had received on payroll vouchers through Building 1000, Camp Kilmer, New Jersey, illegally." (R 472)

The question presented is whether this purported admission against interest by the accused is sufficient to supply the deficiencies of the proof of the prosecution? We think not. In CM 115048, Rainey (1918), the Board of Review held:

"In a prosecution for the forgery of a promissory note when the defendant admits the making of a signature, the burden is not on the man to prove that he had authority. In such case the burden remains on the prosecution to prove that it was without authority, before a conviction can be had. (Roman v. State, 37 N.E. Rep. 1040)."

If this alleged statement was made by the accused, he only admitted that by some illegal means he had received \$5500.00 on some payroll vouchers at Camp Kilmer and it is clear that he could have received such payments by a variety of other means than by committing the offense of forgery.

It is a settled rule that:

"Given the intent to defraud, it is clear that forgery may 'be committed by signing a fictitious name, as where a person makes a check payable to himself as drawee and signs it with a fictitious name as drawer' (MCM 1928, 149j). To the same effect is Wharton's Criminal Law, Section 870." (CM 271591, Bailey, 46 BR 129, 138)

The admission against interest by Neufeld, if true, does apparently constitute a past and future intent to defraud in some manner, nevertheless the prosecution utterly failed to supply the vital proof that the questioned signatures "Clarence J. Wiggins" and "Charles Hillard" were in fact fictitious names, or, if real persons, such persons had not given Neufeld the authority to subscribe their names. This complete failure of proof on the part of the prosecution constitutes fatal error as to accused Wilson, Smith and Neufeld. The holding of the Board of Review in CM 185417, Sadler (1929), applies to these accused, wherein it was stated:

"While the evidence may be sufficient to establish that accused signed the check in question as maker, there is no showing that accused had no authority to sign it as agent of Captain Clark. There is no proof, therefore, that the check was made falsely or with the intent to defraud, essential elements of the offense of forgery."

For the reasons above stated it is concluded that the evidence is not legally sufficient to support the findings of guilty of the Specifications of the Charge, the Charge and the sentence as to accused Smith, Wilson and Neufeld.

8. Accused Meek

The prosecution's proof of the offenses allegedly committed by accused Meek does not present the same questions as were involved against Smith, Wilson and Neufeld, supra. The six specifications of the charge of which Meek was found guilty each alleges in substance that the accused did advise, procure and use the signature of one person for some other person for the purpose of obtaining approval and payment of a claim against the United States, knowing the said signatures were counterfeits or forgeries.

The quantum of evidence in the record of trial aliunde the four pre-trial statements of the accused was sufficient to permit the court to reasonably conclude that the offenses as charged had probably been committed. While this evidence did not establish each element of proof, the corpus delicti of each offense was established (CM 325377, Sipalay, 74 BR 169). In his written pre-trial statements the accused admitted that by agreement with other persons he had been furnished the names of individuals who had been discharged from the military service or had departed for other stations and that during the period of time in question he had added to the WDAGO Forms 14-57 approximately forty of the names supplied to him during the period of time involved. The accused named Recruits Thompson, Ellis and Private First Class DeVito as having been paid by using the false or fictitious names. He admitted that the illegally obtained partial payments had been pooled and that he had received one-fourth of the total amount collected for his part, or about \$2000.00. The evidence of the guilt of the accused Meek was established beyond reasonable doubt.

9. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and sentences as to accused Carmon S. Smith, John D. Wilson, and Herbert Neufeld. The record of trial is legally sufficient to support the findings of guilty and the sentence as to accused Lawrence R. Meek.

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

Marvin W. Ludington , J.A.G.C.

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

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

JAGU CM 341782

November 20, 1950

UNITED STATES )

9TH INFANTRY DIVISION )

v. )

) Trial by G.C.M., convened at  
) Fort Dix, New Jersey, 14, 15,  
) 16, 17, 20 and 21 March 1950.  
) EACH: Dishonorable discharge  
) and total forfeitures after  
) promulgation. Confinement:  
) SMITH ten years, WILSON eight  
) years, NEUFELD six years, and  
) MEEK fifteen years. EACH:  
) Federal Institution.

) Private CARMON SILES SMITH, RA  
) 37383433, and Recruit JOHN D.  
) WILSON, RA 13276471, both of  
) 1262d Area Service Unit, Detach-  
) ment 17 (Replacement; Private  
) HERBERT NEUFELD, RA12255417,  
) Headquarters 4th Medical Labor-  
) atory APO 403, attached to De-  
) tachment 14 (Reassignment),  
) 1262d Area Service Unit; and  
) Recruit LAWRENCE R. MEEK, RA  
) 33434561, Detachment 11 (Person-  
) nel Section, Replacement),  
) 1262d Area Service Unit )

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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(2) and (4) the record of trial in the case of the soldiers named above and the holding by the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon common trial by general court-martial the accused, respectively, pleaded not guilty to and were found guilty of the following offenses, alleged to have occurred at Camp Kilmer, New Jersey, each involving amounts of \$200.00 or more, in violation of the 94th Article of War:

Smith: forging and counterfeiting the signatures of Charles Smith, Charles S. Mason, Charles S. King, and Charles King, respectively, on vouchers for partial payments, for the purpose of obtaining the approval, allowance and payment of claims against the United States by presenting to an authorized finance officer, on or about 11 May, 24 May, 25 May and 31 May 1949, respectively (Specifications 1, 2, 3 and 4, Smith);

Wilson: forging and counterfeiting the signatures of Rufus L. Wilson and John Wilson, respectively, on vouchers for partial payments, for the same purpose as alleged against the accused Smith, supra, on or about 17 June and 24 June 1949 (Specifications 1 and 2, Wilson);

Neufeld: forging and counterfeiting the signatures of Clarence J. Wiggins and Charles Hilliard, respectively, on vouchers for partial payments, for the same purpose as alleged against the accused Smith, supra, on or about 17 June and 10 May 1949, respectively (Specifications 1 and 2, Neufeld);

Meek: advising, procuring and using the signatures of Private First Class Salvatore A. DeVito as William Blake, of Recruit Herbert Neufeld as Clarence J. Wiggins, of Recruit Brownard Thompson as George S. Peters, of Recruit John D. Wilson as Rufus L. Wilson, of Private Carmon S. Smith as Charles King, and of Recruit Edgar O. Ellis as William R. Morrison, respectively, on vouchers for partial payments, for the purpose of obtaining, and of aiding said DeVito, Neufeld, Thompson, Wilson, Smith, and Ellis, respectively, to obtain, the approval, allowance and payment of claims against the United States by presenting to an authorized finance officer, such writings and signatures being forged and counterfeited to the knowledge of said Meek, on or about 30 June, 17 June, 27 June, 17 June, 31 May and 24 June 1949, respectively (Specifications 1, 2, 3, 4, 5 and 7, Meek).

Evidence of one previous conviction by summary court-martial was introduced as to each of the accused Wilson and Neufeld. No evidence of previous convictions was introduced as to either of the accused Smith and Meek. 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 the following periods, respectively: Smith ten years, Wilson eight years, Neufeld six years, and Meek fifteen years. The reviewing authority, as to each accused, approved the sentence, designated a United States penitentiary, reformatory or other such institution 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 sentences as to the accused Smith, Wilson and Neufeld, respectively, and legally sufficient to support the findings of guilty and the sentence as to the accused Meek. The Judge Advocate General has not concurred in the Board's holding as to each of the 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 all its conclusions except that the record of trial is legally sufficient to support the findings of guilty of Specifications 2, 4 and 5 of the Charge against the accused Meek. The mentioned specifications allege in substance that Meek advised, procured and used the signatures of Recruit Herbert Neufeld as Clarence J. Wiggins, of Recruit John W. Wilson as Rufus L. Wilson, and of Private Carmon S. Smith as Charles King, respectively, on vouchers for partial payments, for the purpose of obtaining, and of aiding said Neufeld, Wilson and Smith, respectively, to obtain, the approval, allowance and payment of claims against the United States.

We concur with the Board of Review in its conclusion that the evidence in the record of trial aliunde Meek's four pretrial statements (Pros Exs 32-35, incl) was sufficient to show that each of the six offenses alleged against Meek and of which he was convicted, probably had been committed. The introduction into evidence of Meek's pretrial statements was therefore proper (MCM 1949, par 127a, p. 159).

Meek's statements show that he advised, procured and used signatures by Private First Class Salvatore DeVito, Recruit Brownard Thompson and Recruit Edgar Ellis, respectively, of names other than their own on payrolls (Specifications 1, 3 and 7 against Meek), and that he also advised, procured and used signatures of other unidentified individuals for the same purpose. The names of these latter individuals originally appeared in Meek's statements, but they were obliterated therefrom by agreement between the prosecution and defense before the statements were received in evidence. The apparent purpose of obliterating the names was to prevent Meek's statements from incriminating Smith, Wilson and Neufeld. Such action together with the advice of the law member that Meek's statements could be used only against him accomplished the desired purpose but the obliterating of the names from Meek's statements also prevented the court from receiving admissible evidence against Meek in support of Specifications 2, 4 and 5 against him.

As a result there is no substantial evidence in the record to prove that Meek advised, procured and used the signature of Neufeld as Clarence J. Wiggins in Specification 2, that of Wilson as Rufus L. Wilson in Specification 4 and that of Smith as Charles King in Specification 5. There is thus a failure of proof as to a vital element in each of Specifications 2, 4 and 5 against Meek.

4. For the foregoing reasons, we are of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentences as to the accused Smith, Wilson and Neufeld, respectively, legally insufficient to support the findings of guilty of Specifications 2, 4 and 5 of the Charge against the accused Meek, and legally sufficient to support the findings of guilty of Specifications 1, 3 and 7 of the

Charge and the Charge and the sentence as to the accused Meek. Since the sentence of fifteen years adjudged against Meek by the court was based upon his conviction of six similar specifications as to three of which we consider the record legally insufficient, we recommend that the confinement portion of Meek's sentence be reduced to seven and one-half years.

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Robert W. Brown, Brig Gen, JAGC

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C.B. Mickelwait, Brig Gen, JAGC

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

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DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

JAGU CM 341782

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Carmon Siles Smith, RA 37383433, and Recruit John D. Wilson, RA 13276471, both of 1262d Area Service Unit, Detachment 17 (Replacement); Private Herbert Neufeld, RA 12255417, Headquarters 4th Medical Laboratory APO 403, attached to Detachment 14 (Reassignment), 1262d Area Service Unit; and Recruit Lawrence R. Meek, RA 33434561, Detachment 11 (Personnel Section, Replacement), 1262d Area Service Unit, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence as to each of the accused Smith, Wilson and Neufeld are disapproved; the findings of guilty of Specifications 2, 4 and 5 of the Charge against the accused Meek are disapproved; and the sentence as to the accused Meek is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement of the accused Meek.

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Robert W. Brown, Brig Gen, JAGC

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C. B. Mickelwait, Brig Gen, JAGC

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

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the term of confinement is reduced to seven and one-half years in the case of the accused Meek.

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

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